

VOLUME II OF III

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

APPELLATE CASE NO. 2012-212639

RECORD ON APPEAL

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SC Court of Appeals

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THE FOLLOWING IS ON FILE WITH THIS COURT:

DEFENSE COUNSEL’S VIDEO RECORDING OF APPELLANT AT HOSPITAL

1 MR. MASON: No, Your Honor.

2 THE COURT: Sir, you're excused.

3 (Witness excused).

4 THE COURT: Is the State ready to proceed?

5 MS. KINZELER: Your Honor, the State calls
6 Investigator Kjellman.

7 MR. MASON: Your Honor, may it please the
8 Court, may I approach?

9 THE COURT: You may.

10 (Unrecorded bench conference).

11 THE COURT: You may proceed. Swear the
12 witness.

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1 KATHY KJELLMAN, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please be seated, state your full
4 name, spell your last name.

5 THE WITNESS: Kathy Kjellman, last name is
6 spelled K-j-e-l-l-m-a-n.

7 DIRECT EXAMINATION BY MR. VOIGT:

8 Q Investigator Kjellman, where do you work?

9 A Charleston County Sheriff's office.

10 Q How long have you been employed there?

11 A Approximately twelve years.

12 Q And what is your job description?

13 A I am currently a crime scene investigator.

14 Q How long have you been a crime scene
15 investigator?

16 A Eight years.

17 Q Can you tell the jury what some of the duties
18 of a crime scene investigator may include, some of
19 the general things?

20 A I respond to crime scenes that range from
21 burglaries to arsons, traffic accidents, homicides,
22 photograph and collect the evidence, process
23 evidence from those crime scenes.

24 Q Is it fair to say that your job is to collect
25 evidence?

- 1 A Yes, sir.
- 2 Q And is one of the functions that you perform,
3 to photograph evidence as you may find it?
- 4 A Yes.
- 5 Q Or as it was found by other officers?
- 6 A Yes.
- 7 Q Are you often one of the first officers on a
8 crime scene, be it homicide scene or traffic
9 fatality?
- 10 A Not one of the first ones, no.
- 11 Q Who is normally one of the first ones on the
12 scene?
- 13 A It would be the responding deputies working
14 patrol.
- 15 Q When do you get called out to a crime scene?
- 16 A Normally I'm one of the last ones to show up.
- 17 Q And did you respond to a crime scene on
18 December 8, 2008, in your capacity with the
19 Charleston County Sheriff's Department?
- 20 A Yes, sir.
- 21 Q And the crime scene I'm talking about, the
22 scene I'm referring to is specifically Point of
23 Pines Road near Highway 174 on Edisto Island in
24 Charleston County?
- 25 A Yes.

1 Q And what were, what is the first thing that
2 you did when you got to that particular scene?

3 A Normally what we do is make contact with the
4 responding deputies and other deputies on the scene
5 and get an overall idea of what happened with the
6 accident that transpired.

7 Q From those deputies do you try to obtain as
8 much information as you can from them about what
9 they deem is important on the scene?

10 A Yes.

11 Q And do you recall who you may have spoken to
12 when you arrived on this scene?

13 A There were several people on scene. I know
14 Deputy Brinson and Sergeant Burrell were a couple
15 of them.

16 Q And to the best of your recollection was
17 Deputy Brinson the deputy in charge of this
18 particular scene?

19 MR. MASON: Objection, leading, Your Honor.

20 THE COURT: Overruled.

21 Q Do you recall?

22 A If he was in charge, it was a traffic
23 accident, traffic guys working are usually in
24 charge of the whole investigation of the scene.

25 Q And this was a traffic accident?

1 A Yes.

2 Q Did the deputies on the scene, including
3 Deputy Brinson, direct you to certain areas of
4 interest?

5 A Yes.

6 Q Did you bring a camera out there with you?

7 A Yes, I did.

8 Q When you arrived on the scene what, after you
9 talked to the deputies what did you do with the
10 information that you learned from the deputies,
11 what did you do next?

12 A After I learned the circumstances behind the
13 accident I keep that in mind while I'm taking my
14 photographs, take the overall photographs of the
15 scene and detailed pictures of both vehicles.

16 MR. VOIGT: May I approach the witness, Your
17 Honor?

18 THE COURT: You may.

19 Q Investigator Kjellman, I'm going to show you
20 what has been marked as State's Exhibits 2 through
21 10. I would like for you to take a look at those,
22 if I may. Do you recognize those, Investigator?

23 A Yes, I do.

24 Q Are those some of the photographs that you
25 took at that scene?

1 A Yes.

2 Q Okay. May I have those back?

3 And these photographs, they are copies of the

4 things you would have taken digitally with your

5 digital camera?

6 A Yes.

7 Q And they accurately reflect the scene as you

8 were out there that night?

9 A Yes.

10 MR. VOIGT: At this time, Your Honor, I would

11 offer to intro State's Exhibits 2 through 10.

12 MR. MASON: No objection, Your Honor.

13 THE COURT: All right, in evidence without

14 objection.

15 (Nine Photographs marked and received in

16 evidence as State's Exhibits 2 through 10).

17 THE COURT: What are those numbers again?

18 MR. VOIGT: 2 through 10, Your Honor, three

19 photographs.

20 THE COURT: 2 through 10 marked without

21 objection.

22 BY MR. VOIGT:

23 Q Now, I will show you what is marked State's

24 Exhibit 2. What is that?

25 A That is a telephone pole, a power pole near

1 the scene.

2 Q Do you know why you took a picture of the
3 telephone pole?

4 A It marked the location of the accident. The
5 location of the telephone pole can be researched
6 years later even if the pole has already been
7 removed and replaced.

8 Q Were you directed to take a photograph of
9 that particular pole?

10 A I don't know if I was directed in this case.
11 Usually I try to if there is telephone pole nearby
12 with an identification number on it.

13 Q This is State's Exhibit 3. What does this
14 depict?

15 A That's the roadway where the accident took
16 place.

17 Q What are all those lights in the background?

18 A They are from the rescue vehicles providing
19 lights for us.

20 Q Okay. I'm going to show you what has been
21 marked State's Exhibit 5. You took that
22 photograph?

23 A Yes, I did.

24 Q What does that depict, what kind of vehicle
25 is that?

- 1 A I believe it used to be a Chevy Silverado
2 pickup truck.
- 3 Q Okay. Now, right down here, what are those
4 orange markings?
- 5 A That is markings that the traffic deputies
6 put on the road.
- 7 Q Okay. So that is not, you didn't place those
8 marks there?
- 9 A No, I did not.
- 10 Q And you took that picture after traffic had
11 marked that particular area?
- 12 A Yes, I did.
- 13 Q Similarly, this is State's 6. What does that
14 depict?
- 15 A That's the same vehicle, the Chevy Silverado.
- 16 Q Again we have other orange markings. These
17 were markings placed there by traffic?
- 18 A Yes, sir.
- 19 Q What does State's 7 depict?
- 20 A That is, I believe that is the driver's side
21 front tire. Yes.
- 22 Q Is that a close-up picture of what is in
23 State's 5?
- 24 A Yes.
- 25 Q Let me show you what has been marked State's

1 10. What's that?

2 A That is the victim's vehicle.

3 Q There used to be more car here, right?

4 A Yes.

5 Q And I also show you, I'm going to show you

6 two photographs, one for identification purposes

7 only and another one. I'm going to show you what

8 has been previously marked for identification

9 purposes only as 11-A. I will also show you what

10 has been marked as 11-B. Do you recognize those as

11 photographs you took at the scene?

12 A Yes.

13 Q Now, photograph A, does that depict the

14 vehicle that is here in the photograph 10, does

15 that depict a close-up of that particular vehicle?

16 A Yes.

17 Q And in 11-A is there a deceased person under

18 the steering wheel?

19 A Yes.

20 Q Now, 11-B is that the same photograph?

21 A Yes, it is.

22 Q Now, in that photograph has the image of the

23 deceased person been eliminated?

24 A Yes, it has.

25 Q In all other respects is it the same as 11-A?

1 A Yes, it is.

2 MR. VOIGT: At this time, Your Honor, I would

3 offer 11-B into evidence.

4 THE COURT: Any objection?

5 MR. MASON: No objection.

6 THE COURT: Marked in evidence without

7 objection. That's 11-B?

8 MR. VOIGT: That's correct.

9 (Photograph marked and received in evidence

10 as State's Exhibit 11-B).

11 BY MR. VOIGT:

12 Q Just to be sure what we're talking about,

13 that is the vehicle depicted in Exhibit 10 and this

14 white here, that is where, when you were on the

15 scene there was unfortunately a deceased person

16 there, right?

17 A Yes, sir.

18 Q What are these right here?

19 A I believe those are gloves possibly from

20 rescue personnel.

21 Q So that wouldn't, to the best of your

22 knowledge, have been part of how this vehicle came

23 to rest immediately after the accident?

24 A I'm not sure who put them there.

25 Q But those are definitely added later by the

1 rescue people?

2 A Yes.

3 Q Approximately how long were you on the scene?

4 A I got called at 20 after 6:00 and my report
5 shows I completed at midnight.

6 Q Okay. So you were out there approximately
7 six hours?

8 A Yes.

9 Q And was all of that time spent photographing
10 the scene?

11 A Not all of it, no.

12 Q What was some of the other things that you
13 did while you were out there?

14 A After the initial scene investigation was
15 completed and the cars were removed from the
16 roadway, any evidence that was collected, I took
17 back to my office and secured it.

18 Q Let me show you what has been previously
19 marked as State's 15, 16, 17 and 18. Can you just
20 take a look at those and do you recognize them?

21 A Yes, I do.

22 Q Are those pictures you took during the course
23 of this investigation?

24 A Yes, they are.

25 Q Again are they similar to other pictures we

1 just discussed, are they just print-outs of the
2 digital pictures you took?

3 A They are print-outs of the pictures I took.

4 MR. VOIGT: At this time, Your Honor, I would
5 offer to introduce State's 15 through 20.

6 THE COURT: Any objection?

7 MR. MASON: I'm sorry?

8 THE COURT: Why don't you look over them.

9 MR. VOIGT: I'm sorry, 15, I apologize, 15,
10 16, 17 and 20.

11 THE COURT: 15, 16, 17 and 20.

12 MR. MASON: No objection.

13 MR. VOIGT: Thank you, Your Honor.

14 (Photographs marked and received in evidence
15 as State's Exhibits 15, 16, 17 and 20).

16 BY MR. VOIGT:

17 Q I show you what is marked State's 15. I know
18 there is a glare on that. What does that depict?

19 A A picture of the accident scene, the victim's
20 vehicle.

21 Q That's the victim's vehicle?

22 A And the pickup truck, you can kind of see
23 that.

24 Q We're looking at a different side of the
25 accident than the one we had seen earlier?

1 A Yes.

2 Q Okay. And again these are orange marks
3 placed here by traffic?

4 A Yes.

5 Q And what they indicate, we would have to hear
6 about from traffic, right?

7 A Yes.

8 Q And then 16, this is part of the roadway?

9 A Yes.

10 Q And what are we looking at there?

11 A That is again part of the roadway.

12 Q And those marks were placed there by traffic?

13 A Yes.

14 Q I'm going to show you what has been marked as
15 State's 20. What does that depict?

16 A The passenger side of the victim's vehicle.

17 Q Okay. What is this big white thing here?

18 A That is the passenger side air bag after it
19 was deployed.

20 Q What is all this stuff here?

21 A Stuff that got thrown in the floor during the
22 accident.

23 Q How much stuff was that?

24 A Honestly I don't remember the stuff that was
25 in that car.

1 Q It is very hard to actually see that
2 particular picture up there, I'm going to direct
3 your attention, when I give this picture back to
4 you, to that right there.

5 A Okay.

6 Q This is a picture --

7 MR. VOIGT: Might I approach the witness,
8 Your Honor?

9 THE COURT: Yes.

10 Q I'm showing you again 20 because it really
11 isn't clear on our overhead projector. What did
12 you take a picture of there in the center of the
13 floorboard?

14 A It looks like a Bud Light can.

15 Q Is there any particular reason why you took
16 that picture?

17 A I always take pictures of the interior of a
18 car.

19 Q Is that to be as complete as possible in
20 terms of the investigation?

21 A Yes.

22 Q Did you seize that particular Bud Light can?

23 A I do not believe I did.

24 Q Okay. When you were out there on the scene
25 was there any sort of condensation on that Bud

1 Light can?

2 A I don't recall.

3 Q Did you ever at anytime while you were

4 photographing this particular vehicle stick your

5 head in that car?

6 A Yes.

7 Q What, if anything, did you smell when you did

8 it?

9 A I smelled a lot of engine oil.

10 Q I'm going to show you again three pictures,

11 12, 13 and 14. Do you recognize those as pictures

12 that you took during the course of your

13 investigation?

14 A Yes, I do.

15 Q And those particular pictures, are they

16 print-outs of digital pictures you took with your

17 digital camera?

18 A Yes, they are.

19 Q And do those pictures accurately reflect the

20 scene as you came upon it during the course of your

21 investigation in your role?

22 A Yes, they do.

23 MR. VOIGT: At this time I would offer and

24 introduce State's 12, 13, 14.

25 MR. MASON: Objection, Your Honor.

1 MR. VOIGT: I have previously shown them --

2 THE COURT: Approach.

3 (Unrecorded bench conference).

4 THE COURT: Give me those numbers again, I'm
5 sorry.

6 MR. VOIGT: 12, 13 and 14.

7 THE COURT: 12, 13 and 14 are marked and
8 admitted subject to the objection. You are
9 overruled on the basis of relevance, spoliation,
10 and the other issues raised are as to weight and
11 that can be covered in cross-examination.

12 You may proceed.

13 MR. VOIGT: Thank you very much, Your Honor.

14 (Photographs marked and received in evidence
15 as State's Exhibit 12, 13 and 14).

16 BY MR. VOIGT:

17 Q Now, I'm going to place up here on the board
18 what I previously marked at State's 12. What is
19 this?

20 A It's the Chevy Silverado pickup truck.

21 Q What is that right there?

22 A That is a measuring instrument.

23 Q That is a gauge traffic uses so they can make
24 accurate measurements.

25 A Yes.

- 1 Q That is not something you used at anytime in
2 this incident?
- 3 A No.
- 4 Q Back here, what is all that?
- 5 A That is again the lights. The rescue unit
6 provided lights for us in our investigation.
- 7 Q When you initially got there was EMS there?
- 8 A The victims were gone.
- 9 Q Was any fire company still out there when you
10 got there?
- 11 A I believe there may have been one truck.
- 12 Q There were other sheriff's deputies and
13 sheriff's personnel out there?
- 14 A Yes.
- 15 Q When you were out there was it possible for
16 lay people, neighbors, to pass through here into
17 the crime scene?
- 18 A No.
- 19 Q And I showed you previously a picture of the
20 other side, from the other angle. Was it possible
21 for anybody to come onto this scene from that side
22 as well?
- 23 A That section of road was shut down for any
24 foot traffic or vehicle traffic.
- 25 Q During the time you were out there was there

1 anybody out here who was not either Sheriff's
2 Department, EMS or firefighters in any way, were
3 there any lay witnesses out here during the entire
4 six hours you were out there?

5 A No.

6 Q Did anybody come on the scene at any point
7 later and talk to you, any lay person, about this
8 particular scene?

9 A No.

10 Q Okay. Now, what is all this?

11 A That is a cooler and some beer cans.

12 Q I'm going to show you what has been marked as
13 State's 13. Is this just a close-up picture of
14 that cooler and beer cans?

15 A Yes.

16 Q Again more orange traffic paint?

17 A Yes, sir.

18 Q I'm going to show what you has been marked as
19 State's 14. What does that depict?

20 A That is a Jim Beam bottle, empty.

21 Q And you may not be able to, in this
22 particular picture here is it possible to see where
23 that Jim Beam bottle may have been resting?

24 A It was close around the cooler.

25 Q The Jim Beam bottle next to the cooler, is

1 that the same Jim Beam bottle in the photograph?

2 MR. MASON: Objection.

3 THE COURT: It is really leading.

4 MR. MASON: Objection to leading.

5 THE COURT: Sustained.

6 MR. VOIGT: If I may approach, Your Honor?

7 BY MR. VOIGT:

8 Q I show you State's 13 and 14. Is it possible
9 to see the Jim Beam bottle in State's 13?

10 A I think it is in 13.

11 Q Where is it located?

12 A It's up to the top left-hand corner of the
13 picture.

14 Q Approximately how far away from the cooler is
15 it?

16 A Ten feet.

17 Q Did you perform any tests whatsoever on the
18 beer cans, cooler or Jim Beam bottle?

19 A No, I did not.

20 Q Was that a call you made on the scene or was
21 that something that was dictated by --

22 MR. MASON: Objection, leading, Your Honor.

23 THE COURT: I will give him a little
24 latitude, I will overrule it.

25 Q Was that a call you made?

1 A That was a call I made, yes.

2 Q And why did you choose not to test those

3 items?

4 A As far as latent prints and everything on

5 beer cans and the bottle and the cooler and

6 everything, what the items had went through, being

7 tossed out --

8 MR. MASON: Objection, Your Honor.

9 THE COURT: Overruled.

10 MR. MASON: Objection, speculation.

11 THE COURT: Overruled.

12 MR. MASON: It's the tossed out, Your Honor.

13 THE COURT: It is the circumstances that

14 occurred. You can cover that on cross-examination,

15 overruled.

16 You may answer the question.

17 THE WITNESS: The likelihood of recovering

18 anything, latent prints off the cooler, the bottle

19 or cans was very minimal.

20 Q And you base that opinion -- did you base

21 that opinion on your years of experience in lifting

22 prints in the field?

23 A Yes.

24 THE COURT: Madam Forelady, ladies and

25 gentlemen, we're going to take advantage of this

1 break in testimony to give you your lunch recess.
2 We'll break until 2:15, which gives you an hour and
3 15 minutes. During the break please do not discuss
4 the case among yourselves or with anyone else.
5 Please don't have any contact with anyone in or
6 about the courthouse or allow yourself to be
7 exposed to any media coverage of this event. I
8 hope you all have a good lunch. Please return
9 directly to your jury room at 2:15 at which time
10 we'll resume the testimony.

11 (The jury was excused from the courtroom).

12 THE COURT: You may take your seat. Is there
13 anything before we break for lunch? From the
14 State?

15 MR. VOIGT: No, Your Honor.

16 THE COURT: The defense?

17 MR. MASON: Yes, Your Honor. We have the
18 issue of Mr. Barclay not being able to eat because
19 we don't know when they feed them down at the jail.
20 It is not the same as the court schedule. We have
21 food --

22 THE COURT: What time is lunch prepared
23 there?

24 DEPUTY SHERIFF: They have bag lunches.

25 THE COURT: He should be able to eat lunch at

1 the jail.

2 MR. MASON: Thank you.

3 THE COURT: All right, have a good lunch, see
4 you at 2:15.

5 MS. KINZELER: Thank you, Your Honor.

6 THE COURT: Officer, please do not discuss
7 your testimony with anyone during the break.

8 THE WITNESS: Yes, sir.

9 THE COURT: Thank you.

10 (Recessed at 1:05 p.m.).

11 (Resumed at 2:21 p.m.).

12 THE COURT: The witness can retake the stand.
13 I remind you you're still under oath.

14 Is the defendant ready to proceed?

15 MR. MASON: Your Honor, we have a matter we
16 need to take up with the Court.

17 THE COURT: What is that?

18 MR. MASON: We have been under an assumption
19 throughout this trial that all bench conferences
20 will be recorded. We placed on the record very
21 specific grounds for multiple objections all day
22 long and we have just learned that throughout this
23 day as a result of a failure of the --

24 THE COURT: Not a failure actually. We are
25 having difficulty with the court reporter learning

1 how to use the equipment. That is why I stated
2 specifically for you to state on the record
3 specifically the ground, they have been reserved.
4 In addition to that, when you ask to approach the
5 bench, basically you all cannot succinctly state
6 your objections, that is courtesy of the Court, so
7 from now on you will state your ground. If I want
8 argument I will ask for it, I will excuse the jury
9 if necessary and we'll proceed. I don't know how
10 we're going to get the glitch worked out but we
11 will.

12 MR. MASON: Understood. I just want the
13 record to be clear that each time where we have
14 approached the bench there has been a lengthy
15 conversation.

16 THE COURT: There have not been, that is a
17 misrepresentation, there have not been lengthy
18 conversations. There have been conversations of
19 relative brief length and the grounds for the
20 Court's ruling which has been based explicitly on
21 the grounds for your objection have been placed on
22 the record, the objections have been reserved.

23 MR. MASON: We did not --

24 THE COURT: And for the record, so the record
25 can be clear, I did not find argument necessary for

1 me to make a decision. Argument is to aid the
2 Court, it's not to preserve the record, so when you
3 have asked to approach the bench, you stated your
4 ground for your objection and I ruled specifically
5 on each ground that you stated regarding each
6 objection.

7 MR. MASON: And we did not ask for the jury
8 to be let out because we believed that each time --

9 THE COURT: That is for the Court's
10 discretion. I can tell you now I'm not going to
11 excuse the jury, you should be able to state your
12 ground for the objection. I have found you are
13 capable of doing that, so you have asked for bench
14 conferences, which is fine, I have accommodated
15 you, but what I have done, I have expressly ruled
16 on the grounds on each of your objections on the
17 record, so your objections are preserved. Argument
18 is to aid the Court, not to preserve your grounds
19 for objection, so I would instruct you as I
20 instructed you all prior to trial that I don't take
21 speaking objections so if you have an objection,
22 stand, state the basis for your objection and if I
23 need argument I will excuse the jury for that
24 purpose, if not I will rule contemporaneously on
25 your objection.

1 MR. MASON: For my information, will we be
2 recorded when we approach the bench or not, Your
3 Honor?

4 THE COURT: Pardon me?

5 MR. MASON: For my information, will we be
6 recorded?

7 THE COURT: You're not going to approach the
8 bench anymore so that is not even going to be an
9 issue, you're going to state the ground for your
10 objection and I'm going to rule contemporaneously.
11 I have accommodated your requests as I indicated,
12 you are capable of really, without going into some
13 discussion, which really is not necessary for me to
14 rule, I have ruled specifically on each objection
15 that you have made and the ground for those
16 objections and I have ruled, whether I overruled or
17 sustained, you stated the basis on which you have
18 made them.

19 MR. MASON: Your Honor --

20 THE COURT: So, it has been preserved for the
21 record. And that is why you hear me specifically
22 saying, for example, your last one, I overruled it
23 based on spoliation, I forget what the other one
24 was, but whatever the grounds were that you have
25 stated I have ruled on them based on what your

1 grounds were and I specifically have done that
2 because I knew the court reporter was having some
3 difficulty in learning how to use the equipment but
4 I thought that would have been resolved by now and
5 apparently it is not, so there will be no further
6 bench conferences so don't request them. When you
7 have an objection state the basis of your objection
8 and if I need argument I will have it, if not, I
9 will rule.

10 Is the State ready to proceed?

11 MR. VOIGT: Yes, Your Honor.

12 THE COURT: Is the defense ready to proceed?

13 MR. MASON: Yes, Your Honor.

14 THE COURT: Please bring in the jury.

15 (The jury returned to the courtroom).

16 THE COURT: You may be seated.

17 THE COURT: Ladies and gentlemen, I hope you
18 all had a good lunch. We'll now proceed with the
19 questioning.

20 You may proceed.

21 MR. VOIGT: Thank you very much, Your Honor.

22 THE COURT: You're welcome.

23 BY MR. VOIGT:

24 Q A couple more questions before I turn you
25 over to Mr. Mason. Let me show you what has been

1 previously marked as State's 13 and State's 20. I
2 ask you to take a look at those, if I could.

3 From your recollection and based on those
4 photographs, is the type of beer can found in
5 State's 13 the same type of beer can found in
6 State's 20?

7 A No.

8 Q Are they different brands?

9 A Yes.

10 Q Let me ask you further, Investigator
11 Kjellman, did you have contact with blood evidence
12 in this particular case?

13 A Yes, I did.

14 Q And what was your role concerning the blood
15 evidence?

16 A I picked it up from Deputy Brinson after he
17 collected it, it was collected at MUSC, handed over
18 to him, he in turn handed it over to me where I
19 secured it in my office.

20 Q What does secured in your office mean?

21 A In a secured facility, only six other people
22 in the sheriff's office have access to it, it is
23 placed inside a refrigerator inside that facility.

24 Q Do your policies require that blood evidence
25 be refrigerated?

1 A Yes.

2 Q And after you placed it in this secured
3 refrigrater did you have any other contact with
4 that particular bit of evidence?

5 A No.

6 Q Okay. And is it the policy of the sheriff's
7 office to transport such evidence to SLED in
8 Columbia?

9 A Yes.

10 Q And from time to time do you handle that
11 particular function?

12 A Yes.

13 Q And in this case you did not?

14 A No, I did not.

15 Q Do you know who did?

16 A Investigator Roy.

17 MR. VOIGT: Please answer any questions Mr.
18 Mason may have of you.

19 THE COURT: Any cross-examination of the
20 witness.

21 MR. MASON: Yes, Your Honor.

22 THE COURT: You may proceed.

23 CROSS EXAMINATION BY MR. MASON:

24 Q Good afternoon, Investigator Kjellman.

25 A Good afternoon.

1 Q Now, as the evidence custodian do you have to
2 follow certain procedures at the Sheriff's
3 Department?
4 A Yes, sir.
5 Q And is there a manual for what you're
6 supposed to do when you handle evidence?
7 A Yes.
8 Q And did you follow that manual?
9 A Yes.
10 Q And you have testified in regards to evidence
11 collected at the scene, is that correct?
12 A Yes.
13 Q And when you collected this evidence you used
14 standard procedures for doing so, which included
15 wearing rubber gloves. Is that correct?
16 A Yes.
17 Q And you had rubber gloves on the night in
18 question. Is that correct?
19 A Yes.
20 Q And do you use those rubber gloves when you
21 collected the evidence, is that correct?
22 A Yes.
23 Q And you have documented some evidence which
24 includes a cooler and six unopened Budweiser cans,
25 is that correct?

1 A Yes.

2 Q And the six unopened Budweiser cans, some of
3 them had been burst open but you inspected them
4 close enough to be able to verify that the top had
5 not been popped off those cans like somebody would
6 drink from the cans, is that correct?

7 A Yes, that's correct.

8 Q Okay. And you took that cooler and you took
9 all those cans and you put them in your car and you
10 drove them back to Charleston and you secured them
11 in your evidence compound. Is that correct?

12 A Yes.

13 Q And with regard to the evidence of alcohol
14 use in the Geo, you did not secure or take
15 possession of any of the use of alcohol evidence
16 that was in the Geo. Is that correct?

17 A Yes, that is correct.

18 Q Okay. And evidence is evidence, is that a
19 fair statement?

20 A Yes.

21 Q Okay. So, that can of beer or whatever it
22 was, however many cans of beer were in that car --

23 MR. VOIGT: Objection.

24 THE COURT: Basis?

25 MR. VOIGT: Mischaracterization.

1 THE COURT: Sustained, rephrase.

2 BY MR. MASON:

3 Q Okay. You did not inventory that car, you

4 simply stuck your head in there and photographed

5 it. Correct?

6 A Yes.

7 Q So, the only, the beer evidence that we have

8 from that car is just what happened to get caught

9 in that one photograph that is in evidence.

10 Correct?

11 A I didn't see any other evidence in that car,

12 of alcohol.

13 Q But you didn't take that can into evidence

14 like you took the unopened cans. Is that correct?

15 A No.

16 Q And that was an open can of Bud Light in the

17 Geo, correct?

18 A I don't know if it was open or not.

19 Q So, you haven't even looked at the picture

20 close enough to see that it was open?

21 A Judging by the picture, I couldn't tell you

22 if it is open or not.

23 Q If you looked at the picture closer in a

24 digital way, in other words, where you can go in on

25 your computer and you can click on the little plus

1 bar and it expands the image to where you can view
2 it --

3 A And zoom it, no, I haven't.

4 Q Okay. Now, you indicated that you're
5 familiar with the policy of the Charleston County
6 Sheriff's office in regards to evidence control.

7 Is that correct?

8 A Yes.

9 Q And isn't it correct that property shall not
10 be disposed of until the final disposition of each
11 case?

12 A Yes.

13 Q And isn't it the policy of the sheriff's
14 office that you, that the submitting deputy must
15 notify you before you will dispose of evidence?

16 A Yes.

17 Q Okay. In this case isn't it correct that on
18 July 14th, 2010, Deputy Burrell instructed you to
19 destroy the evidence in this case?

20 A Yes.

21 Q And Deputy Burrell is somebody who you
22 understood to be involved in the prosecution of
23 this case. Isn't that correct?

24 A He's involved in the investigation, yes.

25 Q Okay. And with regard to the destruction of

1 this evidence, you have given testimony about a Jim
2 Beam bottle that was located approximately 10 feet
3 away in the woods, I believe is what you testified.
4 Is that correct?

5 A It was on the side of the road, it wasn't in
6 the woods.

7 Q It was off the road and in the woods ten feet
8 away from the cooler?

9 MR. VOIGT: Objection to the
10 characterization.

11 THE COURT: Basis?

12 MR. VOIGT: Mischaracterization.

13 THE COURT: Sustained, rephrase.

14 BY MR. MASON:

15 Q I just want to make sure I understood. I
16 thought you said that the Jim Beam bottle was 10
17 feet away from the cooler, in the woods.

18 MR. VOIGT: Objection, same objection.

19 THE COURT: You can answer the question. I
20 will give you a little latitude.

21 A It was off the side of the road, in some
22 bushes, it wasn't in the woods. It was visible
23 from the roadway.

24 Q Okay. And you not having been there and seen
25 how it got there, you don't know, is that correct?

1 A No.

2 Q And you collected it with gloves, is that
3 correct?

4 A Yes, sir.

5 Q Okay. And you also, one of the things you
6 record when you do your investigation are weather
7 conditions, and you record that as being 52
8 degrees, 63 percent humidity, winds east-northeast
9 six miles per hour, clear skies. Is that correct?

10 A Yes, sir.

11 Q And if you have what I will call fresh
12 evidence that hasn't been subjected to moisture
13 conditions or what have you, and you collect it
14 properly and you preserve it properly, using your
15 gloves and then taking it to the right place, it is
16 certainly possible to take a fresh print off, say,
17 a plastic bottle?

18 MR. VOIGT: Objection.

19 THE COURT: Basis?

20 MR. VOIGT: Speculation, fresh print.

21 THE COURT: Overruled. To the best of her
22 knowledge, in the course of her duties, she can
23 answer the question to the best of her knowledge.

24 MR. VOIGT: Thank you, Your Honor.

25 THE COURT: Answer the question.

1 THE WITNESS: The condition of the cans and
2 that bottle were not conducive to collecting latent
3 prints. I could visually inspect it and I could
4 tell it wasn't.

5 BY MR. MASON:

6 Q Well, did you inspect the plastic bottle with
7 a specific purpose of making a decision about
8 whether fingerprints could be taken from that
9 bottle?

10 A Yes, I did.

11 Q Okay. And how did you do that?

12 A Visually.

13 Q Okay. And what was it about the bottle that
14 made it impossible, in your view, or I don't think
15 the word impossible is what you used, I thought
16 when you testified you said it was minimal, was
17 your word, what did you mean when you were asked
18 about whether you could take fingerprints from the
19 bottle and you used the word minimal, what were you
20 intending to convey by that testimony?

21 MR. VOIGT: Objection to the form of the
22 question.

23 THE COURT: Overruled. You may answer the
24 question.

25 Ma'am, do you need the question repeated or

- 1 do you understand it?
- 2 A I understand.
- 3 THE COURT: You can answer the question.
- 4 A The condition of the bottle had dirt and
- 5 dust, it would indicate it was thrown from
- 6 somewhere and due to the dirt and the dust on the
- 7 outside of the bottle it was, like I said, it was
- 8 minimal that we were ever going to get a
- 9 fingerprint off that bottle.
- 10 Q In other words, the bottle appeared to be
- 11 trash rather than a fresh bottle?
- 12 A No, I'm not saying it was trash. It looked
- 13 like it had freshly been put there, thrown there,
- 14 tossed there, tossed there recently but the dust
- 15 and dirt and everything on the outside of the
- 16 bottle, the chances of getting a fingerprint from
- 17 that bottle were remote.
- 18 Q So, there was dirt and dust on the outside of
- 19 an empty bottle. Is that correct?
- 20 A Yes.
- 21 Q Okay. And did you make any determination
- 22 from examining the bottle as to how long it would
- 23 have taken or where the dirt and dust would have
- 24 collected on this bottle?
- 25 A I'm not understanding the question.

1 Q Well, again, you said there was dirt and dust
2 on this bottle?

3 A Yes.

4 Q Okay. And if you had it here in court today,
5 if you were the evidence custodian you would have
6 brought it with you and you could have sat it on
7 the table here and we could have looked at it.
8 Isn't that correct?

9 A Yes.

10 Q In fact you do that all the time, you could
11 have laid it in front of the jury for them to
12 determine whether it looks like this is some old
13 bottle that was in the trash in the woods or
14 whether it looks like it was freshly recovered from
15 the scene. Isn't that a fair statement?

16 A Yes.

17 MR. VOIGT: Objection.

18 THE COURT: Basis?

19 MR. VOIGT: That calls for speculation as to
20 what the jury would have thought, having reviewed
21 it.

22 THE COURT: Rephrase the question.

23 BY MR. MASON:

24 Q That bottle, for determination of its age and
25 where the dirt and dust came from would have been

1 available as evidence in this case had Deputy
2 Burrell not instructed that it be thrown out,
3 destroyed. Isn't that correct?

4 A Yes.

5 Q And are you aware that in this case Mr.
6 Barclay's attorneys made a request to have that
7 bottle subjected to fingerprint analysis because --

8 THE COURT: Sustained. Speculation, lack of
9 foundation.

10 Q Did you review any of the legal memoranda in
11 this case with reference to that Jim Beam bottle?

12 MR. VOIGT: Objection.

13 THE COURT: Basis?

14 MR. VOIGT: Relevance.

15 THE COURT: Repeat the question, please.

16 MR. MASON: "Did you review any of the legal
17 memoranda in this case relating to the Jim Beam
18 bottle?"

19 THE COURT: Basis of the objection?

20 MR. VOIGT: Its relevancy, outside the scope
21 of direct, outside the scope, personal knowledge.

22 THE COURT: Sustained based on the lack of
23 foundation, no personal knowledge.

24 BY MR. MASON:

25 Q Now, you have a very specific requirement

1 when you receive evidence. Isn't that correct?

2 MR. VOIGT: Objection to the form of the
3 question.

4 THE COURT: Restate the question.

5 Q Investigator Kjellman, when you receive
6 evidence you're supposed to write down the date and
7 the time that you receive it. Isn't that correct?

8 A No.

9 Q When you receive blood evidence you're
10 supposed to write down the date and time that you
11 received it. Isn't that correct?

12 A Yes, I would say that's correct.

13 Q And the reason for that is because if you
14 write down the date and time we would then know
15 that at a certain time you got it and that it was
16 refrigerated. Isn't that correct?

17 A Yes.

18 Q Okay. And the date and time that you get it
19 and the date and time you log it into the
20 refrigerator shouldn't have some big gap because
21 you're required to refrigerate blood evidence.
22 Isn't that correct?

23 A Yes.

24 Q Okay. And isn't it correct that you did not
25 enter the blood evidence in this case until

1 December 9th, 2008, at 10:40 a.m.?

2 A No, that is not correct.

3 Q Isn't it correct that you failed to record
4 the date and time you received the blood evidence
5 on any written document in this case?

6 A There is no written document for me to record
7 it on. Everything is enclosed in the DUI blood
8 kit.

9 Q Let me see if I understand this correctly.
10 Policy requires you to write down the date and time
11 you receive blood evidence. Isn't that correct?

12 A Yes.

13 Q But you didn't write it down because there is
14 nowhere for it to be written down, is that your
15 testimony?

16 MR. VOIGT: Objection, that mischaracterizes
17 her statement.

18 THE COURT: Sustained, rephrase it.

19 Q Okay. There is something you're required to
20 do. Is that correct?

21 A Yes.

22 Q Okay. And with all due respect, I assume
23 they have paper and report forms and all kind of
24 other stuff at the sheriff's office. Is that
25 correct?

- 1 A Yes.
- 2 Q Okay. So, there would be some type of a
3 supplemental report form or something at which you
4 could write down this information. It is not that
5 you weren't able to do so, you just didn't, is that
6 correct?
- 7 A Did I write down the exact date and time?
- 8 Q Yes.
- 9 A That I received the blood kit from Deputy
10 Brinson?
- 11 Q Yes.
- 12 A No, I did not.
- 13 Q Now, I have stated a real specific time for
14 you and I don't know whether you have, I don't know
15 whether you have all your records up there with you
16 but do you have the record with you that shows the
17 date and time you actually logged in the blood kit
18 or would you like for me to approach and show it to
19 you?
- 20 A No, I have it here.
- 21 Q Okay. Tell the jury from your written
22 document what date and time the blood kit is logged
23 in in the SCSO evidence management computer system?
- 24 A December 9th, 2008, at --
- 25 Q I'm sorry?

1 A December 9th, 2008, at 10:40 a.m.

2 Q It's at 10:40 a.m. and 13 seconds, isn't that

3 correct?

4 A Yes.

5 Q That is how precise the system is, right?

6 A Yes.

7 Q Because that is how important it is in

8 serious felony cases to record dates correctly?

9 MR. VOIGT: Objection, Your Honor.

10 Q Is that correct?

11 MR. VOIGT: He's testifying.

12 THE COURT: Overruled. Be careful in asking

13 your questions.

14 MR. MASON: Thank you.

15 THE WITNESS: Can you repeat the question for

16 me?

17 BY MR. MASON:

18 Q I will be glad to. It is real important in

19 serious felony cases for you to properly record

20 information related to the evidence?

21 A It is in all cases, yes.

22 MR. MASON: That's all the questions I have

23 of this witness.

24 THE COURT: Any redirect of the witness?

25 MR. VOIGT: Very briefly, Your Honor.

1 REDIRECT EXAMINATION BY MR. VOIGT:

2 Q This blood evidence information he talked to
3 you about, from the time Deputy Brinson gave it to
4 you, to the time you put it in the refrigerator,
5 did anybody else have possession or custody of it?

6 A No.

7 Q Did you have it with you during that entire
8 time?

9 A No.

10 Q Where had you stored it when you had it?

11 A In the refrigerator.

12 Q Was the blood kit already sealed when it was
13 given to you?

14 A Yes, it was.

15 Q Was there, was any of the paperwork
16 associated with the blood kit available to you for
17 your signature and notation?

18 A No.

19 MR. VOIGT: One moment, Your Honor.

20 No further questions.

21 THE COURT: Any objection to the witness
22 being excused, from the State?

23 MR. MASON: I think I have one more question.

24 THE COURT: Limit it to redirect. You may
25 proceed.

1 RE CROSS EXAMINATION BY MR. MASON:

2 Q You were just asked the question about
3 refrigeration?

4 A Yes.

5 Q And do you know why it is that the blood has
6 to be promptly refrigerated?

7 MR. VOIGT: Objection, beyond the scope.

8 THE COURT: Sustained. You haven't
9 established a foundation she has the knowledge to
10 answer that question in her position with the
11 Sheriff's Department.

12 Q Without regard to why, policy requires that
13 it be refrigerated right away. Isn't that correct?

14 MR. VOIGT: Objection.

15 THE COURT: Basis?

16 MR. VOIGT: I believe this has not been any
17 part of the testimony.

18 THE COURT: No speaking objection. Is there
19 basis for the objection?

20 MR. VOIGT: Form of the question.

21 THE COURT: Sustained, rephrase that.

22 BY MR. MASON:

23 Q I asked you, I used the word right away.
24 What word would you use to determine how quick the
25 blood needs to be put in the refrigerator?

1 A As soon as possible, which is what I did.

2 THE COURT: Any further questions for the
3 witness, from the State?

4 MR. VOIGT: No, Your Honor.

5 THE COURT: Any objection to the witness
6 being excused, from the State?

7 MR. VOIGT: No, Your Honor.

8 THE COURT: From the defense?

9 MR. MASON: No, Your Honor.

10 THE COURT: Ma'am, you're excused.

11 (Witness excused).

12 THE COURT: You may call your next witness.

13 MS. KINZELER: The State calls Sergeant
14 Burrell.

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1 MICHAEL BURRELL, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please state your name and spell
4 your last.

5 THE WITNESS: Michael Burrell, B-u-r-r-e-l-l.

6 THE COURT: You may proceed.

7 DIRECT EXAMINATION BY MS. KINZELER:

8 Q Sergeant Burrell, how long have you been with
9 the sheriff's office?

10 A Fourteen years.

11 Q And were you employed in the capacity as a
12 sergeant in December of '08?

13 A I was assigned to traffic division in 2008 as
14 a deputy, I just recently got promoted.

15 Q Tell the jury a little bit about your law
16 enforcement background, your training.

17 A Prior to moving to South Carolina I was a
18 police officer in upstate New York for
19 approximately six years. I moved south basically
20 to get out of the snow and started working for the
21 sheriff's office, I worked the road patrol for
22 about a year and a half, then I was selected to the
23 traffic unit of the sheriff's office where I was
24 employed as a motor officer for twelve years.

25 Q Did you go through any formal training?

- 1 A I did.
- 2 Q Where did you do that?
- 3 A At the South Carolina Criminal Justice
4 Academy.
- 5 Q How many weeks did you go through training
6 there?
- 7 A I did nine weeks of basic police officer and
8 when I was assigned to traffic division I went
9 through and completed the traffic safety officer
10 program.
- 11 Q And what does that involve?
- 12 A That involves two weeks of at scene collision
13 investigation, two weeks of technical
14 investigation, one week of reconstruction.
- 15 Q Do you have any certifications?
- 16 A I do.
- 17 Q What are they?
- 18 A Traffic safety officer.
- 19 Q Are you on any particular team with the
20 sheriff's office?
- 21 A Currently, no.
- 22 Q In December of 2008 were you on any
23 particular team?
- 24 A I was.
- 25 Q What team was that?

- 1 A Myself and Deputy Brinson were call-out
2 partners.
- 3 Q What do you mean by that?
- 4 A Traffic.
- 5 Q Do you have experience working fatalities?
- 6 A Yes, ma'am.
- 7 Q In December of 2008 roughly how many fatality
8 collisions had you worked, just ballpark?
- 9 A 25.
- 10 Q Do you recall being involved in any
11 investigations regarding the State versus Mr.
12 Barclay?
- 13 A I do.
- 14 Q Tell the jury a little bit about when you
15 first became involved.
- 16 A We were called out from the house, myself and
17 Deputy Brinson were on call, and the dispatch
18 called us to report there had been a fatal motor
19 vehicle collision on Point of Pines Road down on
20 Edisto Island.
- 21 Q And what county is that in?
- 22 A Charleston County.
- 23 Q When you get there what did you do?
- 24 A Surveyed the scene.
- 25 Q Did you assist Deputy Brinson in any way with

1 marking his spray paint, anything of that nature?

2 A Yes, ma'am.

3 Q Tell the jury a little bit about the things
4 you're doing when you're out there with Deputy
5 Brinson, as far as marking with the spray paint.
6 What are you all doing out there?

7 A We're basically investigating the scene,
8 we're trying to determine path of travel for both
9 vehicles, final resting places for both vehicles,
10 gouge marks from contact, maximum engagement from
11 both vehicles.

12 Q Do you have experience in identifying those
13 kind of markings in the road?

14 A Yes, ma'am.

15 Q And roughly how many times have you had to
16 make those kind of identifications before this
17 accident?

18 A At least 25.

19 MS. KINZELER: May I approach, Your Honor?

20 THE COURT: You may.

21 Q Officer Burrell, let me hand you those. I'll
22 get these out of your way. Do you recognize those
23 photos?

24 A Yes, ma'am.

25 Q Do they depict the scenes you saw that night?

1 A Yes, ma'am.

2 Q Those markings, are those the paint markings
3 we have been talking about with the yellow spray
4 paint?

5 A Yes, ma'am.

6 Q Do you recognize the markings in the roadway
7 in those photos?

8 A I do.

9 MS. KINZELER: May I approach, Your Honor?

10 THE COURT: You may.

11 Q I'm going to put some of these photos up on
12 the screen so you can explain what we're looking at
13 here, if you would look behind you. Did you assist
14 Deputy Brinson in notating these markings in the
15 roadway with the yellow spray paint, or orange?

16 A Orange spray paint, yes, ma'am.

17 Q What do we see right here, what is this?

18 A That is the right rear tire of the
19 defendant's truck.

20 Q What is the significance --

21 MR. MASON: Objection, Your Honor.

22 THE COURT: Basis?

23 MR. MASON: He wasn't there, lack of personal
24 knowledge.

25 THE COURT: He conducted an investigation.

1 Overruled.

2 MR. MASON: He hasn't been qualified yet,

3 Your Honor.

4 THE COURT: It does not require --

5 MR. MASON: 704, Your Honor.

6 THE COURT: It does not require expert

7 witness testimony. Overruled.

8 BY MS. KINZELER:

9 Q What significance, what does RR mean?

10 A Right rear.

11 Q What is the the significance of this notation

12 right here, this particular point?

13 A It shows the path of travel of his truck.

14 Q What do we see right here, what is this area?

15 MR. MASON: Objection.

16 THE COURT: Basis?

17 MR. MASON: Speculation.

18 THE COURT: Overruled. He is not providing

19 an opinion, he is testifying he investigated at the

20 scene, he saw this in the course of investigating

21 this accident.

22 BY MS. KINZELER:

23 Q What do you see right here?

24 A That is maximum engagement.

25 Q Okay.

1 MR. MASON: Objection.

2 THE COURT: Approach.

3 (Unrecorded bench conference).

4 THE COURT: The objection is sustained based
5 on Rule 701 and 702. No opinions are to be
6 elicited until the witness has been qualified as an
7 expert. All opinions, lay opinions he provides are
8 to be considered as lay testimony and are based on
9 rational discussion of his investigation.

10 Proceed.

11 BY MS. KINZELER:

12 Q Sergeant Burrell, what are we looking at
13 right here, those marks in the road that are by
14 these dots?

15 A That is path of travel, his tire.

16 MR. MASON: Objection, speculation.

17 THE COURT: Overruled. You need to change
18 the form of the questions and stop leading. Ask
19 him direct questions.

20 Q Did you tell the jury anything about what
21 made these marks in the roadway?

22 A I made those with the paint.

23 Q The marks that you were indicating with the
24 paint?

25 A The marks in the road.

1 Q Let me rephrase.

2 A Okay.

3 Q What is the significance of you putting the
4 spray paint there, why did you do this?

5 A It shows the path of travel of his right rear
6 tire.

7 MR. MASON: Objection.

8 THE COURT: Basis?

9 MR. MASON: Speculation, 701 and 702.

10 THE COURT: Overruled based on his rational
11 assessment from investigation of the accident as
12 well as his training and experience in the area.
13 And it falls under the duties, his duties and
14 responsibilities at the Sheriff's Department.

15 BY MS. KINZELER:

16 Q Sergeant Burrell, did you take that
17 photograph you are talking about?

18 A Yes, ma'am.

19 Q During the course of your investigation and
20 training and responsibility are you qualified to
21 explain to the jury what these white hash marks
22 are?

23 A Yes, ma'am.

24 Q What are they?

25 A They are tire striations.

1 Q Explain to them what that means. What made
2 those marks, based on the investigation?

3 A It's his right rear tire folding over onto
4 the pavement as it starts to flip the truck, it is
5 making, the tire is still spinning and it is making
6 those marks in the roadway as it is starting to
7 flip over.

8 Q Sergeant Burrell, when you finished with your
9 investigation at the scene what did you do next?

10 A We went to MUSC.

11 Q And who did you see while you were there?

12 A Deputy Martin, Deputy Brinson was with me,
13 emergency room personnel and the defendant.

14 Q Did you have an opportunity to observe the
15 defendant in the emergency room?

16 A I did.

17 Q And tell the jury about your observations.

18 A My observations when I first got there was
19 Deputy Brinson was finishing the paperwork and
20 having Mr. Barclay sign the paperwork.

21 Q Describe the defendant's demeanor while you
22 were there?

23 A Very jovial, very funny, his speech was
24 extremely slurred, his eyes were extremely
25 bloodshot, clothes were dishelved, he didn't think

1 he had been, or why he was even there, he didn't
2 know.

3 Q At some point did the defendant, do you
4 recall, at some point did the defendant engage you
5 in any conversation?

6 A Yes, ma'am.

7 Q Tell the jury about that conversation.

8 A The defendant had, once Deputy Brinson had
9 given him his --

10 Q Just tell the jury about the conversation,
11 you don't --

12 A Okay. He woke up, I'm not sure if he passed
13 out or fell asleep, but he woke up and he said,
14 "What am I doing here?" And I looked at him and I
15 said, "You've been in a crash." "I haven't been in
16 any Goddamn crash." And I said, "Yes, sir, you
17 were in a crash and you killed somebody." "I
18 didn't kill anybody." I asked him, I said, "Where
19 were you coming from tonight?" "I was coming from
20 my farm." And that's when I asked him, I said,
21 "Have you been drinking tonight?" "I was drinking
22 at the farm but why am I here at the hospital?"
23 Q Would that be the extent of the conversation?
24 A Yes, ma'am. Shortly thereafter Mr. Mason
25 walked in.

1 Q Who transported the defendant to the
2 detention center?

3 A I did.

4 Q Once he was booked in, was that the extent of
5 your involvement in this case, was that the extent
6 of any investigation you made?

7 A Yes, ma'am.

8 MS. KINZELER: If you will, answer any
9 questions Mr. Mason has.

10 THE COURT: Any cross-examination?

11 MR. MASON: Yes, Your Honor.

12 THE COURT: You may proceed when you're
13 ready.

14 CROSS EXAMINATION BY MR. MASON:

15 Q Good afternoon, Deputy Burrell.

16 A Good afternoon.

17 Q Now, you stated that I had come to the
18 hospital when Mr. Barclay asserted his right to
19 have his attorney present?

20 MS. KINZELER: Objection.

21 Q Isn't that correct?

22 THE COURT: Basis?

23 MS. KINZELER: Relevance.

24 THE COURT: Please restate the question.

25 Q You stated that I came to the hospital very

1 shortly after these events you have just related,
2 his statement?

3 THE COURT: Overruled. You may answer the
4 question, sir.

5 A Yes, sir.

6 Q And at that time you described Mr. Barclay's
7 appearance, his eyes were extremely bloodshot,
8 correct?

9 A Correct.

10 Q His speaking being extremely slurred.
11 Correct?

12 A Correct.

13 Q His clothes being dishelved, is that correct?

14 A Yes, sir.

15 Q That he did not know why he was there. Is
16 that correct?

17 A That's correct.

18 Q That he had claimed he had not been in any
19 expletive accident. Correct?

20 A Correct.

21 Q And that's your sworn testimony. Is that
22 correct?

23 A Yes, sir.

24 MR. MASON: Your Honor, we have a matter to
25 take up outside the jury.

1 THE COURT: If you have a motion you can
2 state the ground for that.

3 MR. MASON: Okay. Impeachment material.

4 THE COURT: You need to give me the document.

5 MR. MASON: It's a video, Your Honor.

6 THE COURT: Madam Forelady, ladies and
7 gentlemen, I have a brief matter to take up outside
8 your presence. During your break please do not
9 discuss the case, please leave your note pads in
10 your seat.

11 You don't have to take them all the way down
12 the hall.

13 (The jury was excused from the courtroom).

14 THE COURT: What was the last question? I'm
15 speaking to you, Mr. Mason, what was the last
16 question that was asked?

17 MR. MASON: Your Honor, we got to the point,
18 Your Honor --

19 THE COURT: I asked you what was the last
20 question you just asked.

21 MR. MASON: I just confirmed that he --

22 THE COURT: I asked you to state specifically
23 the last question you just asked.

24 MR. MASON: I stopped my questioning and then
25 I made a motion for the Court --

1 THE COURT: Did you not, the question before
2 that, I need to know what the question was before
3 you said you had a matter of law.

4 MR. MASON: With all due respect, I don't
5 remember, Your Honor, I'm sorry.

6 THE COURT: Does the State know?

7 MR. VOIGT: I believe, Your Honor, it was a
8 list of things that the deputy had testified to
9 following his sworn testimony. I believe it had to
10 do with the general appearance of Mr. Barclay.

11 THE COURT: That is exactly what it was, he
12 testified his eyes were extremely bloodshot, speech
13 extremely slurred and his clothes dishelved.

14 Now, what is it you claim --

15 MR. MASON: Can we mark it for
16 identification?

17 THE COURT: Please tell me what it is.

18 MR. MASON: I have a videotape that was taken
19 at the hospital at the exact time that this officer
20 testified Mr. Barclay appears in this condition.

21 THE COURT: You have to show that to the
22 person took it so it could be authenticated, that
23 would be the appropriate time to use that. You
24 cannot introduce it through this witness because
25 you do not have the ability to authenticate it at

1 this time. Who took it?

2 MR. MASON: I did, Your Honor.

3 THE COURT: Be careful, you'll end up as a
4 witness, the State may make a motion to disqualify
5 you, you better have somebody ready to step in for
6 you because they have the ability to cross-examine
7 you and also question you about your mental
8 condition, et cetera, at the time you took the
9 video, so be very careful about whether that is
10 something you want to do because if you made
11 yourself a witness I am going to allow them to
12 cross-examine you, I am going to disqualify you,
13 you better have somebody ready to step in and try
14 the case for you, it is not fair for you to testify
15 without them having the ability to cross-examine.

16 MR. MASON: I'm not going to testify.

17 THE COURT: You are testifying if you
18 authenticate that.

19 MR. MASON: This is a collateral matter, the
20 rule that says an attorney is a witness --

21 THE COURT: I'm very clear with what the rule
22 says but you are making yourself a fact witness by
23 testifying the state and condition your client was
24 in at the time he was arrested.

25 MR. MASON: No, I'm not.

1 THE COURT: And they are entitled -- do not
2 argue with the Court, Mr. Mason. The Court
3 determines whether you made yourself a witness. If
4 you disagree with that decision it is called an
5 appeal. I'm instructing you and advising you so
6 that you do not feel blindsided in any way that if
7 you continue with this line of questioning and you
8 don't have an alternative method to authenticate
9 that video you will have in fact made yourself a
10 witness subject to cross-examination and you should
11 have someone prepared to step in and try this case
12 for you if the State makes a motion to disqualify
13 you for that purposes.

14 If you want to talk about it, if you want to
15 see if there is somebody else that can authenticate
16 it, if you want to show it to the State to see if
17 they can agree to it I will give you a minute to do
18 that. You have to establish a foundation for it,
19 as to who took it and when.

20 MR. MASON: Your Honor, may I inquire of the
21 Court first of all, I think you would have to see
22 it to see if I'm testifying on it.

23 THE COURT: That is not the issue. The issue
24 is who took it, the issue is not whether you're in
25 the video and whether you're expressing --

1 MR. MASON: I'm not.

2 THE COURT: The issue, I assume you took a
3 video of Mr. Barclay for whatever purpose, somebody
4 has to authenticate it, somebody has to
5 authenticate when it was taken, what time it was
6 taken, where, even though you, you still have to
7 establish they were done to make them relevant. In
8 other words, the time frame it was taken from the
9 time you arrived at the hospital or otherwise.
10 Even if it's time stamped, somebody still has to
11 testify to it because with technology that could be
12 altered and it has not been provided to the State
13 so I don't know if they can examine it to tell if
14 it was altered or not by some expert. The bottom
15 line becomes in order to autenticate it you would
16 have to testify. They are entitled to
17 cross-examine you regarding that --

18 MR. MASON: That's fine.

19 THE COURT: -- if you make yourself a
20 witness, so I suggest that you discusse it with the
21 State, since you have never shown it to them.

22 MR. MASON: Excuse me?

23 THE COURT: Let them see it. Try to see the
24 forest for the trees.

25 MR. MASON: Yes, Your Honor.

1 THE COURT: You need to let them look at it,
2 see if they agree to it, see if they have some
3 objection to it, and then we'll go from there.
4 I'll give you a few moments to do that.

5 MR. MASON: If it were the State's video,
6 Your Honor, and they had taken it of Mr. Barclay --

7 THE COURT: Mr. Mason, I'm not doing tit for
8 tat today because it applies equally, the rules
9 apply to everybody, I don't know whether the State
10 had a video, I'm not going to rule in a vacuum on
11 something that has not been introduced, okay? What
12 I instructed you to do is show the video to the
13 State, see if they can agree to the admissibility
14 of the document, or the video, and I will give you
15 all a few minutes to do that. I assume you all
16 have the equipment available to play it, so you can
17 all watch it.

18 MR. MASON: I do, Your Honor. Can I mark it
19 for identification?

20 THE COURT: You're going to do what I have
21 instructed you to do, Mr. Mason, and then we'll go
22 from there.

23 MR. MASON: Thank you, Your Honor.

24 THE COURT: Follow the instructions.

25 MR. MASON: Yes, Your Honor.

1 MS. KINZELER: Your Honor, may the witness
2 step down for a minute?

3 THE COURT: Uh-huh (Affirmative). Sir, do
4 not discuss your testimony with anyone during this
5 break.

6 MR. MASON: Your Honor, we would need the
7 State to look at it out of the presence of the
8 witness. Can we have that requirement?

9 THE COURT: He is going to be watching on the
10 computer screen, he can see it from there.

11 MR. MASON: It has sound, Your Honor.

12 MS. KINZELER: He can go back out in the
13 hallway.

14 THE COURT: You can go out in the hallway.

15 THE WITNESS: Yes, ma'am.

16 MS. KINZELER: Your Honor, we didn't agree to
17 that.

18 THE COURT: Whichever part you can agree to.

19 MS. KINZELER: We can't.

20 THE COURT: I have been listening to the
21 tape. If you play the tape you have made yourself
22 a witness. Can you play the video without showing
23 the audio, which shows his speech? That is what
24 you're trying to accomplish, that he was not
25 dishelved, that his speech was not slurred and that

1 his eyes were not bloodshot.

2 MR. MASON: May I explain, Your Honor?

3 THE COURT: Yes, sir. I need you to answer
4 the question.

5 MR. MASON: I'm going to. If Mr. Barclay
6 testifies in this case --

7 THE COURT: That is a big if.

8 MR. MASON: I'm just saying, because we're
9 talking about what is going to happen as the trial
10 goes forward, if he testifies in this case and says
11 that's me and that is what I said and they
12 cross-examine him and he can authenticate the video
13 in the course --

14 THE COURT: It is another issue, it is not
15 just him authenticating it, now that I have heard
16 it. It is self serving statements which were asked
17 by his attorney clearly anticipating this case.
18 So, they don't come within any exception. If he
19 can authenticate that that is in fact him, I don't
20 have a problem with it coming in through him
21 without audio to show his condition, but answering
22 questions is another story because there clearly, I
23 don't know, if he testifies to it, it would be
24 subject to cross-examination, I might have to think
25 through that one

1 MR. MASON: Just so you know, going forward,
2 Your Honor --

3 THE COURT: I would have to think through
4 that. I don't know if he is going to testify.

5 MR. MASON: We also have an expert who has
6 reviewed the video.

7 THE COURT: Expert on what?

8 MR. MASON: A medical expert who has reviewed
9 that video and looked at the medical record, he
10 reviewed that video as part of his expert opinion.

11 THE COURT: As to whether he's impaired? He
12 can state what he looked at, he can say what he
13 based his opinion on and based on that he is not
14 impaired but he can't repeat what is said in the
15 video. An expert can rely on hearsay as to
16 foundation for opinion but it doesn't allow them to
17 just say whatever they want to say from the
18 document, the issue on credibility, their opinion
19 or otherwise, they don't get to say, "I read the
20 deposition of so and so, this is what the
21 deposition says," this and that and, "This is what
22 it says. As a result of that I formed my
23 decision." They generally say, "I have gone
24 through this laundry list of things and based on
25 that I have formulated this opinion and this is why

1 I have this opinion and these are the bases and
2 reasons for this opinion."

3 MR. MASON: And he would state that one of
4 the bases, without getting into what all it showed,
5 was that he looked at a videotape.

6 THE COURT: He can say that.

7 MR. MASON: And it showed Mr. Barclay in a
8 relevant period of time in the hospital and that
9 based on --

10 THE COURT: You are still going to have to
11 authenticate. He can say he relied on that in
12 forming his opinion.

13 MR. MASON: Understood, Your Honor.

14 THE COURT: But I think you create a lot of,
15 you open a Pandora's box if you try to introduce
16 it.

17 MR. MASON: I understand. With regard to Mr.
18 Barclay, will you let us know at the point in time
19 where we would be in a position to make a decision
20 whether, if he testifies, it might be a big
21 decision for us, we might put him on the witness
22 stand if he is allowed to include the video and if
23 he is not then we might come to a different
24 decision.

25 THE COURT: Let me ask you, does the State

1 have any exception to the video coming in through
2 Mr. Barclay, then he would be subject to
3 cross-examination on those statements and the self
4 serving nature of those statements?

5 MS. KINZELER: Your Honor --

6 THE COURT: But Mr. Mason's voice would have
7 to be redacted out of the video.

8 MS. KINZELER: Well, number one, it is a self
9 serving statement.

10 Number two --

11 THE COURT: It is clearly bolstering.

12 MS. KINZELER: If it were ever going to come
13 in it would have to be with no audio. I don't
14 know, do you have pause, unpause, pause?

15 THE COURT: The problem is you have a witness
16 who says his speech was slurred and the video shows
17 the speech wasn't slurred.

18 MS. KINZELER: Here is the problem.

19 THE COURT: But all that, I didn't see it,
20 his speech does sound delayed, to me, and very
21 deliberate as if someone is impaired.

22 MS. KINZELER: I don't know when it was taken
23 in relation to when the officers were there.

24 THE COURT: It is not time stamped.

25 MR. MASON: It came off a digital camera.

1 THE COURT: Was it time digital?

2 MR. MASON: There is a clock, I will ask
3 Keith this, but he is sitting in the bed, the
4 clocks in the ER are, the clock is right over his
5 head.

6 THE COURT: What time -- is there a clock in
7 it?

8 MR. MASON: 12:30, Your Honor.

9 THE COURT: Well, the officer can testify as
10 to when they were there, what time it is on the
11 clocks, I mean the clock. I don't think he can say
12 the clock in the ER was manipulated.

13 MS. KINZELER: That's fine, he didn't see
14 that part.

15 THE COURT: Anything else?

16 MR. MASON: I was just --

17 THE COURT: I think that is a more prudent
18 course in terms of that video, otherwise you make
19 yourself a witness.

20 MR. MASON: So, the two courses, just so we
21 don't delay, is the expert --

22 THE COURT: The expert can't play the video
23 but he can say he relied on it in formulating his
24 opinion.

25 MR. MASON: But you would decide, before I

1 would call or not call Mr. Barclay, as to whether,
2 if I did call him, you would allow, just so I know,
3 you would allow it or not?

4 THE COURT: I would have to watch it again
5 but my gut impression at this point is that it
6 would not come within any exception because it is
7 not an admission against interest. They really are
8 self serving statements which generally will not
9 come in. But there are some other issues that need
10 to be explored, one of which is his condition at
11 the time, whether in fact his eyes were in fact
12 bloodshot, whether his speech was in fact slurred,
13 and I might allow some portion of it to be played
14 for that limited purpose. I don't know that you
15 need the whole digital recording to establish that.

16 MR. MASON: One of the problems with this,
17 Your Honor, is that one of the statements they made
18 is that he didn't even know he was in an accident,
19 and it was right, they said that, right at the time
20 I was there, whether --

21 THE COURT: Those are all factual issues to
22 sort out. I don't know,, I'm not the fact finder,
23 the beautiful part of my job, though, I'm right
24 now, I'm not the fact finder, these are things you
25 all would have to argue to a jury, but the question

1 becomes what relation was this to the time that the
2 police were talking to him. It all becomes an
3 issue of how fast alcohol is processed in the
4 system and metabolized. I assume they will have a
5 doctor testify about that and what his condition
6 may have been at that time but it all becomes an
7 issue of the continuum and I have to look at all
8 that to see. I assume they are going to ask those
9 questions of this witness.

10 MR. MASON: Your Honor, the reason I stopped
11 at the point I was in questioning Deputy Burrell
12 was we had gotten to the point where I was at the
13 hospital and he said all these things, with the
14 slurred speech, extremely bloodshot eyes, didn't
15 recall he had even been in an accident.

16 THE COURT: He didn't really pinpoint when he
17 came.

18 MR. MASON: We have sworn testimony that, at
19 page 95, line 17; and page 111, lines 12 through 25
20 of his sworn testimony at the pretrial hearing in
21 this matter, which I believe was consistent also to
22 his testimony here at trial, that I was there when
23 all these conditions --

24 THE COURT: It all becomes a factual issue,
25 you elicit what you want to elicit from him, they

1 will elicit what they feel they want to elicit from
2 the time line and I will hear everything and make a
3 decision what portion, if any, of that tape will
4 come in. It is incredibly self serving, I'm not
5 sure how much of it would come in on the other
6 issue, where you have an expert that has already
7 looked at it and relied on it in formulating an
8 opinion he wasn't impaired, at some point it
9 becomes cumulative.

10 MR. MASON: The thing about it is, Your
11 Honor, the fact that when they say all these things
12 are going on he can recount in what I submit is a
13 very clear way --

14 THE COURT: There is nothing inconsistent
15 with that, the EMS driver said he was oriented as
16 to time and place, that doesn't mean a person isn't
17 impaired. Lots of people are impaired, you know,
18 when I was clerking with Judge Hill, there was a
19 man with a .39 and he still knew where he was, he
20 could talk, and Judge Hill said, "I can't believe
21 you were able to walk, that you didn't die," and
22 that came from years and years of drinking, that he
23 was able to do it, that he was oriented. As a
24 matter of fact the officer testified he was
25 shocked, "I almost had to give him a sobriety

1 test." It just depends on how alcohol metabolizes,
2 on how long a person has been drinking. Lots of
3 factors go into that but irregardless of all that
4 it becomes a factual issue as to whether or not he
5 was impaired and it is a credibility issue as to
6 when the officers say their testimony is based on
7 their rational perception, whatever they perceive
8 from the defendant. However, it is not
9 inconsistent with the emergency medical person who
10 said he was compliant in that he knew where, he
11 knew his name, he knew what date. I don't know if
12 he said he knew what day it was, he never said he
13 knew his name, he knew where he was, he knew
14 generally what was going on. I don't think there
15 is any question that that is in fact the testimony
16 at this point. So, I'm not hearing any
17 inconsistency for impairment purposes.

18 MR. MASON: It is very inconsistent with
19 Burrell's perception and, Your Honor, Rule 104 of
20 the rules of evidence allows the Court, because as
21 you know, evidence comes in at different times
22 through different witnesses and different people
23 throughout the case so it allows the Court to
24 conditionally admit evidence.

25 THE COURT: I'm not going to conditionally

1 admit that.

2 MR. MASON: I just wanted the record to
3 reflect we actually offered this videotape.

4 THE COURT: I think the record reflects what
5 we have already stated, I have already ruled and I
6 have given you other options and I have told you
7 what the implications would be if you tried to do
8 it through this witness. I think sometimes as
9 lawyers we get tunnel vision and we forget you can
10 impeach somebody without directly impeaching them.
11 There is plenty of inconsistent testimony in the
12 record, you can always argue the facts, so we have
13 other testimony that contradicts that. It is the
14 way you impeach his credibility. You're not going
15 to be able to do that with that, the only way you
16 can do that right now is make yourself a witness
17 and I don't think that is a good idea.

18 MR. MASON: Your Honor, I would at least like
19 for you to rule on whether that is an ancillary
20 matter in terms of simply --

21 THE COURT: It wasn't an ancillary matter you
22 made yourself a witness in that case, you are
23 clearly participating and you are leading this
24 questioning and it is clear you anticipate a charge
25 and trying to create a legal defense for him and it

1 is not a good idea and especially when you have
2 other options of entering the tape and especially
3 when to some extent it is going to be cumulative,
4 because you have an expert that is going to testify
5 to that. You paid him, let him do his job, you
6 don't need to be a witness.

7 All right, are we ready? And if you all
8 would favor the Court with a copy of the tape. Is
9 there some special program I need to watch it with?

10 MR. MASON: Oh, no, Your Honor, I think once
11 it's saved on the CD, I can give you the CD and you
12 can put it in your drive and just watch it.

13 THE COURT: Thank you. I would like to watch
14 it before I make any decisions regarding whether
15 you will testify.

16 MS. KINZELER: Your Honor, may I clarify one
17 thing for the record?

18 THE COURT: Sure.

19 MS. KINZELER: And I know, Deputy Burrell's
20 observations, it is my understanding this video
21 wasn't at the time we saw on the clock at 12:30.
22 This was after the second trip, it is my
23 understanding Burrell's observations were from the
24 first trip.

25 THE COURT: You need to clarify that. It is

1 up to you all to establish the time line. That is
2 a factual issue for you all to clear up. It is for
3 you all to clear up. It is for you all to find
4 out, that is why you have the direct, cross and
5 redirect, to clarify the evidence.

6 MR. MASON: Your Honor, may I approach and
7 give you a copy of the tape?

8 THE COURT: Yes. This is after he has hit
9 his head and gone back to the hospital to be
10 reexamined, is that correct, that is my
11 understanding?

12 MS. KINZELER: Yes, ma'am.

13 THE COURT: Okay. I'll watch it, we'll go
14 from there.

15 Are we ready to resume the examination of the
16 witness? Does anybody need to go to the bathroom?

17 MR. MASON: Five minutes?

18 THE COURT: All right.

19 (Recessed at 3:27 p.m.).

20 (Resumed at 3:40 p.m.).

21 (The jury returned to the courtroom).

22 BAILIFF: All present, Your Honor.

23 THE COURT: You all may be seated.

24 Ladies and gentlemen, we appreciate your
25 patience. We'll now resume the examination of the

1 witness.

2 You may proceed, Mr. Mason.

3 BY MR. MASON:

4 Q Deputy Burrell --

5 A Yes, sir.

6 Q -- you have testified as to certain things

7 regarding marks you saw and painted in the road.

8 Is that correct?

9 A Yes, sir.

10 Q Okay. And these are your assumptions about

11 what happened based on the markings in the road.

12 Is that correct?

13 A Based on the evidence, yes, sir.

14 Q Okay. And when I say that, that's what you

15 believe occurred but you weren't there so that's

16 just your best view of what happened from the marks

17 in the road. Isn't that correct?

18 A Through investigation of the scene, yes, sir.

19 Q Okay. And you have -- I want to ask you

20 about the pictures you were shown. Before I do,

21 let me ask you, you talked about some striations in

22 the road that would have to be caused by a tire

23 skipping, is that -- have I fairly characterized

24 your testimony?

25 A More sliding on the road.

1 Q Sliding on the road, sliding on the road in a
2 way that it would, you know, cause marks in the
3 road and scuff up the asphalt?

4 A Yes, sir.

5 Q Okay. Now I'm going to show you what it is,
6 if you will look at what is Defendant's Exhibit 15.

7 MR. MASON: Your Honor, it's hard to see good
8 enough without -- thank you.

9 THE COURT: Please make sure you reverse the
10 lights.

11 Q Now, do you see on State's Exhibit 15, where
12 the paint is in what I will refer to as the
13 westbound lane of Highway, Point of Pines Road?

14 A The maximum engagement circle?

15 Q No. There is an RR.

16 MR. MASON: Your Honor, if I may just use
17 this pointer here.

18 Q Do you see here where those marks are right
19 there?

20 A Yes, sir.

21 Q The paint. Now, is this the westbound lane
22 of Point of Pines Road, the beach being over here,
23 174 being over here, Lark Road being down here?

24 MS. KINZELER: Objection.

25 THE COURT: Basis?

1 MS. KINZELER: Form of question.

2 THE COURT: Rephrase.

3 BY MR. MASON:

4 Q The question is, is where the RR is painted,
5 is that the westbound lane of Point of Pines Road?

6 A It's the eastbound lane.

7 Q All right. Now, when you take this marking
8 here, you've got the striation marks that go like
9 that. Is that correct?

10 A Based on what I can see in this photo, it
11 gets kind of dark about halfway in the photo, but
12 yes, sir, that's the general direction of the tire.

13 Q Okay. And that is a tire making that mark,
14 is that correct?

15 A Yes, sir.

16 Q All right. Now, right here where you have
17 the -- let me show you the tire. All right --

18 MS. KINZELER: Objection.

19 THE COURT: Basis?

20 MS. KINZELER: Foundation.

21 MR. MASON: These are already in evidence,
22 Your Honor.

23 THE COURT: That exhibit, what number is
24 that?

25 MS. KINZELER: With respect to what tire?

1 THE COURT: What number exhibit is that?

2 MR. MASON: Exhibit 8, Your Honor.

3 THE COURT: I don't think that's admitted, is
4 it?

5 MR. MASON: Yes.

6 THE COURT: I don't recall that number.

7 MS. KINZELER: Which tire, that wasn't the
8 objection, which tire, foundation.

9 MR. MASON: This is cross examination.

10 THE COURT: Rephrase it.

11 MR. MASON: I will.

12 BY MR. MASON:

13 Q Let me show you Exhibit 16 here. You see
14 Exhibit 16 and you see here where it goes like
15 this, like that. That is how you painted it,
16 correct?

17 A Yes, sir.

18 Q All right. And that would have had to have
19 been caused by something to do with the tire, isn't
20 that your testimony?

21 A It is.

22 Q Okay. And I'm going to show you what is
23 Exhibit 8, which is a tire. Is that correct?

24 A A tire and wheel, yes, sir.

25 Q Okay. And if that is the wheel that caused

1 all these marks all the way around Mr. Barclay's
2 vehicle --

3 MS. KINZELER: Objection, Your Honor.

4 THE COURT: Rephrase your question. You need
5 to elicit from him what is actually in evidence.
6 Rephrase the question.

7 Q Is Exhibit 8 in evidence?

8 MS. KINZELER: Objection, Your Honor.

9 MR. MASON: It's in evidence, Your Honor.

10 THE COURT: You don't have to answer that
11 question. Just ask the question.

12 BY MR. MASON:

13 Q You did the painting correctly and you
14 painted from this spot, little dots, then it fades
15 and it goes around to that tire, is that correct,
16 just as you have shown here on the exhibit?

17 A I don't know if the dots go all the way
18 toward final rest, where the final rest of the
19 truck is or where it started flipping, I can't see
20 that.

21 Q Okay.

22 A And it's been three years.

23 Q I understand. And as far as you know, nobody
24 went back to this scene after you were there for
25 about an hour and a half on the night of this

1 incident, correct?

2 A Not that I know of, no, sir.

3 Q You didn't?

4 A No, sir.

5 Q Okay. But it certainly would appear from
6 photograph number 15, State's Exhibit in evidence,
7 that this striation mark goes from what you call
8 the eastbound lane of Point of Pines Road, and goes
9 around towards the driver's side --

10 MS. KINZELER: Objection.

11 THE COURT: Basis?

12 Q -- front tire, is that correct?

13 THE COURT: Sustain that objection.

14 Q Now, if that's the case, the entirety of Mr.
15 Barclay's vehicle would have been in his own lane,
16 what you have called the eastbound lane of Point of
17 Pines Road.

18 MS. KINZELER: Objection.

19 Q Isn't that correct?

20 THE COURT: basis of the objection.

21 MS. KINZELER: Mischaracterization of his
22 testimony.

23 THE COURT: Sustained. Rephrase.

24 Q Deputy Burrell, where you painted RR, what
25 you know about that mark there is that it was

1 caused by some tire. Isn't that correct?

2 A The right rear tire.

3 Q Well, did you photograph the right rear tire
4 so that you could show the jury whether it
5 collected any asphalt like the driver's side front
6 tire did as shown in Exhibit 8?

7 MS. KINZELER: Objection.

8 THE COURT: Basis?

9 MS. KINZELER: Foundation.

10 THE COURT: Restate the question, please.

11 BY MR. MASON:

12 Q The question is, you testified that you
13 believe the RR was the right rear tire of the
14 truck, and my question is, did you get any
15 photographs of that tire so we could see whether,
16 like Exhibit 8, which is the front left tire of the
17 truck, whether it gathered any asphalt on the rim?

18 MS. KINZELER: Objection.

19 THE COURT: Basis?

20 MS. KINZELER: Facts not in evidence and
21 foundation.

22 THE COURT: Overruled. You can answer the
23 question, sir. You may answer the question. Do
24 you understand it or do you need to repeat it?

25 THE WITNESS: I'm not sure if this is the

1 driver's side front tire without seeing it on the
2 truck.

3 THE COURT: Okay.

4 BY MR. MASON:

5 Q Does Exhibit Number 7 help you to determine
6 that this, that Exhibit 7 is a tire on the truck
7 and Exhibit 8 is a close-up of that same tire?

8 A Okay, I agree with that.

9 Q Okay. When I put them both on there you can
10 see, here is the tire that has got asphalt as shown
11 in Exhibit 7, and then you see a close-up of that
12 on Exhibit 8. Is that correct?

13 A Correct.

14 Q But then you see Exhibit 15 where you, where
15 you painted some stuff in the road and we know that
16 a tire went around like that and disappeared to
17 where you can paint it. Is that correct?

18 A Yes, sir.

19 Q Now, it's important, wouldn't you agree, to
20 the best you can to try and match, figure out which
21 part of which vehicle caused which mark in the
22 road? Isn't that important?

23 A Absolutely.

24 Q Okay. So, when you have a gouge mark, one of
25 the things that you're taught to do, as I

1 understand it, is that when they lift that car up
2 onto the tow truck it might give you an opportunity
3 to look underneath it, maybe photograph it to see
4 if there are any places on the vehicle that have
5 asphalt embedded in them? Isn't that something
6 that is possible to do?

7 A Sure.

8 Q Okay. And as far as you know that was not
9 done in this case, is that correct?

10 A That's correct.

11 Q And with regard to when you're trying to say
12 that a tire caused certain marks in the road like
13 we saw on the exhibit, what you would do with that
14 tire is you would inspect the inside and outside of
15 the rim and one of the things --

16 MS. KINZELER: Objection.

17 THE COURT: Basis?

18 MS. KINZELER: Form of the question.

19 THE COURT: Rephrase.

20 BY MR. MASON:

21 Q If you were trying to determine which tire it
22 is that skipped along the road the way you have
23 described, what you would do is you could look at
24 the inside and outside of that tire to see whether
25 it had the, the rims had gathered any asphalt or

1 what have you. Isn't that something you could do?

2 A Yes, sir.

3 Q Okay. And wouldn't that be the best way to

4 match a mark on the road with a particular vehicle?

5 A Sure.

6 Q And as I understand it this case is primarily

7 Deputy Brinson's case, is that a fair statement,

8 you assisted him, he did the majority of, let's

9 say, of the post scene work, is that a fair

10 statement?

11 A I would say we're a team and we do equal

12 amount of work.

13 Q Okay, I understand that night but at some

14 point in time didn't one of you take over and

15 finish the reports and that kind of thing or did

16 you both finish them together?

17 A We both worked on them together.

18 Q Okay. So, were you involved in the

19 completion of the fatality report?

20 A Yes, sir.

21 Q Okay. And did you carefully review it before

22 it was completed?

23 A To the best of my recollection I did.

24 Q Okay. Now, when you designate east and west,

25 if it's an even numbered road that makes it an

1 east-west road, is that correct, if it's an even
2 numbered state road?

3 A For reference only.

4 Q Okay. But other than that are you supposed
5 to use actual compass directions?

6 A For on exact measurement, sure, compass would
7 probably be outstanding.

8 Q Okay. And you would agree with me that Mr.
9 Barclay was heading west, whatever you want to call
10 his lane, he was heading west by the compass, isn't
11 that correct?

12 A I didn't have a compass and I couldn't swear
13 that's a westerly direction.

14 Q I understand.

15 MR. MASON: Your Honor, may I approach and
16 get an exhibit that's been previously marked?

17 THE COURT: You may.

18 Q I'll show you --

19 MS. KINZELER: Objection, foundation.

20 THE COURT: Let me see what you're doing.

21 MR. MASON: Can I approach, Your Honor?

22 THE COURT: Yes.

23 THE COURT: The basis of the objection?

24 MS. KINZELER: Foundation, Your Honor.

25 THE COURT: Overruled. You may proceed.

1 MR. MASON: Thank you.

2 BY MR. MASON:

3 Q Now, I placed this map that is Defendant's
4 Exhibit 1 for ID, does that directionality appear
5 to properly identify north, south, east and west?

6 A Sure, I'll agree with that.

7 Q Okay. And when you look at Defendant's
8 Exhibit 2 wouldn't you agree with me that by the
9 compass Mr. Barclay was traveling in the westbound
10 lane of Point of Pines Road, and just so you can
11 see clearly, this is Point of Pines Road and as I
12 understand it, this is the direction toward 174, so
13 the question on the table, Deputy Burrell, is was
14 Mr. Barclay traveling in the westbound lane of
15 Point of Pines Road?

16 A That night, upon our arrival at the scene,
17 once we found out what the road number was, an even
18 road number, along with 174 being an even road
19 number, technically they both run east and west.
20 We figured that the beach was this way, so that is
21 why we said Mr. Barclay is heading east and the
22 deceased was heading west.

23 Q But if anything, that was a mistake because
24 clearly Mr. Barclay is traveling westbound. Isn't
25 that correct.

1 MS. KINZELER: Objection.

2 THE COURT: Basis?

3 MS. KINZELER: Mischaracterization.

4 THE COURT: Sustained, rephrase.

5 BY MR. MASON:

6 Q Was that a mistake, Deputy Burrell?

7 A No, sir.

8 Q Are you familiar with the South Carolina

9 traffic collision report form instruction manual?

10 A Yes, sir.

11 Q And in completing reports aren't you supposed

12 to indicate the actual compass direction of travel

13 for each unit?

14 A I'm not sure. I'm not that familiar with the

15 book. If that is in the book --

16 MR. MASON: May I approach, Your Honor?

17 THE COURT: Yes.

18 MS. KINZELER: May I see it?

19 MR. MASON: Yes, this.

20 BY MR. MASON:

21 Q Okay. Do you see there where it says 49?

22 MS. KINZELER: Objection.

23 THE COURT: Basis?

24 MS. KINZELER: Foundation.

25 THE COURT: Rephrase the question.

1 BY MR. MASON:

2 Q I had asked you whether you were familiar
3 with the South Carolina traffic collision report
4 instruction manual and I believe you indicated you
5 were, obviously not every word and I understand. I
6 handed you what has been marked as Defendant's
7 Exhibit Number 3 and I'm asking you whether when
8 you figure out direction of travel you are supposed
9 to use that as stated in there, the actual compass
10 direction of travel?

11 MS. KINZELER: Objection.

12 THE COURT: Basis?

13 MS. KINZELER: Foundation.

14 THE COURT: Let me see the document, please.

15 The question stands, you can explore on
16 redirect what that term means. You may proceed.

17 BY MR. MASON:

18 Q Deputy Burrell, my question is whether the
19 South Carolina traffic collision instruction manual
20 requires that you use the actual compass direction
21 of travel in your reports?

22 A It does.

23 Q Thank you. So, if that was not done, that
24 would be a mistake, is that correct?

25 A Human error, yes, sir.

1 Q Okay. Now, with regard to the fatality
2 investigation report that was prepared, let me just
3 ask you, have you prepared a written document which
4 states that the initial point of collision is in
5 the westbound lane on Point of Pines Road?

6 A Can I refer, do you have --

7 MR. MASON: May I approach, Your Honor?

8 THE COURT: You may.

9 Q At the top, sir.

10 A Yes, sir, initial point of collision,
11 westbound lane on Point of Pines Road.

12 Q Now, do you also recall that part of your
13 process was determining the dimensions of the
14 different vehicles involved?

15 A Yes, sir.

16 Q Okay. And one of the things you record is
17 the rear track of the, the rear track size, or the
18 distance between the rear wheels of the Chevrolet
19 pickup truck. Is that correct?

20 A Yes, sir.

21 Q Do you know what rear track means? That is
22 kind of a term of art relating to measurement, is
23 that a fair statement?

24 A Yes, sir.

25 Q And did you on any report relating to this

1 accident indicate that the rear track width of the
2 Chevrolet truck was ten foot nine inches wide.

3 MS. KINZELER: Objection.

4 THE COURT: Basis?

5 MS. KINZELER: Foundation.

6 THE COURT: Sustained. You need to rephrase
7 the question.

8 MR. MASON: Yes.

9 BY MR. MASON:

10 Q Would it be an an incorrect statement that
11 the rear track of Mr. Barclay's Chevrolet pickup
12 truck --

13 MS. KINZELER: Objection, foundation.

14 THE COURT: Sustained, foundation. You need
15 to establish he's the one that actually prepared the
16 report.

17 MR. MASON: May I approach, Your Honor?

18 THE COURT: Yes.

19 BY MR. MASON:

20 Q I'm going to hand you again the Charleston
21 County Sheriff's office traffic fatality
22 investigation. On the first page does it indicate
23 prepared by Deputy Brinson and Deputy Burrell?

24 A Yes, it does.

25 Q Okay, thank you. And with regard to that

1 report does it indicate that the rear track of the
2 Chevrolet pickup truck is ten foot nine inches
3 wide?

4 A Yes, it does.

5 Q Okay. That's 129 inches, right?

6 MS. KINZELER: Objection, foundation.

7 THE COURT: Basis?

8 MS. KINZELER: Foundation and relevance.

9 THE COURT: Overruled. Sir, you may answer
10 the question to the best of your knowledge.

11 THE WITNESS: To the best of my knowledge
12 that's an incorrect measurement.

13 BY MR. MASON:

14 Q I understand. Because 129 inches is wider
15 than the lane itself, right?

16 A Correct.

17 Q I want to talk about, if you know, in your
18 investigation you determined some of the things Mr.
19 Barclay did right. You determined he was not
20 speeding. Is that correct?

21 A I believe we did estimate his speed under the
22 speed limit.

23 Q Okay. You determined that he had his proper
24 lights on. Is that correct? In other words, it
25 was night and he had on his correct driving lights.

1 Is that correct?

2 A I believe, without looking at that report, I
3 do believe that the headlight switch was on the
4 auto position.

5 Q Okay. Would that then cause you to conclude
6 that the proper lights were on at the time?

7 A Yes sir.

8 Q Okay. And did you conclude that he was also
9 wearing his seatbelt at the time of the collision?

10 A I believe he was.

11 Q Okay. And did you conclude that he didn't
12 have any open alcoholic beverages inside the cab
13 area of his vehicle?

14 A I don't remember seeing any.

15 Q Okay. And the beers, there is beers and the
16 cooler that were found, they were all, had not been
17 opened, is that a fair statement, is that correct?

18 A Yes, sir.

19 Q And Mr. Barclay was traveling essentially
20 straight at the time of the collision. In other
21 words, this isn't a sharp curve, it's a gentle
22 curve, is that a fair statement, slight curve, is
23 that a better word?

24 A Slight curve.

25 Q Now, in some of these cases you will do a

1 scale drawing. Is that a fair statement?

2 A Sometimes, yes, sir.

3 Q Okay. And in a case where there is a scale
4 drawing, and you usually do that, when you do do
5 it, a lot of times it is on these fatality cases,
6 is that correct?

7 A Yes, sir.

8 Q And when you do do these scale drawings do
9 they locate all of the different marks in the road
10 and final resting position and measurements that
11 you have taken, is that one of the things that is
12 generally shown on these scale drawings?

13 A Yes, sir.

14 Q Now, would it depict very specifically the
15 way in which you believe, in other words, your
16 assumptions about how these vehicles traveled,
17 would it then show your assumptions about the
18 travel paths of these vehicles?

19 A Yes, sir.

20 Q Okay. Now, when you have cars converging on
21 each other, one at 30 to 35 and the other at 40
22 they are making up a lot of ground in a very short
23 period of time. Is that a fair statement?

24 A Yes, sir.

25 Q Okay. And we have talked about the fact that

1 30 miles an hour you're going 43 feet a second, and
2 at 40 miles an hour you're going 58 feet a second,
3 so the combined is you're going about 102 feet a
4 second as the vehicles come together. Is that a
5 fair statement?

6 A Sure.

7 Q Okay. And everything you do in your
8 investigation, you try to locate the physical marks
9 on the roadway, is that a fair statement?

10 A Yes, sir.

11 Q So is it also a fair statement that there is
12 no way whatsoever for you to tell what happened in
13 the 200 or 300 feet before any marks show up on the
14 pavement? Is that a fair statement?

15 A Would you ask that one more time?

16 Q Yes. The first part of the question was when
17 you do your investigation you base it on physical
18 marks in the roadway. Correct?

19 A Correct.

20 Q Okay. And the physical marks, if there is no
21 physical marks for 200 or 300 feet in front of a
22 point and 200 or 300 feet behind the point you
23 really can't say what the movement of those
24 vehicles was at a point in time they left no mark
25 in the road. Isn't that a fair statement?

- 1 A I would agree.
- 2 Q Okay. And during that 200 or 300 feet of
3 space vehicles can, in either direction vehicles
4 can come in and out of each other's lane, all you
5 know at some point they met in the same place. Is
6 that a fair statement?
- 7 A Yes, sir.
- 8 Q Now, with regard to the vehicles colliding,
9 there is a lot of force involved in an accident,
10 isn't that correct?
- 11 A Yes, sir.
- 12 Q And there is a lot of angles involved, isn't
13 that correct?
- 14 A Yes, sir.
- 15 Q A lot of geometry, how things hit each other,
16 this I think is called an offset frontal collision,
17 is that correct?
- 18 A Exactly.
- 19 Q When it is offset one of the vehicles hit and
20 because it is offset it spun, the other one spun,
21 too, is that a fair statement?
- 22 A Yes, sir.
- 23 Q They moved, they rotated, I guess is the best
24 word, right?
- 25 A Yes, sir.

1 Q Now, when they first collide you have some
2 crushing that takes place before what is called
3 maximum engagement, is that a fair statement?

4 A Yes, sir.

5 Q So, you have to determine the distance
6 between the middle of the front tire and the
7 leading edge of the bumper?

8 MS. KINZELER: Objection.

9 THE COURT: Basis?

10 MS. KINZELER: Foundation.

11 THE COURT: Be very careful. He is not an
12 expert witness, keep it within the ambit of his
13 rational perception within the realm of his
14 responsibilities as a member of the fatality team.

15 You may proceed.

16 BY MR. MASON:

17 Q As a member of the fatality team part of what
18 you see happen, before you have maximum engagement
19 the two vehicles have to come together --

20 MS. KINZELER: Objection.

21 THE COURT: Basis?

22 MS. KINZELER: Outside the scope of his
23 expertise.

24 THE COURT: Sustained.

25 BY MR. MASON:

1 Q You have used -- point of impact and point of
2 initial impact is not the same thing as maximum
3 engagement. Is that correct?

4 A Correct.

5 Q Okay. The point of initial impact occurs at
6 some distance ahead of maximum engagement. Isn't
7 that correct.

8 MS. KINZELER: Objection.

9 THE COURT: Basis?

10 MS. KINZELER: Outside the scope.

11 THE COURT: Well, he's a member of the
12 fatality team. This is within his training and
13 it's within Rule 701 but be very careful not to
14 solicit anything beyond that scope, Mr. Mason.

15 MR. MASON: Yes, Your Honor.

16 THE COURT: He is not offered as an expert
17 witness.

18 THE WITNESS: Would you ask that one more
19 time?

20 BY MR. MASON:

21 Q Sure. I said that maximum engagement occurs
22 at some distance away from the initial point of
23 contact. Isn't that correct?

24 A Thousandths of a second.

25 Q Well, if it is one second, then it would be,

1 could be as much as a hundred feet, so I'm trying
2 to figure out how many feet away it could be. I
3 mean, it could be, it could be ten feet away?

4 MS. KINZELER: Objection.

5 THE COURT: Basis?

6 MS. KINZELER: Foundation and speculation.

7 THE COURT: The objection is sustained to the
8 extent you need to be very careful in your
9 question, Mr. Mason, he is not an expert, he is not
10 rendering an opinion. The testimony in this record
11 is he described, although he assisted in preparing
12 this report, he is not the one that rendered the
13 report. If he is not going to be offered as an
14 expert you need to confine the questions within the
15 ambit of Rule 701.

16 BY MR. MASON:

17 Q Now, you have the orange spray can?

18 A I do.

19 Q And with the orange spray can you paint
20 things in the road and if you're going to locate
21 the point of impact one of the things you would
22 paint in the road would be POI or --

23 MS. KINZELER: Objection.

24 Q -- or some other designation, isn't that
25 correct?

1 THE COURT: Basis?

2 THE COURT: Scope.

3 THE COURT: You're doing to have to establish
4 that is what he did and within the scope of his
5 employment. Under 701 you can elicit lay opinions
6 that do not require specialized knowledge and
7 training. Be careful not to hedge into 702, he has
8 not been offered as an expert witness.

9 BY MR. MASON:

10 Q You did not paint any abbreviations in the
11 road to indicate point of impact. Isn't that
12 correct?

13 A I did not.

14 Q Okay. Nor were you instructed to, isn't that
15 correct?

16 A I was not.

17 Q Now, isn't it correct that the South Carolina
18 Criminal Justice Academy, one of the things that
19 you're taught to do is to try to interview
20 witnesses in doing a complete accident
21 investigation?

22 A Is that the question?

23 Q Yes.

24 A Yes, sir.

25 Q Is it a fair statement people who have

1 information about the accident must be identified
2 and questioned for the purpose of aiding in the
3 investigation? Is that a fair statement?

4 A Yes, sir.

5 Q And that obtaining verbal and preferably
6 written statements is invaluable to investigation
7 and for follow-up investigation purposes, in
8 reference to that being the rule?

9 A Yes, sir.

10 Q And a passenger is a potential witness.
11 Isn't that correct?

12 A Yes, sir.

13 Q Okay. And were you involved in any efforts
14 to interview Mr. Jose Santos Davilla in regards to
15 how he said the accident happened?

16 A We were unable to talk to him at the time of
17 the accident, sir.

18 Q Okay. Did you make any follow-up effort to
19 speak with him?

20 A No, sir.

21 Q Now, there has been in evidence -- did you
22 know he was upstairs in MUSC when you were there?

23 MS. KINZELER: Objection.

24 THE COURT: Basis?

25 MS. KINZELER: Not in evidence.

1 THE COURT: Rephrase the question, Mr. Mason.

2 BY MR. MASON:

3 Q Do you know whether or not Mr. Davilla was at
4 MUSC hospital during the time you were there to
5 speak with Mr. Barclay?

6 A I did not know that. I knew he went there in
7 the ambulance but I did not know he was there.

8 Q Now, there has been some evidence in this
9 case -- did you ask where Mr. Davilla was when you
10 got to MUSC?

11 A No.

12 Q Now, there has been entered into evidence in
13 this case a photograph of a beer can, open beer can
14 found in the front passenger area of the Geo. Were
15 you aware of that, the presence of that beer in the
16 Geo on December 8th, 2008, when you were involved
17 in the investigation of this collision?

18 A I didn't see it that night. I saw it in the
19 photo.

20 Q Okay. When you saw it in the photo did you
21 see it in a photo very recently or shortly after
22 the accident?

23 A I would probably say, I would probably say
24 recently.

25 Q And recently, do we mean within the last 45

1 days?

2 A Yes, sir.

3 Q Okay. So is it a fair statement that for
4 about two years and nine months you weren't aware
5 of the presence of alcohol in the Geo and you have
6 recently become aware of it?

7 A I would say a more fair statement would be if
8 the beer can was there that night and I saw it,
9 then I had just forgotten about it over three
10 years.

11 Q Now, if you had seen the beer can in the Geo
12 or had other information regarding the passenger in
13 the Geo, that related to alcohol, would you have
14 reported that in some way in your report?

15 A Yes, sir.

16 Q And as I understand, because that's evidence
17 just like anything like finding the beer cans on
18 the side of the road. Is that a fair statement?

19 A Yes, sir.

20 Q Now, if you were preparing the Uniform
21 Traffic Collision Report, fatality investigation,
22 did you determine that Mr. Garcia did not have a
23 South Carolina driver's license.

24 MS. KINZELER: Objection, Your Honor.

25 THE COURT: Basis?

1 MS. KINZELER: Foundation.
2 THE COURT: Sustained.
3 BY MR. MASON:
4 Q Did you check to see if Mr. Garcia had a
5 South Carolina driver's license?
6 MS. KINZELER: Objection.
7 THE COURT: Basis?
8 MS. KINZELER: Foundation.
9 THE COURT: Overruled?
10 THE WITNESS: The deceased?
11 BY MR. MASON:
12 Q Yes, sir.
13 A I believe he had a Florida ID or license, I'm
14 not sure which of the two.
15 Q If it's a Florida ID it would not be a
16 driver's license, is that a fair statement?
17 A That's correct.
18 Q And you just don't recall, sitting on the
19 witness stand, whether it was a driver's license or
20 just an ID card. Is that a fair statement?
21 A Fair statement.
22 Q But he did not have a South Carolina driver's
23 license. Is that correct?
24 A Not to my recollection.
25 Q And have you been, did you, were you ever

1 involved in the process of trying to find Jose
2 Santos Davilla?

3 MS. KINZELER: Objection.

4 Q Looking for him?

5 THE COURT: Basis?

6 MS. KINZELER: Asked and answered.

7 THE COURT: Please restate the question.

8 BY MR. MASON:

9 Q I asked you some questions about trying to
10 talk with him at the hospital but in the weeks
11 following the collision did you make effort to find
12 Jose Santos Davilla, the passenger in the Geo?

13 A No, sir.

14 Q To your knowledge did Deputy Brinson make any
15 efforts to find Mr. Davilla?

16 A I don't believe so, sir.

17 Q Now, one of the things -- let me ask you, in
18 your process as a traffic accident investigator is
19 one of the things you do sometimes is to get the
20 black boxes from the vehicles involved, the data
21 recorders?

22 A In 2008?

23 Q Yes, 2008.

24 A Not at that time.

25 Q One of the things you do in the investigation

1 of the more serious accidents, fatalities,
2 certainly, is to impound any vehicles for the
3 purpose of keeping them as evidence in case
4 questions arose relating to what a vehicle showed
5 or didn't show. In other words, take the vehicles,
6 impound them somewhere either in the evidence yard
7 at the compound or somewhere else?

8 A In the past I would say that it would be
9 indicative of the type of crash or circumstances of
10 the crash.

11 Q I understand. But certainly if somebody is
12 dead and felony charges are going to be brought one
13 of the things that, in that situation, would be to
14 preserve the vehicles, isn't that correct, take
15 them and impound them, put them somewhere?

16 A We took photos of the scene, we took photos
17 of the cars, we didn't need the cars. In fact we
18 released the truck to the defendant and the Geo to
19 the insurance company.

20 Q Now, with regard to, are you familiar with
21 the South Carolina driver's license manual?

22 MS. KINZELER: Objection.

23 THE COURT: Basis?

24 MS. KINZELER: Relevance.

25 THE COURT: Overruled. I will give him some

1 latitude.

2 Sir, you can answer the questions.

3 THE WITNESS: Yes, sir, I am.

4 BY MR. MASON:

5 Q Okay. And are you familiar with the
6 provision of that manual dealing with one of the
7 things it requires is you pass a road test, is that
8 correct?

9 A Yes, sir.

10 Q And a vision test, is that correct?

11 A Yes.

12 Q Now, with regard to driving at night, are you
13 familiar with the situation where on a rural road
14 if two cars are approaching with their headlights
15 coming toward one another what a driver is supposed
16 to do is not stare into the headlight but look to
17 the right fog line, slow down and watch the other
18 car in their peripheral vision? Is that a fair
19 statement?

20 A Yes, sir.

21 Q That is how the manual teaches to drive in
22 that situation, is that correct?

23 A Yes, sir.

24 Q Now, you don't know whether Mr. Garcia had
25 any experience driving at night, isn't that

1 correct?

2 A I don't know.

3 Q Okay. And you don't know whether he had any
4 experience driving, period, is that correct?

5 A No, sir.

6 Q And one of the things that the South Carolina
7 Criminal Justice Academy, the accident
8 investigation manual talks about is determining the
9 experience of the driver involved, maybe at least
10 to determine if they have a license and can operate
11 the piece of equipment that they're driving. Is
12 that a fair statement?

13 A Fair statement.

14 Q Now, how many times prior to your testimony
15 today have you met with the Solicitor's office to
16 prepare for your testimony?

17 A Prior to today?

18 Q Yes, prior to today.

19 A I think we went over the case twice in my
20 office.

21 Q And also today?

22 A Not today.

23 Q Okay. So is it a fair statement that you
24 were at the scene of the accident, didn't go back,
25 didn't have any involvement in the case for about

1 two years and ten months, and recently, within the
2 last 45 days you have had a few meetings and
3 learned of the beer in the other car in just this
4 recent time frame, is that a fair statement?

5 MS. KINZELER: Objection.

6 THE COURT: Basis?

7 MS. KINZELER: Mischaracterization of the
8 testimony.

9 THE COURT: Rephrase it, Mr. Mason.

10 BY MR. MASON:

11 Q The question is, you were involved in
12 investigating the accident on December 8th, 2008,
13 correct?

14 A Correct.

15 Q Then about two years and nine months went by,
16 you didn't have any involvement in the case at all.
17 Is that correct?

18 A We had involvement about a year and a half
19 ago, it was a different Solicitor involved, I can't
20 recall who it was.

21 Q But you have known this case was pending all
22 along, isn't that correct?

23 A Yes, sir.

24 Q Okay. But yet on July the 10th of 2010 you
25 instructed Investigator Kjellman to destroy

1 evidence in this case, isn't that correct?

2 A I did.

3 Q And that is not supposed to take place until

4 after the charges are disposed of. Isn't that

5 correct?

6 A That's correct.

7 MR. MASON: Your Honor, I have no further

8 questions.

9 THE COURT: Any redirect?

10 MS. KINZELER: Briefly, Your Honor.

11 THE COURT: You may proceed.

12 REDIRECT EXAMINATION BY MS. KINZELER:

13 Q Sergeant Burrell, earlier you were testifying

14 about your observations of the defendant at the

15 hospital. Do you recall particularly what time

16 exactly you were at the hospital when you made

17 these observations? Is there some kind of log that

18 would refresh your memory?

19 A There would be a dispatch log where we called

20 out from the hospital.

21 MS. KINZELER: May I approach, Your Honor?

22 THE COURT: You may.

23 MR. MASON: Could I see what --

24 BY MS. KINZELER:

25 Q What is your call number?

- 1 A At that time it was 229.
- 2 Q Will you refresh yourself with that? Is your
3 call number in there anywhere?
- 4 A Yes, ma'am.
- 5 Q If I could direct you, I'm sorry, does that
6 document help you refresh your recollection as to
7 what time you arrived at MUSC the first time?
- 8 A Yes, ma'am.
- 9 Q What time did you arrive at the ER on the
10 first trip to MUSC with the defendant?
- 11 A 2202 and 50 seconds.
- 12 Q In other words, 10:52 p.m.?
- 13 A 10:52 p.m.
- 14 Q And when you testified earlier about your
15 observations of the defendant in the hospital were
16 you referring to your first trip or your second
17 later trip.
- 18 MR. MASON: Objection, leading.
- 19 THE COURT: Overruled.
- 20 A First trip.
- 21 Q What time did you leave MUSC the first time?
- 22 A I'm sorry, what time did we leave?
- 23 Q The first time.
- 24 A I left for the jail at 2244, which is 10:44
25 p.m.

1 Q And what time did you return to MUSC for the
2 second trip with the defendant? It may be on
3 another page, Sergeant Burrell.

4 A I think it is 0042.

5 Q Do you know, based on your call, that you
6 were at the hospital for the second time around
7 12:42 a.m.?

8 A Yes, ma'am.

9 Q What time did you leave the hospital the
10 second time?

11 A 0042 and 59 seconds.

12 Q Did you check in and check out at the same
13 time, is that what that looks like?

14 A Yes, ma'am.

15 Q Had you been there some time prior to 12:42?
16 Obviously you didn't come and leave within 50
17 seconds?

18 A Yes, I don't know why that's like that.

19 Q Is the departure time accurate when you left
20 for the jail the second time?

21 A The departure time from MUSC?

22 Q To the jail, yes, sir.

23 A The second time?

24 Q Uh-huh (Affirmative).

25 A If I go by this, yes, ma'am, 0042 59.

1 MS. KINZELER: I think that's all I have.

2 Your Honor.

3 THE COURT: Any objection to the witness
4 being excused, from the State?

5 MS. KINZELER: No, ma'am.

6 THE COURT: From the defense?

7 MR. MASON: Not at this time, Your Honor.

8 THE COURT: Sir, you're excused.

9 MR. MASON: We would like him subject to
10 being recalled.

11 THE COURT: That's fine.

12 MR. MASON: Actually maybe not, Your Honor.

13 THE COURT: You're excused, sir.

14 (Witness excused).

15 THE COURT: Call your next witness.

16 MS. KINZELER: The State calls Deputy Herman
17 Martin -- I'm sorry Your Honor, we have another
18 witness before Deputy Martin, I'm sorry.

19 Your Honor, may I have a five minute recess?

20 THE COURT: Madam Forelady, ladies and
21 gentlemen, we're going to take a brief recess.
22 During the break please do not discuss the case.
23 Leave your note pad in your seat.

24 (The jury was excused from the courtroom).

25 MR. MASON: Your Honor --

1 THE COURT: Do you all want to keep Deputy
2 Burrell under subpoena or make some sort of
3 agreement for him to be available, or you all might
4 need him again?

5 MR. VOIGT: We'll do the best we can to make
6 him available.

7 MR. MASON: Real quick we would like to state
8 on the record we will have a bond on Mr. Barclay
9 will cover throughout the trial, we asked him to
10 come down to represent that to the Court, he is
11 here if you want that put on the record.

12 THE COURT: You just need to understand if
13 Mr. Barclay does not appear his bond will be
14 estreated and that bond is a hundred thousand
15 dollars. Do you understand that, sir?

16 SPECTATOR: Yes, Your Honor.

17 THE COURT: What is your name?

18 SPECTATOR: Melvin White.

19 THE COURT: You own the company?

20 SPECTATOR: I'm employed by my father.

21 THE COURT: You currently have a hundred
22 thousand dollars surety bond on Mr. Barclay?

23 SPECTATOR: No, Your Honor.

24 THE COURT: What do you have on it?

25 SPECTATOR: It was another company I used to

1 work for has a bond on him, I'm willing to write a
2 new bond.

3 THE COURT: You're going to write a new bond?

4 SPECTATOR: Yes, Your Honor.

5 THE COURT: All right. He's going to have to
6 go back to the jail and be processed back out.

7 MR. MASON: He will be released sometime this
8 evening?

9 DEPUTY SHERIFF: I will have to check. They
10 didn't fully process him. It may not be a problem.

11 MR. MASON: Thank you, Your Honor.

12 (Recessed at 4:40 p.m.).

13 (Resumed at 4:50 p.m.).

14 THE COURT: Is the State ready to proceed?

15 MS. KINZELER: Yes, ma'am.

16 THE COURT: Is the defense ready to proceed?

17 MR. MASON: Yes, Your Honor.

18 THE COURT: Who is the next State's witness?

19 MS. KINZELER: Josh Sims.

20 THE COURT: Please tell him to stand by the
21 witness stand.

22 (The jury returned to the courtroom).

23 THE COURT: Ladies and gentlemen, we hope you
24 enjoyed your break. We'll now resume the
25 testimony.

1 The State may call its next witness.
2 MS. KINZELER: The State calls Josh Sims.
3 THE COURT: Please swear the witness.
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1 JOSHUA LEE SIMS, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please be seated, state your full
4 name and spell your last name?

5 THE WITNESS: Joshua Lee Sims, S-i-m-s.

6 THE COURT: You may proceed.

7 DIRECT EXAMINATION BY MS. KINZELER:

8 Q Mr. Sims, where do you currently work?

9 A I am a paramedic for Charleston County EMS.

10 Q How long have you worked for Charleston
11 County EMS?

12 A Three and a half years at this time.

13 Q Do you have any experience prior to that?

14 A Yes, ma'am. I worked for just over two years
15 in southern California as a paramedic and was an
16 EMS for four years prior to that and MT basic.

17 Q How many years total?

18 A Nearly ten at this point.

19 Q What kind of training and experience do you
20 have as far as first responding goes?

21 A I received my MT basic from Tacoma Community
22 College in Tacoma, Washington. I worked for two
23 and a half years for American Medical Response in
24 Seattle, Washington, then transferred to Billings
25 Montana where I attended Montana State University

1 Billings for my paramedic degree. I received an
2 Associate Degree in applied sciences in paramedic
3 studies, and then two years in, just over two years
4 in southern California as a paramedic and then
5 three years here.

6 Q And were you working in that capacity in
7 December of 2008?

8 A Yes, ma'am.

9 Q Do you recall at any point in time responding
10 to a collision on Edisto Island?

11 A Yes, ma'am.

12 Q Tell the jury what you recall.

13 A We were called for a motor vehicle collision
14 and it ended up being a pickup versus a sedan and
15 there was one fatality involved in the accident.

16 Q Were you involved in the treatment of any
17 patients from the scene?

18 A Yes, ma'am. The passenger in the car, I was
19 the primary care paramedic for that patient until
20 he was transferred to the flight crew.

21 Q Do you recall anything in particular about
22 your treatment or would you need your report to
23 refresh your memory?

24 A I would need the report to refresh my memory.

25 THE COURT: You may approach.

1 MS. KINZELER: Thank you.

2 THE COURT: You're welcome.

3 BY MS. KINZELER:

4 Q Mr. Sims, I will let you review that briefly.

5 A Yes.

6 Q Is that the report you prepared in relation
7 to this incident?

8 A Yes, ma'am, it is.

9 Q And does that report accurately reflect the
10 observations you had that night?

11 A Yes, ma'am, it does.

12 Q Can you tell the jury a little bit about the
13 injuries you treated Jose for?

14 A Yes, ma'am. He was complaining of difficulty
15 breathing and pain in his chest. In my physical
16 examination of the patient I found that he had pain
17 in the left side of his chest that increased with
18 palpation or respiration and upon palpation of the
19 lower portion of the chest I found it positive for
20 crepitus in the area of the eighth, ninth and tenth
21 ribs.

22 Q What does crepitus means?

23 A Crepitus is the physical feeling of two edges
24 of bones rubbing together where they have been
25 broken.

1 Q Do you recall where Jose was or what your
2 observations were of him when you first got there?

3 A He was outside of the vehicle and ambulatory
4 upon our arrival on the scene.

5 Q What does ambulatory mean?

6 A He was up and walking around without any
7 assistance from anyone else.

8 Q At some point -- who was responsible for
9 transporting Jose and where did you go?

10 A We were responsible for transporting him to a
11 landing zone, his care was then transferred to a
12 helicopter crew who would have flown him into the
13 city and he would have been seen and treated at the
14 medical university.

15 Q In your report where you noted that -- I'm
16 sorry, let me rephrase that. What was it about
17 Jose's injuries that led you to the conclusion he
18 needed to be airlifted?

19 A There were multiple items. The first being
20 death of a person in the same passenger compartment
21 would be an indication in our policies and
22 protocols for use of a helicopter for transport of
23 the patient. The fact that, that in my physical
24 exam he had diminished lung sounds on the left side
25 of his chest where the broken ribs were also would

1 be an indication for transport by helicopter to the
2 trauma center.

3 Q What does your inability to hear lung signs
4 on the left side of his chest mean? Tell them why
5 that matters.

6 A Being unable to hear lung sounds by
7 auscultation, by stethoscope means the air is no
8 longer moving in and out of that portion of the
9 lung and that would give high indices of suspicion,
10 along with with the mechanism that caused the
11 injuries, to him having either a collapsed lung
12 with air or fluid, so hemopneumothorax had
13 developed on that side and when the lung collapses,
14 then you're no longer able to oxygenate your body
15 through that lung, so it diminishes the amount of
16 oxygen that you can get in with every breath.

17 Q Tell the jury a little bit about the need to
18 airlift him as opposed to ground transport?

19 A The decision to airlift versus ground
20 transport comes, we do it based on multiple
21 criteria. Your distance from the scene of the
22 accident to the level one trauma center, which is
23 the Medical University, the severity of the
24 patient's injuries, and the other indications that
25 the patient could very well have life threatening

1 injuries. The fact that his vital signs were
2 trending over the time I was with me, his blood
3 pressure, the cystolic and dystolic numbers
4 continued to become closer and closer together.
5 The term is convulsing blood pressure. There is an
6 indication of cardiac tamponade, which is where the
7 sac, the sac that holds the heart begins to fill
8 with fluid and doesn't allow for the heart to
9 circulate the blood efficiently.

10 Q What can happen with converging --

11 A Eventually the heart will be, the pericardial
12 sac will be so full of fluid that the heart will no
13 longer be able to efficiently circulate blood and
14 the patient's heart will stop beating.

15 Q On your report, on the front, on the front
16 page you made a notation, impact factors, ETOH?

17 A Yes, ma'am.

18 Q Can you tell the jury what that observation
19 is about, tell them what you meant at that point?

20 A That, that front page and the initial
21 information means that when I was treating my
22 patient I had a smell that would be consistent with
23 someone who had consumed alcoholic beverages which
24 would lead me to believe that alcohol was a factor
25 in the impact itself.

1 Q Are you able to determine, do you have any
2 way of knowing, based on that observation you just
3 mentioned, which or how much Jose may have had?

4 A No way of quantifying it at all, ma'am.

5 Q And somewhere in your report you also
6 indicated Jose's inability to recall certain
7 things?

8 A Yes, ma'am. In my narrative I state that the
9 patient is alert to person, place, time but is
10 unable to recall the events immediately prior to or
11 after the event.

12 Q Tell the jury about that, when someone is
13 involved in a collision, what that means.

14 MR. MASON: Objection, Your Honor.

15 THE COURT: Basis?

16 MR. MASON: Outside the scope of 702, Your
17 Honor, the motion we filed previously.

18 THE COURT: Overruled. It is within his
19 knowledge, his assessment, within the scope of his
20 job responsibilities.

21 THE WITNESS: We note the patient's level of
22 consciousness, because it is an indication of the
23 possibility of a traumatic brain injury, so what we
24 ask are four questions. We ask who are you? Does
25 the patient respond to his name, so when you say

1 Jose, does he look at you and respond.

2 Where are you? Does the patient know in a
3 general sense where he is at.

4 When are you? Does the patient know what day
5 of the week it is, does he know the day, is he able
6 to cognitively realize, if he can't tell me today
7 is Tuesday, that if he looks at his watch or his
8 cell phone it will tell him that it's Tuesday and
9 then he can tell me that it's Tuesday.

10 And what happened that brought me here to you
11 right now? And with Jose he was able to tell, he
12 was able to respond to his name, he was able to
13 tell me we were on Edisto Island, was able to tell
14 me it was the correct date of the week. When I
15 asked him what had happened that had brought me to
16 him he was unable to explain that he had been in a
17 car wreck to me.

18 BY MS. KINZELER:

19 Q Did you, can you clarify for the jury was it
20 his inability to remember or he just could not
21 articulate it to you?

22 A It was to me an inability to remember at that
23 moment. When I asked him I would get a blank look.

24 Q Based on your training and experience, if
25 there is a problem with recall what is the

1 significane of that?

2 MR. MASON: Objection Your Honor.

3 THE COURT: Basis?

4 MR. MASON: Rule 701, 702 and --

5 THE COURT: Overruled. It is common
6 knowledge and within the scope of his duty he
7 performs as a paramedic, it does not require, it is
8 really not rendering opinion, this is based on his
9 assessments, the treatment given at the scene of
10 the incident.

11 You may proceed, sir. Do you need the
12 question restated?

13 THE WITNESS: Please.

14 THE COURT: Please restate the question.

15 BY MS. KINZELER:

16 Q Mr. Sims, we were talking about Jose not
17 having an immediate recall. Tell the jury, based
18 on your training and experience, what you know
19 about someone's ability to recall events
20 immediately or sometime after?

21 A In my experience it is not at all uncommon to
22 have someone who has been involved in a traumatic
23 event, when you ask them immediately following the
24 event, them not be able to tell you but then 15
25 minute later when you get them to the emergency

1 room and the emergency room doctor comes to them
2 and goes, "Tell me what happened," they can give
3 the entire story to the emergency room physician
4 without a problem.

5 Q And did you and Jose encounter any kind of
6 language barrier?

7 A There was some language barrier. Obviously I
8 was able to assess him in a way that allowed me to
9 come up with this physical assessment that is
10 documented and the complaints that he voiced to me.

11 Q So, the observations contained in your
12 report, are those independent of the conversation
13 with Jose?

14 A The second section is entirely independent of
15 any conversation, that is an objective section,
16 those are all things that I was able to visually
17 see or quantify myself, versus something that he
18 told me.

19 Q And on the front page of your report you also
20 made a notation about an estimated speed. Was that
21 accurate?

22 A Yes, ma'am.

23 Q Tell the jury what you have indicated in your
24 report?

25 A The initial speed of the accident would have

1 had to have been greater than 55 miles per hour at
2 the time of impact.

3 Q Are you referring to either particular car?

4 A The combined speed between the two cars would
5 have had to have been greater than 55, greater than
6 55 miles an hour.

7 Q Is that subjective or objective?

8 A That is based on my training and my
9 experience and the observable damage to the
10 vehicles that I could see, for the amounts of
11 damage that was done to that vehicle, to be done to
12 it, it would have needed to be going at least 55
13 miles an hour or greater when it hit a stationary
14 object, to do that kind of damage.

15 Q So, if two vehicles are involved in a
16 collision, is your reference to that 55 miles an
17 hour a reference to one car or a combined speed?

18 A The combined speed of the two vehicles would
19 have had to have been greater than 55 mile an hour.

20 Q You're not an accident reconstructionist?

21 A No, ma'am.

22 Q This is just based on your ten years of
23 experience responding to accidents?

24 A This is based on the ten years of experience
25 responding to collisions and the training and

1 trauma kinetics that I received both as an MT basic
2 student and as a paramedic student.

3 Q Did you have an opportunity at any point to
4 encounter the deceased victim in the Geo?

5 A Only long enough to confirm my partner's
6 findings that the patient was pulseless and apneic.

7 Q I'm sorry, what was the last part?

8 A Apneic, without breath.

9 MS. KINZELER: If you will, answer any
10 questions for Mr. Mason.

11 THE COURT: You may proceed.

12 CROSS EXAMINATION BY MR. MASON:

13 Q Mr. Sims, tell me how many times you have met
14 with or talked with anybody from the Solicitor's
15 office about this case?

16 A I have talked with the Solicitor's office
17 just once prior to being here today. Well, twice.
18 Once after I received the subpoena and then once on
19 Saturday to let me know I would be here today to
20 testify.

21 Q Thank you. And you have indicated that your
22 report is accurate, is that correct?

23 A Yes, sir.

24 Q And do you type this report either in your
25 ambulance the night of or real shortly thereafter,

1 maybe back at the station or somewhere?

2 A Policy for us is that for critical events
3 such as this it has to be completed before I leave
4 the station at the end of my shift, so most are
5 started enroute to the hospital and then completed
6 either shortly thereafter at the hospital or
7 shortly after, depending on call volume.

8 Q And you have already testified that you
9 smelled an odor of alcohol about Mr. Avilla's
10 person and that was the reason for your notation of
11 motor vehicle accident, impact factor being ETOH,
12 is that correct?

13 A Yes, sir.

14 Q And you have testified about having prepared
15 the report, and doesn't it indicate that Mr.
16 Davilla did not lose consciousness? Is that
17 correct?

18 A That was the patient's statement, was that he
19 did not lose consciousness.

20 Q Okay. And the patient self extricated prior
21 to EMS's arriving on the scene and was found
22 ambulatory. Were you the one that found him?

23 A Yes, sir.

24 Q Can you describe with any more detail where
25 you found him?

1 A No, sir, I can't.

2 Q Let me ask you this. Were you the one who

3 put him on the spine board?

4 A Yes, sir, I was.

5 Q Did you have any assistance?

6 A Yes. I had the assistance of the fire

7 department that was on scene with us.

8 Q And you testified that Mr. Davilla was alert,

9 oriented to person, place and time but unable to

10 recall the events immediately prior to or after the

11 event. Those are the exact words you recorded, is

12 that correct?

13 A Yes, sir.

14 Q Okay. And isn't it your process that if he

15 had said he knew he had been in an accident or what

16 had happened, that you would have then gotten him

17 to provide even more information about the accident

18 if it had seemed as though he knew anything about

19 it?

20 A Yes, sir.

21 Q Okay. But he knew so little about what had

22 happened you didn't follow up with subsequent

23 questions that would have given you greater detail

24 about what had just occurred?

25 A Correct.

1 Q And from your report is it fair to say you're
2 a detail oriented person as you are in the
3 preparation of these reports?

4 A Yes, sir.

5 Q And all you're trying to do at the scene is
6 truthfully document what it is you find, is that a
7 fair statement?

8 A Yes, it is.

9 Q Now, you were asked by the Assistant
10 Solicitor whether sometimes people remember things
11 later. Well, sometimes they don't. Isn't that a
12 fair statement?

13 A I honestly could not say. Most of the time,
14 in the limited contact I have with the patient, I
15 go from the scene to the hospital, our job in the
16 EMS is to provide safe transport to definitive care
17 and my follow-up is usually minimal to non-existent
18 as to what happens with patients afterwards but as
19 I said before, I have had patients in the past who
20 couldn't tell me anything when I asked them what
21 had happened but in that time period when I put
22 them in the bed at the hospital and the physician
23 has walked in and said what happened they have been
24 able to provide an entire answer to that question
25 and, yes, I have had ones who couldn't answer the

1 question when the physician came in and asked as
2 well.

3 Q I understand. And so you continued to assess
4 this patient from 1837 to 1840, 1842 and 1846, and
5 throughout all those assessments and during that
6 entire time that you were with the patient he never
7 had any better recall about the events immediately
8 prior to or after the accident. Is that a fair
9 statement?

10 A Yes, sir.

11 Q And with regard to language, you referenced
12 having worked in southern California. Is that
13 correct?

14 A Yes, sir.

15 Q And do you have the opportunity, did you have
16 the opportunity during that time frame to provide
17 care and treatment to Spanish speaking persons?

18 A Yes, sir.

19 Q Okay. And so do you have, do you have the
20 ability to communicate with them in some limited
21 way?

22 A I have enough of an ability with, for lack of
23 a better term, Spanish to complete an assessment,
24 to find out where the patient's complaints are and
25 what they are.

- 1 Q And you don't really recall whether Mr.
2 Davilla is in fact fluent in English or whether he
3 has less than fluent English, is that a fair
4 statement?
- 5 A Yes, sir.
- 6 Q For all you know he is a Spanish speaking
7 individual who also speaks good English. I mean,
8 is that a fair statement?
- 9 A It is.
- 10 Q And at no point in time during your treatment
11 did you feel like you were unable to make any
12 important medical decision or other thing related
13 to his care as a result of any language barrier.
14 Is that a fair statement?
- 15 A Yes, it is.
- 16 Q Now, you have given some testimony about how
17 Mr. Davilla was at the scene. I just want to go
18 over a couple other things. He was walking at the
19 scene, is that correct?
- 20 A Yes, sir.
- 21 Q He did not complain of any problems in his
22 left or right extremities, is that correct?
- 23 A No, sir -- yes, it is correct. No, he did
24 not complain of anything.
- 25 Q I understand. He had equal chest ranges?

1 A He had equal ranges in the chest visually
2 with difficult breathing. He complained of pain to
3 the left side of his chest and had crepitus in the
4 lower ribs.

5 Q His neurological situation was intact. Is
6 that correct?

7 A Yes, sir, both prior to and after placing the
8 patient into full mechanical C-spine he had
9 circulation, motor and sensation in all four
10 extremities.

11 Q And at all vital signs checks he was alert as
12 to person, place and time, correct?

13 A Correct.

14 Q The call to EMS was a Bravo call, is that
15 correct?

16 A Yes, sir.

17 Q And a Bravo call is non emergent, is that
18 correct?

19 A No, sir. A Bravo call is an emergent call.
20 Our non emergent signals are an Alpha call or Omega
21 call.

22 Q The level of care rendered to Mr. Davilla was
23 it an ALS level one care?

24 A Yes, sir.

25 Q Is that an abbreviation for a non emergency

1 type of care?

2 A No, sir. That is an abbreviation for an
3 advanced life support at level one, the levels
4 being determined by the number of medications given
5 to any patient as defined by Medicare.

6 Q Now, with regard to your report, does he
7 indicate any complaint whatsoever about a shoulder?

8 A He did not at any time to me. His complaint
9 was chest pains and difficulty breathing.

10 Q Okay. And when I say shoulder, it could be
11 either the left or right shoulder, did he make any
12 complaint about either of his shoulders?

13 A Not to me.

14 Q And you don't know anything about his
15 hospital course following your getting him to the
16 hospital, is that a fair statement?

17 A That's correct.

18 Q And none of the bad things that you were
19 concerned about in your testimony actually happened
20 to him while he was in your care. Is that a fair
21 statement?

22 A He had diminished lung sound, so I, without
23 an xray, cannot decide whether or not he did or did
24 not have hemopneumothorax. His pulse continued but
25 it also, his blood pressure continued to converge

1 the entire time. That again can only be confirmed
2 by radiography or ultrasound.

3 Q And you are unable to make any determination
4 about the level of alcohol or amount of alcohol
5 that Mr. Davilla had consumed prior to this
6 accident. Is that a fair statement?

7 A That is correct, sir.

8 MR. MASON: Thank you. No further questions.

9 THE COURT: Any redirect?

10 MS. KINZELER: No, ma'am.

11 THE COURT: Any objection to the witness
12 being excused, from the State?

13 MS. KINZELER: No, ma'am.

14 THE COURT: From the defense?

15 MR. MASON: No, Your Honor.

16 THE COURT: Sir, you're excused.

17 (Witness excused).

18 THE COURT: Madam Forelady, ladies and
19 Gentlemen, we're going to take advantage of this
20 break in testimony to take our evening recess.
21 During the break please do not discuss the case,
22 please do not do any independent research of any
23 type, please do not allow yourselves to be
24 associated with media coverage. Also please do not
25 discuss this case among yourselves or with anyone

1 else.

2 I know it might seem innocent to have a
3 conversation about what you have heard but to do
4 that requires you to process what you have heard
5 and to draw conclusions based upon it and that
6 would be deliberation, and you are not supposed to
7 do that until you have heard all the evidence,
8 counsel's argument and the Court's instructions on
9 the law.

10 Also I need to say, and I apologize, I may
11 have said it early on but I need to re-enforce it.
12 I would ask you have and instruct that you have no
13 discussion on any social network site. That
14 applies to Facebook, and there are so many now I
15 have forgotten, there are so many, but a very
16 innocent or casual comment on any of these
17 networking sites can be very easily misinterpreted
18 even if you think you have your settings set so
19 that only your friends can view them. You would be
20 amazed. I'm even more convinced now that everyone
21 is only separated by six degrees of separation,
22 which I'll give you an example. I had a trial, a
23 jury a couple weeks ago, I picked three juries,
24 it's a little complicated but I will try to tell it
25 without going around the barn. I had three juries,

1 was finishing one jury, about to start a second
2 jury. Someone from the second jury called my jury
3 coordinator downstairs and said someone that she
4 works with was a high school friend of someone on
5 the third jury and that that person had commented
6 about their jury service on Facebook. Small
7 circle.

8 So, I would ask, and was a very innocent
9 comment, it wasn't anything too particularly fact
10 specific but it was very easily misinterpreted
11 because what the person said to the person was this
12 person was talking about this case they're going to
13 hear on Facebook. So this was a high school friend
14 who worked with someone on the second jury who
15 talked about somebody on the third jury.

16 So, the better course is just to make no
17 comments at all because people, depending on the
18 personality of the person, can very easily
19 misinterpret a very innocent comment. So, we would
20 not want anything that you might innocently say to
21 be misinterpreted, so I would ask you refrain from
22 making even a passing comment regarding your jury
23 service until you have concluded your service on
24 this case.

25 You will return to your jury room in the

1 morning at 9:45. I have some other matters
2 unrelated to this case that I need to take care of
3 from the jury roster and they are supposed to be
4 here at 9:15 but just out of an abundance of
5 precaution, whatever can go wrong can, Murphy's
6 law, I don't want you all to be waiting on us. I
7 expect we'll done by 9:30. I just want to give
8 myself a little window just in case we are not
9 because I don't want you all waiting. So, if you
10 could arrive no later than 9:45 that would be
11 greatly appreciated.

12 If you will, return directly to your jury
13 room, if you would leave your note pad in your
14 seat. I hope you all have a great evening, we'll
15 see you in the morning at 9:45.

16 (The jury was excused from the courtroom).

17 THE COURT: You all can take your seats. I
18 have some things, so 9:45. I would rather us have
19 to wait than the jury wait.

20 Is there anything we need to take up before
21 we adjourn for the evening, from the State?

22 MS. KINZELER: No, ma'am.

23 THE COURT: From the defense?

24 MR. MASON: No, Your Honor.

25 MR. FORSBERG: I apologize. Mr. Seigler came

1 into court, and to tell you about the bond, was
2 unable to get in to the clerk's office before 5:00
3 o'clock. I made representations to the Court on
4 the record and in open court he is going to go on
5 the bond. Is that sufficient for Your Honor?

6 THE COURT: Yes, sir. It is going to take
7 them several hours to process him out anyway. Make
8 sure he does it first thing in the morning.

9 MR. MASON: Is he going to be freed to go
10 from here?

11 THE COURT: No. They process him out.
12 Either way, he will have to be processed out.

13 MR. FORSBERG: Will they process him out of
14 jail? Mr. Seigler hasn't been able to write the
15 bond.

16 DEPUTY SHERIFF: The only problem I can
17 perceive, if he doesn't have a paper bond they are
18 not going to let him out.

19 MR. FORSBERG: That is why I bring it to
20 your attention.

21 THE COURT: There is nothing I can do about
22 that. You all should have had him here before
23 5:00.

24 MR. FORSBERG: We did it before 5:00, we had
25 him here before 5:00, they are not required to stay

1 here past 5:00 o'clock.

2 THE COURT: We talked about this at 9:30 this
3 morning, you all should have done something before
4 now.

5 MR. FORSBERG: Your Honor, I have been told
6 they want the, the Sheriff's office wants the order
7 from you discharging the first bond.

8 THE COURT: I can't handle it now, they're
9 gone.

10 MR. MASON: Could we get it from you in case
11 they --

12 THE COURT: It is going to have to be
13 stamped. They are gone, you all should have done
14 it earlier today, during work hours. We talked
15 about this 9:30.

16 Is there anything else we need to take up
17 before we adjourn for the evening, from the State?

18 MS. KINZELER: No, Your Honor.

19 THE COURT: Is there anything else we need to
20 take up before we adjourn for the evening?

21 MR. MASON: Not from the defense, Your Honor.

22 THE COURT: Have a good evening, I will see
23 you all 9:45.

24 (Recessed at 5:25 p.m., October 25, 2011).

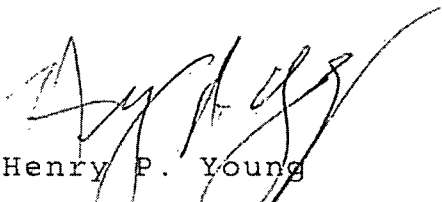
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Charleston County, South Carolina, on the 25th day of October, 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 28, 2012



Henry P. Young
Court Reporter

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1 STATE OF SOUTH CAROLINA
 2 COURT OF GENERAL SESSIONS
 2011-GS-10-002817
 3 COUNTY OF CHARLESTON

4 STATE OF SOUTH CAROLINA,)
 5)
 6 -vs-)
 7)
 8 WALTER DOUGLAS BARCLAY,)
 9 Defendant.)

10 October 24-31 2011
 11 November 1, 2011

12 B E F O R E:

13 HONORABLE DEADRA L. JEFFERSON

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

15 JENNIFER KINZELER, Esquire
 16 GREGORY K. VOIGT, Esquire
 Attorneys for the State

17 MARK MASON, Esquire
 18 ANTHONY E. FORSBERG, Esquire
 19 MATTHEW J. KELLER, Esquire
 Attorneys for the Defendant

20
 21 Henry P. Young
 Court Reporter

22 VOLUME III of V
 23 October 26, 2011
 24
 25

1 (Reconvend 9:55 a.m., October 26, 2011).

2 THE COURT: Is the State ready to proceed?

3 MS. KINZELER: We are, Your Honor.

4 THE COURT: Is the defense ready to proceed?

5 MS. KINZELER: Your Honor, we both need to

6 approach one second.

7 THE COURT: Sure.

8 (Unrecorded bench conference).

9 THE COURT: All right, are we ready to

10 proceed with the State's next witness?

11 MS. KINZELER: Yes, ma'am.

12 THE COURT: Is the State ready to proceed?

13 MS. KINZELER: Yes, ma'am.

14 THE COURT: Is the defense ready to proceed?

15 MR. MASON: Yes, Your Honor.

16 THE COURT: Did you have something?

17 MR. MASON: Yes, Your Honor. He --

18 THE COURT: Who are you referring to?

19 MR. MASON: Mr. Davilla is a Spanish speaking

20 individual.

21 THE COURT: Yes.

22 MR. MASON: The level of his understanding is

23 as he wants it to be. In other words, he can speak

24 fluent English and he understands when he wants to

25 but then when he's being asked questions he may

1 then claim a lack of understanding, so we believe
2 that it is probably going to be necessary, for him
3 to understand the questions and the
4 cross-examination, for there to be an interpreter
5 available.

6 THE COURT: Provisions already been made for
7 that? Is the interpreter available?

8 MR. MASON: I didn't know that. I haven't
9 been told who the interpreter was or the presence
10 of the interpreter in the courtroom.

11 THE COURT: Where is the interpreter?

12 MS. KINZELER: Right here.

13 THE COURT: She's well aware of court
14 procedures.

15 MR. MASON: Okay. Your Honor, there are also
16 some matters the Court excluded from testimony,
17 that may come up in Mr. Davilla's testimony.
18 Specifically the matter of any insurance settlement
19 pertaining to this case. I don't know whether that
20 has yet been explained to Mr. Davilla but if the
21 interpreter were to be told that if any of that --

22 THE COURT: An interpreter doesn't do
23 anything but interpret, she does not, all she does
24 is repeat what is said, it is not her job to filter
25 things. In fact it is a violation of her ethics.

1 An interpreter only repeats what you say exactly
2 and what he says exactly.

3 MR. MASON: I don't know that he has been
4 explained in Spanish the rulings of this Court so
5 he would not inadvertently violate the Court's
6 order.

7 MS. KINZELER: Your Honor, it was our
8 intention to bring out that there was a civil suit
9 filed and settled to address any potential bias.
10 We were going into insurance and proximate cause
11 and admissions and all that, but if we're not
12 addressing civil lawsuits --

13 THE COURT: If there were judgments in the
14 file it would be admissible. A compromise which is
15 a settlement is not.

16 MS. KINZELER: I only intended on --

17 THE COURT: For what purpose, what relevance?

18 MS. KINZELER: To the extent he was going to
19 cross-examine on something like that to show bias.

20 THE COURT: If he opens the door then it is
21 fair game but if he doesn't --

22 MS. KINZELER: Then I wouldn't even ask him
23 about it.

24 THE COURT: If there were judgments against
25 the defendant it would be admissible but there is

1 not a judgment.

2 MS. KINZELER: Absolutely.

3 THE COURT: Are we square on that issue?

4 Is Mr. Davilla going to be your first
5 witness?

6 MS. KINZELER: Yes, ma'am.

7 THE COURT: Is the State ready to proceed?

8 MS. KINZELER: Yes, ma'am.

9 THE COURT: Is the defense ready to proceed?

10 MR. MASON: Yes, Your Honor.

11 THE COURT: What is the best place for you to
12 stand, Miss Lester, what is most comfortable for
13 you?

14 INTERPRETER: I would prefer to stand beside
15 the witness.

16 THE COURT: If it would be easier for you to
17 get a chair and be next to the witness so you could
18 speak directly into his ear, which is easier?
19 Because we can position the chair for you right
20 next to him on the witness stand.

21 INTERPRETER: What I say is audible needs to
22 be picked up. Is it okay if I go up there?

23 THE COURT: Sure.

24 INTERPRETER: I think having a chair would be
25 nice.

1 THE COURT: Could we get a chair for her,
2 please?

3 INTERPRETER: Thank you, Your Honor.

4 THE COURT: You're welcome.

5 Could we have Mr. Davilla come into the
6 courtroom, please. Have him sit down.

7 INTERPRETER: Okay, we're ready.

8 THE COURT: Is there enough room for both of
9 to you get close to the microphone? Have him bring
10 his chair up a little bit. Perfect.

11 Okay, Miss Lester, does that work for you?

12 INTERPRETER: Yes, Your Honor.

13 THE COURT: If you would, raise your right
14 hand for me, please.

15 LYDIA LESTER, after being first duly sworn, stated
16 as follows:

17 THE COURT: If you would, state your name for
18 the record.

19 INTERPRETER: My name is Lydia Lester.

20 THE COURT: What we will do is we'll bring in
21 the jury, the clerk will administer an oath to the
22 witness. The translator will translate and then
23 we'll proceed with testimony.

24 Is the State ready to proceed?

25 MS. KINZELER: We are, Your Honor.

1 THE COURT: Is the defense ready to proceed?

2 MR. MASON: Yes, Your Honor. One more issue.

3 THE COURT: Yes, sir.

4 MR. MASON: In that he does speak a level of
5 English and there is going to be an issue as to
6 whether he could communicate effectively with the
7 EMS people, that he told them he didn't know how
8 the accident happened, we're going to need to have
9 some examination of him where he answers questions
10 in English so that --

11 THE COURT: I can't compel him to do that.
12 Ask the question and if he is able to he will and
13 if not he has indicated to this Court his preferred
14 language is Spanish. That is why we have an
15 interpreter and that is how he will answer the
16 questions.

17 MR. MASON: Your Honor, can he indicate that
18 on the record, whether that is his preferred
19 language, because I don't have any indication that
20 he --

21 THE COURT: It has been referred to the Court
22 by an officer of the court he had limited English
23 proficiency and to understand the proceedings it
24 would have to be interpreted and that is what we're
25 going to do. Generally, and I have dealt with this

1 a lot more than you have, when someone has limited
2 proficiency in English they will answer as well in
3 English and Spanish those questions that they do
4 understand, some portion of it will be in English,
5 some portion of it will be in Spanish or they will
6 indicate they don't understand.

7 MR. MASON: He is allowed to do both, is my
8 question?

9 THE COURT: He is going to answer in whatever
10 his preference is.

11 MR. MASON: I understand.

12 THE COURT: I'm not going to interfere with
13 how he answers the questions.

14 MR. MASON: In other words, he may answer in
15 English or in Spanish?

16 THE COURT: However he answers is how he
17 answers. If he answers in English, if he answers
18 in Spanish, it has been my experience when people
19 have limited proficiency they will, if they
20 understand they will answer in English, they do not
21 feel constrained to answer in Spanish.

22 MR. MASON: And with regard to my questions,
23 Your Honor, if I feel he is not perceiving the
24 question will the interpreter, is she going to
25 interpret every question in Spanish, every

1 question?

2 THE COURT: She interprets every word that is
3 said. It is her job to interpret. She does not,
4 whatever you say is what she is going to interpret,
5 she does not interject herself into the
6 proceedings.

7 MR. MASON: Understood.

8 THE COURT: So, whatever he says, that is
9 what she's going to repeat back to us, she is not
10 going to say what she thinks, she is going to state
11 what he said.

12 MR. MASON: To the extent he uses Spanish.

13 THE COURT: Yes, I think that goes without
14 saying.

15 MR. MASON: Thank you.

16 THE COURT: That is why she is here. Her
17 ethics prohibit her from interjecting herself. She
18 is merely a mouthpiece.

19 Okay, please bring in the jury.

20 (The jury returned to the courtroom).

21 BAILIFF: All jurors are present, Your Honor.

22 THE COURT: Thank you. You may be seated.

23 Ladies and gentlemen, I hope you all had a
24 pleasant and restful evening. We will now resume
25 with the testimony in this case.

1 The State may proceed.

2 MS. KINZELER: May it please the Court, Your
3 Honor?

4 THE COURT: Yes, ma'am. You need to call
5 your witness.

6 MS. KINZELER: The State calls Jose Davilla.

7 THE COURT: Swear the witness.

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1 JOSE SANTOS AVILLA, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name and spell
4 your last name.

5 THE WITNESS: Jose Santos Davilla.

6 THE COURT: You may proceed.

7 DIRECT EXAMINATION BY MS. KINZELER:

8 Q Mr. Davilla, how old are you?

9 INTERPRETER: 48.

10 Q Where do you live?

11 A Edisto Island.

12 Q How long have you been in Edisto?

13 INTERPRETER: Eleven years.

14 Q Do you work in Edisto?

15 INTERPRETER: Yes.

16 Q Back in December of 2008 did you live and
17 work in Edisto Island?

18 INTERPRETER: On the island that is called
19 Jimmy Cay, but it's Edisto also.

20 Q On December 8, 2008, do you recall that day?

21 A Si.

22 INTERPRETER: Yes.

23 THE COURT: What were you doing that day, how
24 did your day start? Tell the jury about your day.

25 INTERPRETER: We were working in Jimmy Cay,

1 we were making a form for a house and putting down
2 gravel. We finished the work and we headed toward
3 our houses.

4 Q Who is we?

5 INTERPRETER: Alvero Garcia, the one died in
6 the accident. Jose Licon, family, cousins, I
7 think. His brother goes by Gaspar Licon.

8 Q What time did you finish work that day?

9 A 6:00 o'clock.

10 INTERPRETER: 6:00 o'clock, something like
11 that.

12 A 6:00 o'clock.

13 Q When you were going home after work were you
14 walking or driving?

15 A No. Garcia driving?

16 INTERPRETER: No, Garcia was driving.

17 Q Where were you in the car?

18 INTERPRETER: As a passenger, in the front
19 seat.

20 Q When you finished your work that day and you
21 were driving home, tell the jury what you remember
22 about what happened on your way home.

23 INTERPRETER: On the little street that goes
24 to our house there is a stop, a gas station, a
25 restaurant, it's an old post office, restaurant, we

1 call it the old post office, and there is a Point
2 Road, we went on that street to get home faster.

3 Q Point of Pines Road?

4 INTERPRETER: Yes.

5 Q Okay. What happened when you turned onto
6 Point of Pines Road, what happened?

7 INTERPRETER: We saw that there was a light
8 that lit up on the street and my friend asked me
9 what is that, why is the street lit up?

10 A So he, I don't know --

11 INTERPRETER: I told him I don't know. My
12 friend was driving and the light was getting
13 closer. And suddenly we saw that it was a gray
14 truck. And the one driving was Mr. -- I don't
15 know, I don't remember his name.

16 Q Do you see him in the room right now?

17 A Yes, he in the corner right there.

18 INTERPRETER: Yes, him in the corner right
19 there.

20 Q Is he waving, with the navy blue jacket?

21 A Yes.

22 MS. KINZELER: Let the record reflect Mr.
23 Davilla has identified the defendant.

24 THE COURT: Let the record so indicate.

25 BY MS. KINZELER:

1 Q When you saw what this light was, this truck,
2 where was it when you saw it? Do you remember?

3 A I remember he come --

4 INTERPRETER: I remember.

5 Q I didn't understand.

6 A He ended up --

7 INTERPRETER: He ended up, he turned around,
8 he turned around two times and then he ended up
9 close to the woods. When the vehicle was close to
10 the woods or the brush I opened my eyes and I saw
11 that there was smoke coming out of the vehicle, in
12 front.

13 Q Let me back up one minute. Before the cars
14 hit each other which lane was the truck in, do you
15 remember?

16 INTERPRETER: It was in our lane because it
17 got there.

18 Q After the wreck, tell the jury what happened,
19 you woke up, your eyes open, what did you see?

20 INTERPRETER: I opened my eyes, I saw there
21 was smoke coming from the vehicle, I tried to get
22 out because I didn't want to die from being burned.

23 Q How did you get out of the car?

24 INTERPRETER: Very patiently and I did it
25 through the window.

1 Q Did anybody help you get out of the car?

2 INTERPRETER: Somebody, white people, come,
3 take my hand, couple times, "Oh, my God," asking
4 me, "You okay," and I say, "Yes, I okay, check my
5 friend."

6 Q These people, were they rescue people or
7 other people? Do you know who they were?

8 INTERPRETER: No. They were passing by on
9 the street and they saw the accident.

10 Q After the wreck did you see the defendant?

11 A Si.

12 INTERPRETER: Yes. I saw him in his vehicle,
13 he was unconscious and the vehicle was across the
14 highway.

15 Q Where was he in his car? Do you know which
16 side of the car he was on?

17 INTERPRETER: On this side where you drive
18 from.

19 Q Did you ever talk to him?

20 A No.

21 INTERPRETER: No, I didn't talk to him.

22 Q How did you get -- let me back up. Do you
23 remember talking to EMS?

24 INTERPRETER: A police officer asked me what
25 had happened in the accident. I told him, "I can't

1 explain it to you because I can't breathe.

2 Q Why couldn't you breathe."

3 INTERPRETER: Because I had four broken ribs.

4 Q Do you remember how you got to the hospital?

5 INTERPRETER: The ambulance came to me and

6 the ambulance took me to where the helicopter was.

7 The helicopter took me to the university hospital.

8 Q How long were you in the hospital?

9 INTERPRETER: A day and a half.

10 Q Did you see any, did you see any beer cans at

11 the wreck scene, did you see anything out there

12 like that?

13 INTERPRETER: I saw a cooler, an orange one,

14 and beers that were strewn out on the street.

15 Q Did you see anything that happened, did you

16 see anything happen to that stuff when you were

17 there?

18 INTERPRETER: No, because I wasn't paying

19 attention to it because the medics got there and

20 they took me in the ambulance.

21 Q You didn't see anyone picking anything up?

22 MR. MASON: Objection, leading, Your Honor.

23 THE COURT: Sustained, leading, rephrase it.

24 Q Let me ask it differently. Did you see

25 anyone else out there after it first happened

1 helping in any way or doing anything at the scene
2 before EMS got there?

3 A Si.

4 INTERPRETER: Yes. I saw a young guy maybe
5 eighteen years old and an old man 50, there were
6 two people. I think it was a son and father.

7 Q What were they doing? Do you remember?

8 INTERPRETER: Well, they helped me with my
9 arm get out of the vehicle, then they went to see
10 Mr., that guy, Barkley, or I don't know what his
11 name is.

12 Q Had you been drinking that day at all?

13 INTERPRETER: One beer, Bud Light in a can.

14 Q How many did you have?

15 INTERPRETER: Just one?

16 Q One?

17 INTERPRETER: One.

18 Q Do you remember when that day you had it?

19 INTERPRETER: After work.

20 Q Do you know if your friend Mr. Garcia had
21 anything to drink?

22 A No. He doesn't drink for three months --

23 INTERPRETER: No, he hadn't been drinking for
24 three months because he had gone back to Mexico and
25 his children were studying so he decided not to

1 drink.

2 MS. KINZELER: If you will, answer any

3 questions Mr. Mason has.

4 THE COURT: You may proceed.

5 CROSS EXAMINATION BY MR. MASON:

6 Q Good morning, Mr. Davilla. can you

7 understand what I'm saying to you in English?

8 A No.

9 INTERPRETER: No, not a lot, it's better if

10 you interpret it for me.

11 Q You do speak English pretty well, though,

12 isn't that correct?

13 INTERPRETER: But I don't understand all of

14 them.

15 Q But you understand a good bit of it, isn't

16 that correct?

17 INTERPRETER: Like at work, well, things like

18 that, yes.

19 Q How long have you been in this country?

20 INTERPRETER: 28 years.

21 Q Okay. And you lived in California. Is that

22 correct?

23 A Yes.

24 INTERPRETER: For ten years.

25 Q And you have lived in Miami. Is that

1 correct?

2 INTERPRETER: Seven years.

3 Q Okay. And during that time you have held
4 multiple different jobs. Isn't that correct?

5 INTERPRETER: Yes, but doing labor, I worked
6 with labor.

7 Q Do you remember when you sued your cousin in
8 a court proceeding?

9 MS. KINZELER: Objection.

10 THE COURT: Basis?

11 MS. KINZELER: Relevance.

12 THE COURT: Sustained to relevance.

13 BY MR. MASON:.

14 Q Have you ever spoken English in another court
15 proceedings?

16 MS. KINZELER: Objection.

17 THE COURT: Sustained, relevance.

18 Q Now, are you able to order, read a menu in a
19 restaurant and order from that menu in English?

20 MS. KINZELER: Objection.

21 THE COURT: Overruled.

22 INTERPRETER: The interpreter would ask for a
23 repetition of the question.

24 THE COURT: Please repeat the question.

25 BY MR. MASON:

1 Q Are you able to read a menu in a restaurant
2 and order from that menu in English?
3 A No.
4 INTERPRETER: No, I can't.
5 Q Are you able to write anything in the English
6 language?
7 A No, sir, no.
8 INTERPRETER: No, sir.
9 Q Who is currently your boss?
10 INTERPRETER: I work with Joe Murray but he's
11 not my boss, he just gives me little jobs to do.
12 Q You mean you work with Joe Murray?
13 INTERPRETER: At the time of the accident I
14 was working with another boss.
15 Q The last couple years, though, have you known
16 a good friend named Joe Murray?
17 INTERPRETER: Yes, because he's helped me
18 since the accident to get work here and there for
19 me.
20 Q Do you talk to Joe Murray?
21 INTERPRETER: Because he speaks a little bit
22 of Spanish, we understand each other.
23 Q Do you talk to Joe Murray regularly in
24 English?
25 MS. KINZELER: .Objection.

1 THE COURT: I will give you a little
2 latitude, you need to move on.

3 Q Do you talk to Joe Murray regularly in
4 English?

5 INTERPRETER: Mixed.

6 Q Now, you don't have a driver's license, is
7 that correct?

8 INTERPRETER: No, I don't have one.

9 Q But yet you have had, owned an automobile, is
10 that correct?

11 MS. KINZELER: Objection, relevance.

12 THE COURT: Not relevant. Sustained.

13 Q You don't have any experience driving, isn't
14 that correct, Mr. Davilla?

15 INTERPRETER: No. Well, I don't drive.

16 Q So it's your testimony you don't drive?

17 INTERPRETER: In the accident I wasn't
18 driving.

19 Q I understand, but is it your testimony, sir,
20 that you do not drive an automobile?

21 INTERPRETER: Like to the store, like a
22 block, to buy something for me but in an emergency.

23 Q Your testimony is you drive without a license
24 but only in emergencies?

25 MS. KINZELER: Objection.

1 THE COURT: Madam Forelady, ladies and
2 gentlemen, I have a very brief matter I need to
3 take up outside your presence. During this break
4 please do not discuss the case, please leave your
5 note pads in the seat.

6 Don't take them all the way to the jury room,
7 stand them in the hallway for a moment.

8 (The jury was excused from the courtroom).

9 THE COURT: Mr. Mason, why is any of this
10 relevant? There is no indication he was driving at
11 the time of the accident and now you're asking to
12 have him incriminate his self. It puts me in a
13 very bad posture. I'm going to have to get him a
14 lawyer, you're asking if he violated the criminal
15 laws of this state.

16 MR. MASON: Credibility.

17 THE COURT: How does it bear on his
18 credibility?

19 MR. MASON: Well, you're asking me about the
20 questions --

21 THE COURT: I'm going to let the question
22 stand if that is in fact credibility. But driving
23 without a license, how is that relevant to
24 credibility?

25 MR. MASON: Again, he says he only drvies to

1 the store back and forth.

2 THE COURT: He says he doesn't have a
3 license, he admitted he has driven back and forth
4 to the store, the next question is redundant, "Have
5 you driven without a license?" It goes without
6 saying he has already admitted he drove without a
7 license if he has driven to the store, therefore he
8 has driven without a license.

9 Now the initial question asks him to
10 incriminate his self and I'm going to have to get
11 him a lawyer and I'm going to have to advise him
12 about his Fifth Amendment rights against self
13 incrimination, it complicate these proceedings.

14 MR. MASON: I understand, Your Honor. I will
15 move on from that line of questioning.

16 THE COURT: Please bring in the jury.

17 (The jury returned to the courtroom).

18 BAILIFF: The jury is present, Your Honor.

19 THE COURT: You may be seated.

20 You may proceed.

21 MR. MASON: Thank you, Your Honor.

22 BY MR. MASON:

23 Q Mr. Davilla, on December 8th, 2008, who was
24 the boss of the crew that you and Mr. Garcia were
25 working for it?

1 INTERPRETER: Mr. George Gossett. The
2 interpreter repeating the name phonetically.

3 Q Did you mean George Dossett?

4 A Yes.

5 Q Now, on December 8th, 2008, weren't you
6 expecting Mr. Dossett or one of the workers that
7 had a driver's license to come pick you and Mr.
8 Garcia up for work at your house?

9 INTERPRETER: No, we weren't expecting
10 anybody.

11 Q So, you knew Mr. Garcia did not have a
12 license, isn't that correct?

13 MS. KINZELER: Objection.

14 THE COURT: Basis?

15 MS. KINZELER: Foundation, facts not in
16 evidence, and relevance.

17 THE COURT: Sustained to foundation. Sir,
18 you can't answer the question.

19 Proceed.

20 BY MR. MASON:

21 Q Did Mr. Garcia regularly drive an automobile?

22 MS. KINZELER: Objection.

23 THE COURT: Basis?

24 MS. KINZELER: Relevance.

25 THE COURT: Overruled. Well, you need to

1 establish a foundation for that question.

2 MR. MASON: I will.

3 BY MR. MASON:

4 Q Did you and Mr. Garcia live together for
5 approximately five years?

6 INTERPRETER: We lived in the same trailer,
7 same house but I never knew if he had a driver's
8 license or not.

9 Q Okay. Now, did you know whether he had a car
10 that he drove?

11 INTERPRETOR: Just the one that the man ran
12 into, the one from the accident.

13 Q You didn't know that Mr. Garcia also had a
14 Ford car?

15 MS. KINZELER: Objection.

16 Q Did you, sir?

17 THE COURT: Basis for the objection?

18 MS. KINZELER: Foundation, facts not in
19 evidence.

20 THE COURT: Sustained. The objection is
21 sustained, foundation.

22 BY MR. MASON:

23 Q Do you know about a Ford he wrecked into the
24 tree on Point of Pines Road?

25 MS. KINZELER: Objection.

1 THE COURT: Sustained.

2 Q Mr. Davilla --

3 THE COURT: Sustained. The question will be

4 stricken from the record. Be careful, establish

5 foundation for your question and also establish

6 facts in evidence prior to asking the question.

7 Q You testified you only know of one car that

8 Mr. Garcia ever had. Is that your testimony, sir?

9 MS. KINZELER: Objection.

10 THE COURT: Basis?

11 MS. KINZELER: Asked and answered.

12 THE COURT: Sustained, asked and answered.

13 BY MR. MASON:

14 Q Do you know of Mr. Garcia having a Ford car?

15 MS. KINZELER: Objection.

16 THE COURT: Overruled. You may answer the

17 question, Mr. Davilla.

18 INTERPRETER: The interpreter would ask for a

19 repetition of the question.

20 Q Do you know of Mr. Garcia owning or driving a

21 Ford car?

22 INTERPRETER: I don't know if he had that

23 car, if he was the owner or if it had another

24 owner, I don't know.

25 Q Well, was a Ford car parked in front of the

1 trailer where you and he lived for some period of
2 time?

3 INTERPRETER: There has been a lot of cars
4 parked there. Ford car, I'm not sure which one
5 he's talking about.

6 Q Did Mr. Garcia operate these various cars,
7 the lot of cars you --

8 MS. KINZELER: Objection, relevance.

9 THE COURT: Sustained.

10 Q Now, you have testified that Mr. Garcia
11 stopped drinking when he went back to Mexico just
12 before this accident. Is that your testimony?

13 INTERPRETER: He had not been drinking for
14 three months, that's what I remember.

15 Q Didn't Mr. Garcia stop drinking when he
16 wrecked his car into the tree?

17 MS. KINZELER: Objection.

18 THE COURT: Sustained. When there is an
19 objection please stop the question.

20 Madam Forelady and ladies and gentlemen, I
21 have a brief matter while you step outside. Please
22 do not discuss the case while you're outside.
23 Please leave your note pads in your seats.

24 Don't take them all the way down the hallway.

25 (The jury was excused from the courtroom).

1 THE COURT: Is there any evidence of this?
2 How is this relevant?

3 MR. MASON: First of all, it goes to his
4 credibility.

5 THE COURT: It does not go to his
6 credibility.

7 MR. MASON: It goes to his ability to drive.
8 He has already, Mr. Garcia had had a wreck, Your
9 Honor, 680 feet away from --

10 THE COURT: What evidence do you have of
11 that?

12 MR. MASON: I have this paperwork right here,
13 Your Honor.

14 MS. KINZELER: It has not been provided.

15 THE COURT: You need to provide it to the
16 State.

17 MR. MASON: All right.

18 THE COURT: His ability to drive is really
19 not an element of the offense. I'm trying to
20 figure out how it's releant.

21 MR. MASON: Causation of the accident. So
22 far the record is that one of the things that the
23 officers look at in connection with the
24 investigation of the accident is whether you have a
25 licensed driver who has passed the South Carolina

1 --

2 THE COURT: That is not a part of the
3 investigation.

4 MR. MASON: And what the driver's abilities
5 are.

6 THE COURT: There is no testimony that they
7 look at that. You might want to argue that to the
8 jury but there has been no testimony those
9 investigating an accident, that they look at their
10 driving record. You could be the worst driver in
11 the world and not be the cause of an accident. It
12 has nothing to do with your driving record. As a
13 matter of fact, your driving record only comes in
14 on the issue of punitive damages, if at all, which
15 goes to a constant standard of violating safety
16 standards, but your ability to drive, unless it is
17 on that particular night or that particular time of
18 the incident really isn't relevant.

19 MR. MASON: Your Honor, what we have here is,
20 A, somebody who doesn't regularly drive, doesn't
21 like to drive at night, particularly doesn't like
22 to drive on this road because they have had a wreck
23 on it and --

24 THE COURT: What evidence do you have of
25 that?

1 MR. MASON: Your Honor, I just showed it to
2 the State.

3 THE COURT: Just because you have a wreck on
4 a road doesn't mean you don't like driving on it.

5 MR. MASON: Well, he had a wreck 600 feet
6 away from the place where --

7 THE COURT: My question was what evidence do
8 you have he did not like to drive on this road or
9 he did not like to drive at night?

10 MR. MASON: Well, I have listed a witness
11 named Jose Licona who I intend to call, who is the
12 decedent's cousin.

13 THE COURT: How is he going to testify to
14 statements made by a dead person?

15 MR. MASON: He is going to testify, this is
16 personal knowledge.

17 THE COURT: How is he going to have personal
18 knowledge without relying on hearsay?

19 MR. MASON: He won't need to, Your Honor. He
20 rode with this person before and it would be all of
21 his ability to perceive him, have personal
22 knowledge of it and we would have conceptions,
23 including impression, with regard to his driving
24 and his driving at night and particularly on this
25 road.

1 In fact there is already testimony in the
2 record that they only took this road because they
3 were in a hurry, it was a shortcut, I think was the
4 testimony, get there faster. They didn't usually
5 take this road. The reason they didn't usually
6 take this road is because he couldn't drive on it,
7 he was scared of it and because he wrecked his Ford
8 vehicle into a tree while operating the vehicle and
9 we have a witness who was at the scene of that
10 accident, who is listed, who has personal knowledge
11 of those events and we also have a witness who has
12 personal knowledge of Mr. Garcia's habits.
13 Certainly a person's habits, and we can't establish
14 habit until we start having a number of witnesses
15 add up to prove it amounts to habit evidence, Your
16 Honor, that is why we have this witness.

17 THE COURT: Habit evidence is not offered
18 when you're offering -- that is not habit evidence.
19 In other words, you cannot offer evidence to say a
20 person acted a particular way on a particular night
21 unless they have personal knowledge, they saw it.

22 MR. MASON: Well --

23 THE COURT: You have yet to connect the dots.

24 MR. MASON: I'm getting ready to ask the
25 witness whether Mr. Garcia usually took that road,

1 whether he was scared of that road.

2 THE COURT: You haven't established a
3 foundation he rode with him enough to know that.

4 MR. MASON: Okay. Well, I will do that, Your
5 Honor.

6 THE COURT: Okay. Now, tell me again what it
7 is you're trying to elicit.

8 MR. MASON: That with regard to what we're
9 talking about in terms of this accident, that Mr.
10 Garcia had wrecked his Ford automobile into a tree
11 on Point of Pines Road, that this witness knows
12 about that, he knows that's why Mr. Garcia did not
13 like to drive on Point of Pines Road, especially at
14 night, which is the time at which this accident
15 happened. This accident involved a tree on the
16 right side of the road and of course it is our
17 position that's the reason that he wouldn't have
18 been hugging the right side of the road but that he
19 actually came in our client's lane was because of
20 this relevant previous bad experience with the
21 road.

22 There is also going to be a number of
23 witnesses who are going to testify that not only
24 did he not have experience driving, but he
25 particularly did not like to drive at night and so

1 I would believe that some limited questioning
2 relating to that is relevant.

3 THE COURT: Why would that qualify as habit
4 evidence?

5 MR. MASON: It would qualify as habit
6 evidence because he lived in this area for five
7 years, he took a certain way home usually.

8 THE COURT: How you are going to establish
9 that?

10 MR. MASON: Through the witness, Your Honor.

11 THE COURT: Through which witness?

12 MR. MASON: Through witness Davilla, through
13 witness Licona.

14 THE COURT: How you are going to establish
15 that?

16 MR. MASON: I'm going to ask them whether
17 they have personal knowledge of that. These are
18 people that were with him every day to and from
19 work, these are people that were with him every day
20 socially, on a regular or frequent basis, they are
21 people that knew his habits, his behavior.

22 THE COURT: Does the State have any objection
23 to this line of questioning?

24 MS. KINZELER: Absolutely, Your Honor.

25 THE COURT: What is the basis for the

1 objection?

2 MS. KINZELER: Number one, this is plain and
3 simple 404(B) because if it is going to be
4 qualified as a prior bad act --

5 THE COURT: It is not a prior bad act.

6 MS. KINZELER: Any kind, character evidence
7 or, the exact purpose of trying to elicit this
8 testimony from any witness is to basically --

9 THE COURT: Let me make the inquiry a little
10 more narrow. Does the State have any exception to
11 the mention of an accident in a truck without the
12 mention of alcohol?

13 MS. KINZELER: Yes.

14 THE COURT: And what is the basis for that
15 objection?

16 MS. KINZELER: Relevance.

17 THE COURT: Why do you say it's not relevant?

18 MS. KINZELER: Having been in an accident, I
19 don't know how having been in an accident before
20 has anything to do with this.

21 THE COURT: It doesn't but that is not his
22 argument. His argues it is that he had trepidation
23 about this road and therefore it is, it is not
24 about him, it is not being offered, it is my
25 understanding he wants to offer this evidence in

1 the nature of habit, which is that he had a
2 particularized habit of taking a particular road to
3 and from work and that he had trepidation about a
4 different road, being this Point of Pines Road, but
5 not, that there would be no mention of alcohol
6 because there is no indication that alcohol was,
7 that he was impaired at the time of this accident,
8 so that would not be relevant and it would be
9 unduly prejudicial. However, if I understand Mr.
10 Mason's argument, what he is offering it for would
11 be that this gentleman had some fear about this
12 road and so I need to know what the nature of your
13 objection is to that.

14 MS. KINZELER: Will, I think there are two
15 things, Your Honor. What he is showing me are
16 reckless driving conviction tickets, so this is
17 what he showed me, uniform traffic tickets.

18 THE COURT: That wouldn't come in. What he
19 is trying to elicit from this witness is whether he
20 has knowledge of his friend having an accident on
21 this road and if he had fear about driving on this
22 road and if he had fear about driving at night.

23 MS. KINZELER: I think that if he were to lay
24 the proper foundation to establish whether or not
25 any of these witnesses mentioned, including Jose,

1 know if he had any fear of this road, if he did,
2 why did he have fear of this road, that would be
3 completely different. But the direction he is
4 heading is what I object to.

5 THE COURT: Is that the question, which is,
6 one, "How often did you ride with him?" Two, "Are
7 you aware, was he afraid of this road, did he have
8 some fear factor?" I hate to use that word fear
9 factor, that shows -- "Does he have some fear or
10 trepidation from traveling on this road and did
11 that affect his ability to drive?"

12 Now, as you know, proximate cause is no
13 different in a felony DUI case than in a civil
14 case. There can be more than one cause to an
15 accident, it's not a plausible defense, there could
16 be concurring causes to an accident. So, you know,
17 even if he, I don't know, I assume you have an
18 expert that is going to say the point of contact or
19 the point of, point of impact is different, so it
20 is going to come down to who the jury believes
21 about how this accident happened, but I guess it
22 all still turns back around to does the State have
23 any exceptions to him eliciting was he aware that
24 his friend had a previous accident on this road and
25 as a result of that accident he had some fear about

1 driving on that road and he also had some fear
2 about driving at night.

3 MS. KINZELER: My other ground for the
4 objection, Your Honor, would be that, depending on
5 what his basis of knowledge is.

6 THE COURT: We have to, one, establish that
7 he rode with him enough to know what his driving
8 habits were because as we know, there is a fine
9 line between habit and character. Habit, in order
10 for it to come within the confines of habit
11 testimony it has to be something that somebody does
12 almost involuntarily, something that they do,
13 something that they do every day, that is
14 predictable, something that is reactive. That is
15 habit testimony.

16 Character is a whole another ball of wax. He
17 would have to be able to establish this gentleman
18 rode with him enough to know his driving habit and
19 know, and to know whether he had fear, either when
20 he asks the question either he'll say, first he
21 will ask him how often he rode with him, then he is
22 going to have to establish whether he knew about
23 the accident. If he says he didn't know about the
24 accident that is the end of it. If he says he knew
25 about the accident, then he can ask him whether he

1 had fear about driving on this road.

2 And what if he had fear, a lot of people
3 don't like driving at night, I know a lot of people
4 don't like driving at night, which has nothing to
5 do about an accident. Some people, their eyesight
6 or for whatever reason as they get older they have
7 a fear about driving at night, they just don't like
8 driving at night. So, I don't know that that is
9 necessarily connected, a fear of driving at night
10 is necessarily connected to an accident, per se, so
11 with that line of questioning does the State have
12 any criticism?

13 MS. KINZELER: If he lays the foundation and
14 stops, if the witness --

15 THE COURT: If the witness stays he doesn't
16 know about the accident, then we'll stop. I think
17 there would be no basis for him to know. He could
18 ask him, I think, if he had a fear about driving at
19 night but he would have to establish he has ridden
20 with him specifically at night, he would not be
21 able to say that this gentleman said to him, "I
22 don't like driving at night." That would be
23 offered for the truth and would not be subject to
24 cross-examination and does not come within any
25 hearsay exception.

1 MS. KINZELER: I would ask he lay the
2 foundation first instead of going straight to the
3 question.

4 THE COURT: Is that the line of inquiry you
5 intend to follow, Mr. Mason?

6 MR. MASON: Yes, Your Honor.

7 THE COURT: For the record, when we talk
8 about habit evidence, you have to talk about
9 conduct, more particularized, before it qualifies
10 as habit, and habit evidence is when someone
11 engages in conduct without thinking about it, the
12 more likely it will be deemed to be qualified as
13 habit. Whereas character evidence more is in the
14 nature of maybe a one time event or something that
15 may have happened, more in terms of, when we talk
16 about character, we are talking about a person's
17 general traits, which is different than habit,
18 which is someone doing something with frequency and
19 regularity for it to have occurred sufficiently.
20 In other word, something you do almost
21 unconsciously, something you do by habit.

22 Use as a better example, if they have a
23 process in a business, if they have a process and
24 that is how they do it every time, that is a better
25 example of habit. It is my understanding that is

1 the line of questioning you are going to follow,
2 Mr. Mason?

3 MR. MASON: Yes.

4 THE COURT: Limit it to that. If he
5 indicates he has no personal knowledge you would
6 not be able to establish foundation for the
7 question.

8 MR. MASON: Yes. There is one more matter
9 while we're, while the jury is out.

10 THE COURT: Yes, sir.

11 MR. MASON: I had served a subpoena on a Joe
12 Murray and I had asked him to bring a number of
13 documents. The reason I had asked him to bring
14 these documents is twofold. One is, part of the
15 claim in this case is that Mr. Davilla has trouble
16 working because of injuries in this accident, and
17 the other reason, the other reason that --

18 THE COURT: It wouldn't be relevant to
19 anything. The only thing relevant is he suffered
20 great bodily injury. Whether he can work or not is
21 not relevant.

22 MR. MASON: The other reason is they have
23 exchanged, I believe they have exchanged certain,
24 exchanged certain written paperwork in the form of
25 proposals and various documents which would go to

1 credibility of this witness' testimony.

2 THE COURT: He hasn't said he can't work.

3 MR. MASON: Your Honor, what I'm saying is
4 this witness says he doesn't really understand the
5 English language, he can't read a menu, he has gone
6 through these things I have gone through, that I
7 don't believe is true and I believe this witness is
8 going to testify to that. I have asked him to
9 bring certain written communications that he has
10 had with Mr. Davilla for the purpose of attacking
11 the credibility of this testimony.

12 THE COURT: I will cross that bridge when I
13 come to it. I haven't heard the witness testify to
14 that.

15 MR. MASON: The problem is I believe the
16 State has told the witness he didn't need to come
17 and bring the documents I subpoenaed from him and I
18 need for the State, if they have told him he didn't
19 need to give me my documents subject to my
20 subpoena --

21 THE COURT: I believe it is speculation on
22 your part about that. I can't deal with
23 speculation.

24 MR. MASON: I asked the State, Your Honor, I
25 asked Miss Kinzeler whether two of my subpoenas to

1 Mr. Murray, I asked her, I have advised her I had
2 asked for certain documents, to which she responded
3 they are not relevant, that they deal with
4 immigration status and led me to believe from our
5 conversation --

6 THE COURT: If it deals with immigration
7 status it is relevant. You are walking a thin
8 line, you need to be very, very careful, I don't
9 know what they have.

10 MR. MASON: The bottom line is my
11 conversation with the Solicitor's office led me to
12 believe they have had communications with Mr.
13 Murray.

14 THE COURT: Here is the bottom line. What
15 led you to believe, what you think, what you
16 speculate about, you all need to have a
17 conversation and come to some conclusion about what
18 actually happened because I don't want to deal with
19 conjecture and I'm not going to mediate your fight,
20 so you need to talk to Miss Kinzeler and find out
21 whether in fact she did what you're accusing her of
22 and we'll go from there.

23 MR. MASON: Thank you.

24 THE COURT: At this point it is just
25 speculation on your part.

1 MR. MASON: Your Honor, Miss Kinzeler and I
2 can speak, if that is okay with the Court, we'll
3 step out in the hallway.

4 THE COURT: Okay.

5 MR. MASON: Thank you.

6 THE COURT: Why doesn't everybody take a
7 restroom break, I'm going to let the jury go ahead
8 and have a cigarette. We have a couple people need
9 a smoke break frequently.

10 (Recessed at 11:10 a.m.).

11 (Resumed at 11:30 a.m.).

12 THE COURT: Have you all worked it out?

13 MR. MASON: Yes, Your Honor. The Assistant
14 Solicitors for the State have provided the
15 disclosures in this case and I was incorrect when I
16 stated to the Court an assumption that I had about
17 communications that had been made with Mr. Murray
18 and now that I have spoken with Miss Kinzeler and
19 Investigator, the investigator for the Solicitor's
20 office, I'm now straight that that didn't take
21 place.

22 I have also had a chance to speak with Mr.
23 Murray who has indicated he is going to continue to
24 be a cooperative witness, whether he's called by
25 the defense or by the State. I just want on the

1 record to apologize to Assistant Solicitor
2 Kinzeler. We had our first heated exchanges before
3 that occurred and I think that that led to --

4 THE COURT: The reason I told you all to
5 talk, there is a method to why I do things. When
6 we are advocating it is so easy to take things
7 personal when it really isn't personal and you all
8 have to work together too much, so I appreciate
9 that and I appreciate you all talking to one
10 another. Litigants get heated, that is why I love
11 it.

12 Ready?

13 MR. MASON: Yes, Your Honor.

14 THE COURT: All right, let's call the jury,
15 please.

16 (The jury returned to the courtroom).

17 BAILIFF: The jury is present, Your Honor.

18 THE COURT: You may all be seated.

19 Ladies and gentlemen, I hope you enjoyed your
20 break. We appreciate your indulgence while we
21 worked through those matters. We will now resume
22 with the witness' testimony.

23 You may proceed, Mr. Mason.

24 MR. MASON: Thank you, Your Honor.

25 THE COURT: You're welcome.

1 BY MR. MASON:

2 Q Now, am I correct that you lived with Mr.
3 Garcia for approximately five years before this
4 accident?

5 INTERPRETER: Yes.

6 Q And did you live at the address on LaGrae
7 Road, [REDACTED] [REDACTED] [REDACTED]?

8 INTERPRETER: Yes, LaGrae, I still live
9 there.

10 Q Okay. And during that time, that five years,
11 did you and Mr. Garcia also work together?

12 INTERPRETER: Well, he worked, I mean, I
13 worked first and then he got some work and we
14 worked, we lived there in the same dwelling but we
15 didn't always work together.

16 Q On the times when you and Mr. Garcia worked
17 together did you ride in the car with him from the
18 house to work?

19 INTERPRETER: No. He still didn't have a
20 car.

21 Q Okay. How many times before this accident is
22 it that you think you rode in a car in which Mr.
23 Garcia was the driver?

24 INTERPRETER: Like six months he gave me a
25 ride six months but not every day, sometimes, some

1 days.

2 Q Was it in the six months before the accident
3 that he gave you rides to work?

4 INTERPRETER: Sometimes, before the accident,
5 yes, he gave me a ride to work every once in
6 awhile.

7 Q Was it just in that six month period?

8 INTERPRETER: And after. Well, before,
9 before the accident also.

10 Q Did you understand my question?

11 INTERPRETER: I understand you.

12 Q So, the question is, if you can estimate how
13 many times you had ridden in the car with Mr.
14 Garcia as the driver, and that can be either going
15 to work or to the store or to eat or wherever?

16 INTERPRETER: Sometimes he would ask me if I
17 wanted to go to the store with him and I would say
18 no and he and his wife would go like to the store
19 and I wouldn't go, but like I was saying, for six
20 months he gave me a ride to work, sometimes to go
21 to work.

22 Q Okay. And did you know about the accident
23 that Mr. Garcia had on Point of Pines Road on
24 February 25th, 2007, when he ran his car into a
25 tree on the right side of the road just past the

1 old post office and restaurant?

2 INTERPRETER: I wasn't with him on that day.

3 Q But did you know about that accident?

4 INTERPRETER: No, I was never told anything.

5 Q Did you see the car in the woods?

6 MS. KINZELER: Objection.

7 THE COURT: Sustained. Not personal
8 knowledge.

9 Q Did you testify that on this day of December
10 8 that you took Point Of Pines road to get home
11 faster? Is that a correct statement of your
12 testimony?

13 INTERPRETER: No, I never said that.

14 Q Now, Point of Pines Road, was Mr. Garcia
15 scared to drive that road at night?

16 MS. KINZELER: Objection.

17 THE COURT: Basis?

18 MS. KINZELER: Personal knowledge.

19 THE COURT: You have to establish foundation
20 for habit testimony, Mr. Mason, and you have not
21 done that to this point so the objection is
22 sustained.

23 BY MR. MASON:

24 Q When you rode with Mr. Garcia for this six
25 month time period was it always in the daylight?

1 A Si.

2 INTERPRETER: Yes.

3 Q So, you never previous to this accident rode
4 with Mr. Garcia at night. Is that correct?

5 INTERPRETER: Well, I mean, just like on that
6 day of the accident it was getting dark but that
7 was like 6:30.

8 Q So is it your testimony that when this
9 accident happened it was not dark?

10 INTERPRETER: Yes, because the street is dark
11 because there is a lot of trees and it gets darker
12 before the other ones.

13 Q My question is, was it dark at the time of
14 the accident?

15 INTERPRETER: The officials came 30 minutes
16 after the accident and they were asking questions,
17 so they know that it was getting dark. It wasn't
18 really dark but it was getting dark.

19 Q Now, on December 8th, 2008, you and Alvera
20 and Gaspar were in Jimmy Cay, isn't that correct?

21 INTERPRETER: Yes. Tell them yes.

22 Q And you parked your, the Geo, Mr. Garcia
23 parked the Geo in Jose Licon's driveway at the end
24 of LaGrae Road, isn't that correct?

25 INTERPRETER: No. He's saying -- well,

1 Gaspar's.

2 Q Is there a trailer or a house near Jimmy Cay
3 where Jose Licona and Gaspar Licona live?

4 A Yes.

5 INTERPRETER: Yes.

6 Q And is that where Mr. Garcia parked the Geo
7 when you went to work that day?

8 INTERPRETER: There, yes, but the trailer
9 wasn't there anymore because like three days later
10 they sold it, three years, and then it wasn't
11 there, they sold it.

12 Q But you parked and then walked to Jimmy Cay,
13 is that correct?

14 INTERPRETER: No, because there was two
15 vehicles. My boss, there was my boss' vehicle and
16 then a vehicle driven by somebody else and from
17 there we were transported to Jimmy Cay.

18 Q And when you got off work did you get dropped
19 back off where the Geo was parked?

20 INTERPRETER: Yes, so that we could go back
21 home.

22 Q Okay. And at that time did you drink beer?

23 INTERPRETER: One.

24 Q Did Mr. Jose Licona give you beer?

25 INTERPRETER: He gave me one.

1 Q Where did it come from?

2 INTERPRETER: He had it there at his house,
3 he lived there.

4 Q Okay. And you took the beer and you rode off
5 in the car and you pass --

6 MS. KINZELER: Objection.

7 THE COURT: Basis of the objection.

8 MS. KINZELER: Fifth Amendment and
9 irrelevant.

10 THE COURT: I'm sorry, I didn't hear.

11 MS. KINZELER: Fifth Amendment and
12 irrelevant.

13 THE COURT: I will sustain on relevance. You
14 may proceed.

15 BY MR. MASON:

16 Q Okay. The beer you got, you didn't drink it
17 at the house, you took it with you in the car,
18 isn't that correct?

19 A No, I --

20 INTERPRETER: No, I drank it at his house but
21 then I forgot to throw away the container and I
22 didn't want to throw it in the street because you
23 can get a ticket for throwing trash in the street
24 so I took it in the car.

25 Q You wanted to drink that day with Jose Licona

1 but he had English lessons. Isn't that correct?

2 MS. KINZELER: Objection.

3 THE COURT: Basis?

4 MS. KINZELER: Relevance.

5 THE COURT: Sustained.

6 BY MR. MASON:

7 Q Now, is Jose Licona, did Jose Licona see you
8 drive off in the car?

9 MS. KINZELER: Objection.

10 THE COURT: Basis?

11 MS. KINZELER: Foundation, hearsay.

12 THE COURT: You would have to establish that
13 he knew that of his own personal knowledge, Mr.
14 Mason, so you need to establish a foundation. The
15 objection is sustained.

16 BY MR. MASON:

17 Q You said that Jose Licona gave you a beer.
18 Is that correct?

19 INTERPRETER: Yes.

20 Q You said he got it from the house. Is that
21 correct?

22 A Si.

23 INTERPRETER: Yes.

24 Q Where did you drink it?

25 MS. KINZELER: Objection.

1 THE COURT: Basis?

2 MS. KINZELER: Asked and answered.

3 THE COURT: Sustained.

4 MR. MASON: Your Honor --

5 THE COURT: No argument, Mr. Mason, unless

6 the Court asks for argument. It is not necessary

7 for the Court to make a decision. The objection is

8 sustained.

9 Q Was it in the house, that you drank the beer?

10 INTERPRETER: In Licona's house.

11 Q And you're sure of that?

12 A Si.

13 INTERPRETER: Yes.

14 Q And was Jose Licona there with you when you

15 say you dranked this beer inside his house?

16 INTERPRETER: No, it was outside the house.

17 Q So you dranked the beer outside the house?

18 A Si.

19 INTERPRETER: Yes.

20 Q Were you in the car outside of the house when

21 you dranked the beer?

22 INTERPRETER: No. I was outside and I

23 dranked it because I was thirsty because I was

24 tired from work.

25 Q And you know, Mr. Davilla, it's illegal to

1 drink --

2 MS. KINZELER: Objection.

3 THE COURT: Basis?

4 MS. KINZELER: Fifth Amendment, relevance,

5 foundation.

6 THE COURT: Sustained.

7 BY MR. MASON:

8 Q Do you know Deputy Luckadoo?

9 INTERPRETER: The interpreter is asking you

10 repeat the question.

11 Q Yes, thank you. Do you know Deputy Luckadoo?

12 A No.

13 INTERPRETER: No. I don't know who that is.

14 Q You don't remember when he charged you with

15 open container?

16 MS. KINZELER: Objection.

17 THE COURT: Sustained. Irrelevant. It has

18 no bearing on credibility, prior bad act, not the

19 subject of a conviction, it has no bearing on

20 credibility of the witness nor is there any

21 indication this witness was driving or that he

22 contributed to, that it contributed to the

23 accident.

24 Proceed.

25 BY MR. MASON:

1 Q Now, after you left the house, is that
2 correct?

3 INTERPRETER: You mean I left the Licona
4 house?

5 Q Yes.

6 A Yes.

7 Q Then you were heading home, is that correct?

8 INTERPRETER: That's correct.

9 Q Did you go down LaGrae Road and take a right
10 on Highway 174?

11 INTERPRETER: That's correct.

12 Q And then did you go down Highway 174 and take
13 a right on Point of Pines Road?

14 A Si..

15 INTERPRETER: Yes.

16 Q And nowhere did you stop in between, is that
17 correct?

18 A No.

19 INTERPRETER: No. No, he stopped at the
20 accident.

21 Q When you turned on Point of Pines Road there
22 was a light that lit up the whole street. Is that
23 correct?

24 INTERPRETER: Correct.

25 Q And Alvero said --

1 MS. KINZELER: Objection.

2 THE COURT: Basis?

3 MS. KINZELER: Hearsay.

4 THE COURT: Sustained. Hearsay.

5 BY MR. MASON:

6 Q You testified that you told Alvera you did
7 not know why the light was lighting up the street.
8 Is that your testimony?

9 INTERPRETER: There was a curve in the road,
10 there is a curve in the road there and he was
11 driving too high, he was driving too high.

12 Q It was at the curve in the road that the
13 light came in your eyes, is that correct?

14 MS. KINZELER: Objection.

15 THE COURT: Basis?

16 MS. KINZELER: Misstatement of the testimony.

17 THE COURT: Rephrase.

18 BY MR. MASON:

19 Q You made a motion with your hand while you
20 were testifying. Did you mean to signify that they
21 curved?

22 INTERPRETER: Well, we still hadn't
23 identified the vehicle was coming.

24 Q Was the light that you talked about in your
25 eyes as you approached the curve?

1 INTERPRETER: I'm sorry, the interpreter
2 would ask for repetition of that question.

3 Q Was the light that you have said was in your
4 eyes, was that as you approached the curve?

5 INTERPRETER: Yes.

6 Q Now, after the accident did a father and son
7 help you out of the Geo?

8 INTERPRETER: No. I got out by myself and it
9 was when I was out that he grabbed me by my arm.

10 Q So, it was after you got out of the car by
11 yourself that the father or son helped you. Is
12 that correct?

13 INTERPRETER: Because I had my foot and half
14 my body was out but he helped me lift my other leg.
15 He said to me twice, "My goodness, my goodness,
16 what happened here?"

17 Q And once you got out of the car did you walk
18 around outside of the car?

19 INTERPRETER: No, because I was afraid that
20 it would explode so I crossed the street and sat
21 down.

22 Q After you sat down did you remain sitting
23 down until you were helped by the medical people?

24 INTERPRETER: Well, two agents, officers
25 arrived, I think one of them is here, and I don't

1 remember which one it was that asked me, "Do you
2 remember what happened in the accident," he asked
3 me, "Do you remember what happened?"

4 Q And when you say you think he was here, do
5 you mean that you think you saw him in the hallway
6 this week, the EMS person that asked you that
7 question?

8 A No, I don't see anybody here, no, I don't see
9 nobody.

10 INTERPRETER: No, I don't see anybody, I
11 don't see anybody.

12 Q But you specifically remember an official
13 person asking you what happened. Is that correct?

14 INTERPRETER: Yes.

15 Q And did you tell him the truth?

16 INTERPRETER: No, because I couldn't breathe,
17 I had four broken ribs and I couldn't breathe, I
18 was just trying to survive, myself.

19 Q Now, did you have a cell phone with you in
20 the car at the time of the accident?

21 INTERPRETER: Yes, I had my cell phone.

22 Q Okay. After the accident did you try to find
23 your cell phone?

24 A Tried but I don't speak enough --

25 INTERPRETER: I didn't speak very long, I

1 just talked to my boss.

2 Q So you got your cell phone, you called your
3 boss George Dossett, is that correct?

4 INTERPRETER: Yes.

5 Q And George Dossett mainly speaks English, is
6 that correct?

7 INTERPRETER: And I explained to him that we
8 had had an accident there by the old post office.

9 Q Okay. And did you explain that to him in
10 English?

11 INTERPRETER: Yes, because in an emergency I
12 had to speak English, it was just a little bit.

13 Q So, this was an emergency?

14 INTERPRETER: I needed to explain to my boss
15 what had happened but I didn't do it well because
16 he said where and I tried to explain it to him but
17 he went to another place, another post office,
18 there's two of them.

19 Q Now, where was your cell phone in the car
20 when you found it?

21 INTERPRETER: When I found what?

22 Q The cell phone.

23 A I don't remember that. I don't remember it.

24 INTERPRETER: I had had it outside of the
25 car.

1 Q Now, the road, Point of Pines Road, was the
2 condition of this road bad, a bad road?

3 INTERPRETER: Well, I couldn't really speak
4 about that, that's an issue for the city, I don't
5 understand those things, like if it's good or not
6 but there were some holes in it.

7 Q There are some holes in the road leading up
8 to where the accident happened?

9 INTERPRETER: Yes, from 174, a mile and a
10 half down the road.

11 Q And it was in that location there are holes
12 in the road, is that correct?

13 INTERPRETER: No. On the part where he was
14 coming.

15 Q Now, other than talking to the medical person
16 who helped you on the night of the accident, did
17 you after that day talk to the police?

18 INTERPRETER: No, because I was taken to the
19 hospital in a helicopter and there was nobody there
20 to talk to me at the hospital.

21 Q So the police did not come to talk with you
22 at the hospital. Is that correct?

23 A Correct.

24 INTERPRETER: Correct.

25 Q And the police did not come to talk to you

1 for over two and a half years about this accident.

2 Isn't that correct?

3 INTERPRETER: They said they were from the
4 prosecutor but there wasn't any more, there wasn't
5 any other police.

6 Q Okay. Do you see the people in the courtroom
7 that you have met with before your testimony? Can
8 you point them out in the courtroom?

9 A Yes.

10 INTERPRETER: Yes.

11 Q Please do.

12 A Miss Jennifer, Mr. David Watson, I saw --

13 INTERPRETER: They have gone but the first
14 ones, they aren't here.

15 Q Okay. So there were other people that you
16 met with and talked to about the accident, that
17 aren't in the courtroom right now?

18 INTERPRETER: They're not here.

19 Q Okay. And when you met with him two and a
20 half years after the accident did the police, the
21 prosecutor, did they drive around in a car while
22 you were down there?

23 INTERPRETER: Yes, they took pictures, they
24 had a lot of questions for me.

25 Q And that was the first time they had tried to

1 talk with you during this time period?

2 INTERPRETER: It was the first time.

3 Q And did they take you over to where Ray Woods
4 lives, did they take you to Ray Woods' house?

5 INTERPRETER: Who's that?

6 Q The father who was there with his son, who
7 helped you when you got out of the car.

8 INTERPRETER: I wasn't taken there the first
9 time I went with them.

10 Q Did you go to Ray Woods' house another time?

11 MS. KINZELER: Objection.

12 THE COURT: Basis?

13 MS. KINZELER: Relevance.

14 THE COURT: Please restate the question.

15 MR. MASON: Yes.

16 THE COURT: Because I didn't hear.

17 BY MR. MASON:

18 Q Did somebody from the prosecutor's office,
19 somebody take you to Ray Woods' house at any point
20 in time?

21 INTERPRETER: Because he got the cooler, the
22 beer, so I wanted to ask what happened.

23 Q And you were in the car when that took place.
24 Is that correct?

25 A When what?

1 Q When you went to Ray Woods' house?

2 INTERPRETER: Well, I don't know what his

3 name was, I mean, we went but I don't know what his

4 name is.

5 Q Was it a trailer on Point of Pines Road?

6 INTERPRETER: They live in a house.

7 Q Was it a house on Point of Pines Road?

8 A Si.

9 INTERPRETER: Yes.

10 Q Pretty close to where the accident happened.

11 Correct?

12 A Yes, close by, yes.

13 Q And the investigator that is in the back of

14 the courtroom here, you referred to him as David?

15 A Yes.

16 INTERPRETER: Yes.

17 A David.

18 INTERPRETER: David.

19 Q He didn't have a uniform but did he show you

20 his gun?

21 MS. KINZELER: Objection.

22 THE COURT: Basis?

23 MS. KINZELER: Relevance.

24 THE COURT: The objection is sustained,

25 relevance.

1 BY MR. MASON:

2 Q Have you been told that you will be arrested
3 if you do not testify?

4 A No.

5 INTERPRETER: No.

6 A Never.

7 INTERPRETER: Never.

8 MR. MASON: Your Honor, may I approach the
9 witness?

10 THE COURT: Show opposing counsel.
11 Is there any objection?

12 MS. KINZELER: Not at this point, Your Honor,
13 contingent on foundation.

14 THE COURT: Approach. I'm sorry, when I say
15 approach, I should have been more clear.

16 MR. MASON: Thank you.

17 THE COURT: I apologize.

18 BY MR. MASON:

19 Q Mr. Davilla, do you recognize the woman shown
20 in this photograph?

21 INTERPRETER: Yes, I saw her at a store.

22 Q Okay. And did you see the woman shown in the
23 photograph at the Horizon Store on Edisto Beach.

24 MS. KINZELER: Objection.

25 THE COURT: Basis?

1 MS. KINZELER: Relevance.

2 THE COURT: I'm going to let you connect it,
3 otherwise I'm going to strike the entire line of
4 questioning.

5 MR. MASON: Thank you.

6 INTERPRETER: She was inside the store.

7 BY MR. MASON:

8 Q And did you ask to speak with her?

9 INTERPRETER: I knew her and I went to ask
10 her why, because she had gone to the house with a
11 lawyer, I don't know why she's not here, she came
12 with you.

13 Q Okay. And did you see the woman at the store
14 after the police came to meet with you, the
15 prosecutor's office?

16 INTERPRETER: Who, the woman?

17 Q Was this meeting when you ran into her at the
18 store, was that after these people came and talked
19 with you about the accident?

20 INTERPRETER: Yes, because I asked her who he
21 was because he didn't say, he came to my house with
22 some papers but I, but he didn't say who he was.

23 Q And are you referring to David, the
24 investigator?

25 A No.

1 INTERPRETER: No, him, he went to my house
2 with the woman.

3 Q Okay. And did you tell this woman that you
4 had been told that you would be arrested if you
5 didn't testify against Mr. Barclay?

6 INTERPRETER: She is lying, I didn't say
7 that. I told her that I had to come because they
8 came to get me so that I could testify on behalf of
9 the deceased.

10 Q Did you tell Joe Murray that you thought you
11 would be arrested if you didn't testify against Mr.
12 Barclay?

13 INTERPRETER: I told him, I asked him,
14 because, well, he was in the Army so I asked him,
15 you know, what could happen but he said I should
16 come.

17 Q Did Mr. Joe Murray tell you you would be
18 arrested --

19 MS. KINZELER: Objection.

20 THE COURT: Basis?

21 MS. KINZELER: Hearsay.

22 THE COURT: Sustained, hearsay.

23 MR. MASON: Beg the Court's indulgence just a
24 moment.

25 BY MR. MASON:

1 Q And you didn't really want to come testify
2 today but they made you come, isn't that correct?

3 MS. KINZELER: Objection, Your Honor.

4 THE COURT: Basis?

5 MS. KINZELER: Relevance.

6 THE COURT: Overruled. Do you need the
7 question restated?

8 INTERPRETER: The interpreter would need the
9 question restated.

10 THE COURT: Restate the question.

11 BY MR. MASON:

12 Q You didn't really want to come testify today
13 but they have made you come. Isn't that correct?

14 A No --

15 INTERPRETER: No. I came three times and
16 they told me now I would testify, that I would
17 testify about what happened.

18 Q Okay. But before you came the three days and
19 waited, before that time you did not want to come
20 but they made you come. Isn't that correct?

21 INTERPRETER: No, not them. The first ones
22 that came, the first ones that came from the
23 prosecutor's office, but they haven't pushed me at
24 all.

25 Q Do you remember signing a paper relating to

1 whether you wanted to testify in this case or not?

2 MS. KINZELER: Objection, Your Honor.

3 THE COURT: Basis?

4 MS. KINZELER: I haven't seen it -- oh, I
5 have it.

6 THE COURT: Let me see. Approach.

7 (Unrecorded bench conference).

8 THE COURT: Overruled.

9 MR. MASON: May I approach the witness?

10 THE COURT: Yes.

11 MR. MASON: May I mark this for
12 identification?

13 THE COURT: Actually you have to give him the
14 opportunity to answer consistently or
15 inconsistently. You need to ask a direct question.

16 MR. MASON: Thank you, Your Honor.

17 BY MR. MASON:

18 Q Do you recall giving a sworn statement in
19 which you said that, "I do not wish to participate
20 as a witness or otherwise in the criminal
21 prosecution of Walter Douglas Barclay for driving
22 under the influence or any other criminal charge
23 arising from the accident"?

24 INTERPRETER: The interpreter missed or did
25 not understand the last part of what he said, may I

1 clarify it with the witness?

2 THE COURT: You may.

3 MR. MASON: May I approach, Your Honor?

4 INTERPRETER: I was lied to because I was
5 told that Melody Bailey was telling, sent them to
6 tell me to sign the paper.

7 Q So, did you sign a paper that states, "I do
8 not wish to participate as a witness or otherwise
9 in criminal prosecution of Walter Douglas Barclay
10 for driving under the influence or any other
11 criminal charge arising from the accident"?
12 You did sign such a paper, isn't that correct?

13 INTERPRETER: That paper, I didn't understand
14 it, it's in English, and they didn't say here, read
15 this document, they said sign and I told them I'm
16 tired of this problem.

17 Q Now, when you signed it Jose Licon was with
18 you, correct?

19 INTERPRETER: There was a girl there that I
20 think, well, yes, she was there.

21 Q Do you recognize the other girl that was
22 there in the courtroom?

23 INTERPRETER: Yes, and Licon was also there.

24 Q Jose Licon speaks good English, doesn't he?

25 INTERPRETER: No, he doesn't speak English.

1 MR. MASON: May I approach, Your Honor?

2 THE COURT: Yes.

3 Q Also present when you signed this sworn
4 statement was the one in this picture, isn't that
5 correct?

6 A Si.

7 INTERPRETER: Yes. She was there.

8 Q And the paper which we're talking about, did
9 you sign it on October 7th, 2010, and is that your
10 signature?

11 INTERPRETER: The one on top is mine.

12 Q The others are witnesses?

13 INTERPRETER: I think so.

14 MR. MASON: No further questions.

15 THE COURT: Any redirect of the witness?

16 MS. KINZELER: Briefly.

17 THE COURT: You may proceed.

18 REDIRECT EXAMINATION BY MS. KINZELER:

19 Q Jose, who brought you this?

20 INTERPRETER: Where?

21 Q To your house. Let me back up. You
22 testified that some people brought you some papers.
23 Is that --

24 INTERPRETER: Yes.

25 MS. KINZELER: May I approach, Your Honor?

1 THE COURT: Yes.

2 Q Mr. Davilla, is this what they brought you?

3 INTERPRETER: Yes, but -- no, but this

4 signature was from another official, no, these are

5 the same papers from the, I think that this is the

6 same ones, their signature.

7 Q Who is they, who is them?

8 INTERPRETER: Well, the woman, she's not

9 here, the one he was showing me by the vehicle.

10 Q Is there anyone else here that was there that

11 brought you those papers?

12 INTERPRETER: Are these the same papers that

13 he was showing me?

14 Q Yes.

15 A Yes, the girl come, the lawyer, too.

16 INTERPRETER: The girl and the lawyer?

17 A And the lady in the vehicle.

18 INTERPRETER: And the lady in the vehicle.

19 Q Did you know what those papers aid when you

20 signed them?

21 INTERPRETER: No. Everything English, he

22 told me to sign the papers, handed it to me.

23 Q Who is Bubba?

24 A Lawyer.

25 MR. MASON: Objection, Your Honor.

1 THE COURT: Overruled.

2 A The Bubba I know, he said that he is a lawyer
3 but he's --

4 INTERPRETER: He's a lawyer for Jose.

5 Q Was it your lawyer for something?

6 MR. MASON: Objection, Your Honor.

7 THE COURT: Overruled.

8 INTERPRETER: Yes, because he represented me
9 in the accident.

10 Q Why did you sign those papers?

11 INTERPRETER: I was told that I had to sign
12 it, that Bubba had sent them for me to sign them,
13 they came from his office.

14 Q And --

15 INTERPRETER: I think these saying Bubba
16 Unger.

17 Q Did you think that you weren't going to get
18 paid in your civil suit?

19 MR. MASON: Objection, Your Honor.

20 THE COURT: Basis?

21 MR. MASON: Prior ruling under 403.

22 THE COURT: I'm not sure.

23 MR. MASON: Leading.

24 THE COURT: When I'm speaking don't speak.

25 The court reporter is only going to take down what

1 I say.

2 MR. MASON: I'm sorry.

3 THE COURT: Madam Forelady, ladies and
4 gentlemen, I have a matter to take up. It will
5 only take a second, if you will stand out in the
6 hallway for me a moment. During this break please
7 don't discuss the case. I appreciate your
8 patience, I will let you all go to lunch shortly.

9 (The jury was excused from the courtroom).

10 THE COURT: You may be seated. What is the
11 question that you're wanting to ask, Miss Kinzeler?

12 MS. KINZELER: Your Honor, I was trying to
13 ask him --

14 THE COURT: I need you to repeat the exact
15 question, that is my question to you.

16 MS. KINZELER: If he was told he wouldn't get
17 any civil money if he didn't sign the papers.

18 THE COURT: What civil money?

19 MS. KINZELER: His civil lawsuit that Bubba
20 Unger represented him on, Bubba represented him on
21 a civil suit for the helicopter bills and whatever
22 civil suit there may have been from that.

23 THE COURT: Why can't you ask him that
24 without making reference to any civil suit that
25 would have arisen out of this case? You have

1 already established -- why can't you just indicate
2 that it is something that was represented to him,
3 that he would not get something from Mr. Unger or
4 something related to his legal representation
5 without signing this, without making reference to
6 any civil settlement in this case? You opened the
7 door. You opened the door on this by asking him
8 about this affidavit, so the State is allowed to go
9 into the underlying basis as to why he signed it,
10 whether he was misled, that opened another whole
11 Pandora's box. If you continue to tell me somebody
12 in your offers misrepresented something you would
13 be in a very precarious position. If I have a
14 lawyer tell me somebody represented what something
15 was, that put me in an odd posture, I'm not sure
16 how to handle it. Never put yourself in that
17 posture.

18 MR. MASON: May I be heard, Your Honor?

19 THE COURT: Yes.

20 MR. MASON: First of all he received the
21 money a year before. There was a civil case that
22 was settled a year before with no litigation, he
23 had received all the money.

24 THE COURT: The issue is not whether he
25 received it. The issue is whether he was misled,

1 whether they were from his lawyer's office and
2 whether somehow he was put in a bad position by not
3 signing a document, whether it was represented to
4 him these people were from his lawyer's office with
5 papers signed in that office.

6 MR. MASON: Your Honor, may I address that?
7 Mr. Unger had to give me permission to go meet with
8 Mr. Davilla before I went down there, therefore I
9 had to, as an officer of the court I'm telling you
10 that Mr. Unger asked Mr. Davilla would he be
11 willing to meet with me and other people from my
12 office. I then secured the permission of Mr. Unger
13 after he talked with his client and got that
14 permission. I then went down there and took two
15 other persons, another member of the South Carolina
16 Bar with me as well as another person who is a non
17 lawyer, who is also a friend of Mr. Davilla. I
18 also made sure that during this time he had other
19 people with him such as his cousin Jose Licona who
20 is also a witness in this case. During that period
21 of time I made sure that I had permission.

22 THE COURT: The problem is you're still
23 bringing this element into play because people
24 often sign these type statements in cases for
25 sentiment, it happens all the time, it happens in

1 the fender benders, happens in major accidents,
2 it's a trade-off for settlement. It
3 shouldn't happen but it does. People don't show up
4 to testify about tickets at municipal court and
5 otherwise because they know the case is going to
6 settle. The driver is saying, "I'm not going to
7 show up," and the police officer is not going to
8 show up, no difference in this type case where
9 there has been great bodily injury and there has
10 been some talk of settlement or otherwise, that he
11 might sign a statement in exchange for that.

12 By going down this road they are entitled to
13 inquire as to why he signed it, what impression he
14 was under when he signed it, because you offer it
15 to impeach his credibility. In other words, you
16 have put before this jury he is not here
17 voluntarily, he is doing this somehow against his
18 will and they are entitled to fully explore that
19 and you made that decision when you decided to go
20 down this road and they are not limited by what
21 you, you know, whatever your theory is is fine but
22 they are not limited by it, they are entitled to
23 question him regarding it and irregardless of
24 whether you got permission from Mr. Unger, there is
25 a perception about whether he was misled or not, I

1 don't know.

2 MR. MASON: I guess on redirect I'm going to
3 have to go into the facts, if he waives the
4 attorney-client privilege --

5 THE COURT: He is not going to waive
6 attorney-client. That is not waiving
7 attorney-client privilege. He is saying what
8 somebody from your offers said to him. That is not
9 waiving attorney-client privilege. What he is
10 saying, "I thought somebody came from my lawyer's
11 office and asked me to sign it." That is not
12 waiving attorney-client privilege. Nobody is
13 asking him what he said to his attorney.

14 MR. MASON: Your Honor, again, the settlement
15 that was consummated a year earlier without
16 litigation, we didn't have anything to do with it,
17 the carrier simply did it without our involvement
18 and there was no litigation, the Court already
19 ruled that the settlement information --

20 THE COURT: Rules are always subject to
21 revision.

22 MR. MASON: She blurted out before the
23 jury --

24 THE COURT: She didn't blurt it out. I told
25 you when I speak, the only thing the court reporter

1 types is what the Court says so you're wasting
2 energy by continuing to talk and you're not going
3 to overtalk the Court. First, I'm a professional.
4 Secondly, I'm the judge.

5 Now, when you had asked about it they are
6 entitled to inquire about it, it doesn't matter
7 when it was settled. What is germane to this issue
8 is whether he believes or whether he was misled as
9 to whether somebody was sent from his lawyer's
10 office and he was instructed to sign that. It
11 doesn't open the door to when it was settled,
12 whether it was settled, settlement and compromise
13 is still off limits, and really that enures to your
14 client's benefit because if you start going into it
15 it's going to prejudice him because the jury is
16 going to be left with the impression that his
17 insurance settled it because he was at fault, so if
18 you want to go down that road it's your preference.

19 MR. MASON: I don't, Your Honor, my motion is
20 to keep that out.

21 THE COURT: That has already been resolved.
22 She's not going into that but she's entitled to
23 inquire as to why he signed this document and what
24 his perception was when it was signed and if he
25 feels he was misled, fine.

1 MR. MASON: I don't have a problem with that.
2 It is when she starts using the word she did when I
3 objected was this was some civil settlement.

4 THE COURT: I have already instructed her
5 he's not to make reference to whether he thought
6 they were coming from his lawyer's office and
7 whether somehow he would be prejudiced by not doing
8 what this lawyer asked him to do, without reference
9 to settlement.

10 MR. MASON: I understand. That is different
11 to reference to settlement. It is on the basis of
12 his referring to a settlement in front of the jury,
13 there was a pretrial order on that and I move for
14 mistrial.

15 THE COURT: There is no basis for mistrial.
16 The question was not completed. I have to go back
17 and see the question completely but there has been
18 no showing of prejudice to your client and there is
19 never appropriate order of mistrial when jury
20 instructions would be suitable but I don't think
21 curative instructions are warranted under this
22 circumstance, but you opened the door so once you
23 went into that she had full ability to inquire into
24 the underlying basis of why he signed it, so you
25 ran that risk strategically when you went down that

1 road. I didn't know about the statement, had no
2 awareness of it, so I had no way of anticipating
3 those questions would be asked or we could have
4 dealt with it prior to the question, the line of
5 questioning, had it been pursued.

6 All right, ready to proceed?

7 MS. KINZELER: Yes, Your Honor.

8 THE COURT: Clear about the parameters?

9 MS. KINZELER: Yes, ma'am.

10 THE COURT: Let's bring in the jury.

11 (The jury returned to the courtroom).

12 BAILIFF: The jury is present, Your Honor.

13 THE COURT: You may be seated.

14 Ladies and gentlemen, we appreciate your
15 patience. We'll now resume with questioning of the
16 witness.

17 You may proceed.

18 MS. KINZELER: Thank you, Your Honor.

19 THE COURT: You're welcome.

20 BY MS. KINZELER:

21 Q Jose, who did you think these papers were
22 from?

23 INTERPRETER: I thought it was from maybe a
24 lawyer of mine or someone who was arranging
25 something like, because the medical things, they

1 aren't with me in the ambulance and now it turns
2 out that's it.

3 Q Did the people who brought you these papers
4 tell you who they were?

5 INTERPRETER: I didn't ask them. I asked the
6 woman in the store who they were and she said that
7 it was Mr. Barclay's lawyer.

8 Q Did you feel, were you misled in signing this
9 paper?

10 MS. KINZELER: Objection, leading.

11 THE COURT: Sustained, leading. Rephrase.

12 Q How did you feel about having to sign these
13 papers?

14 INTERPRETER: Sad.

15 Q Jose, are you here to testify voluntarily
16 today?

17 INTERPRETER: Yes, because I want to see what
18 is going to happen with the death of my friend.

19 MS. KINZELER: That's all I have. Thank you.

20 THE COURT: Any objection to the witness
21 being excused, from the State?

22 MS. KINZELER: No, ma'am.

23 THE COURT: From the defense?

24 MR. MASON: No, Your Honor.

25 THE COURT: Sir, you're excused,

1 (Witness excused).

2 THE COURT: Madam Forelady and ladies and
3 gentlemen, rather than start another witness, we're
4 going to take advantage of this break and take our
5 lunch recess. During the break please do not
6 discuss the case amongst yourselves or anyone else,
7 please do not allow yourselves to be exposed to any
8 media coverage and don't do any independent
9 research. Also please don't have any contacts with
10 anyone in or about the courthouse. When you return
11 you will return directly to your jury room. We
12 will break until 2:00 o'clock, that will give you
13 an hour and 15 minutes for lunch. Again, you will
14 return directly to your jury room, and please leave
15 your note pad in your seat. I hope you all have a
16 good lunch, we'll see you all at 2:00 o'clock.

17 (The jury was excused from the courtroom).

18 THE COURT: You may be seated.

19 THE COURT: Is there anything before we break
20 for lunch?

21 MS. KINZELER: Your Honor, briefly. We have
22 been referring to papers and we would ask they be
23 marked a court exhibit.

24 MR. MASON: I would like that, Your Honor.

25 THE COURT: You all agree. Marked for ID

1 only.

2 (Photograph marked as Defendant's Exhibit 6
3 for Identification).

4 (Davilla statement and attachments marked as
5 Defendant's Exhibit 7 for Identification).

6 MR. FORSBERG: May I approach?

7 THE COURT: Yes.

8 MR. FORSBERG: Although, Your Honor, it was
9 worked out, the clerk's office is not aware it has
10 been worked out.

11 THE COURT: I don't have to sign anything
12 when a bond is written --

13 MR. FORSBERG: They want to know the terms of
14 the new bond.

15 (Recessed at 12:50 p.m.).

16 (Resumed at 2:13 p.m.).

17 THE COURT: Is the State ready to proceed?

18 MS. KINZELER: Yes, ma'am.

19 THE COURT: Is the defense ready to proceed?

20 MR. MASON: Yes, Your Honor.

21 THE COURT: Call your next witness. Go ahead
22 and bring them in.

23 (The jury returned to the courtroom).

24 BAILIFF: The jury is present, Your Honor.

25 THE COURT: Thank you. You may all be

1 seated.

2 Ladies and gentlemen, I hope you all had a
3 pleasant lunch recess. We'll now resume with
4 testimony.

5 The State may proceed.

6 MR. VOIGT: Thank you, Your Honor. The State
7 calls Doris Yarborough.

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1 DORIS YARBOROUGH, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name and spell
4 your last name.

5 THE WITNESS: My name is Doris Yarborough,
6 Y-a-r-b-o-r-o-u-g-h.

7 THE COURT: You may proceed.

8 MR. VOIGT: Thank you very much, Your Honor.

9 DIRECT EXAMINATION BY MR. VOIGT:

10 Q Miss Yarborough, how are you employed? I'm
11 employed by the South Carolina Law Enforcement
12 Division, also known as SLED.

13 Q And how long have you been employed there?

14 A Three years and three months.

15 Q And what is your position at the South
16 Carolina Law Enforcement Division?

17 A I'm a forensic technician in the log-in
18 department.

19 Q What are some of the duties you have there in
20 the log-in department?

21 A We take the evidence from throughout the law
22 enforcement agencies in South Carolina and we take
23 the paperwork that is presented to us and with the
24 evidence and log it into our computerized system.

25 Q And when evidence comes to SLED is it given a

1 number of some sort?

2 A Each item is assigned an item number or a
3 container number or both and then upon submission
4 it's given what we call a lab number.

5 Q Okay. Now, when evidentiary items are moved
6 around in SLED for whatever reason is that tracked
7 by SLED?

8 A It's an electronic system that we use, yes,
9 sir.

10 Q And does that tracking system involve using
11 that lab number?

12 A It does.

13 Q Did you have occasion to come into contact
14 with evidence involved with SLED number L0900249?

15 A I did.

16 Q And when did you come into contact with that
17 evidence?

18 A On January the 7th of 2009.

19 Q And how did you come into contact with it?

20 A It was presented to me by Investigator Brent
21 Roy of the Charleston County Sheriff's office.

22 Q And what did you do with that evidence?

23 A This was evidence for our toxicology
24 department and these items are placed into a
25 plastic pouch we refer to as a heat seal pouch.

1 Once it is placed in that pouch, then I heat seal
2 it closed, that investigator will initial and date
3 that heat seal, then he also signs and puts his
4 signature and the date on the package, another
5 place on that same package.

6 Q Do you yourself do anything with any of the
7 samples that you heat seal?

8 A Nothing other than package them.

9 Q Okay. And after the items that I will refer
10 to as L0900249 was placed in the heat seal package
11 what did you do with it?

12 A I received it, it was logged in at
13 approximately 12:44 on January the 7th of 2009 and
14 at approximately 1:11 p.m. I transferred it to what
15 we refer to as our toxicology evidence intake
16 storage, which is a refrigerated unit in our secure
17 storage room.

18 Q And from there did other technicians handle
19 it?

20 A We have someone from the toxicology
21 department who picks up sometimes once, sometimes
22 twice a day, depending on the volume we receive.
23 They will come down. We have four, there are four
24 technicians, including myself, that log in the
25 evidence, that can transfer it throughout the lab,

1 meaning that an analyst or another technician from
2 another department will come down to pick up this
3 evidence.

4 If I went to the refrigerator to get this to
5 transfer, then I would have to scan my ID card. It
6 would go back into my custody, then I would have to
7 scan the ID card of the person picking it up and
8 then it is electronically monitored through them.

9 Q Okay. So, for SLED's record purposes, you
10 had possession of this item from the time it was
11 given to you by Brent Roy, until the time that you
12 placed it into the --

13 A Toxicology, yes, sir.

14 Q Okay. And from that point on it went into
15 somebody else's custody?

16 A Correct.

17 MR. VOIGT: Okay, please answer any questions
18 Mr. Mason may have.

19 THE COURT: You may proceed.

20 MR. MASON: Thank you Your Honor.

21 THE COURT: You're welcome.

22 CROSS EXAMINATION BY MR. MASON:

23 Q Good afternoon, Miss Yarborough.

24 A Good afternoon.

25 Q You mentioned that you received cases from

1 all over the State. Is that a fair statement?

2 A Correct.

3 Q Okay. And these are all different criminal

4 investigations or other situations in which SLED is

5 there to provide some type of service?

6 A Our building is a forensic services building,

7 so anything that gets a forensic analysis comes

8 through our office.

9 Q And it comes from law enforcement, is that

10 correct?

11 A Correct.

12 Q So, the assumption being that it's evidence

13 pertaining to some criminal investigation or

14 matter. Is that a fair statement?

15 A Yes, sir.

16 Q Okay. So it is very important to properly

17 label everything, is that correct?

18 A Correct.

19 Q And it is very important to properly date

20 everything, isn't that correct?

21 A Correct.

22 Q And in order to do that the laboratory uses a

23 computer software system called LIMS, isn't that

24 correct?

25 A That's correct.

1 Q And in short it's called Laboratory
2 Information Management System, is that a fair
3 statement?

4 A Correct.

5 Q And you have described having a badge, you
6 have it with you?

7 A Yes.

8 Q Okay, thank you. And as I understand it,
9 every time evidence moves SLED policy requires that
10 it be tracked in LIMS, is that correct?

11 A Correct.

12 Q And so if you go into the refrigerator you
13 can take your badge and --

14 A I actually have to scan my badge, then I will
15 scan the bar code that is on the package, that
16 places it into my custody, I have to say it's in my
17 custody. Then the person that is going to pick it
18 up will scan their badge, the item that is being
19 transferred and then they have to put in a password
20 which means it now becomes in their custody.

21 Q And that is done anytime the evidence moves?

22 A That is correct.

23 Q Okay. That would be just someone going to
24 get it from the refrigerator, take it somewhere,
25 putting it back in the refrigerator?

1 A Correct.

2 Q If it moves it's got to be scanned in the

3 LIMS?

4 A That's correct.

5 Q And that is a very good computer program as

6 far as you know for doing that?

7 A Yes, sir.

8 Q Okay. And you use it regularly and properly

9 in the handling of evidence. Is that correct?

10 A Yes, sir, I do.

11 Q And do you believe that other people that

12 receive the evidence from you, are they also bound

13 to use it?

14 A Yes, sir.

15 Q And they use it in a proper way, is that

16 correct?

17 A Correct.

18 Q So, does that mean that at the end of

19 handling of evidence we should have something that

20 is a computer generated print-out that shows all of

21 the movement of the evidence within the laboratory?

22 Is that correct?

23 A That is correct.

24 Q Okay.

25 MR. MASON: Your Honor, may I approach the

1 witness?

2 THE COURT: You may.

3 Q I'm going to show you a document and ask if
4 you have ever been involved in -- I see you have
5 the same document with you.

6 A Yes, sir.

7 Q Thank you. Is that a document that is
8 generated by LIMS?

9 A Yes, sir.

10 Q Okay. Have you ever been in the process of
11 being asked to do what is called verify or
12 participate in the verification of a chain of
13 custody?

14 A Yes, sir.

15 Q Okay. That is part of your job as well, is
16 that correct?

17 A Yes, sir.

18 Q And do you see on the form you have before
19 you where between the dates of January 7th, 2009,
20 and January 27th of 2009 there are no entries, is
21 that correct?

22 MR. VOIGT: Objection to relevance.

23 THE COURT: I'm sorry, I didn't catch what
24 you said.

25 MR. VOIGT: I'm sorry. Objection to

1 relevance and beyond the scope.

2 THE COURT: Please restate the question.

3 MR. MASON: Yes.

4 BY MR. MASON:

5 Q Do you see where between the dates of January
6 7th, 2009, and January 27th of 2009 there are no
7 entries?

8 MR. VOIGT: Objection, beyond the scope of
9 this witness --

10 THE COURT: You're going to have to establish
11 a foundation, whether she prepared the document
12 within the scope of her responsibility and that she
13 would have knowledge of this item. Sustained.

14 BY MR. MASON:

15 Q You're looking at the document I'm asking you
16 questions about, so let me ask you --

17 THE COURT: That does not establish
18 foundation, you have to establish she prepared that
19 document, that she is aware of it in the ordinary
20 course of business, that she would have prepared it
21 in the course and scope of her responsibility.

22 Q Within the course and scope of your
23 responsibilities do you enter information into
24 LIMS?

25 A I'm not understanding exactly what you're

1 asking.

2 Q I asked you if you participated in the
3 process of verifying chains of custody?

4 A I did, and my verification would end when I
5 placed it into the toxicology evidence intake
6 refrigerator.

7 Q Okay. So, even though you brought the whole
8 form with you of the chain, you weren't involved in
9 the preparation of this other than as to the
10 entries where your name appears?

11 A I only -- that is where my part ends. I
12 verified that I did in fact log this item in and
13 after that that's where my participation ends.

14 Q Then I will just ask you about that part,
15 okay? For your part, you did what you described as
16 a bar code scanner, correct?

17 A Correct.

18 Q Then you pulled up LIMS to verify that it had
19 properly been entered into LIMS?

20 A No, I didn't. What happens is once we create
21 the lab number, once all the items are placed into
22 the system with the evidence given to us by the law
23 enforcement agency that is submitting it, we create
24 the lab number, I will take that sticker, will
25 place it on the paperwork presented and then I will

1 take the item number and place it in the plastic
2 container, or plastic pouch in this case. Then
3 once that is done, when I'm ready to transfer it to
4 that refrigerator unit I will scan, we have a list
5 of bar codes that's used for different areas within
6 our laboratory, I will scan that bar code, I will
7 scan that item and it shows this particular item
8 went into the toxicology evidence intake storage on
9 1/7/09 at 1:11 p.m.

10 Q I've got you. Then everybody else that
11 handles it after you does the same thing?

12 A Correct.

13 Q Then once all that is done it generates the
14 piece of paper in front of you called chain of
15 custody. Is that correct?

16 A And that chain of custody is requested
17 through our admin person, Tammy Raul, she will send
18 us this chain of custody, ask us to look at it and
19 if there is any discrepancies we need to note it,
20 and my part appeared to be correct.

21 Q Okay. So you have gone back to check the
22 chain of custody but only as it relates to your
23 part. Is that right?

24 A Correct.

25 Q Now, with regard to the receipt of different

1 items from law enforcement, you mentioned receiving
2 items, and the question is, when it's a type of
3 blood item like needs to be refrigerated do you
4 often see where law enforcement, when they bring it
5 in they have it in some type of cooler or something
6 of that nature?

7 A I do.

8 Q And do you happen to recall whether when
9 Trent Roy brought the evidence to you that that was
10 his method of transport?

11 A I cannot say particularly on that day but as
12 a general rule it does arrive to us in a cooler or
13 an insulated bag.

14 Q Okay. In other words, it's been kept cold
15 through whatever period of time it was driven there
16 or what have you?

17 A It appears to be, yes, sir.

18 Q As part of your training in and working in
19 the lab, then you are to also be diligent about
20 getting items that need to be refrigerated into the
21 refrigerator?

22 A That is correct.

23 Q And is this so important that the, you keep a
24 log on the refrigerator that makes sure that it
25 keeps the temperature of the refrigerator between

1 certain ranges of temperature?

2 A That is correct.

3 Q And is part of your job also involved in any
4 way occasionally checking that log to make sure
5 that the refrigerator is within the range of
6 temperatures?

7 A The refrigeraters are checked daily.

8 Q Okay. You or somebody else you know of?

9 A Usually the first person in in the morning
10 that unlocks our evidence room goes back and checks
11 the refrigerator units.

12 Q And you understand that that's the level of
13 importance at which you assign the responsibility
14 of refrigerating a blood sample?

15 A That is correct.

16 MR. MASON: Thanks. I have no further
17 questions.

18 THE COURT: Any redirect of the witness?

19 MR. VOIGT: No redirect, Your Honor.

20 THE COURT: Any objection to the witness
21 being excused, by the State?

22 MR. VOIGT: None from the State.

23 THE COURT: From the defense?

24 MR. MASON: No, Your Honor.

25 THE COURT: You're excused.

1 THE WITNESS: Thank you.

2 THE COURT: You're welcome, Miss Yarborough.

3 Have a good day.

4 (Witness excused).

5 THE COURT: The State may call its next
6 witness.

7 MR. VOIGT: Thank you, Your Honor, the State
8 will call Patricia Crooks.

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1 PATRICIA CROOKS, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please state your full name and
4 spell your last name.

5 THE WITNESS: My name is Patricia Crooks,
6 C-r-o-o-k-s.

7 THE COURT: You may proceed.

8 MR. VOIGT: Thank you very much, Your Honor.

9 THE COURT: You're welcome.

10 DIRECT EXAMINATION BY MR. VOIGT:

11 Q Where are you employed, Miss Crooks?

12 A I'm employed by the South Carolina Law
13 Enforcement Division, commonly known as SLED.

14 Q How long have you been employed by SLED?

15 A About 27 years.

16 Q And what is your current position at SLED?

17 A I'm a forensic technician in the evidence
18 control department and I work in the evidence room.

19 Q Was that your position in January, 2009?

20 A Yes, it was.

21 Q In January, 2009, did you come into
22 possession of a piece of evidence lab number was
23 L0900249?

24 A Yes, I did.

25 Q And when did you come into possession of that

1 item?

2 A I took possession of that item January the
3 7th, '09, at 1555 hours.

4 Q Give us the civilian time.

5 A Let's see. 9:00 o'clock, 12:00, 1300 would
6 be 1:00. 3:55.

7 Q So, you took possession of this item at 3:55.
8 Where did you get it from?

9 A I got the evidence from a refrigerator in the
10 evidence control department and it is for incoming
11 toxicology evidence.

12 Q And how long did you have this piece of
13 evidence in your care, custody and control?

14 A I had it less than a minute.

15 Q And what happened to it, who did you give it
16 to?

17 A I gave it to forensic technician Brandon
18 Williams of the toxicology department.

19 Q And to indicate that you had turned over
20 possession to Brandon Williams did you make an
21 entry in SLED's software system to that effect?

22 A Yes, I did.

23 Q During that 60 seconds or less that you had
24 possession of this item did you open the heat
25 sealed pouch?

1 A No, I did not.

2 Q Did you tamper in any way with the evidence
3 contained in that sealed pouch?

4 A No, I did not.

5 MR. VOIGT: Please answer any questions the
6 defendant may have, or Mr. Mason may have of you.

7 THE COURT: You may proceed.

8 CROSS EXAMINATION BY MR. MASON:

9 Q Good afternoon.

10 A Good afternoon.

11 Q I just have one question for you. Even
12 though you only had the evidence for one minute, it
13 was important enough that the handling of that
14 evidence during that one minute was properly
15 entered into the computer system by you. Isn't
16 that correct?

17 A That's correct.

18 MR. MASON: Thank you. No further questions.

19 THE COURT: Any redirect?

20 MR. VOIGT: No redirect, Your Honor.

21 THE COURT: Any objection to this witness
22 being excused, from the State?

23 MR. VOIGT: None from the State.

24 THE COURT: From the defense?

25 MR. MASON: No, Your Honor.

1 THE COURT: Ma'am, you're excused.

2 THE WITNESS: Thank you.

3 THE COURT: You're welcome.

4 (Witness excused).

5 THE COURT: Proceed.

6 MR. VOIGT: Thank you, Your Honor. At this
7 time the State will call Dr. Nicholas Batalis.

8 MR. MASON: Your Honor, we have a matter of
9 law to take up.

10 THE COURT: Approach.

11 (Unrecorded bench conference).

12 THE COURT: Madam Forelady, ladies and
13 gentlemen, I have a matter of law I need to take up
14 with the attorneys. It should be brief. During
15 the break please do not discuss the case. Please
16 leave your note pad in your seat. You may go with
17 the bailiff.

18 (The jury was excused from the courtroom).

19 THE COURT: Can the State produce a chain
20 from the time it was taken by the medical examiner
21 from Mr. Garcia's body, to when it was tested?

22 MS. KINZELER: It is my understanding
23 whatever lab unit they sent it to, I believe after
24 that the results come back, there is an
25 understanding --

1 THE COURT: My question was can the State
2 produce a chain from the time it was taken by the
3 medical examiner from Mr. Garcia's body, to when it
4 was tested?

5 MS. KINZELER: No.

6 THE COURT: Is there a reason why the blood
7 sample was not sent to SLED, why it was sent to
8 this independent lab for a toxicology analysis?

9 MS. KINZELER: Your Honor, we would have to
10 ask the pathologist why he sent it to the lab he
11 sent it to.

12 THE COURT: You might need to do that.

13 MR. VOIGT: Your Honor, it appears that is a
14 decision made by Mr. Wooten and we may have to
15 inquire of Mr. Wooten's office as to why that is
16 done.

17 THE COURT: The coroner?

18 MR. VOIGT: The coroner. Apparently they use
19 this particular laboratory due to speed and
20 accuracy, they get the result back faster. As to
21 why the coroner's office does what they do, I'm not
22 in a position to tell you.

23 THE COURT: What is Mr. Batalis' position,
24 Dr. Batalis?

25 MR. VOIGT: He is a forensic pathologist.

1 THE COURT: Who is he employed by.

2 MR. VOIGT: MUSC.

3 THE COURT: Is he under the employment of the
4 coroner?

5 MS. KINZELER: No, Your Honor, he's
6 independent, not related, independent.

7 THE COURT: Once the blood was collected how
8 was it sent to this other lab?

9 MR. VOIGT: Your Honor, would you like to
10 hear the testimony on this?

11 THE COURT: No, sir, I want you to answer my
12 question.

13 MR. VOIGT: I'll ask.

14 THE COURT: I would assume it was overnighted
15 because of the nature of it but I don't want to
16 make that assumption. I would like to know how it
17 was sent.

18 MR. VOIGT: It apparently is sent overnight
19 via Fed-X.

20 THE COURT: I assume someone signed for it
21 and they get some sort of verification that it's
22 been received.

23 MR. VOIGT: At this time, Your Honor, I'm not
24 sure. If I --

25 THE COURT: Is there a reason you all did not

1 provide Mr. Mason with what he requested within ten
2 days of that, being chain of custody from National
3 Medical Labs, National Medical Services Lab? I
4 guess the question is did you all receive his
5 request and did you respond and if you didn't, why?

6 MS. KINZELER: I have to see the contact
7 first of all.

8 MR. MASON: It was filed with the Court on
9 October --

10 MS. KINZELER: Your Honor, before I can make
11 an answer to the Court I have to go double check, I
12 don't have it in the correspondence file but I
13 don't want to say I didn't receive it without
14 double checking.

15 THE COURT: I'm going to give you the
16 opportunity to double check and see if you received
17 it. Then we'll go from there. And what is the
18 likelihood of you all being able to obtain the
19 person -- where is the lab located?

20 MS. KINZELER: Michigan.

21 THE COURT: And have that person available to
22 testify regarding the chain of custody?

23 MR. VOIGT: Pennsylvania, suburb of
24 Philadelphia, I lived there until I was ten.

25 THE COURT: Have you made inquiry as to

1 whether that person is available?

2 MR. VOIGT: I have not as of this moment,
3 Your Honor.

4 MR. MASON: Of course, Your Honor, I have a
5 lawyer present in my office that handled this --

6 THE COURT: I'm not dealing with that right
7 now. I need the opportunity to determine what
8 happened, then I will go from there, especially in
9 the absence of counsel I'm not going to entertain
10 that. We'll be at ease for a few moments.

11 MR. VOIGT: Thank you, Your Honor.

12 THE COURT: What kind of test was this you
13 had performed?

14 MS. KINZELER: Your Honor, I believe that the
15 reason the pathologist does that testing is in
16 basically determining the manner of death. It
17 rules out any other contributing factor.

18 THE COURT: The purpose of the testing is to
19 determine the manner of death?

20 MS. KINZELER: I think that is part and
21 parcel of it, yes.

22 THE COURT: Is that correct?

23 MR. VOIGT: Cause of death.

24 MS. KINZELER: Yes, ma'am.

25 THE COURT: I need some more time to research

1 this but case law seems to indicate, one, that the
2 medical examiner, forensic pathologist is not an
3 employee of the coroner, is not an agent of the
4 coroner, therefore the statute cited by the defense
5 is inapplicable as to him. So, he has no duty
6 pursuant to that statute.

7 In addition to that, there is a multi-layered
8 issue in this case. There is case law that
9 indicates that where, the only purpose of the chain
10 is for the protection of a criminal defendant to
11 make sure that the sample has not been hypothecated
12 in some way or tampered with in some way for
13 purposes of determining a blood alcohol result for
14 a criminal defendant. However, no such protection
15 exists when such tests are done for medical
16 purposes. That being the determination of cause of
17 death.

18 So, I don't think any of it is applicable.
19 According to that, analysis chain does not have to
20 be established, that the indicia of reliability of
21 medical testing is inherent within the testing, but
22 I need to research it a little bit more.

23 And in the future, Mr. Mason, when I instruct
24 you we're to hear all pretrial motions that is
25 precisely what I mean, because that is why, the

1 Court should not have to make a decision in ten
2 minutes when it had enough time to really research
3 the matter and make an informed decision. That's
4 why we took two days to hear pretrial motions in
5 this case and I do not believe that you just
6 figured out you had this motion, based on what you
7 have already indicated to the Court.

8 So, if you all have some other witnesses you
9 could call you can go ahead and call them because I
10 need to think about this some more. I need to
11 research it some more so I can make an informed
12 decision on the issue. And we'll be at ease for
13 just a moment.

14 (Recessed at 3:10 p.m.).

15 (Resumed at 3:41 p.m.).

16 THE COURT: Is the State ready to proceed
17 with the next witness?

18 MS. KINZELER: Yes, Your Honor.

19 THE COURT: Is the defendant ready to
20 proceed?

21 MR. FOSBERG: No, Your Honor. The defendant
22 finally got out on bond, the bond was dealt with.

23 THE COURT: Who is the State's next witness?

24 MS. KINZELER: Charles Heath.

25 THE COURT: Is the defense ready to proceed?

1 MR. MASON: Yes, Your Honor.

2 THE COURT: Please bring in the jury.

3 (The jury returned to the courtroom).

4 THE COURT: You all may be seated.

5 Ladies and gentlemen, we appreciate your
6 patience. I hope you enjoyed your break. We will
7 now resume with the State's case.

8 The State will call its next witness.

9 MS. KINZELER: The State calls Charles Heath.

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1 CHARLES ROBERT HEATH, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name, spell your
4 last name.

5 THE WITNESS: Charles Robert Heath, last name
6 H-e-a-t-h.

7 THE COURT: Sir, speak a little closer to the
8 microphone, you're a little soft spoken. Repeat
9 your name for me.

10 THE WITNESS: Charles Robert Heath.

11 THE COURT: If you could, spell your last
12 name for the court reporter.

13 THE WITNESS: H-e-a-t-h.

14 THE COURT: Thank you. You may proceed.

15 DIRECT EXAMINATION BY MS. KINZELER:

16 Q Mr. Heath, where are you currently employed?

17 A Medical University.

18 Q In what capacity do you work there?

19 A I'm a nurse in the emergency room.

20 Q Tell the jury a little bit about your
21 responsibilities as an RN nurse.

22 A Caring for the sick and injured basically,
23 treating wounds, providing fluids, providing
24 whatever care is necessary.

25 Q Do you have any kind of training or

- 1 educational background in this field?
- 2 A I do.
- 3 Q Start with education.
- 4 A I've got an Associate's Degree in nursing.
- 5 Q Did you get any additional education or
- 6 training after that?
- 7 A We have continuous training for certification
- 8 and so forth.
- 9 Q Are you a Registered Nurse?
- 10 A Yes.
- 11 Q And when did you become a Registered Nurse?
- 12 A Thirteen years ago.
- 13 Q Where did you did get that through?
- 14 A That was in California.
- 15 Q Were you working as an ER nurse back in
- 16 December of 2008?
- 17 A Yes.
- 18 Q I don't know if you stated it yet. What
- 19 hospital do you work for now?
- 20 A Medical University.
- 21 Q MUSC?
- 22 A Correct.
- 23 Q On December 8th, 2008, did you have an
- 24 opportunity to treat the defendant Walter Barclay?
- 25 A Yes, I did.

1 Q Do you recall what capacity you were working
2 in when you treated him?

3 A I was the nurse, primary first for his care.

4 Q Do you have any experience -- let me back up.
5 Can you tell the jury a little bit about what you
6 recall about the defendant's demeanor when you were
7 with him that night?

8 A That's a hard one to answer. He was --

9 Q Just what you remember?

10 A My overall impression, he just didn't seem
11 too awfully concerned.

12 Q When he came into your care did you receive
13 any information about what it was that led him to
14 the ER?

15 A Yes. We got a report at MUSC.

16 Q Tell the jury what kind of information you
17 had at the time you started treating the defendant?

18 A As I recall, he was in a head-on collision
19 with fatalities.

20 Q While you were treating the defendant did any
21 officer direct you to draw blood?

22 A Yes.

23 Q Do you recall who that was?

24 A I don't recall his name.

25 Q Do you recall preparing the paperwork in

1 conjunction with this blood draw?

2 A Absolutely.

3 MS. KINZLER: May I approach, Your Honor?

4 THE COURT: You may.

5 BY MS. KINZLER:

6 Q Do you recognize that?

7 A Yes, I do.

8 Q Does that document refresh your recollection

9 at all as to who might have been there with you, or

10 did you fill out any additional paperwork that

11 might refresh your recollection?

12 A Just my chart. I remember what the doctor

13 looks like, I don't recall his name.

14 Q What did he look like?

15 A Fairy stocky, short hair, dark hair, as I

16 recall. There were actually two officers there,

17 one was a black gentlemen and the other one white,

18 as I recall.

19 Q When you drew the defendant's blood, based on

20 your experience, are there certain things that have

21 to occur before you do that?

22 A Yes.

23 Q What are those things? Tell the jury.

24 A In general the patient has to have his rights

25 read to him before I'll touch him and then I

1 reiterate to him I'm drawing it for evidence and
2 make sure that he consents to it.

3 Q And in felony DUI's, do you have experience
4 handling those?

5 A Yes.

6 Q And when you draw this blood -- let me back
7 up. Do you recall Deputy Martin complying with
8 those procedures you just described?

9 A Yes.

10 Q Were you present in the room when he was
11 doing this?

12 A I was at the bedside, yes.

13 Q Tell the jury a little bit about how you
14 collect a blood sample, what kind of swab you use
15 and the process you use to take it and package it?

16 A I use everything that is in the evidence
17 collection kit that the officers bring with them.
18 The site is always prepped with iodine versus
19 alcohol.

20 Q Why is that?

21 A Supposedly to prevent the alcohol swab from
22 being misconstrued as an alcohol level. But I prep
23 the site, let the iodine dry and I draw the sample
24 from one of the veins. I draw two vials. Those
25 vials are, there are seals that go with them, I

1 will sign the seals, seal the two vials and turn
2 them over to the officer at bedside.

3 Q When you say seals, there is a cap on them,
4 too?

5 A It's a red tape essentially that goes over
6 it.

7 Q Over --

8 A Over the top.

9 Q And do you recall roughly what time you drew
10 this blood?

11 A No, I don't.

12 Q Did you document that somewhere that you
13 might be able to refresh your recollection?

14 A It is documented in the chart.

15 Q Would it be documented on the seal where you
16 sealed it?

17 A I don't remember.

18 MS. KINZELER: May I approach, Your Honor?

19 THE COURT: Yes.

20 Q Do you recognize that document?

21 A I do.

22 Q Is there any of your writing on this?

23 A Yes it is.

24 Q What does that document indicate that
25 refreshes your recollection?

- 1 A One is a seal that I signed, placed on the
2 specimen container.
- 3 Q What did you write on that seal?
- 4 A It was drawn at 2150.
- 5 Q What time is that?
- 6 A 9:50 p.m.
- 7 Q Did you put any identifying information on
8 the seal as to whose blood it was you were putting
9 in that vial?
- 10 A It's hard to read but I can make out Walter
11 Douglas Barclay, yes.
- 12 Q Does that document refresh your recollection
13 at all as to who you gave the blood to after it was
14 drawn?
- 15 A I gave it to the officer at bedside. As far
16 as his name, I couldn't --
- 17 Q Describe him for me, for them. You said
18 there were two there?
- 19 A Yes. I wouldn't remember which one I gave it
20 to.
- 21 Q Okay.
- 22 A It should be in my notes, the chart.
- 23 Q If I gave you your chart would that refresh
24 your recollection?
- 25 A I should be able to provide you with his name

1 if I saw the chart, yes. As a general rule I will
2 write it in there.

3 MS. KINZELER: May I approach, Your Honor?

4 THE COURT: Yes.

5 Q Do you recognize that document?

6 A Yes, I do.

7 Q Is that part of the chart you were referring
8 to?

9 A Yes, it is.

10 Q Do those notes I provided you, does that
11 refresh your recollection at all as to who was with
12 you when you were doing the blood draw?

13 A Yes, it does. I turned the sample over to
14 Officer Martin.

15 Q Does that, the notes you made, does that form
16 indicate what time Officer Martin was at the
17 defendant's bedside?

18 A It does.

19 Q What time was that?

20 A 2100, or 9:00 o'clock.

21 Q And after you took the blood sample from the
22 defendant, tell us how you package it after you
23 label it, what did you do with it?

24 A After I labeled the samples the officer
25 placed it inside the cardboard box that it comes

1 with and I will sign that as well and there is a
2 seal that closes that, or seals that shut as well,
3 another tape seal.

4 Q Did you, do you recall any other observations
5 about the defendant, his demeanor, physical
6 appearance at the time you observed him?

7 MR. MASON: Objection, asked and answered.

8 THE COURT: Overruled. You may answer the
9 question.

10 A He struck me as being intoxicated.

11 Q Tell the jury what it was that led you to
12 that impression?

13 A Really, he just gave me the overall
14 impression and he did tell me he had had a couple
15 beers.

16 Q Did he say anything about where he had been
17 earlier that day?

18 A I recall him telling me he had a couple beers
19 while he was attending his mules.

20 Q Is that the extent of what you remember?

21 A That is the only actual statement he made.

22 MS. KINZELER: If you will, answer any
23 questions for Mr. Mason.

24 THE COURT: You may examine.

25 MR. MASON: Thank you.

1 THE COURT: You're welcome.

2 CROSS EXAMINATION BY MR. MASON:

3 Q Now, did you take good records of the

4 treatment you rendered to Mr. Barclay?

5 A I believe so.

6 Q Okay. And are you familiar with the saying

7 in the medical profession if you didn't document it

8 you didn't do it? Have you ever heard that said

9 before?

10 A I have.

11 Q Do you make an effort to document that which

12 occurred?

13 A I do.

14 Q Okay. And with regard to Mr. Barclay, he

15 arrived in an ambulance, on a spine board, is that

16 correct?

17 A Yes, I believe so.

18 Q So, you could determine from your records

19 what time he was placed on that spine board and how

20 long he remained strapped to it. Isn't that a fair

21 statement?

22 A Not when he was placed on it. That was out

23 in the field but it should be on there when he was

24 taken off it.

25 Q Okay. But when he arrived he was on a spine

1 board, is that correct?

2 A The best of my knowledge.

3 Q And you assessed him and he was alert,

4 oriented to time and place times three. Is that

5 correct?

6 A That's correct.

7 Q Throughout the entire treatment period he was

8 at MUSC he was cooperative and alert. Is that

9 correct?

10 A That's correct.

11 Q And his eyes were open spontaneously?

12 MS. KINZELER: Objection.

13 THE COURT: Basis?

14 MS. KINZELER: Compound question, relevance.

15 THE COURT: I'll give you a little latitude.

16 BY MR. MASON:

17 Q Mr. Barclay obeyed all commands, is that

18 correct?

19 A Correct.

20 Q He was not in any way confused, is that

21 correct?

22 A I don't recall him being confused.

23 Q He didn't have any trouble with his words, is

24 that correct?

25 A He could speak.

- 1 Q He could speak coherent, is that correct?
- 2 A Yes.
- 3 Q And he could respond, is that correct?
- 4 A Correct.
- 5 Q And he could also relate to you questions
- 6 regarding level of pain. Is that a fair statement?
- 7 A Yes.
- 8 Q Now, your choices with regard to a patient
- 9 that comes into your care, he is either
- 10 cooperative, uncooperative, chemically paralyzed,
- 11 combative and some you even have to apply restraint
- 12 to. Is that a fair statement?
- 13 A Correct.
- 14 Q And he was cooperative?
- 15 A Right.
- 16 Q Which is the highest level of behavior you
- 17 could have in a patient, is that correct?
- 18 A Correct.
- 19 Q Now, you also were involved in managing his
- 20 vital signs. Is that correct?
- 21 A Yes.
- 22 Q And you recorded his blood pressure. Is that
- 23 correct?
- 24 A Correct.
- 25 Q His pulse. Correct?

- 1 A Yes.
- 2 Q His respirations, his oxygen level?
- 3 A Correct.
- 4 Q And you specifically indicated the size of
- 5 his pupils and you indicated those as right and
- 6 left were both size three. Is that correct?
- 7 A Without looking at the chart I couldn't say
- 8 but if that is what it says that is what they were.
- 9 MR. MASON: May I approach, Your Honor?
- 10 THE COURT: Yes.
- 11 A That's correct.
- 12 Q Now, with regard to Mr. Barclay's pain scale,
- 13 do you recall it being, do you recall what it was?
- 14 A Not offhand.
- 15 MR. MASON: May I approach, Your Honor?
- 16 THE COURT: You may.
- 17 Q Was his pain scale a four?
- 18 A That's correct.
- 19 Q And four on the pain scale means that he hurt
- 20 a whole lot. Right?
- 21 A It's a scale of zero to ten.
- 22 Q Okay. Well, will you tell me from the
- 23 document what is four, or can you describe it,
- 24 howeve you think it should be described?
- 25 A Moderate pain.

1 Q Okay. Now, are you aware that Mr. Barclay
2 had about a three inch laceration in the right rear
3 part of his head, right side?

4 A I remember a laceration, I don't remember
5 which side it was on.

6 Q Do you remember there being approximately 60
7 staples that were --

8 MS. KINZELER: Objection.

9 THE COURT: Basis?

10 MS. KINZELER: Not in evidence.

11 THE COURT: Approach.

12 (Unrecorded bench conference).

13 THE COURT: Sustained.

14 BY MR. MASON:

15 Q Now, Mr. Heath, do your records note that Mr.
16 Barclay, or what you believe from the history is
17 Mr. Barclay was a restrained driver in a collision
18 and that he did not lose consciousness?

19 A I don't recall specifically if he was
20 restrained or if he lost consciousness.

21 MR. MASON: Your Honor, may I approach?

22 THE COURT: You may.

23 Q Is this your handwriting on this document?

24 A Yes, it is. That would be correct.

25 Q He was a restrained driver and he did not

- 1 lose consciousness, at least insofar as you
2 recorded, is that correct?
- 3 A Correct.
- 4 Q And was he visually, visibly upset being
5 strapped to the board but he remained cooperative?
- 6 A He was cooperative.
- 7 Q Now, with regard to his treatment, did you
8 indicate the exact time that the laceration repair
9 started?
- 10 A I may have.
- 11 Q Would it help for me --
- 12 A I have it.
- 13 Q Do you have yours with you? Okay, thank you.
14 What time did you start the laceration, or was the
15 laceration repair of Mr. Barclay's head started?
- 16 A The physician started that repair at 2032.
- 17 Q Okay. And was he still on the spine board or
18 was he taken off just before that?
- 19 A I don't recall.
- 20 Q Do you see your note there?
- 21 A He was taken off the board at 8:15.
- 22 Q Okay. Taken off the board at 8:15, the
23 laceration repair started at 2032, is that correct?
- 24 A Correct.
- 25 Q And it took a half an hour to stitch up his

1 head, is that correct?

2 A Correct.

3 Q During that time he also remained

4 cooperative. Is that correct?

5 A Correct.

6 Q And then it was after the stitching of the

7 head was complete that Officer Martin came to

8 bedside, is that correct?

9 A He was already at the bedside, it was after

10 that the draw was done, or he, or excuse me, I

11 stand corrected, he did arrive at the bedside at

12 9:00 o'clock.

13 Q Okay. After the laceration was repaired,

14 that is when Officer Martin arrived at bedside. Is

15 that correct?

16 A That's correct.

17 Q Officer Martin arrived at bedside around 9:00

18 o'clock. Is that correct?

19 A Correct.

20 Q Now, you testified -- what happened at 9:45?

21 A It looks like I started a magnesium drip, if

22 I can read that correct.

23 Q You started an i.v. bag in one of Mr.

24 Barclay's arms, is that correct?

25 A Correct.

1 Q And are you also, you also have knowledge of
2 Mr. Barclay receiving other i.v.'s while enroute to
3 the hospital in the ambulance?

4 A Any trauma patient will get at least two
5 i.v.'s, one in each arm. I don't remember
6 specifically what he had.

7 Q So, without knowing what was in those i.v.'s,
8 you started what would be a third, would that be
9 the third bag of fluid that Mr. Barclay would have
10 received?

11 A Typically but I don't recall specifically in
12 this case.

13 Q Okay. And then five minutes after you
14 started the third bag of fluids that is when the
15 blood was drawn. Is that correct?

16 A Correct.

17 Q And have you recorded everything that you did
18 with regard to the blood, in your narrative, with
19 regard to the drawing of the blood, in your
20 narrative report?

21 A With the exception of documenting, actually
22 signing the paperwork and so forth, I believe
23 everything is there.

24 Q And did you also describe the entire process
25 when you testified in response to the Solicitor's

- 1 questions?
- 2 A I believe so.
- 3 Q And when you got the kit did you look at it
- 4 to see whether the vials in which you placed the
- 5 blood had any preservatives in them?
- 6 A They did, a white powder.
- 7 Q And after you did all those things, at 10:15
- 8 did you discharge the patient to home in the care
- 9 of Charleston County deputies?
- 10 A I did.
- 11 Q Okay. And did Mr. Barclay walk out of the
- 12 emergency room, just walk out of the ER department
- 13 on his own two feet?
- 14 A As I recall, the deputies assisted him in
- 15 walking out.
- 16 Q That's not noted on your report, is that
- 17 correct?
- 18 A No, it's not.
- 19 Q And with regard to his -- you have
- 20 wheelchairs to get people in and out of the
- 21 hospital. Do you use those if you believe somebody
- 22 is a fall risk, as a safety precaution, isn't that
- 23 correct?
- 24 A That's correct.
- 25 Q No wheelchair was used to get Mr. Barclay at

1 least off the hospital premises where Medical
2 University would be responsible for him, is that
3 correct?

4 A Correct.

5 Q If you had felt that was necessary you would
6 have done so, is that correct?

7 A That's correct.

8 Q And when he left the emergency room you have
9 choices. One is ambulatory, the other is
10 wheelchair, stretcher, carry, or by ambulance
11 transport company, is that correct?

12 A Correct.

13 Q And your record states that Mr. Barclay was
14 ambulatory. Is that correct?

15 A Correct.

16 Q Now, nowhere in your records do you use the
17 word intoxicated. Is that correct?

18 A Correct.

19 Q Nowhere in these records do you use the word
20 impaired. Is that correct?

21 A Correct.

22 Q Nowhere in the record do you record that Mr.
23 Barclay was behaving in any way unusual. Isn't
24 that correct?

25 A Correct.

1 Q Nowhere in this record do you record that he
2 did not seem awfully concerned. Isn't that
3 correct?

4 A Correct.

5 Q And you don't know at what point the police
6 even told him, you know, that another human being
7 had died in this wreck. Isn't that a fair
8 statement?

9 A It was shortly after their arrival but I
10 can't tell you exactly when.

11 Q Okay. Now, you have referred to two officers
12 and you have described both their appearances for
13 the jury. Isn't that correct?

14 A Correct, the best of my knowledge.

15 Q And this was two years and ten months ago and
16 really what you remember, or your best recollection
17 is what you wrote down, isn't that correct?

18 A For the most part.

19 Q All right. And wasn't it in fact there was
20 one officer that was there and that two others
21 arrived, isn't that really what happened?

22 A I know there was more than one officer there.
23 I don't remember exactly when they came and left.

24 Q Now, you testified to giving what you have
25 described as the sealed shut blood kit to Deputy

1 Martin. Is that correct.

2 MS. KINZELER: Objection.

3 THE COURT: Basis?

4 MS. KINZELER: Not in evidence, misstates the
5 testimony.

6 THE COURT: Sustained.

7 BY MR. MASON:

8 Q Did you use the word sealed shut in your
9 testimony?

10 A I documented that I turned the two tubes over
11 to, over to the deputy.

12 Q The only things you gave Deputy Martin were
13 two tubes of blood, is that correct?

14 A As I recall, I placed them back into the box
15 and gave them to him.

16 Q Did you seal the box?

17 A I was present when the box was sealed.

18 Q Who sealed the box?

19 A I can't recall if it was myself or if it was
20 the deputy but it was sealed in both our presence.

21 Q Okay. Which deputy?

22 MS. KINZELER: Objection.

23 THE COURT: Basis?

24 MS. KINZELER: Not in evidence, mistates the
25 testimony.

1 THE COURT: Re-ask the question.

2 BY MR. MASON:

3 Q You testified the deputy sealed the box in

4 your presence and the deputy is which?

5 A According to my chart, that would be Officer

6 Martin.

7 Q Part of what you were there to witness was

8 the sealing of the tubes in the box. Isn't that

9 correct?

10 A Correct.

11 Q And your testimony is that that was done by

12 Deputy Martin. Right?

13 A Yes, sir.

14 Q I apologize for this question. Was Mr.

15 Barclay allowed to use the bathroom while he was in

16 the ER?

17 A I don't recall. Until his C-spine is clear

18 and we're sure he's not going to paralyze himself

19 by being out of it we don't allow them to get up

20 but we do provide a urinal for him.

21 Q It's fair to say you don't know one way or

22 the other whether he used the bathroom one time,

23 two times, three times during his hospital stay?

24 A I don't.

25 Q But certainly it wouldn't have, he wouldn't

1 have been able to utilize the bathroom until he was
2 cleared for removal from the C-spine?

3 A He wouldn't be able to get up and walk to the
4 restroom.

5 Q All right. And we know that the C-spine
6 wasn't removed until 8:15. Is that correct?

7 A I believe so.

8 Q Now, with regard to Mr. Barclay, his vital
9 signs were normal. Is that correct?

10 A I don't recall what they were.

11 MR. MASON: May I approach, Your Honor?

12 THE COURT: You may.

13 Q Were his vital signs normal?

14 A According to that they're normal.

15 Q And did he appear well?

16 A Considering he was strapped to a backboard.

17 Q I guess he is as well as he can be for
18 somebody who is receiving that level of trauma
19 care?

20 A I'm not familiar with that form. I wouldn't
21 describe somebody as being well after an accident
22 like that.

23 Q But some record in his chart indicates he was
24 well, it could just be somebody checked the wrong
25 box?

1 MS. KINZELER: Objection.

2 THE COURT: Basis?

3 MS. KINZELER: Personal knowledge.

4 THE COURT: You have to establish he created
5 that form.

6 MR. MASON: I understand.

7 BY MR. MASON:

8 Q Let me ask you, was he psychiatrically
9 normal?

10 MS. KINZELER: Objection.

11 THE COURT: Basis?

12 MS. KINZELER: Lack of knowledge.

13 THE COURT: You have to establish that is
14 part of his record and he created that form in
15 order to testify about it.

16 BY MR. MASON:

17 Q So, you were the primary RN for Mr. Barclay,
18 correct?

19 A Correct.

20 Q Was he psychiatrically normal?

21 A I couldn't make that determination.

22 Q He did not have what are referred to as
23 raccoon eyes, isn't that correct?

24 A Correct.

25 Q What are raccoon eyes?

1 A Bruising, bloody, blue around the eyes would
2 indicate a skull fracture.

3 Q And you didn't note anywhere in any of his
4 records that his eyes were extremely bloodshot,
5 were extremely dilated. Isn't that correct?

6 A No.

7 Q Explain what the Glasgow coma scale is.

8 A We use it basically to determine whether or
9 not we have to intubate a patient, whether or not
10 they are responsive enough. I don't know how to
11 word it.

12 Q Well, is it a nuerological scale that --

13 MS. KINZELER: Objection.

14 THE COURT: Basis?

15 MS. KINZELER: Form of the question.

16 THE COURT: Rephrase it.

17 BY MR. MASON:

18 Q I asked you about the Glasgow coma scale. Is
19 it a neurological scale --

20 MS. KINZELER: Objection.

21 Q -- that gives --

22 THE COURT: You need to ask a direct question
23 regarding that. You need to establish a foundation
24 that it is within the knowledge of something he
25 employed to treat the patient.

1 Q Did you employ Glasgow coma scale in order to
2 determine how to treat this patient?
3 A I documented the response for the physician.
4 Q It was two people were involved in the
5 process, yourself and the physician?
6 A Correct.
7 Q He told you what to put down?
8 MS. KINZELER: Objection.
9 THE COURT: Basis?
10 MS. KINZELER: Hearsay.
11 THE COURT: Sustained.
12 BY MR. MASON:
13 Q You documented -- what does that mean, sir?
14 A I documented the reported scale.
15 Q And is 15 --
16 MS. KINZELER: Objection.
17 THE COURT: Basis?
18 MS. KINZELER: Hearsay.
19 THE COURT: Approach. Bring the notes.
20 (Unrecorded bench conference).
21 THE COURT: Proceed.
22 BY MR. MASON:
23 Q Did you utilize Glasgow coma scale in the
24 treatment of Mr. Barclay?
25 A Yes.

1 Q Okay. And do you understand how that scale
2 works?

3 A Yes, sir.

4 Q And did you understand how to add up the
5 numbers and then use the totals, the sum total of
6 those numbers in making various decision about the
7 patient's treatment?

8 A Yes.

9 Q Okay. Do you understand the scoring? In
10 other words, how you add up the numbers?

11 A Yes.

12 Q And you understand what they mean?

13 A Yes.

14 Q Okay. And is 15 the highest score, is the
15 best score you can get on a Glasgow coma scale?

16 A Yes.

17 Q And did Mr. Barclay have a 15 on the Glasgow
18 coma scale?

19 A I believe so.

20 Q Now, do you recall a Dr. Rebecca Borders
21 coming to, the wife of Mr. Barclay, coming to the
22 emergency room on December 8th, 2008?

23 A I don't recall. I don't recall if she came
24 to bedside or not.

25 Q Do you know whether or not she came to

1 bedside, do you recall seeing Dr. Borders, the
2 doctor from Edisto Island?

3 MS. KINZELER: Objection.

4 THE COURT: Basis?

5 MS. KINZELER: Not in evidence.

6 THE COURT: Sustained.

7 BY MR. MASON:

8 Q Do you recall seeing Dr. Borders on December
9 8th, 2008?

10 A I don't recall seeing her.

11 Q Did you allow Rebecca Borders --

12 MS. KINZELER: Objection.

13 THE COURT: Basis?

14 MS. KINZELER: Foundation, personal
15 knowledge.

16 THE COURT: Sustained. He said he did not
17 recall.

18 BY MR. MASON:

19 Q With regard to additional information, did
20 you allow a female to utilize a telephone?

21 MS. KINZELER: Objection.

22 THE COURT: Basis?

23 MS. KINZELER: Objection.

24 THE COURT: State the basis of your
25 objection.

1 MS. KINZELER: Relevance, personal knowledge.

2 THE COURT: When he finishes the question,
3 sir, you may answer to the best of your knowledge.

4 Continue.

5 BY MR. MASON:

6 Q Did you allow a female to use a telephone in
7 the ER in relation to Mr. Barclay?

8 A I don't recall.

9 Q Did you tell any female person that was there
10 to see Mr. Barclay --

11 MS. KINZELER: Objection.

12 THE COURT: Basis?

13 MS. KINZELER: Personal knowledge.

14 THE COURT: Been asked and answered, he
15 indicated he does not recall.

16 Move on.

17 BY MR. MASON:

18 Q Did you state to anyone that you were sorry
19 to meet them under these circumstances in relation
20 to Mr. Barclay's, in relation to Mr. Barclay's
21 health?

22 A I don't recall, sir.

23 Q Did Mr. Barclay at any point in this process
24 appear to you to be tired or exhausted or anything
25 of that nature?

- 1 A Not as I recall.
- 2 Q Did Mr. Barclay appear to fall asleep or pass
3 out at any point in time that you were providing
4 medical care for Mr. Barclay?
- 5 A I don't recall.
- 6 Q If a patient passes out, that just had a head
7 injury, wouldn't that be something you would need
8 to assess?
- 9 A Yes, it would be.
- 10 Q And is it a fair statement, Mr. Heath, that
11 every five minutes while Mr. Barclay was in your
12 care you recorded his condition?
- 13 A I recorded his vital signs every five
14 minutes, yes.
- 15 Q So, if he had been passed out or fell asleep
16 that would have been something you would have
17 noted. Isn't that correct, sir?
- 18 A Not necessarily.
- 19 Q What would be a circumstance in which you
20 would want to note the state of his alertness?
- 21 A If he passed out and fell asleep with a
22 corresponding drop in his vital signs or change in
23 his vital signs it would alert me but simply
24 falling asleep would not.
- 25 Q Now, you cannot be alert and oriented times

1 three if you're asleep. Is that a fair statement?

2 A That's a fair statement.

3 Q Was he even on any, you know, vital sign

4 monitors that monitored his heart rate or his blood

5 pressure or anything like that continuously?

6 A Continuously.

7 Q So, if he had -- how did you affix the

8 different testing strips or what have you?

9 A There are adhesive tabs. For the cardiac

10 monitor there is five adhesive tabs that wires

11 connect to.

12 Q Okay, and where on the person's body are they

13 located?

14 A The shoulders, center and lower ribs.

15 Q Okay. And did you affix those to Mr.

16 Barclay's body?

17 A No. That would have been done by our tech.

18 Q Okay. Did you see them present on his body

19 when you attended to him at bedside?

20 A Yes.

21 Q And did they remain affixed without being

22 pulled off by movement or something like that?

23 A I don't recall specifically but it is not

24 uncommon for them to be pulled off, repeatedly

25 replaced.

1 Q In other words, as a result of the patient's
2 movement? You don't recall any particular problem
3 with the monitors that were monitoring him?

4 A I don't recall any.

5 Q And do you recall his clothes being cut off
6 him?

7 A Specifically no, but that is standard.

8 Q And so how is it that he gets dressed in the
9 hospital scrubs after the clothes are cut off him,
10 what is the normal practice if you don't recall
11 what happened?

12 A We'll generally help the patient if they need
13 it and provide scrubs and like I say, assistance
14 getting dressed if they require assistance.

15 Q Your notes that you brought with you to the
16 witness stand, your narrative, you don't even note
17 in here you smelled alcohol. Isn't that correct?

18 A No, sir.

19 Q Now, once -- let me ask you, Mr. Barclay had
20 been in the ER, the history you got was that he was
21 in a significant motor vehicle accident, correct?

22 A Correct.

23 Q You're aware that he had the stitches, is
24 that correct?

25 A Correct, staples.

1 Q Staples, and if it is three inches, you have
2 done this before, do you know how many stitches
3 were in Mr. Barclay's head?

4 MS. KINZELER: Objection, asked and answered.

5 THE COURT: Overruled.

6 A The physician didn't tell me how many he put
7 in.

8 Q Okay. But you are aware of this head injury,
9 if you will, is that correct?

10 A Correct.

11 Q He had his clothes cut off, he was in scrubs,
12 is that correct, at some point in time before he
13 was discharged?

14 A As I recall, yes.

15 Q Is it a fair statement that in that condition
16 he looked pretty rough?

17 A That would be a fair statement.

18 Q During this process did Mr. Barclay have to
19 give to you any detailed information in order to
20 check him in, in other words, address, phone
21 number, driver's license number, social security
22 number, date of birth, all that kind of stuff?

23 A No, he didn't.

24 Q Would he give it to someone else, that is not
25 part of your job?

1 A It would have been registration that
2 collected that information. If it's readily
3 available I will write it on the chart. Our
4 charting system doesn't require it for a trauma
5 patient.

6 Q Okay. But did you review his record before
7 coming in here today?

8 A Not in quite some time.

9 Q You don't know of any inability that Mr.
10 Barclay had to provide any of these various numeric
11 information or what have you, isn't that a fair
12 statement?

13 A He should have been able to answer it.

14 Q And you believe that he was, isn't that a
15 fair statement?

16 A Correct.

17 Q Now, in connection with your testimony, have
18 you talked with the office of the Solicitor anytime
19 before you have gotten on this witness stand?

20 A We spoke briefly.

21 Q Okay. Well, did you go meet with her in her
22 office?

23 A No.

24 Q Did she go meet with you anywhere outside her
25 office?

1 A She met with me at the hospital.

2 Q Okay. She came to the hospital and met with
3 you. Could you tell the jurors when that was?

4 A Two or three weeks ago.

5 Q Okay. And is two or three weeks ago the
6 first time you told anybody that Mr. Barclay did
7 not seem to be awfully concerned?

8 A No. I remember specifically but it would --
9 I don't remember specifically but it would have
10 been -- I can't remember specifically but I doubt
11 it.

12 Q That is one of the things that you related to
13 the Solicitor's office when you met at the
14 hospital. Isn't that correct?

15 A Correct.

16 Q Okay. And is the meeting at the hospital
17 with the Solicitor the first time you have told
18 anybody that Mr. Barclay appeared in some way
19 intoxicated?

20 A I don't recall discussing the case with
21 anybody between the time of that night and that
22 time period.

23 Q So the answer to my question is the first
24 time you told anybody that Mr. Barclay appeared
25 intoxicated was about three weeks ago when the

1 Solicitor's office came to meet with you at the
2 hospital. Is that correct?

3 A The first time since the incident.

4 Q Okay. Well, the incident was two years and
5 ten months ago. Is that correct?

6 A Correct.

7 Q Did the Solicitor tell you she was trying to
8 convict Mr. Barclay of DUI?

9 MS. KINZELER: Objection.

10 THE COURT: I heard the objection. Basis for
11 the objection?

12 MS. KINZELER: Is that kind of evidence
13 relevant?

14 THE COURT: Approach.

15 (Unrecorded bench conference).

16 THE COURT: Sustained. You may rephrase the
17 question.

18 BY MR. MASON:

19 Q When you met with the Solicitor's office
20 three weeks ago did you know whether Mr. Barclay
21 was charged with anything?

22 A I assumed so.

23 Q And that's because you were meeting with the
24 Solicitor, is that correct?

25 A Correct.

1 Q Now, you made no notes of this event even
2 though you were involved in what you understood to
3 be a legal blood draw, is that correct?

4 A No notes when?

5 Q On or about the date of the incident. I
6 should be specific. You never recorded anything
7 about Mr. Barclay not seeming too awfully concerned
8 or appearing --

9 MS. KINZELER: Objection.

10 THE COURT: Rephrase the question.

11 Q You made no contemporaneous notes in the time
12 frame of December 8th, 2008, in which you recorded
13 either that Mr. Barclay did not appear to be
14 awfully concerned or that he appeared in any way
15 impaired or intoxicated?

16 A I didn't write anything to that effect.

17 Q Now, in addition to your meeting with the
18 Solicitor's office at the hospital, what else took
19 place during that meeting?

20 A Not a lot. They just informed me I was going
21 to be called as a witness and asked me if I
22 remembered the case at all and not much more in the
23 way of detail.

24 Q In fact what you remember about the case,
25 your clearest recollections of the case are what

1 you wrote down to document everything you did on
2 December 8th, 2008. Isn't that correct?

3 A As far as the details. I remember certain
4 parts of it because he stood out in my memory but
5 the actual details of times and so forth, my best
6 recollection is on the chart.

7 Q So, what you stated about Mr. Barclay is
8 really a very vague recollection, isn't that
9 correct?

10 A With a couple exceptions, yes.

11 Q Now, in addition to this meeting -- how many
12 people came from the Solicitor's office to meet?

13 A Just one.

14 Q Okay. And in addition to that meeting, how
15 many phone conversations have you had with
16 representatives of the Solicitor's office?

17 A The only phone conversations that I have had
18 are telling me when I should be here.

19 Q Have you exchanged any faxes or emails?

20 MS. KINZELER: Objection.

21 THE COURT: Basis?

22 MS. KINZELER: Relevance.

23 THE COURT: Overruled.

24 THE WITNESS: No.

25 BY MR. MASON:

1 Q You haven't sent them a fax or a text or
2 email nor have they sent you one, is that your
3 testimony?

4 A Correct.

5 MR. MASON: The Court's indulgence just a
6 second, please.

7 No further questions, Your Honor.

8 THE COURT: Redirect?

9 MS. KINZELER: Briefly, Your Honor.

10 THE COURT: You may proceed.

11 REDIRECT EXAMINATION BY MS. KINZELER:

12 Q You were being asked about this alert times
13 three and some scale. What are those tests used to
14 measure?

15 A The Glasgow coma scale is whether or not you
16 can answer a question, are you moving, are you
17 alert.

18 Q Do any of the tests that we have been talking
19 about, vital signs, do they have anything to do
20 with someone's level of intoxication?

21 A No.

22 Q And we talked about i.v. bags. Do you know
23 what is in an i.v. bag?

24 A The standard for --

25 MR. MASON: Objection, Your Honor.

1 THE COURT: Basis?

2 MR. MASON: Relevance.

3 THE COURT: Overruled.

4 THE WITNESS: The standard for local EMT's

5 and for our hospital is normal saline.

6 BY MR. MASON:

7 Q Why do you give a patient an i.v. bag with

8 saline in it?

9 A Volume control. It's a neutral fluid, it

10 will provide volume for someone bleeding or

11 suspected of bleeding.

12 Q Is there any alcohol of any kind in these

13 i.v. bags?

14 A No.

15 Q Did anyone from our office or anyone at all

16 tell you how to testify today?

17 A No.

18 MS. KINZELER: Thanks. That's all I have.

19 THE COURT: Any objection to the witness

20 being excused, from the State?

21 MS. KINZELER: No, ma'am.

22 THE COURT: From the defense?

23 MR. MASON: I have one more question.

24 THE COURT: You may proceed, limited to

25 redirect.

1 RE CROSS EXAMINATION BY MR. MASON:

2 Q Can you just describe for the jury the
3 concept of, I won't say it right, it is a big word,
4 osmotically neutral, what is that concept?

5 A It just means that it's a neutral fluid. In
6 other words, it won't draw, we have different
7 fluids for different purposes, some of them will
8 draw fluid from your tissue and enter your
9 bloodstream, some will push fluid out of your
10 bloodstream into your tissue, normal saline is
11 neutral.

12 MR. MASON: Okay, thank you.

13 THE COURT: Anything further from the State?

14 MS. KINZELER: No, ma'am.

15 THE COURT: Any objection to the witness
16 being excused, from the State?

17 MS. KINZELER: No, Your Honor.

18 THE COURT: From the defense?

19 MR. MASON: No, Your Honor.

20 THE COURT: Sir, you're excused.

21 (Witness excused).

22 THE COURT: Ladies and gentlemen, you all
23 have been sitting about an hour. Does anyone need
24 a restroom break?

25 We'll take a restroom break. During the

1 break please do not discuss the case, please leave
2 your notes in your seat. Go with the bailiff.

3 (The jury was excused from the courtroom).

4 THE COURT: You may be seated. We'll be at
5 ease about ten minutes. Who is the State's next
6 witness?

7 MS. KINZELER: The pathologist.

8 THE COURT: He's not going to be able to
9 testify until I do the research. Are you telling
10 me you don't have any other witnesses?

11 MS. KINZELER: No, ma'am.

12 THE COURT: So who is your next witness?
13 Other than the pathologist, who else? I assume the
14 rest of the chain witnesses?

15 MS. KINZELER: We have Herman Martin, the
16 deputy, Investigator Roy, a chain witness and Dr.
17 Batalis.

18 THE COURT: Are you planning on calling Wendy
19 Bell?

20 MS. KINZELER: At this point, Your Honor, no,
21 not at this point.

22 THE COURT: Dustin Smith?

23 MS. KINZELER: Not at this point, ma'am.

24 THE COURT: Brandon Williams.

25 MS. KINZELER: Yes. He is a chain witness.

1 Those last three are necessary as part of our case
2 in chief at this point in time, Your Honor.

3 THE COURT: So, you have left Deputy Martin,
4 Investigator Roy who transported to SLED the blood
5 samples, Brandon Williams, and this Dr. Batalis?

6 MS. KINZELER: Yes.

7 THE COURT: Who much do you have for him to
8 testify to after he testifies about the blood
9 alcohol level?

10 MS. KINZELER: I don't think it would be
11 particularly long. Only speaking from what I would
12 ask, how the gentleman died, what caused his death,
13 that is going to be it.

14 THE COURT: Then you're going to ask what the
15 toxicology report was?

16 MR. VOIGT: I would ask him his final
17 diagnosis, those things that caused the death,
18 would the intake of alcohol be part of that
19 analysis, and I anticipate it would, and the fact,
20 and the analysis, is testing available to him,
21 there was no indication that alcohol --

22 MR. VOIGT: He will rule out --

23 THE COURT: I didn't ask for argument. I
24 want to know what you would be able to elicit after
25 that.

1 MR. VOIGT: From my point of view one, maybe
2 two questions concerning that.

3 THE COURT: That is not my question. My
4 question is the scope of the entire, your
5 testimony, absent that issue, what do you have to
6 ask him about?

7 MR. VOIGT: I have to ask him about cause and
8 manner of death.

9 THE COURT: So you're going to have to go
10 through the whole thing, the autopsy, correct,
11 identification, training, experience?

12 MR. VOIGT: Well, yes. I anticipate some
13 sort of stipulation as to that.

14 MR. MASON: Yes, he died in an accident, Your
15 Honor.

16 THE COURT: Pardon me?

17 MR. MASON: He died in the accident.

18 THE COURT: I know that. Are you all going
19 to stipulate to his qualifications as an expert?

20 MR. MASON: I don't think we're going to voir
21 dire him on his qualification, no, Your Honor.

22 THE COURT: The fact it's 4:41, by the time
23 the jury gets their break it will probably be 10 to
24 5:00, I think it is probably prudent we break for
25 the afternoon and resume in the morning.

1 Is there any objection from the State?

2 MS. KINZELER: No, Your Honor.

3 THE COURT: Any objection from the defense?

4 MR. MASON: No, Your Honor.

5 THE COURT: Then when the jury comes back I
6 will send them home for the afternoon and start
7 back in the morning.

8 MR. MASON: Thank you, Your Honor.

9 THE COURT: How many witness does the defense
10 have? I have a list of 14. Do you plan to call
11 all 14?

12 MR. MASON: Some of them have already
13 testified, Your Honor. I'm looking at --

14 THE COURT: None of your witnesses have
15 testified.

16 MR. MASON: Joshua Sims has testified, number
17 seven and eight from my list have testified.

18 THE COURT: Wait a minute.

19 MR. MASON: Nine or ten.

20 THE COURT: Those are both the EMS witnesses,
21 is that correct?

22 MR. MASON: Yes, Your Honor.

23 THE COURT: That still leave, though, twelve,
24 correct?

25 MR. MASON: Yes, Your Honor, and one of the

1 witnesses that the State didn't call.

2 THE COURT: Which is?

3 MR. MASON: Joe Murray, we're going to call
4 him.

5 THE COURT: So that means you have, then, 13
6 witnesses. Correct?

7 MR. MASON: Yes, Your Honor.

8 THE COURT: Okay. You all may take a break.

9 MR. VOIGT: Thank you, Your Honor.

10 THE COURT: Ready?

11 BAILIFF: Yes.

12 THE COURT: Bring them in for me.

13 (The jury returned to the courtroom).

14 BAILIFF: All present, Your Honor.

15 THE COURT: You may be seated.

16 Madam Forelady, ladies and gentlemen, we
17 anticipate that the next witness would take us well
18 beyond 5:00 o'clock so we're going to adjourn for
19 the afternoon. During the break please do not
20 discuss the case among yourselves or with anyone
21 else. Please do not discuss your service on any
22 social networking site, please don't allow
23 yourselves to be exposed to any media coverage or
24 do any independent research on the internet.

25 If you would, leave your note pads in your

1 seat, we will resume at 9:30 and you will return
2 directly to your jury room. I hope you all have a
3 great evening, we'll see you in the morning at 9:30.
4 We appreciate your patience.

5 (The jury was excused from the courtroom).

6 THE COURT: Anything before we adjourn, from
7 the State?

8 MS. KINZELER: No, ma'am.

9 THE COURT: From the defense?

10 MR. MASON: No, Your Honor.

11 THE COURT: See you all in the morning at
12 9:30.

13 MR. MASON: Thank you, Your Honor.

14 THE COURT: You're welcome. Have a good
15 evening.

16 (Recessed at 4:57 p.m.).

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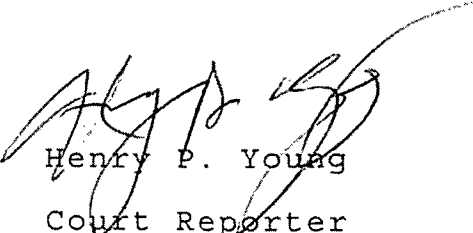
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3
4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Charleston County,
11 South Carolina, on the 26th day of October, 2011.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 December 28, 2012

15
16
17
18 
19 Henry P. Young
20 Court Reporter
21
22
23
24
25

1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF CHARLESTON 2011-GS-10-002817
4
5 STATE OF SOUTH CAROLINA,)
6)
7 -vs-)
8)
9 WALTER DOUGLAS BARCLAY,)
10 Defendant.)
11
12 October 24-31 2011
13 November 1, 2011
14
15 B E F O R E:
16
17 HONORABLE DEADRA L. JEFFERSON
18
19
20
21
22 A P P E A R A N C E S:
23
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VOLUME IV of V
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1 (Reconvened at 9:35 a.m., October 27, 2011).

2 THE COURT: Our last four jurors have
3 arrived, is that correct?

4 BAILIFF: Yes, ma'am.

5 THE COURT: Is the State ready to proceed?

6 MS. KINZELER: Yes, ma'am.

7 THE COURT: Is the defense ready to proceed?

8 MR. MASON: Yes, Your Honor.

9 THE COURT: Who is the next State's witness?

10 MS. KINZELER: It will be the pathologist.

11 If Your Honor still has that issue under advisement
12 we can call Deputy Martin.

13 THE COURT: Why don't we go ahead and call
14 Deputy Martin. Is he here?

15 MS. KINZELER: Yes. I will just grab him
16 real quick.

17 (The jury returned to the courtroom).

18 BAILIFF: All present, Your Honor.

19 THE COURT: Thank you. You may be seated.

20 Ladies and gentlemen, I hope that you all had
21 a very pleasant and restful evening. We'll now
22 resume with trial testimony. I would ask that you
23 give the attorneys your attention.

24 You may proceed.

25 MS. KINZELER: The State calls Deputy Herman

1 Martin.

2 THE COURT: Sir, if you would come to the
3 witness stand and be sworn.

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1 HERMAN MAURICE MARTIN, after being first duly
2 sworn, testified as follows:

3 THE CLERK: State your full name and spell
4 your last name.

5 THE WITNESS: Herman Maurice Martin, last
6 name spelled M-a-r-t-i-n.

7 THE COURT: You may proceed.

8 MS. KINZELER: Thank you, Your Honor.

9 THE COURT: You're welcome.

10 DIRECT EXAMINATION BY MS. KINZELER:

11 Q Deputy Martin, how long have you been with
12 the sheriff's office?

13 A Approximately nineteen years.

14 Q Was that your first law enforcement job?

15 A Yes, ma'am.

16 Q Tell the jury a little bit about your
17 training you went through when you became a police
18 officer.

19 A Back in '92, approximately eight weeks at the
20 academy, South Carolina Criminal Justice Academy,
21 accident reconstruction training. When I got back
22 to the sheriff's office we did another eight weeks
23 of training, in-house training.

24 Q And what area was that training in?

25 A Accident reconstruction.

1 Q What are your present duties with the
2 sheriff's office?

3 A I work with the traffic enforcement unit.

4 Q Okay. And what team were you working on in
5 December of 2008?

6 A Traffic enforcement unit.

7 Q On December 8th, 2008, did you have an
8 opportunity to interact with the defendant?

9 A Yes, ma'am.

10 Q Can you tell the jury a little bit about how
11 you became involved in this case on December 8th,
12 '08?

13 A I was working the area of Johns Island, a
14 call went out of a possible fatality in the area of
15 Edisto Island and I was directed to go to the
16 hospital to meet with Mr. Barclay who was at the
17 hospital.

18 Q Do you recall who gave you that direction or
19 why?

20 A As far as I can recall it was the lieutenant
21 on duty, the traffic lieutenant.

22 Q When you got to the hospital where did you
23 go?

24 A To the MUSC trauma unit.

25 Q Was the defendant there when you got there,

1 in that particular room or area?

2 A No, he wasn't. He was, offhand I can't
3 remember, he was in the CAT scan.

4 Q Where was he, in a room, or describe it?

5 A An open bay area with curtains sectioning off
6 each bed for the ER there.

7 Q Do you recall roughly what time you got
8 there?

9 A Approximately 7:30 p.m.

10 Q Do you recall at all when it may have been
11 the defendant came back from all those tests?

12 A Say possibly about an hour and a half or two
13 hours later.

14 Q When he came back to the room was there
15 anyone else there with you or was it just you and
16 the defendant?

17 A No, it was the nurses, the medical staff.

18 Q As far as sheriff's deputies go, were you the
19 only one there at that time?

20 A Yes, I was.

21 Q What did you do next? Did you interact with
22 the defendant at all?

23 A Yes. I went over, tried to talk to him.

24 Q Tell the jury what you went over with the
25 defendant, what did you do with him while you were

1 there?

2 A Just went over his --

3 Q Did you read him his Miranda rights?

4 A Yes, I did.

5 Q Do you do it verbally or in writing?

6 MR. MASON: Objection, leading.

7 THE COURT: Overruled, you may answer the

8 question.

9 A Verbal.

10 Q Did you do it from memory?

11 A No. I went from a card I have, Miranda

12 rights card that I carry.

13 Q After that did you advise him of any other

14 rights?

15 A Implied consent warning.

16 Q And why did you do that?

17 A Because he was being charged with felony DUI.

18 Q Subsequent to that, tell the jury what

19 happened. After you read him all these rights what

20 happened after that?

21 A Then we went into the -- the nurse did the

22 blood draw.

23 Q Were you there observing the blood draw as it

24 was occurring?

25 A Yes, ma'am, I was.

1 Q Can you tell the jury anything about the
2 defendant's demeanor, any observations you had of
3 his demeanor in the room that night?

4 A As far as I can recall he had the smell of
5 alcoholic beverage on him, bloodshot eyes. That's
6 basically it, that I can recall.

7 Q How far away were you from him while you were
8 making these observations?

9 A From, let's say, here to the edge of this
10 bench here, standing beside him as he was laying
11 down or sitting up.

12 Q After the blood draw was complete did you
13 have an opportunity to come into contact with that
14 evidence?

15 A Yes, ma'am. It was given to me by the nurse
16 when he finished with the blood draw.

17 Q What condition was it in when the nurse gave
18 it to you?

19 A It was in good condition.

20 Q Were the vials sealed?

21 A Yes, they were.

22 Q Were they loose vials or put somewhere, how
23 did they come to you?

24 A In a little box container and they have
25 little indentures in the little box that you slid

1 the little vials in so they can stay in place.

2 Q Was there any identifying information placed

3 on this evidence?

4 A Yes. The defendant's name and information

5 are attached to the box to identify who is who,

6 whose sample it is.

7 Q After that did any other officers arrive?

8 A Later Deputy Burrell and Deputy Brinson came

9 in from the accident scene.

10 Q What happened when they got there?

11 A When they got there I turned everything,

12 everything over, the paperwork, everything over to

13 Deputy Brinson.

14 Q In addition to the paperwork what else did

15 you give Deputy Brinson?

16 A The blood specimen, everything went to him.

17 Q The blood kit?

18 A The blood kit, yes, ma'am.

19 Q Did you stay or were you involved in the case

20 in any other way after that?

21 A No, ma'am, I was not. I left after that.

22 Q Do you recall what the implied consent rights

23 were that you advised him of?

24 A Felony DUI.

25 Q Do you recall verbatim what you actually said

1 to him that night?

2 A From memory, not offhand.

3 Q Would it refresh your recollection if I
4 showed you the form?

5 A Yes.

6 MS. KINZELER: May I approach, Your Honor.

7 THE COURT: Yes.

8 Q Do you recognize that form, Deputy Martin?

9 A Yes, ma'am, I do.

10 Q How do you recognize it?

11 A Because the top portion is my handwriting
12 where I filled it out.

13 Q And whose form does that pertain to?

14 A Walter Douglas Barclay.

15 Q And can you just tell the jury what the
16 implied consent rights were you read to the
17 defendant that night?

18 A Do you want me to read it out?

19 Q Yes, sir.

20 A Okay. The second section here says felony
21 driving under the influence, advisement. You are
22 under arrest for felony driving unde the influence,
23 felony DUI, Secton 56-5-2945, South Carolina Code
24 of Laws, 1976 as amended, or a law enforcement
25 officer has probable cause to believe you have

1 violated this section. The officer has directed
2 that samples be taken for alcohol and/or drug
3 testing. The samples will be taken and tested
4 according to Section 56-5-2950 and SLED policies.
5 Pursuant to section 56-5-2946 you must submit to
6 either one or a combination of chemical tests for
7 the purpose of determining the presence of alcohol,
8 drugs or a combination of alcohol and drugs. The
9 resistance, obstruction or opposition to testing
10 pursuant to Section 56-5-2946 is evidence
11 admissible at trial. If your tests or samples have
12 an alcohol concentration of 15 one-hundredths of
13 one percent or more your privilege to drive in
14 South Carolina must be suspended for at least
15 thirty days. You have the right to have a
16 qualified person of your own choosing conduct
17 additional independent tests at your expense and
18 the officer upon request must provide you
19 affirmative assistance. You have the right to
20 request an administrative hearing within thirty
21 days of the issuance of the notice of suspension.
22 If you do not request an administrative hearing or
23 if your suspension is upheld at the administrative
24 hearing you must enroll in an alcohol or drug
25 safety action program.

1 Q At the bottom of that page do you see a
2 signature anywhere?

3 A Yes, officer's named, print, then it has
4 officer's signature below that.

5 Q Does it have a subject signature?

6 A Yes, ma'am.

7 Q Whose signature appears there?

8 A It says W. D. Barclay.

9 Q What does it say underneath the line he
10 signed?

11 A Subject's signature, received copy.

12 Q So, in a felony DUI, based on those rights
13 you read, does the subject have a right to refuse
14 the test?

15 MR. MASON: Objection, leading.

16 THE COURT: Please restate the question.

17 Q Does the defendant, or does the subject have
18 a right to refuse to give a sample?

19 A No.

20 Q And you filled out the form --

21 MR. MASON: Objection, leading.

22 THE COURT: She didn't finish the question.

23 MS. KINZELER: I can rephrase it.

24 BY MS. KINZELER:

25 Q You testified that you filled out the top

1 portion of this form?

2 A Yes, ma'am.

3 Q Where there is a place for the officer's

4 signature, is that your signature?

5 A It says officer's name, print, I filled that

6 part out.

7 Q And whose name did you put there?

8 A Deputy Brinson.

9 Q Why did you fill out the form if you weren't

10 going to be the one to sign it?

11 A Just to start the paperwork because Deputy

12 Brinson and Burrell were at the accident scene

13 collecting evidence, so I was, I went ahead to

14 start the paperwork form.

15 Q When you read him those implied consent

16 rights did you give him a copy to read along with

17 you?

18 A Yes, ma'am, I did.

19 Q And did he give you any indication as to

20 whether or not he was following along?

21 A He had the form in front of him, as I was

22 reading he was looking at the form, going along

23 with it.

24 MS. KINZELER: That's all I have. If you

25 will, answer any questions Mr. Mason has.

1 THE COURT: Cross-examination of the witness?

2 MR. MASON: Yes, Your Honor.

3 THE COURT: You may proceed.

4 CROSS EXAMINATION BY MR. MASON:

5 Q Good morning, Deputy Martin.

6 A Good morning.

7 Q Now, as I understand it, you would have been

8 in the presence of Mr. Barclay for roughly 45

9 minutes, is that a fair statement?

10 A Longer than that, as I recall.

11 Q I mean where you could actually see him. I

12 think you related that he was in the CAT scan room?

13 A Yes, sir. Yes, sir.

14 Q When I say in the presence, you were at the

15 hospital longer?

16 A Yes.

17 Q But part of the time you were at the hospital

18 you could see Mr. Barclay was about 45 minutes. Is

19 that a fair statement?

20 A As far as I can recall, yes, sir.

21 Q Okay. And during that time he was fully

22 cooperative. Is that correct?

23 A Yes, sir, I didn't have any problems out of

24 him.

25 Q During that time he was not screaming or

1 yelling. Isn't that correct?

2 A No, sir, not I recall.

3 Q You explained to him a series of complicated

4 legal rights and he appeared to you to understand

5 them. Is that correct?

6 A Yes, sir, as I recall.

7 Q He appeared to you to have the ability to

8 read along as you were reading to him. Is that

9 correct?

10 A Yes, sir.

11 Q And as far as his conduct was concerned, it

12 was in every way appropriate. Isn't that correct?

13 A As far as I can recall, yes, sir.

14 Q In other words, you can't point to anything

15 that was in your mind that was inappropriate, isn't

16 that correct?

17 A Inappropriate, what do you mean by

18 inappropriate?

19 Q Well, like disorderly, unruly, rude.

20 A No, sir.

21 Q Now, you have testified that you had a blood

22 test kit with you. Is that correct?

23 A No, sir. It came from the hospital. As far

24 as I recall, it was obtained from the hospital,

25 they had one on the scene.

1 Q So, you did not bring it with you?

2 A Not that I can recall, sir, no, sir.

3 Q Okay. So, you did not give it to Chuck

4 Heath, he gave it to you?

5 A What do you mean?

6 Q Well, the nurse, did the nurse go get it

7 himself?

8 A Yes, as far as I can recall.

9 Q Now, with regard to that kit, there are

10 certain paperwork that is involved. Is that

11 correct?

12 A Yes, sir.

13 Q And part of that paperwork is what is called

14 chain of possession paperwork. Is that correct?

15 A Chain of custody, yes, sir.

16 Q Okay. And did you fill out some of that

17 paperwork?

18 A Yes, sir.

19 Q If I showed you a document do you think you

20 would be able to identify it if it was your

21 handwriting?

22 A Yes, sir.

23 MR. MASON: Your Honor, may I approach?

24 THE COURT: You may.

25 MR. MASON: May I mark this as ID?

1 BY MR. MASON:

2 Q Is this your handwriting on this paperwork?

3 A Yes, sir, it is.

4 MR. MASON: Thank you. Your Honor, may I

5 mark it for identification? May I approach?

6 THE COURT: Yes.

7 MR. MASON: Thank you.

8 THE COURT: Any exception from the State?

9 MS. KINZELER: No, ma'am.

10 BY MR. MASON:

11 Q Deputy Martin, do you see there is a place

12 where you wrote in where you received the blood,

13 the time you received it?

14 A The place that says received from?

15 Q Yes.

16 A Yes, sir.

17 Q And what does it say there?

18 A It says Charles Heath.

19 Q Okay. And then there is a place underneath

20 there that is blank, isn't that correct?

21 A Yes.

22 Q So, the paperwork as to who received the

23 blood from you and at what time is not filled in.

24 Isn't that correct?

25 A Where it says received from?

1 Q Yes.

2 A It is not filled out.

3 Q And Deputy Brinson failed to fill that in?

4 MS. KINZELER: Objection.

5 Q Isn't that correct?

6 THE COURT: Basis?

7 MS. KINZELER: Personal knowledge.

8 THE COURT: Sir, there is an objection. You

9 need to establish the foundation, personal

10 knowledge. Sustained.

11 BY MR. MASON:

12 Q When you turned this box and this paperwork

13 over to Deputy Brinson was one of the documents you

14 turned over what is Defendant's Exhibit 8 for ID,

15 was that part of the paperwork?

16 A I'm sorry, say again.

17 Q Yes. Exhibit 8 that is in your handwriting,

18 was --

19 A Yes, sir.

20 Q -- that part of the paperwork you turned over

21 to Deputy Brinson with the blood kit?

22 A Yes, sir, it was.

23 Q Okay. And is there a place where the person

24 who gets it from you is supposed to fill in the

25 date and time they got it?

1 A Yes, sir.

2 Q And is it blank on that form?

3 A Yes, sir, it is.

4 MR. MASON: Your Honor, we would move to

5 admit Defendant's Exhibit 8 for ID into evidence.

6 THE COURT: Any objection?

7 MS. KINZELER: No, ma'am.

8 THE COURT: Marked and entered without

9 objection.

10 (Chain of custody form marked and received

11 in evidence as Defendant's Exhibit Number 8).

12 MR. MASON: May I publish it to the jury?

13 THE COURT: You may.

14 MR. MASON: Sorry about the glare for a

15 second.

16 BY MR. MASON:

17 Q Now, Deputy Martin, you did a good job in

18 this case in properly filling out the paperwork,

19 isn't that correct, the part you were responsible

20 for?

21 A I did my part.

22 Q Okay. And you understand how important it is

23 to properly do your part when you're handling

24 paperwork relating to blood samples, isn't that

25 correct?

1 A Yes, sir.

2 Q And you understand that part of that
3 responsibility is documenting the precise time and
4 date that a sample is transferred from one person
5 to another. Is that correct?

6 A Yes, sir.

7 Q And also the time and precise date that the
8 sample is transferred into the evidence compound
9 where it can be refrigerated, isn't that correct?

10 A Yes, sir.

11 Q And you understand the importance of
12 refrigeration in handling a blood sample, isn't
13 that correct?

14 A I don't work in forensics, so I wouldn't know
15 about the refrigeration part.

16 Q Well, do you know, without knowing why it has
17 to be refrigerated, do you know that that is
18 something that is done?

19 A Yes, sir, that is part of it as far as I
20 know.

21 Q So you know, for instance, that you would not
22 drive around in your patrol car, for instance, with
23 a blood sample in the trunk or in the passenger
24 side for, let's say, twelve hours or something like
25 that, you wouldn't do that, would you?

1 A No, sir.

2 Q Right. You would make sure that evidence was
3 logged in at the evidence compound at certain dates
4 and times so it could be refrigerated, is that
5 right?

6 A Yes, sir.

7 Q That is the proper manner for handling blood
8 evidence, isn't that correct?

9 A Yes, sir.

10 Q Okay. So it's not just a minor thing that
11 the time isn't filled in, it is real important,
12 isn't it?

13 A I'm sorry?

14 Q It is real important that the time be filled
15 in and the date be filled in on this form, isn't
16 that correct?

17 A Yes, sir.

18 Q Now, you have referenced that you read some
19 implied consent rights to Mr. Barclay. Is that
20 correct?

21 A Yes, sir.

22 Q Okay. And you have the form with you up
23 there, is that right?

24 A Yes, sir.

25 Q Okay. And the person who signed that form on

1 behalf of law enforcement was Deputy Brinson, is
2 that correct?

3 A Yes, sir.

4 Q And isn't it true that Deputy Brinson wasn't
5 even physically present at the hospital when the
6 blood was drawn?

7 A No, he wasn't.

8 Q Okay. And these rights that are to be given
9 to Mr. Barclay, the important part of it is that
10 they are given to him before any blood is taken
11 from him. Is that correct?

12 A Yes, sir.

13 Q Okay. So, the law enforcement officer who
14 signed as a witness --

15 MS. KINZELER: Objection.

16 THE COURT: Basis?

17 MS. KINZELER: Mischaracterization.

18 THE COURT: Sustained.

19 BY MR. MASON:

20 Q The law enforcement, the person who signed on
21 behalf of law enforcement on this advisement of
22 rights was not physically present when Mr.
23 Barclay's blood was drawn. Is that correct?

24 A That's correct.

25 Q And you did not witness Mr. Barclay sign that

1 form, isn't that correct?

2 A No, sir.

3 Q Okay. In other words, that took place

4 apparently some time after you left.. Is that

5 correct?

6 A Yes, sir, that's the best of my knowledge.

7 Q And just so I'm clear, during the time you

8 were at the hospital with Mr. Barclay you had not

9 told him that somebody died in this accident, isn't

10 that correct?

11 A No, I didn't.

12 MR. MASON: May I approach, Your Honor? He

13 has the document, I want to retrieve it.

14 THE COURT: Okay.

15 Q Now, the document that the Solicitor gave

16 you, the implied consent rights form is the one

17 that Deputy Brinson signed where it says officer's

18 signature. Correct?

19 A Yes, sir.

20 Q And you didn't see Mr. Barclay sign it,

21 you're just reading W. D. Barclay where it says,

22 where the signature line is?

23 A I didn't see him sign it, sir, no, sir.

24 Q And were you there at bedside as they were

25 finishing up Mr. Barclay's head?

1 A I can't recall. I know he had a gash on his
2 head but I can't remember what they were doing at
3 that time.

4 Q Okay. Can you describe in any way what your
5 recollection of that head injury was?

6 A Just a cut on his head, laceration, I think
7 it was.

8 Q Okay. Do you remember anything about the
9 length of it or anything like that?

10 A Not offhand, no, sir.

11 Q Did it look pretty bad?

12 A I don't recall.

13 Q Okay, that's fine, thank you. It wasn't a
14 scratch, though, was it?

15 A No, sir.

16 MR. MASON: That's all I have, Your Honor.

17 THE COURT: Any redirect?

18 MS. KINZELER: No, ma'am.

19 THE COURT: Any objection to the witness
20 being excused, from the State?

21 MS. KINZELER: No, ma'am.

22 THE COURT: From the defendant?

23 MR. MASON: No, Your Honor.

24 THE COURT: Sir, you're excused.

25 THE WITNESS: Thank you judge.

1 THE COURT: You're welcome.

2 (Witness excused).

3 THE COURT: You may proceed.

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1 BRENT MICHAEL ROY, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name and spell
4 your last name.

5 THE WITNESS: Brent Michael Roy, last name
6 spelled R-o-y.

7 THE COURT: You may proceed.

8 MR. VOIGT: Thank you, Your Honor.

9 THE COURT: You're welcome.

10 DIRECT EXAMINATION BY MR. VOIGT:

11 Q Mr. Roy, where are you employed?

12 A Charleston County Sheriff's Department.

13 Q How long have you been employed there?

14 A Nine years.

15 Q What is your current assignment?

16 A I'm a forensic investigator.

17 Q Okay. And do you work with Investigator
18 Kjellman?

19 A I do.

20 Q How long have you been a forensics
21 investigator?

22 A About seven years.

23 Q What are some of the roles and
24 responsibilities that you have as an investigator?

25 A I process crime scenes, maintain evidence in

1 the evidence compound and transport evidence to
2 other facilities for testing.

3 Q Okay. In this particular case were you
4 involved in the crime scene at all?

5 A No, sir.

6 Q Did you transport anything in this case?

7 A I did.

8 Q And what did you transport?

9 A A blood kit.

10 Q Where did you get the blood kit from?

11 A The refrigerator in the evidence compound.

12 Q Do you know who put that blood kit in the
13 evidence compound?

14 A I do not.

15 Q Where did you take the blood kit?

16 A To SLED, to evidence intake at SLED.

17 Q And how did you transport it?

18 A In my assigned county vehicle.

19 Q And what did you do when you got to SLED?

20 A I logged it in with Miss Yarborough at
21 evidence intake.

22 Q At anytime from the time you had, that you
23 took it out of the refrigerator, to the time you
24 gave to it Miss Yarborough did anybody other than
25 you have the custody, control or possession of that

1 sample?

2 A They did not.

3 Q When you got to SLED did you relinquish the
4 care, custody and control of that sample to Miss
5 Yarborough at SLED?

6 A I did.

7 Q Did you sign indicating that you had done so?

8 A I did.

9 Q And was that paperwork something provided to
10 you by SLED for that purpose?

11 A It was.

12 Q When it was transported to SLED was it opened
13 or sealed?

14 A It was sealed.

15 Q Could you see inside it?

16 A No. A cardboard box.

17 Q At anytime did you open that box and have any
18 contact with the samples therein?

19 A No.

20 Q At anytime during the time you had possession
21 of this did you expose that sample to extremes of
22 either heat or cold?

23 A No, sir.

24 MR. VOIGT: Thank you. Please answer any
25 questions Mr. Mason has.

1 THE COURT: You may proceed.

2 MR. MASON: Thank you, Your Honor.

3 THE COURT: You're welcome.

4 CROSS EXAMINATION BY MR. MASON:

5 Q Good morning, Investigator Roy.

6 A Good morning, sir.

7 Q Now, are you familiar with the Charleston

8 County Sheriff's office policy and procedure manual

9 for the collection and preservation of evidence?

10 A I am.

11 Q And is it a part of your job responsibilities

12 to follow the procedures set forth in that manual?

13 A It is.

14 Q And with regard to that, is one of the things

15 that happens at the evidence compound is that you

16 have a SCSO evidence management system that is a

17 computerized system for logging in evidence?

18 A It is.

19 Q Okay. And when evidence is received by you

20 to be stored in the compound do you go on that

21 computer system?

22 A We do, yes.

23 Q And do you indicate who you received it from

24 and the precise time you received it?

25 A Not precise time.

1 Q Well, does the computer indicate --

2 A When you enter that item as what you're
3 talking about, typing it in, it automatically time
4 stamps.

5 Q It's automatically time stamped, so with
6 regard to this case --

7 MR. MASON: Your Honor, may I approach?
8 There is something has been marked that is up
9 front.

10 THE COURT: You may.

11 MR. MASON: Thank you.

12 BY MR. MASON:

13 Q Are you familiar with what the print-out
14 looks like that the computer evidence management
15 system prints out?

16 A I am.

17 MR. MASON: Your Honor, may I approach the
18 witness?

19 THE COURT: Yes.

20 BY MR. MASON:

21 Q I show you what has been marked for ID Number
22 7. Does that appear to be a print-out from the
23 Charleston County evidence control software?

24 A It is.

25 Q And does it indicate that the blood kit of

1 Mr. Barclay was entered on 12/9/08, at 10:40 and 13
2 seconds a.m.?

3 A It does.

4 Q Now, you would not drive around with a blood
5 sample in your car for twelve hours unrefrigerated,
6 would you?

7 A No, sir.

8 Q That would violate the policy, isn't that
9 correct?

10 A It would.

11 Q And you know that that would not be the
12 proper way in which to handle evidence. Is that
13 correct?

14 A Correct.

15 MR. MASON: May I approach, Your Honor?

16 THE COURT: You may.

17 BY MR. MASON:

18 Q Can you identify this document as something
19 that is created by your department?

20 A This is the, basically the screen shot of
21 that particular item as we would see it on the
22 computer screen, is what this is, a print-out of
23 the screen, basically.

24 Q Now, with regard to the document that you
25 just identified, does it indicate that the evidence

1 in this case was submitted by Michael E. Burrell?

2 MR. VOIGT: Objection.

3 THE COURT: Basis?

4 MR. VOIGT: Personal knowledge.

5 THE COURT: Sustained. You haven't
6 established an appropriate foundation.

7 BY MR. MASON:

8 Q When you handle evidence and you transport it
9 to SLED, that is part of your job, right?

10 A Yes, sir.

11 Q Okay. So, part of what you do is every time
12 you touch evidence you would go into the computer
13 or at least have somebody do that to make sure that
14 the evidence was transferred from somebody else to
15 you. Is that correct?

16 A Yes, sir.

17 Q Okay. You have testified that you were the
18 one who transported this evidence to SLED. Is that
19 correct?

20 A Yes, sir.

21 Q Okay. And, so, when you were involved in
22 this process did you go into the system to look to
23 see who had put the evidence, who had originally
24 entered the evidence, where it came from, and then
25 that you were being the person that's to take it to

1 SLED?

2 A No.

3 Q Who did that?

4 A What I do, I don't know who would have done
5 that but what I do on a SLED trip is I have a
6 folder with requests what needs to go to SLED. I
7 take that folder, pull those items according to
8 that list, then when I actually make the trip I go
9 in and make the entries. If you look on that
10 sheet, at the bottom it says date, my initials, lab
11 number for SLED, basis, but I don't go in and check
12 to see the previous chain of that item, I just take
13 it from the refrigerator and continue that chain.

14 Q You enter what you did?

15 A Correct.

16 Q But part of this document that -- is it fair
17 to say you work with this screen regularly?

18 A Yes.

19 Q And you know what these entries are, is that
20 a fair statement?

21 A Yes.

22 Q Okay. So you would have no, it wouldn't be a
23 guess for you to look at this and tell what the
24 record of the Charleston County Sheriff's office
25 relative to this evidence shows, you could do that?

1 MR. VOIGT: Objection, speculation.

2 THE COURT: Sustained. Rephrase it.

3 Q Do you believe this is a true, correct and
4 accurate record of your department?

5 MR. VOIGT: Objection, foundation.

6 THE COURT: Sustained.

7 Q Okay. Who is the keeper of these records?

8 MR. VOIGT: Objection.

9 THE COURT: He can answer that.

10 MR. VOIGT: I'm sorry, Your Honor, my
11 objection is that he is standing too close to the
12 witness.

13 MR. MASON: I'm sorry, Your Honor, I
14 apologize, I'm sorry.

15 MR. VOIGT: Thank you, Your Honor.

16 BY MR. MASON:

17 Q Who is the keeper of the records, somebody
18 who can say that this is a genuine document?

19 A That is maintained by the Charleston County
20 Sheriff's office.

21 Q Okay. Well, do you know who it would be at
22 the Charleston County Sheriff's office? If there
23 was some question about whether this was a genuine
24 document, who would be the person at the sheriff's
25 office to say that it is a real document?

1 A Either Sergeant Manuel in conjunction with IT
2 because the database is on a server which is
3 maintained by IT, and also Sergeant McDaniel.

4 Q You have no reason to question the
5 authenticity of this document?

6 MR. VOIGT: Objection, foundation.

7 THE COURT: Sustained.

8 Q Now, do you know of your own personal
9 knowledge whether it was Deputy Burrell who gave
10 the blood kit to Investigator Kjellman?

11 A I have no idea.

12 Q From the records could you look and
13 determine?

14 MR. VOIGT: objection.

15 THE COURT: Basis?

16 MR. VOIGT: Foundation.

17 THE COURT: Sustained.

18 BY MR. MASON:

19 Q Is there a way you could determine who gave
20 the --

21 MR. VOIGT: Objection, speculation.

22 THE COURT: Sustained.

23 Q Now, part of your job is to preserve evidence
24 in the compound and sometimes you bring it to
25 court, right?

1 A Yes, sir.

2 Q Okay. And you have a special procedure for
3 bringing evidence to court. Isn't that correct?

4 A Yes.

5 Q Okay. And you also make sure that evidence
6 is not destroyed before court, isn't that correct

7 MR. VOIGT: Objection.

8 THE COURT: Basis?

9 MR. VOIGT: Relevance.

10 THE COURT: Please restate the question, Mr.
11 Mason, I didn't hear you completely.

12 MR. MASON: Thank you, Your Honor.

13 BY MR. MASON:

14 Q You're familiar with the Charleston County
15 Sheriff's office policy and procedure manual. Is
16 that correct?

17 A Yes, sir.

18 Q Part of your job is following that procedure
19 insofar as it relates to the collection and
20 preservation of evidence. Is that correct?

21 A Correct.

22 Q And you would not destroy evidence that was
23 in the compound, that you knew was involved in a
24 case that had not yet been disposed of, isn't that
25 correct?

1 MR. VOIGT: Objection.

2 THE COURT: Basis?

3 MR. VOIGT: Foundation, outside the personal
4 knowledge of this particular witness.

5 THE COURT: You're going to have to establish
6 that is part of his responsibility, Mr. Mason. Be
7 very careful, you're --

8 MR. MASON: Thank you.

9 BY MR. MASON:

10 Q Does part of your job involve the handling of
11 evidence?

12 A It does.

13 Q Okay. And is part of that handling its
14 ultimate destruction or disposition or returned to
15 its owner, whatever it might be?

16 A That is part of it, yes.

17 Q That is part of what you do?

18 A Correct.

19 Q You also bring evidence to court. Is that
20 correct?

21 A Yes, I do.

22 Q Okay. So, you receive evidence, you bring it
23 to court and you also dispose of it. Is that
24 correct?

25 A Yes, sir.

1 Q Okay. The question being, you would not
2 destroy evidence that you know is part of a
3 criminal case that has not yet been disposed of by
4 trial. Isn't that correct?

5 MR. VOIGT: Objection.

6 THE COURT: Basis?

7 MR. VOIGT: Pitting.

8 THE COURT: Very close. I'm going to sustain
9 the objection. If you want to ask him what he
10 would do in a particular situation. Rephrase the
11 question.

12 BY MR. MASON:

13 Q Would you destroy evidence in a pending case?

14 A No, sir.

15 MR. MASON: That's all I have, Your Honor.

16 THE COURT: Any redirect of the witness?

17 MR. VOIGT: Thank you, Your Honor.

18 REDIRECT EXAMINATION BY MR. VOIGT:

19 Q Do you make the decision whether or not to
20 destroy evidence?

21 A I do not.

22 Q That's not within your ambit, purview or
23 discretion at all?

24 A No, sir.

25 Q Okay.

1 MR. VOIGT: May I approach?

2 THE COURT: You may.

3 Q I believe Mr. Mason showed you this
4 particular document, Court's 7, and that particular
5 document, you appear on that document, don't you?

6 A I do.

7 Q And what does that document indicate that you
8 did?

9 A It indicate that on January 7th, 2009, I took
10 the DUI blood kit that is listed to SLED.

11 Q Okay. Is Investigator Kjellman listed on
12 that particular entry as well for that particular
13 piece of evidence?

14 A She is.

15 Q And can you tell from that document and the
16 information contained on that document -- let me
17 ask that question second, let me ask this question
18 first. Does the cooler or refrigerator that the
19 Sheriff's Department maintains automatically log in
20 or have a process for which there is some sort of
21 automated log-in process for evidence that is put
22 in the refrigerator?

23 A As far as the refrigerator itself, no.

24 Q Kind of a normal refrigerator, isn't it?

25 A Just like the one in your kitchen.

1 Q So if something is placed in the refrigerator
2 there is not any sort of automatic digital record
3 of the door being opened and something being placed
4 inside?

5 A No.

6 Q As a matter of fact, to indicate that
7 something has been placed inside that --

8 MR. MASON: Objection.

9 THE COURT: Basis?

10 MR. MASON: Leading.

11 THE COURT: I haven't heard the whole
12 question. State the question again.

13 MR. VOIGT: Thank you, Your Honor.

14 BY MR. VOIGT:

15 Q To indicate that something has been placed
16 inside the refrigerator must an investigator
17 manually input that into your computer system?

18 A They do.

19 Q Okay. Is the time that is manually put into
20 the computer system necessarily the same time that
21 that item is placed into a refrigerated unit?

22 MR. MASON: Objection, leading, speculation.

23 THE COURT: It is not speculation, it is part
24 of his responsibility and duties. However, you are
25 leading. Rephrase it.

1 MR. VOIGT: Thank you.

2 BY MR. VOIGT:

3 Q Is the time reflected necessarily the time
4 that the item is placed in the refrigerator?

5 A No, sir.

6 Q In your experience maintaining evidence and
7 logging in and out of evidence is it a practice of
8 the Sheriff's Department evidence room to place
9 those items --

10 MR. MASON: Objection, leading.

11 THE COURT: Restate your question.

12 MR. VOIGT: Thank you, Your Honor.

13 BY MR. VOIGT:

14 Q Is it the practice in the evidence department
15 to place items that need to be refrigerated in the
16 refrigerator prior to their being logged into the
17 computer?

18 MR. MASON: Objection, leading.

19 THE COURT: Sustained, rephrase.

20 Q Can you tell from that entry and from the
21 information contained on your evidence sheet or
22 from the practices and procedures in your office
23 the exact time that that piece of evidence was
24 placed in the refrigerator?

25 A No, sir.

1 Q Do you know if it would have been placed in
2 the refrigerator subsequent to that entry, after
3 that entry?

4 A No.

5 Q What is the protocol, established protocol in
6 your office, how long in your possession of a
7 sample that requires refrigeration before you would
8 be required to refrigerate it?

9 A As far as when we receive it, as far as how
10 long we have to have it refrigerated?

11 Q No. When you receive a sample that requires
12 refrigeration, is there a policy, protocol or
13 procedure for taking that from the point where you
14 get it, to the refrigerator, is there some sort of
15 recommended time, required time?

16 A Immediately.

17 Q As practical?

18 A As soon as possible.

19 Q Does the data entry reflecting refrigeration
20 have a similar policy or procedure, or can that be
21 done later?

22 A It can be done later.

23 MR. VOIGT: That's all.

24 MR. MASON: If it please the Court, Your
25 Honor?

1 THE COURT: You may proceed.

2 RE CROSS EXAMINATION BY MR. MASON:

3 Q Now, Investigator Roy, the evidence compound

4 is a metal building right behind the Sheriff's

5 Department on Pinehaven Road, is that correct?

6 A It is.

7 Q And it is a small little room and there is

8 two or three work stations that have computers,

9 isn't that correct?

10 A Not exactly.

11 Q You walk in, there is a door, then there is

12 Miss Kjellman's desk where she has her computer and

13 there is some other little computers there, is that

14 correct?

15 A There are computer desks.

16 Q Six computer desks, thank you. And it is

17 very close to where this refrigerator is, isn't

18 that correct?

19 A Yes.

20 Q Okay. Is it one, two, there, four, is it

21 five steps, ten steps?

22 MR. VOIGT: Objection, outside the scope of

23 redirect.

24 THE COURT: It is outside the scope.

25 MR. MASON: May I --

1 THE COURT: Keep it within the scope of
2 redirect.

3 BY MR. MASON:

4 Q You have testified that in regards to whether
5 you would enter the evidence at or about the same
6 time that you put it in the refrigerator, so my
7 question relates to how close --

8 MR. VOIGT: Objection to the form of the
9 question.

10 THE COURT: Let him finish the question.

11 Q The computer terminal where you would enter
12 the entry in relation to the evidence is, to the
13 refrigerator, how close?

14 A It's in a separate building, actually.

15 Q Okay. So --

16 A By line of sight, if you didn't have two
17 walls to go through, it is probably from here to
18 the door.

19 Q Okay. So, you have estimated what, 25, 30
20 feet or so?

21 A About.

22 Q Okay. So you would have to go 25 or 30 feet
23 to make a computer entry, for it to be
24 contemporaneous, in other words, at the same time
25 as it was put in the refrigerator?

1 A Right, two locked doors, 25 feet.

2 Q Okay. Not a big deal?

3 A No.

4 Q Okay. And in fact your practice would be if
5 you were putting something in the refrigerator,
6 would be that you would walk that 25 feet and make
7 the entry, is that correct?

8 MR. VOIGT: Objection.

9 THE COURT: Basis?

10 MR. VOIGT: Beyond the scope of redirect.

11 THE COURT: Overruled. You can answer the
12 question?

13 THE WITNESS: I have done it both ways, I
14 have entered it then, it all depends on the
15 circumstances. I can't say that every time I
16 walked in there and put something in the
17 refrigerator I walked in and entered it
18 immediately. I have put stuff in the refrigerator,
19 put a note on my desk, and took care of it on the
20 next business day, I have done it both ways.

21 BY MR. MASON:

22 Q But there is nothing that would prevent you
23 from entering it into your computer system on the
24 same time you put it in the refrigerator, isn't
25 that correct?

1 A Yes.

2 Q And that would be the best practice for
3 keeping track of the evidence, isn't that correct?

4 A Yes.

5 MR. MASON: Thank you.

6 THE COURT: Any further questions, Mr. Voigt?

7 MR. VOIGT: No, Your Honor.

8 THE COURT: Any objection to the witness
9 being excused, from the State?

10 MR. VOIGT: No, Your Honor.

11 THE COURT: From the defense?

12 MR. MASON: No, Your Honor.

13 THE COURT: Sir, you're excused.

14 THE WITNESS: Thank you.

15 THE COURT: You're welcome.

16 (Witness excused).

17 THE COURT: Ladies and gentlemen, you have
18 been seated about an hour. I'm going to give you a
19 break. During the break please do not discuss the
20 case, please leave your note pad in your seat. Go
21 with the bailiff.

22 (The jury was excused from the courtroom).

23 THE COURT: You may be seated. Who is your
24 next witness?

25 MS. KINZELER: Your Honor, the forensic

1 pathologist is here. There are two SLED witnesses
2 here, maybe 20 to 30 minutes. That is the rest of
3 our witnesses.

4 THE COURT: You all take a few minutes, I'll
5 make my decision on the pathologist.

6 MR. MASON: Are we at ease, Your Honor?

7 THE COURT: Yes.

8 (Recessed at 10:30 a.m.).

9 (Resumed at 11:12 a.m.).

10 THE COURT: Miss Kinzeler did you all provide
11 a copy of the custody document from the lab where
12 the specimen was tested?

13 MS. KINZELER: No, ma'am, not other than
14 whatever the pathologist relied on, which I think
15 is certification of the lab it was tested under, an
16 internal chain of custody.

17 THE COURT: We're talking about the same
18 thing?

19 MS. KINZELER: Yes.

20 THE COURT: What is it that you provided to
21 Mr. Mason?

22 MS. KINZELER: As part of -- may I approach,
23 Your Honor?

24 THE COURT: Have you made any attempt to get
25 the chain of custody documents they indicated?

1 MS. KINZELER: Yes, ma'am. I tried to follow
2 up with the lab, I called the lab, NSM lab, to ask
3 them how I obtain it and they said it would be some
4 \$200 to \$300 litigation package, it would take
5 several weeks and wouldn't get here before trial,
6 so I didn't attempt to get whatever they had but it
7 wasn't feasible for several reasons.

8 THE COURT: You got the file this summer and
9 you contacted them this summer?

10 MS. KINZELER: I got this case in June or
11 July, I believe it was probably September by the
12 time that I contacted someone at NSM and went back
13 and forth with them about how to get it and they
14 gave me a big spill about procedures and litigation
15 packages and sent me the list of all the fees and
16 what not and then they said it was going to take so
17 long, I can't remember how long they said but
18 whatever it was was beyond whenever our trial was
19 scheduled for.

20 THE COURT: Is the doctor going to be able to
21 testify to how he collected the specimens and how
22 he sent them, in other words, were they sealed, in
23 other words, the packaging, as to how he dispatched
24 those to the lab?

25 MS. KINZELER: I believe he can, yes, ma'am.

1 THE COURT: And did he get any corroboration
2 the samples were actually received by the lab and
3 means by which he dispatched them?

4 MS. KINZELER: I don't think he got a return
5 receipt, Your Honor.

6 THE COURT: How did he send them?

7 MS. KINZELER: Fed-X.

8 THE COURT: They give you documentation,
9 isn't that why you use them?

10 MR. VOIGT: I don't think -- I think once he
11 received the results he assumed they had gotten the
12 package. I don't think he actually double checked.

13 MS. KINZELER: He may have had a tracking
14 number or something to that effect but I don't
15 know.

16 THE COURT: Is there anything to prevent you
17 from going and getting that?

18 MS. KINZELER: I can go ask him if it's
19 available.

20 THE COURT: I need you to. I need to know
21 that for my purposes.

22 MS. KINZELER: Your Honor, he has the
23 tracking number, he is going to look it up now.

24 MR. FORSBERG: Your Honor, we have never been
25 provided with that tracking number.

1 THE COURT: They'll provide you with that
2 information. It is really not dispositive, I'm
3 just curious.

4 You all did receive a copy of the
5 certification of the report, correct?

6 MR. FORSBERG: Yes, Your Honor.

7 MS. KINZELER: Your Honor, I have an update.

8 THE COURT: Okay.

9 MS. KINZELER: We called, we looked up
10 Fed-X's number, couldn't find it, it is old, called
11 Fed-X, they said, "We can't find it in our computer
12 system but if you fax the proof to the delivery
13 department, the number, they will fax something
14 back, if they have it, stating it was delivered,"
15 so I can do that.

16 THE COURT: It is not necessary -- well, just
17 go ahead and do it, I'm curious what they would
18 send back, if they can send something back today.

19 All right, I have reviewed the defense's
20 motion regarding that, being the motion they filed
21 on yesterday to exclude -- is there a reason you're
22 standing -- to exclude the evidence relating to
23 results of blood test on the decedent Alvero
24 Antonio Garcia, as well as their motion that the
25 State cannot prove a chain of custody and that in

1 addition to the, in addition to submitting the
2 result to SLED.

3 I did research on the matter yesterday and
4 last night as well as this morning. There are no
5 cases on point dealing with the motion that was
6 raised. There are some cases dealing with the
7 issue, although there are very few, but without
8 belaboring the point, I pretty much gave you all an
9 indication based on my brief research yesterday of
10 what the case law reflected, that being that
11 17-780, which is entitled coroner's
12 responsibilities and has a much longer title but
13 I'm abbreviating it, it deals with a coroner's
14 responsibility to do certain things after the death
15 of an individual by certain mechanism or means.

16 As I have indicated, and I stand by that
17 initial impression, that statute is not applicable
18 to a forensic pathologist employed with the Medical
19 University of South Carolina. He is not a coroner,
20 he does not come within the additional title within
21 the statute, which is other officials. He is a
22 forensic pathologist, he is not employed as a
23 coroner, he is not an employee of the coroner's
24 office, he is acting independently as an employee
25 of the Medical University of South Carolina for the

1 purposes of performing an autopsy and, as I have
2 already indicated, he is not a forensic pathologist
3 within the definition of other officials. I at
4 least cannot find any statutory authority that
5 would define him in that manner.

6 And the defense is correct that the statute
7 provides certain mandatory duties of the coroner.
8 The remedy to that, however, would be to compel the
9 coroner to perform his statutorily mandated duties.
10 However, in this case, and probably as I thought
11 through it, in some instances the coroner and
12 forensic pathologist is the same person, especially
13 in a lot of smaller counties but in a county of
14 Charleston's size autopsies are performed routinely
15 by medical facilities within the municipality,
16 within a county.

17 State versus Mullins articulates what the
18 power is given by the statute to the coroners to do
19 blood samples, that function being performed by a
20 forensic pathologist employed by the Medical
21 University of South Carolina. In this case the
22 State is not seeking to admit the actual report.
23 What the State is seeking to elicit is the
24 testimony of the forensic pathologist as to the
25 mode and manner of the death of the defendant.

1 That being, when the body came in to them, the
2 inspection of the body as well as performance of an
3 autopsy and the results of that autopsy. That
4 being in essence the mode and manner of death of
5 the deceased, and I would assume that, or they
6 would not be calling him, he is going to testify as
7 to the condition of the body and what caused the
8 decedent's death, which would entail him testifying
9 as to, you know, whether there was any presence of
10 disease or otherwise that would have contributed to
11 the decedent's death.

12 For example, in extrapolating, if he had some
13 heart condition or some other illness that may have
14 enhanced or caused him to die prior to the
15 collision or if it, as we would commonly refer to
16 in a civil context, the collision would have
17 exacerbated some pre-existing condition and
18 accelerated his death.

19 So, I would expect the coroner to testify,
20 not coroner, I apologize for using the
21 inappropriate term, for the forensic pathologist to
22 testify regarding the results of his autopsy, so
23 the State is not seeking to admit the report. They
24 are simply asking to allow, or what they would
25 elicit from the witness would be the mode and

1 manner of death and those things that a forensic
2 pathologist would normally testify to as to the
3 result of any autopsy.

4 The toxicology samples taken in this case
5 were taken from the body of the deceased, that
6 being Alvero Garcia, at the time of his death and I
7 would assume at the time when his body was brought
8 into the medical examiner's office. I would have
9 to assume it was in close proximity of death
10 because the results that were performed by the lab
11 were on December 13th, 2008, and his death was on
12 December 8th of 2008, although not particularly
13 dispositive, but of note.

14 These tests were conducted for medical
15 forensic purposes, therefore the results are not
16 subject to the State being required to demonstrate
17 chain of custody. And again, as I have already
18 indicated, the State is not seeking to admit the
19 report, but the result as the underlying basis of
20 the witness' testimony as to the cause of death in
21 this case.

22 The toxicology results obtained by the
23 forensic pathologist are admissible. There are
24 many -- well, not many. Some would argue they
25 would be admissible under the business records

1 exception to the hearsay rule and without chain of
2 custody, for the purposes of him testifying as an
3 expert as to the cause and manner of death of the
4 deceased, again that being Mr. Garcia.

5 The blood or tissue samples that were taken
6 by the forensic pathologist, it indicates in the
7 report it was a blood sample, were taken for the
8 purposes of medical diagnostic, were taken for
9 medical diagnostic purposes, that being the cause
10 and manner of death and were relied on by the
11 witness subsequently to establish the mode and
12 manner of death and not for the purpose of
13 litigation. Therefore such results and other
14 relevant medical information that he will testify
15 to are considered trustworthy without chain of
16 custody and as such the results having an indicia
17 of reliability.

18 As we all know, such records, and again, the
19 State is not seeking to actually admit the record,
20 they are simply seeking to have the witness testify
21 to the mode and manner of death, but in addition to
22 that, such records are admitted routinely as
23 trustworthy, records are presumed, based on the
24 fact they were relied on for diagnostic purposes,
25 for medical purposes, and the mode, in that case

1 the mode and manner of death and they are
2 sufficiently trustworthy to be relied on in light
3 of the tests being taken in a neutral setting, not
4 being a police lab, and no discrepancies, at least
5 based on what has been presented to the Court, are
6 apparent on the face of the record.

7 The tests or samples were taken by the
8 Medical University of South Carolina's forensic
9 pathologist for the medical purpose of an autopsy
10 and were relied on not for litigation but to
11 establish the mode and manner of the death of the
12 deceased. The purpose of a chain of custody is for
13 a person charged with a criminal offense, that
14 being whether it be DUI, felony DUI or any other
15 type offense. The purpose of a chain is to protect
16 and preserve evidence that potentially could not be
17 retested and which is an indicia of reliability
18 provided by a chain of custody. Generally a chain
19 of custody is required where results are sought to
20 establish criminal or civil rights, that being DUI,
21 wrongfully death or otherwise and that is simply not
22 the posture of this, at least in this case, as
23 being relied on for and it really isn't in the
24 focus of the witness' testimony, it will be a
25 peripheral issue he will mention. In other words,

1 rule in or rule out what caused this individual's
2 death and the mode and manner of his death and the
3 condition of his body at the time it was examined.
4 Therefore the motion to exclude the testimony is
5 denied.

6 Now, however, having made that observation,
7 it appears that the State will, the State will
8 still have to establish the appropriate foundation,
9 that being who took the samples, where they were
10 taken, how they were packaged, how they were sent,
11 who received them at the lab, and it appears that
12 can be established by the certification of records
13 which was provided by the lab.

14 Although not particularly required, I think
15 that it would probably be prudent in the future
16 that the State would obtain the medical package
17 provided by the lab that can show every person that
18 had control of the specimen. It would seem to me
19 that would probably be the more prudent course of
20 action, however I don't think it is required in
21 this case.

22 Of course it would be a different result if
23 we were talking about a specimen taken by the
24 defendant, taken from the defendant, and in
25 addition to that, that peripheral sort of a matter

1 as well, while the defense may argue that these
2 things are important because the evidence could
3 have been hypothecated in some way, of course they
4 can explore that line of questioning with this
5 witness because it would certainly go to the weight
6 of his testimony, it is not really probative in
7 this case, in other words, the deceased could have
8 been stone cold drunk on that night, he could have
9 done something that could have contributed to this
10 accident but that is not what the State is required
11 to prove.

12 The State can prove as a matter of fact
13 Alvero Garcia and the defendant contributed to the
14 accident, all they have to prove is that the
15 defendant was one of the concurring causes of the
16 accident, they do not have to prove he was the sole
17 cause of the accident, so to some extent it is not,
18 I don't know it is necessarily probative, although
19 I'm certain the defense is going to argue that the
20 deceased came into the defendant's lane, the State
21 is going to argue that the defendant came into the
22 decedent's lane and caused the accident, but the
23 Court is going to instruct that they only have to
24 establish he was one of the concurring causes of
25 the accident and that they have to prove, one, that

1 he was driving, that he was impaired and he was one
2 of the concurring causes of the accident, which is
3 proximate cause. They don't have to prove he was
4 the sole cause of the accident.

5 In addition to that, even if we were looking
6 at a chain of custody analysis, the State only has
7 to prove the chain as far as practicable. It does
8 not have to negate all possibility of tampering,
9 but they are again not seeking to admit this test.
10 They are seeking to admit or elicit the testimony
11 of the forensic pathologist as to the mode and
12 manner of death and to that extent that testimony
13 is admissible and the motion is denied.

14 Are we ready to proceed with the witness,
15 from the State?

16 MR. VOIGT: Yes, Your Honor.

17 THE COURT: From the defense?

18 MR. MASON: No, Your Honor.

19 THE COURT: Yes, sir. There is to be no
20 further argument unless the Court asks for it. You
21 have made your motion, your record is supported and
22 the rules specifically provide once the Court has
23 ruled there is to be no additional argument.

24 MR. MASON: Your Honor, it's a different
25 motion.

1 THE COURT: Pardon me.

2 MR. MASON: It's a different motion.

3 THE COURT: Did you already file it? I
4 assume you gave me a copy, I assume you filed your
5 original.

6 MR. MASON: Yes.

7 THE COURT: I need to make sure it is in the
8 record.

9 Yes, sir, what is the additional motion?

10 MR. MASON: The first page of the autopsy
11 report reads that according to the Charleston
12 County Deputy Coroner the decedent was a 41 year
13 old restrained driver of a compact car which was
14 hit head-on by a pickup truck when it crossed the
15 centerline. Our motion is for counsel not to
16 elicit the hearsay testimony of the Deputy Coroner
17 who supposedly told somebody that it was Mr.
18 Barclay who crossed the centerline, and so we're
19 moving in limine.

20 THE COURT: Do you all plan to elicit that
21 testimony?

22 MR. VOIGT: I never intended to, Judge.

23 THE COURT: All right, they said they don't
24 plan to elicit it.

25 MR. MASON: Okay.

1 THE COURT: Okay. Ready?

2 MR. VOIGT: Yes, Your Honor.

3 MR. MASON: Your Honor, that same information
4 is written on one of these reports.

5 THE COURT: None of of those reports are
6 coming in. He is going to testify what he
7 determined to be the mode and manner of death.
8 They are not seeking to admit any of these reports.
9 It would be inadmissible anyway, he is here to
10 testify and can be cross examined.

11 MR. MASON: Your Honor, one of the statements
12 represented to the Court to rule on the motion was
13 that Dr. Batalis was the one who I believe had
14 mailed this off. The record clearly indicates it
15 was not him.

16 THE COURT: It doesn't have to be, he's the
17 custodian of the records of this lab, he's the
18 supervisor, he can testify whether he delegated
19 that to one of his employees. If an internal
20 document reflects it, then he can testify to that.
21 It is a regularly kept business record. I don't
22 know it is necessary at all, frankly I just covered
23 all my bases, but I don't think, he is testifying
24 to mode and manner of death, the chain is not
25 required, there is an indicia of reliability in

1 medical records especially when it is not taken for
2 litigation purposes and where it is relied on
3 solely for the purpose, for medical purposes, which
4 is different when you have a criminal defendant, or
5 even somebody in a wrongful death, it really is the
6 same kind of thing, you're seeking to establish
7 liability in some way.

8 We're crossing the line, again we're getting
9 into argument and I have indicated the rules
10 provide no further argument. I have given this a
11 great deal of thought, as a matter of fact it ate
12 into my evening last night and I took a whole lot
13 of time trying to research it to try to find
14 everything I could on it to give a balanced view of
15 it. I struggled through it and came to a decision
16 and as my minister would say, right or wrong, I
17 don't claim I'm perfect but I have made the best
18 decision I could.

19 MR. MASON: Respectfully, our objection to it
20 also is the authenticity of any of the NMS records.

21 THE COURT: We're getting into argument again
22 and we have already reduced your objection to
23 writing, it is for the record and they are not
24 seeking to admit the report. They are seeking to
25 admit the testimony, the underlying basis of a

1 medical opinion by a medical witness, that being
2 the forensic pathologist. You can question him
3 about all that stuff. You're entitled to do that.

4 MR. VOIGT: Not by way of argument, just more
5 for counsel's benefit, my original intention was
6 really to omit any reference to this test. Per the
7 Court's instruction, I will go through, as counsel
8 would like me to, as much of that as the Court has
9 instructed me to, however that may seem more
10 appropriate.

11 THE COURT: I haven't instructed you, you can
12 examine the witness the way you intend to, it is
13 Mr. Mason's job to make any objections. I can
14 anticipate what the objections might be but you
15 certainly are not bound by that, you can examine
16 the witness as you deem fit.

17 MR. VOIGT: Thank you, Your Honor, any way
18 you need me to lay it out.

19 THE COURT: I don't look to tell you how to
20 try your case.

21 All right. Are we ready, from the State?

22 MR. VOIGT: Yes, Your Honor.

23 THE COURT: The defense?

24 MR. MASON: Yes, Your Honor.

25 THE COURT: Is the jury back? You can go

1 ahead and bring them in.

2 While we're waiting, do you all have any
3 requested charges I need to look at?

4 MS. KINZELER: Not at this second, Your
5 Honor. I believe we will go with the standard
6 charges.

7 THE COURT: Unless you can find something
8 specific. Unless you were to find something
9 specific, I rarely use them, I tend to use mine
10 because they are neutral and they are an accurate
11 statement of the law. That doesn't mean I don't
12 consider things that are submitted, sometimes I
13 read stuff that is different.

14 MS. KINZELER: I think I need to provide you
15 with the statute as far as centerline is concerned.

16 THE COURT: I already have it.

17 MS. KINZELER: Okay.

18 THE COURT: I will assume that is a statutory
19 duty that you all would be saying that he violated.

20 MS. KINZELER: Yes, ma'am.

21 THE COURT: I have already got both of them,
22 maintain your vehicle within your lane, keeping
23 your vehicle under control, as well as centerline.

24 Mr. Mason, do you all have any proposed
25 charges you would like to present?

1 MR. MASON: We do but we don't have them
2 right now.

3 THE COURT: Could you get them for me? I
4 don't like to wait until the last second.

5 MR. MASON: Thank you.

6 THE COURT: When do you expect to have that
7 done?

8 MR. MASON: We can put some more effort into
9 it this evening.

10 THE COURT: That would give me the weekend to
11 look at it because I don't think we're going to
12 finish anyway.

13 MR. MASON: I understand. Minimally, Your
14 Honor, we could email them to you, you know,
15 Saturday.

16 THE COURT: I have tried to get a life this
17 year, it's been difficult.

18 MR. MASON: You said you worked over the
19 weekend?

20 THE COURT: I usually do but I really am
21 trying very diligently to get a life, it's hard to
22 break all that.

23 MR. MASON: It's hard to break old habits.

24 THE COURT: They say it takes 21 days to
25 create a new habit.

1 I'm trying to figure out what you would
2 submit to me that would be different. I'm trying
3 to really save you some work. I feel like you all
4 have enough to do than spending your energy on jury
5 charges when this Court's charge is so
6 straightforward. I don't have anybody to reward or
7 punish, I try to take neutral view of everything.
8 If you don't need to take the time to do that I
9 wouldn't spend the energy on it unless you feel you
10 really need to. It is pretty straightforward.

11 MR. MASON: Well, we do, Your Honor, I can
12 tell you, without giving the actual charge.

13 THE COURT: Tell me.

14 MR. MASON: Okay. We will be asking for a
15 sudden emergency charge.

16 THE COURT: I don't know that would be
17 applicable but I will think about it.

18 MR. MASON: There are also some cases dealing
19 with the crossing the centerline that indicate that
20 you can do that if you're doing it to avoid a
21 collision, and there is two or three cases --

22 THE COURT: I would charge the statute.

23 MR. MASON: The statute has two or three
24 cases that have interpreted that particular
25 statute, just so you will know what we'll be

1 submitting, you can look at it certainly in time.
2 We have some cases on that. We're also going to be
3 asking that driving under the influence first
4 offense be charged as a lesser included offense
5 because in the event --

6 THE COURT: No argument. I'm going to look
7 at it but the facts would not support it in this
8 case, you would have to have no death and no great
9 bodily injury. I don't know what the testimony is
10 going to be but it would have to be within that
11 circumference of a BA level. I will listen to the
12 whole case before, we're going to have a charge
13 conference, I'm not trying to have a charge
14 conference right now, I just wanted to know if you
15 had any charges, I wanted to know if you had any
16 proposed charges you wanted me to look at.

17 What else?

18 MR. MASON: That would be part of the
19 proposed charges, Your Honor. I don't know what
20 you're going to do, I don't know what you're going
21 to do at the directed verdict stage but the
22 indictment also, crossed over the centerline is
23 that wording of the indictment but in any event, if
24 one of the allegations of the wrongful death is
25 recklessness as alleged in the indictment, then we

1 would need the Court to explain to the jury what
2 recklessness is. If the Court strikes that from
3 the case --

4 THE COURT: The indictment is not part of the
5 instruction. The indictment, as you know from case
6 law, is simply a notice document, it is to put you
7 on notice of what you're facing and what you need
8 to defend, so that is not part of what the Court
9 instructs. I'm going to instruct --

10 MR. MASON: We have been charged with two
11 acts in relation to the alleged felony DUI charges
12 and those two acts are, one, recklessness, and two,
13 crossing the centerline, so if recklessness is no
14 longer part of the case when we get to the charge,
15 then that would be one situation, but if that is
16 still one of the acts that is being, that my client
17 is being accused of, then we would need a charge on
18 recklessness.

19 THE COURT: Anything else I need to look at?

20 MR. MASON: Again I'm just trying to give you
21 a little heads up, as you requested, and we're
22 still working on this matter based on what evidence
23 is coming in.

24 THE COURT: I'm hesitant to give you a
25 deadline but would prefer you give them to me by

1 tomorrow because once we get to the jury charge,
2 the charge conference portion I'm going to be ready
3 to rule and I'm not going to spend a whole lot of
4 energy having the jury wait while we're doing
5 charge conference.

6 MR. MASON: We will, Your HOnor, but as I
7 understand it, the charges have to be related in
8 some way to what evidence comes in.

9 THE COURT: You know the theory of your case.

10 MR. MASON: Yes, ma'am.

11 THE COURT: So you should give me everything
12 you think should be covered and as I listen to the
13 case, I have been doing this long enough I can
14 pretty much anticipate how it's going to develop
15 and I know the things that are going to be
16 factually supported and those that are not, so it
17 is better to err on the side of safety, but again
18 don't do a whole bunch of extra work until and
19 unless you have to and be very careful not to
20 submit anything that is a charge on the facts,
21 because I'm not going to do it.

22 (The jury returned to the courtroom).

23 BAILIFF: The jury is present, Your Honor.

24 THE COURT: You may be seated.

25 Ladies and gentlemen, I hope you enjoyed your

1 break. As well, we appreciate your indulging us as
2 we worked through some matters of law that took
3 some additional time. I know it would seem we
4 ought to be able to anticipate some of these but
5 believe it or not, just the way the system is
6 structured, the way the law works, unfortunately
7 there are some things we can anticipate and some
8 things we can't and they take a little extra time,
9 so please note we do not take your time for granted
10 and we truly appreciate your patience.

11 The State may proceed.

12 I would ask you give the attorneys your
13 undivided attention.

14 MR. VOIGT: The State calls Dr. Nicholas
15 Batalis.

16 THE COURT: Sir, if you would come to the
17 witness stand and be sworn.

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1 NICHOLAS BATALIS, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please state your full name and
4 spell your last name.

5 THE WITNESS: My name is Nicholas Batalis,
6 B-a-t-a-l-i-s.

7 THE COURT: You may proceed.

8 MR. VOIGT: Thank you very much, Your HONOR.

9 THE COURT: You're welcome.

10 DIRECT EXAMINATION BY MR. VOIGT:

11 Q Dr. Batalis, what is your current occupation?

12 A I'm a forensic pathologist.

13 Q Where do you work?

14 A At the Medical University of South Carolina
15 in Charleston.

16 Q How long have you worked at the Medical
17 University?

18 A I have been on staff there for approximately
19 three and a half years.

20 Q And what are your duties there at the Medical
21 University of South Carolina?

22 A My duties include teaching medical students
23 and trainees in pathology, and my main role as a
24 forensic pathologist is to perform autopsies to
25 determine the cause and manner of death, and in

1 simple terms, how people die.

2 Q Tell the jury what is a forensic pathologist,
3 what do those words mean?

4 A Forensic pathology is a specialty of
5 medicine. After completing medical school,
6 complete a four year residency training program in
7 general pathology, so a general pathologist would
8 be one who would look at the tissue to see if you
9 had cancer or not, so pathology is a study of
10 diseases. After that forensic pathology is a one
11 year specialty training that specifically focuses
12 on performing autopsies to determine why people
13 died.

14 Q Are you Board certified in the area of
15 forensic pathology?

16 A Yes, I'm Board certified by the American
17 Board of Pathology.

18 Q And when did you receive that certification?

19 A In forensic pathology in September of 2008.

20 Q And approximately how many, approximately how
21 many autopsies have you performed?

22 A Well over a thousand.

23 Q Have you ever been qualified in the area of
24 forensic pathology in a court of law?

25 A Yes, approximately 15 to 20 times here in

1 South Carolina and once in Texas.

2 MR. VOIGT: At this time, Your Honor, I would
3 offer Dr. Batalis as an expert in the field of
4 forensic pathology.

5 THE COURT: Any objection?

6 MR. MASON: No, Your Honor.

7 THE COURT: So, admitted without objection.
8 You may proceed.

9 BY MR. VOIGT:

10 Q Dr. Batalis, did you have occasion to perform
11 an autopsy on Alvero Antonio Garcia?

12 A Yes, I did, on December 9th, 2008.

13 Q And tell the jury how you initially, how
14 these things are assigned to you. How did you come
15 to do this particular autopsy?

16 A At the Medical University of South Carolina
17 we perform autopsies for numerous counties. When a
18 coroner, like a coroner in this case, that may need
19 an autopsy they contact our office to refer it to
20 us to perform the examination, so for this case the
21 Charleston County Coroner called our office, said
22 they had a case for us and I was the person
23 assigned to serve that day.

24 Q Where in the Medical University would Mr.
25 Garcia's body be?

1 A In our area of autopsies there is a morgue
2 that has a large refrigeration unit where a body
3 would be received when it initially comes in and
4 then when we're ready to do the exam there is an
5 elevator that goes directly upstairs where we have
6 our examination suite.

7 Q Can you tell from your record when Mr.
8 Garcia's body arrived at the Medical University?

9 A I do not have those records.

10 Q When did you initially encounter Mr. Garcia?

11 A The first time I encountered him was at 9:00
12 a.m. on December 9th, 2008.

13 Q What is the first thing that you do when
14 performing an autopsy, how do you start this
15 process?

16 A When a body comes for autopsy the first thing
17 we do is place it on our examination table and then
18 we do what I would call an external exam. That
19 would include to take pictures of the body as we
20 receive it, with the clothing on, without touching
21 the body whatsoever. After that happens we will
22 then take the clothes off the body, clean up any
23 blood, dirt or debris, and then take another set of
24 photographs of the body, make identify without any
25 clothing, without anything to alter the photos.

1 After that we move on to the external exam. The
2 external exam is simply just looking at the body to
3 see what hair hair color, eye color, tattoos, any
4 identifying features, also any evidence of trauma
5 that we see.

6 Q Now, when there is an autopsy how many people
7 approximately are in the room with you?

8 A Usually we have one to two medical students,
9 one to two pathology trainees and an autopsy
10 assistant that helps us with the case, so
11 approximately five people.

12 Q Including and in addition to yourself?

13 A Correct.

14 Q And is it safe to say you are the person,
15 though, in charge of conducting this autopsy, you
16 direct these other people to do whatever you would
17 wish them to do?

18 A Right, yes, assisting me with the case.

19 Q And some people merely observe?

20 A Yes, that's true.

21 Q When you conducted the external examination
22 of Mr. Garcia's body did you note any injuries or
23 abrasions?

24 A Yes, we did.

25 Q And can you tell the jury what those would

1 have been?

2 A Sure. On the decedent's body there were
3 essentially various scrapes and bruises on the
4 legs, several different ones on the legs, one on
5 the chest, and then several bruises and scrapes on
6 the face area. In addition to that, the left arm,
7 there was a big gaping tear with a fracture of the
8 left arm, that was protruding from the tear in the
9 skin, and then on the face there were four other
10 tears of the skin.

11 Q After you conducted the external view of Mr.
12 Garcia's body what did you proceed to do next?

13 A The next part of the autopsy is the internal
14 exam. This is a process where we conduct surgical
15 type incisions to open the body and then go through
16 the organs to look for any evidence of natural
17 disease and also any evidence of trauma. So, all
18 the internal organs are examined that way.

19 Q For example, do you take out various organs
20 and weigh them and measure them?

21 A Yes, we would take each organ out, weigh it
22 and then section it very thoroughly, again to look
23 for any trauma or natural diseases.

24 Q Did you note any disease process in Mr.
25 Garcia's body by way of that examination?

1 A Yes. He had significant internal injuries.

2 Q Did you notice any disease, though, is what
3 my question was?

4 A Sorry. Natural disease, very minimal. One
5 of his coronary arteries had some blockage but it
6 would be considered mild, nothing severe.

7 Otherwise he was a healthy individual with no
8 significant natural disease.

9 Q Did you take any particular samples to aid
10 you in your diagnosis, any tissue samples, blood
11 samples, any other fluids?

12 A Yes. As part of the autopsy we collect
13 tissue samples, small pieces of various organs to
14 look at under the microscope. Some things we see
15 very well just with our eyes, other times we need
16 help with the microscope, so we collected a good
17 set of tissue to look at, and also as part of the
18 autopsy we collect a sample of blood to send for
19 toxicology test.

20 Q And do all those samples assist you in your
21 final determination of the cause of death and
22 manner of death?

23 A Yes, they do.

24 Q Did you in fact take a look at any of those
25 samples under a microscope?

1 A I did. Mr. Garcia, I looked at his heart and
2 his liver.

3 Q What sort of injuries, internal injuries did
4 Mr. Garcia suffer?

5 A I guess just for simplicity we'll start with
6 the head and kind of work our way down. On the
7 head, once we reflected back the scalp, he had a
8 large contusion we couldn't see from the outside,
9 on the back of the head. In addition, he had a
10 large skull fracture that went all along, kind of
11 the bottom of the skull, crossing the entire base
12 of the skull. Associated with this he had blood
13 surrounding the brain. So, that was the nature,
14 the major trauma of the head.

15 Additionally, in the neck there is some
16 cartilage there, specifically the thyroid cartilage
17 that kind of sits back down inside the neck, and
18 that was fractured as well, which you could say
19 there was a great amount of force that was pressed
20 onto the neck to fracture that cartilage. It takes
21 a great deal of stress. You see a blunt force
22 injury, you can see it in strangulation, but it
23 takes a good amount of stress.

24 Q Based on the amount of blood that was
25 contained in the brain cavity, did that indicate

1 that he was alive for at least some time after he
2 sustain that injury?

3 A Yes. You know, it probably wasn't very long
4 but to actually, if somebody died instantaneously
5 the heart will stop beating so we don't generally
6 get a lot of blood around the brain or other
7 places, so in this case, since he did develop the
8 bleeding, there would have been some period of
9 survival, if it was just seconds.

10 Q Were the injuries that he suffered from the
11 neck, up, would those have been considered fatal
12 injuries?

13 A Yes. Just the head injuries alone, if he had
14 no other injuries to his body, that would be enough
15 to cause death.

16 Q What was going on below the neck in Mr.
17 Garcia's body?

18 A From the neck, down, again we had numerous
19 internal injuries. Kind of starting from the
20 outside, in, he had five separate rib fractures,
21 one was on the left side, four fractures were on
22 the right side, so fractures on both sides of the
23 chest.

24 Inside the chest there was a little bit of
25 blood in each cavity and then inside the abdomen,

1 the stomach, there were 300 milliliters of blood,
2 so about a Coke can amount, so a good deal of blood
3 in the abdomen. And where this blood came from, he
4 had several organs that were torn, so the sac that
5 surrounds the heart was torn, both lungs had tears
6 in them, the liver and spleen all had tears.

7 In addition, the lungs, the heart, the colon
8 and some of the other soft tissue deep inside were
9 also bruised, so numerous tears and bruises of the
10 internal organs.

11 Q Would any of these or a combination of these
12 injuries also have been fatal?

13 A Yes. Just like with the head trauma, if he
14 did not have any head trauma at all and just
15 presented with this chest trauma there is plenty of
16 injury here that could have caused his death.

17 Q You testified earlier that you sent
18 toxilological samples off. Did any of the results of
19 that toxilological sample influence his manner of
20 death directly?

21 A It did, but more the absence, so in our
22 testing we look for a couple hundred different
23 drugs, including illicit drugs and therapeutic
24 drugs, various medications, so in his case there
25 was only caffeine detected.

1 MR. MASON: Objection, Your Honor.

2 THE COURT: Overruled.

3 A In his case there was only caffeine detected,
4 so it wasn't really the presence of anything that
5 affects it but the lack of, the lack of other
6 substances, that specifically affected it.

7 Q Did that assist you to rule out, in ruling
8 out certain causes of death that you normally have
9 to consider at any autopsy?

10 A Yes, cases of death or contributory factors
11 to the death.

12 Q What ultimately caused Mr. Garcia's death?

13 A His cause of death was full body blunt force
14 trauma. In this case the most obvious way to put
15 it, because he had the fatal injuries in the chest
16 and in the head, it is impossible to say exactly
17 which one led to his death, either one could have
18 done it, they could have done it in combination, so
19 full body blunt force trauma.

20 MR. VOIGT: One moment, Your Honor.

21 I have no further questions at this time.

22 THE COURT: You may proceed.

23 MR. MASON: No questions, Your Honor.

24 THE COURT: Any objection to the witness
25 being excused, from the State?

1 MR. VOIGT: None, Your Honor.
2 THE COURT: From the defense?
3 MR. MASON: No, Your Honor.
4 THE WITNESS: Doctor, you're excused.
5 THE WITNESS: Thank you.
6 THE COURT: You're welcome.
7 (Witness excused).
8 THE COURT: Who is your next witness?
9 MS. KINZELER: Brandon Williams.
10 THE COURT: I didn't hear.
11 MS. KINZELER: Brandon Williams.
12 THE COURT: Come around and be sworn.
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1 BRANDON WILLIAMS, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name and spell
4 your last name.

5 THE WITNESS: Brandon Williams,
6 W-i-l-l-i-a-m-s.

7 THE COURT: You may proceed.

8 MS. KINZELER: Thank you, Your Honor.

9 THE COURT: You're welcome.

10 DIRECT EXAMINATION BY MS. KINZELER:

11 Q Mr. Williams, where do you work?

12 A I work at SLED, South Carolina Law
13 Enforcement Division.

14 Q How long have you been there?

15 A Five and a half years.

16 Q What are your current duties and
17 responsibilities?

18 A My current duties is I bring up evidence,
19 nowadays I take pictures of that evidence and label
20 it in our system what the evidence is.

21 Q Now, what are your current duties, then we'll
22 go back to what they were before that.

23 Q That is my current duties now.

24 Q All the things you just said?

25 A Uh-huh (Affirmative).

1 Q Do you have any particular title?

2 A I'm a forensics technician in the toxicology
3 department.

4 Q And back in January of 2009 did you work in
5 that same capacity?

6 A I was also a technician.

7 Q What department did you work in in January,
8 2009?

9 A Toxicology.

10 Q On January 7th of 2009 did you have the
11 occasion to come into contact with evidence being
12 lab number L09-00249?

13 A Yes, I did.

14 Q Tell the jury when you first came in contact
15 with this evidence, what did you do?

16 A In 2009 all I did was make sure it was a
17 sealed package and I brought it up into my
18 department and placed it into our refrigerator.

19 Q Let's walk through it. What is the
20 toxicology department.

21 A On the fourth floor.

22 Q Where is the evidence intake storage that you
23 get evidence from?

24 A The first floor.

25 Q When you go down to the evidence intake

1 storage for toxicology, tell them how you get that
2 evidence, who you deal with. What do you do, what
3 happens?

4 A A log-in technician gives me the evidence.

5 Q Where does it come from?

6 A They get it out of their storage.

7 Q Is it refrigerated storage?

8 A Yes, ma'am.

9 Q Do you recall who you received this evidence
10 from?

11 A I have a chain in my hand, Pat Crooks.

12 Q When you received this evidence from Pat
13 Crooks what kind of condition was it in?

14 A It was in a heat sealed pouch.

15 Q And what was inside the heat sealed pouch?

16 Let me rephrase that question. Did the heat sealed
17 pouch still have the initials on top of it?

18 A Yes.

19 Q When you received it from Pat Crooks did it
20 appear to be opened or tampered with in any way?

21 A No, ma'am.

22 Q What happens when Pat gives you this heat
23 sealed bag of evidence, what happens next?

24 A It's taken into my custody and I go upstairs
25 and I place it into the toxicology refrigerator.

1 Q Do you do something to log in this evidence,
2 to record it?

3 A I have to actually scan it into our
4 refrigerator.

5 Q It has a bar code?

6 A It has a bar code, yes, ma'am.

7 Q Does Pat scan it out when she gives it to
8 you?

9 A She scans the bar code into my custody, then
10 I scan the bar code into our refrigerator.

11 Q You scan your badge along with that?

12 A She has to, for me to get it from Miss Pat
13 she has to scan my badge and it goes into my
14 custody, and for me to put it into our refrigerator
15 I have to scan our refrigerator's bar code.

16 Q Okay.

17 A And then scan the bag.

18 Q To put it in the refrigerator, that is at
19 your location?

20 A Yes, ma'am.

21 Q Who has access?

22 A Only the toxicology department.

23 Q When you put it in there do you put it on any
24 shelf or how do you know who to assign it to or who
25 it goes to?

1 A Inside the refrigerator there are designated
2 areas for each analyst. I put it for that analyst.

3 Q In this case what day did you put the
4 evidence bag into the refrigerator in toxicology?

5 A January 7th.

6 Q How much time, you've got that form to
7 refresh your recollection, how much time did you
8 actually have this evidence from from the time you
9 took it from Pat until the time you put it in the
10 refrigerator in toxicology?

11 A About ten minutes.

12 Q And did you, do you know who took custody of
13 it after that?

14 A Shana Sorrells.

15 Q When you put the heat sealed bag in the
16 refrigerator in the toxicology department, in the
17 secure location on the 7th, did you touch this bag,
18 this heat sealed bag or the evidence inside at any
19 point in time beyond that through the 13th or 14th
20 of January?

21 A No, ma'am.

22 Q When is the next time you ever touched any of
23 this evidence involved.

24 Q This case, the lab number I just mentioned to
25 to you, on February 3rd.

- 1 Q And on February 3rd what did you do with it?
- 2 A I placed it into our hold bin for six months.
- 3 Q Why did you place it into the hold bin?
- 4 A SLED policy, we hold all evidence for six
- 5 months just in case there needs to be anything
- 6 extra done with it for six months, then we throw it
- 7 away at the end of six months.
- 8 Q At that point had the tests already been
- 9 conducted?
- 10 A Yes, ma'am.
- 11 Q Did you conduct any of those quantitative
- 12 tests?
- 13 A No, ma'am.
- 14 Q Did you do any confirmatory tests?
- 15 A I did.
- 16 Q When -- you made a face, can you explain?
- 17 A I did.
- 18 Q When did you do the confirmatory test?
- 19 A I'm unsure. I can't say exactly when I did
- 20 it.
- 21 Q Would there be a graph or print-out to
- 22 refresh your recollection, that you're familiar
- 23 with?
- 24 A Yes.
- 25 MS. KINZELER: Just one moment, Your Honor.

- 1 Q I'll come back to that question. Would you
2 have done, when would you do a confirmatory test?
- 3 A After the quantitative test has been
4 completed.
- 5 Q What is a confirmatory test?
- 6 A It just confirms the presence of what they
7 found in the quantitative.
- 8 Q And in this case do you recall what you were
9 looking for?
- 10 A It was for alcohol.
- 11 Q What is the commonly used designation for
12 alcohol?
- 13 A Repeat.
- 14 Q What is the chemical --
- 15 A Ethyl alcohol.
- 16 Q When you do the confirmatory test you're
17 looking for the presence of ETOH, ethyl alcohol?
- 18 A Correct.
- 19 Q When you do the confirmatory test has the
20 quantitative test --
- 21 MR. MASON: Objection, leading.
- 22 THE COURT: Rephrase.
- 23 Q Would you ever do a confirmatory test prior
24 to the analyst doing a quantitative test?
- 25 A No.

1 Q So, when you actually do this confirmatory
2 test are you looking for any particular number or
3 result of ETOH?

4 A I actually did not interpret the result, I
5 just ran the test, just ran the test, I didn't look
6 at any results.

7 MS. KINZELER: May I approach, Your Honor?

8 THE COURT: You may.

9 Q Mr. Williams, look at that form, review it
10 for a second. Do you recognize that form?

11 A Yes, ma'am.

12 Q And how do you recognize it?

13 A This is an evaluation of the instrument.

14 Q Does it refresh your recollection as to when
15 you may have done the confirmatory test?

16 A Yes, ma'am.

17 Q When did you do that?

18 A January 14 at 3:15 in the afternoon.

19 Q Did you create any new samples or handle the
20 evidence in any way, or what is it you're testing?

21 A I did not handle any samples in any way. I
22 took a sequence, sign it in and hit the sequence.

23 Q So, did you ever handle any vial pertaining
24 to this case?

25 A No, ma'am.

1 Q The extent of your involvement was data
2 entry, is that correct?

3 A Yes, ma'am.

4 Q And pushing go?

5 A Yes, ma'am.

6 MS. KINZELER: That's all I have. If you
7 will, answer any questions for Mr. Mason.

8 THE COURT: You may proceed.

9 CROSS EXAMINATION BY MR. MASON:

10 Q In one minute I will say good afternoon.
11 Good afternoon.

12 A Good afternoon.

13 Q You had the evidence, you said for about ten
14 minutes and yet you were very careful to log the
15 movements of the evidence into LIMS, is that
16 correct?

17 A Yes, sir.

18 Q Okay. And I think it was about eight minutes
19 that you had the evidence?

20 A Okay.

21 Q If you want to be specific. Is that a fair
22 statement?

23 A Yes, sir.

24 Q Okay. And -- did you drop something?

25 A No, I just hit the chair, I'm sorry.

1 Q You're familiar with the policy of SLED that
2 talks about all movement of evidence must be
3 recorded in LIMS? Are you familiar with that
4 policy?

5 A Yes, sir.

6 Q Do you do your best to follow that policy?

7 A Yes, sir.

8 Q Okay. And you have a bar code badge, is that
9 correct?

10 A Yes, sir.

11 Q Then you have access to other bar codes that
12 allow you to pretty easily track the evidence into
13 the computer program. Is that correct?

14 A Yes, sir.

15 Q And with regard to this case, you brought up
16 to the witness stand with you a document called
17 chain of custody. Is that correct?

18 A That's correct.

19 Q Okay. And that document, as I understand, is
20 created by the LIMS system. Is that correct?

21 A Correct.

22 Q So all movement of evidence at least insofar
23 as you're involved should be recorded on that
24 document. Is that correct?

25 A Correct.

1 Q Now, also you have given testimony about
2 having pushed the button on a machine. Is that a
3 fair statement?

4 A Correct.

5 MR. MASON: May I approach the witness, Your
6 Honor?

7 THE COURT: You may.

8 Q I hand you a document and ask you if you
9 recognize that?

10 A This is the sequence.

11 Q Okay. And are you operator BAW?

12 A I am.

13 Q Okay. And are you familiar with this
14 document?

15 A Yes, sir.

16 Q And did you create it?

17 A I did.

18 MR. MASON: Your Honor, may I mark it for
19 identification?

20 THE COURT: Any objection.

21 MS. KINZELER: No, ma'am.

22 THE COURT: Marked for ID only.

23 BY MR. MASON:

24 Q I hand you what has been marked Defendant's
25 Exhibit 9 for identification. I ask you again is

1 that a document you created and do you believe it
2 fairly and accurately represents what took place?

3 A Yes, sir.

4 MR. MASON: Your Honor, I would move to admit
5 into evidence Defendant's Exhibit Number 9.

6 THE COURT: Any objection?

7 MS. KINZELER: No, ma'am.

8 THE COURT: Marked and admitted without
9 objection.

10 (Chain of custody sequence marked and
11 received in evidence as Defendant's
12 Exhibit Number 9).

13 BY MR. MASON:

14 Q Now, do you see at the bottom of Defendant's
15 Exhibit 9 where it says last modified Friday,
16 January 9th at 1708 02, 2009?

17 A Yes, sir.

18 Q Okay. And January 9th, that would be at
19 5:08, 2009. Is that correct?

20 A Yes.

21 Q Okay.

22 Q And does that indicate that there was some
23 sample that is referenced at line 12 that relates
24 to the matter L09-00249?

25 A Yes, sir.

1 Q Now, in order for there to have been a sample
2 number 12 associated with case 249, it would have
3 had to have been created in order for you to have
4 queued up the confirmatory test. Is that correct?

5 A What would have to be created?

6 Q You would have to have a vial with a sample
7 in it in order to run a test. Is that correct?

8 A Correct.

9 Q Okay. So, you can't run a test until the
10 sample is created. Is that, I mean, you understand
11 that, right?

12 A Yes, sir.

13 Q And your testimony previous was that all your
14 work was done after the original quantitative
15 samples were tested. Is that correct?

16 A Repeat that.

17 Q Yes. You testified that you didn't do your
18 confirmatory test until some date after which the
19 quantitative tests were run. Is that correct?

20 A That's correct.

21 Q Now, do you still have in front of you the
22 chain of custody?

23 A Yes, sir.

24 Q Okay. Am I correct that there are no entries
25 on the chain of custody form between January 7th,

1 2009, and January 27th of 2009?

2 A Yes, sir.

3 Q Okay. And if you you handled that evidence
4 on January 9th of 2009, if that happened, that
5 would be entered in LIMS, isn't that correct?

6 A That would be correct, yes, sir.

7 Q Now, just so I'm clear, if you go up to the
8 fourth floor, and it's a floor of the building with
9 a number of rooms in it. Is that correct?

10 A Yes, sir.

11 Q You've got a refrigerator and then you've got
12 different technician work areas, is that correct?

13 A We have different work areas, yes.

14 Q Is your work area on the fourth floor?

15 A Yes, sir.

16 Q Okay. And is your work area in the vicinity
17 of the desk of Shana Sorrells?

18 A She's -- it's close.

19 Q Close, okay, thank you. But if you went into
20 the toxicology refrigerator on the fourth floor and
21 you took out a sample to handle, to move it from
22 the refrigerator on the fourth floor to your work
23 station area on the fourth floor you would use LIMS
24 and your badge to record it on the chain of
25 custody. Isn't that correct?

1 A That is correct.

2 Q And at that point that is how things work in
3 regard to the removal of evidence on the fourth
4 floor, that is how things work?

5 A Correct.

6 Q Now, you have mentioned about refrigeration.
7 Would you keep blood samples refrigerated while
8 they are at the SLED laboratory?

9 A Yes, sir.

10 Q Okay. And would that include, if they were,
11 if you had queued up a tray and you hadn't the time
12 that night, couldn't run it that night and were
13 going to run it the next day --

14 MS. KINZELER: Objection.

15 THE COURT: Basis?

16 MS. KINZELER: Personal knowledge, outside
17 the scope.

18 THE COURT: Sustained.

19 BY MR. MASON:

20 Q With regard to your handling of evidence, you
21 would not leave it unrefrigerated?

22 MS. KINZELER: Objection.

23 THE COURT: Sustained, foundation.

24 Q Your handling of the evidence is at what
25 point in the procss, I guess is the best way to say

1 it?

2 A My handling of the actual evidence when it
3 came up from evidence log-in was to place it in the
4 refrigerator, I never touch it, that is all I have
5 done with it.

6 Q My question more is your job, what does it
7 include. Does it just include taking the evidence
8 and putting it in the refrigerator, or do you do
9 more things than that? I'm talking in 2009, in
10 January of 2009.

11 A Yes.

12 Q What were those duties, just briefly?

13 A I mainly made buffers and stuff for tests
14 analysts to do, and clean up.

15 Q Okay. Now, you have indicated about moving a
16 sample into a hold bin, that was part of your
17 testimony on direct. As I understand it, in this
18 testing process, even after the test is done there
19 is still blood left. Is that correct?

20 A Correct.

21 Q And so when you refer to moving evidence into
22 a hold bin are you talking about blood that was
23 left in test tubes or vials that then goes into a
24 certain bin, refrigerated bin?

25 A The evidence I move to a hold bin was the

1 original evidence that came in at the beginning.

2 Q And that is not the vials that are separated

3 from the original evidence?

4 A That's correct.

5 Q Because it is not the original evidence that

6 is tested, it's the part that is separated from the

7 original evidence?

8 A That's correct.

9 Q Is that correct?

10 A Yes, sir.

11 Q Do any of the reports you have show when the

12 portions of the blood were taken from the original

13 test tube --

14 MS. KINZELER: Objection.

15 Q -- and put in a vial?

16 THE COURT: Basis?

17 MS. KINZELER: Foundation.

18 THE COURT: Sustained.

19 Q Now I want to ask you about this. Was the

20 blood evidence in this case destroyed?

21 A Actually I left that part of the chain out.

22 MR. MASON: Can I approach the witness, Your

23 Honor?

24 THE COURT: You may.

25 A Yes, it was destroyed.

1 Q Was the evidence destroyed? Tell the jury
2 what date and time the blood evidence was destroyed
3 in this case.

4 A It was destroyed July 29th, 2009, at 4:16.

5 Q Thank you. May I have that back?

6 You brought a print-out, just so it is clear
7 what just took place, you have a print-out of what
8 I just gave you, it is just when it came off your
9 printer it cut off the bottom. Is that a fair
10 statement?

11 A That's correct.

12 Q And are you familiar with SLED policy that
13 talks about special care being taken to protect
14 evidence from degradation?

15 MS. KINZELER: Objection.

16 THE COURT: Basis?

17 MS. KINZELER: Foundation and relevance.

18 THE COURT: Sustained, relevance.

19 BY MR. MASON:

20 Q Are you familiar with SLED policy that refers
21 to evidence being preserved --

22 MS. KINZELER: Objection.

23 THE COURT: Basis?

24 MS. KINZELER: Relevance and foundation.

25 THE COURT: Sustained, relevance.

1 BY MR MASON:

2 Q Were you instructed you had to destroy this

3 evidence?

4 A Yes, sir.

5 Q Who gave you the instructions to destroy this

6 evidence? Again, if you need, if you would like me

7 to come back up and show you the part cut off your

8 form?

9 A No, sir, I don't have to. At that time that

10 we were destroying evidence it was the policy to

11 destroy evidence in six months.

12 Q And now you don't do that, is that correct?

13 A That is correct.

14 Q And at the time you weren't doing this

15 photographing of the evidence either, isn't that

16 correct?

17 A That is correct.

18 Q And are you also now properly labeling --

19 MS. KINZELER: Objection.

20 Q -- the portion --

21 THE COURT: Sustained, assumes facts not in

22 evidence, rephrase.

23 Q Have you also altered the policy --

24 MS. KINZELER: Objection.

25 Q -- with regard --

1 THE COURT: Basis?

2 MS. KINZELER: States facts not in evidence.

3 THE COURT: Sustained.

4 MR. MASON: Thank you very much.

5 THE COURT: Any redirect?

6 MS. KINZELER: Briefly, if I may Your Honor.

7 THE COURT: Proceed.

8 MS. KINZELER: May I approach, Your Honor?

9 THE COURT: You may.

10 REDIRECT EXAMINATION BY MS. KINZELER:

11 Q Mr. Williams, Defendant's Exhibit 9 you were

12 asked about on cross-examination, this January 9th,

13 '09 date at the bottom of the page, explain to the

14 jury what this date means, if anything.

15 A That date means the last date that something

16 was saved on that instrument. It doesn't mean that

17 where I ran is wrong, I identified the sequence,

18 typed in the new sequence, printed it, pressed go,

19 it is going to run what was printed in there, what

20 was typed in there at the time.

21 Q Would it, would it be possible to type in a

22 sequence, save it --

23 MR. MASON: Objection, leading, Your Honor.

24 THE COURT: Sustained, leading.

25 Q The January 9th date -- let me rephrase that.

1 This form you were handed, where it says samples,
2 it has labs numbers next to it, and you referred to
3 sequences, what you are handling. Is this the
4 actual evidence or when you talk about sequence --

5 MR. MASON: Objection.

6 THE COURT: I will give her a little
7 latitude, overruled.

8 Q What are you doing?

9 A I am not handling the evidence at all.

10 Q So, when you refer to sequence what are you
11 actually doing?

12 A I'm typing in, the analysts actually have a
13 form they fill out, they fill out where they put
14 the vials and I take that form and I type that form
15 into the instrument and that is what this is a
16 reflection of.

17 Q Is this document where you type in the
18 sequence, is that LIMS or is that a different sort
19 of software?

20 A Different software.

21 Q Is it particular to the instrument?

22 A To the instrument.

23 Q So, on January 9th of '09 did you do anything
24 on that date?

25 A Not that I can say right now.

1 Q Did you save something on that date?

2 A Yes.

3 Q What does it actually say on that date?

4 A It says last modified, Friday, January 9th,
5 1708 02, 2009.

6 Q Does that refer in any way to any kind of
7 testing whatsoever, any actual testing?

8 A Repeat.

9 Q Does the January 9th date pertain to any
10 actual testing of any evidence?

11 MR. MASON: Objection, asked and answered.

12 THE COURT: Overruled.

13 THE WITNESS: Not on the day this was ran,
14 no.

15 MS. KINZELER: That's all I have.

16 THE COURT: Any objection to the witness
17 being excused, from the State?

18 MS. KINZELER: No, ma'am.

19 THE COURT: From the defense?

20 MR. MASON: No, Your Honor.

21 THE COURT: Sir, you're excused,
22 (Witness excused).

23 THE COURT: You may call your next witness.

24 MS. KINZELER: Your Honor, she might be
25 lengthy.

1 THE COURT: Call your next witness.
2 MS. KINZELER: Shana Sorrells.
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1 SHANA SORRELLS, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name, spell your
4 last name.

5 THE WITNESS: Shana Sorrells,
6 S-o-r-r-e-l-l-s.

7 THE COURT: You may proceed.

8 DIRECT EXAMINATION BY MS. KINZELER:

9 Q Miss Sorrells, where are you currently
10 employed?

11 A South Carolina Law Enforcement Division, more
12 commonly known as SLED.

13 Q How long have you worked for SLED?

14 A Almost six years.

15 Q What do you do there, what are your
16 responsibilities?

17 A I'm a forensic toxicologist.

18 Q What does forensic toxicology involve? Tell
19 the jury about that.

20 A Forensic toxicology involves the analysis of
21 biological and chemical samples. We're looking for
22 drugs, poisons, alcohol, and we interpret those
23 results, what we find, in courts of law, to
24 coroners and law enforcement.

25 Q Do you have any educational background in

1 this field?

2 A I have a Bachelor's Degree in chemistry and a
3 Master's Degree in analytical chemistry.

4 Q Do you have any other certifications or
5 additional training?

6 A We have extensive in-house training, about a
7 two year training that we have to go through under
8 a senior toxicologist.

9 Q Do you have any other particular
10 certifications or tests that you passed?

11 A We are given two alcohol and two drug
12 proficiency tests each year and I have also
13 attended a school for alcohol and driving.

14 Q What does that training pertain to?

15 A Pretty much it pertains to alcohol levels and
16 impairment.

17 Q Did you go for any training regarding the
18 impairment effects of alcohol? Let me rephrase
19 that. This training and experience you just
20 mentioned, does that offer you any education or
21 training as to what those results mean as far as a
22 driver being impaired?

23 A It does. It gives you a range of the alcohol
24 levels and tells you on average what you're going
25 to see with each person at a certain level. I have

1 also had the benefit of sitting in on a drinking
2 study where people drink to a certain amount and
3 then on breathalyzer after a certain time frame so
4 you can see, given field sobriety tests after a
5 certain level, after they reach a certain, how much
6 alcohol they have had to drink, and so you can
7 actually see and visualize the effect the alcohol
8 has on the mind.

9 Q How many times -- I'm sorry. Have you ever
10 been qualified as an expert in a court of law
11 before in forensic toxicology?

12 A Yes, I have.

13 Q How many times?

14 A Twelve times.

15 MS. KINZELER: Your Honor, at this time the
16 State would offer Miss Sorrells as a forensic
17 toxicology expert.

18 THE COURT: Any questions or objection?

19 MR. MASON: Objection.

20 THE COURT: Objection?

21 MR. MASON: Qualification.

22 THE COURT: Overruled. Do you wish to voir
23 dire the witness?

24 MR. MASON: No, ma'am.

25 THE COURT: Admitted subject to the

1 objection.

2 BY MS. KINZELER:

3 Q Miss Sorrells, are you familiar with the

4 toxicology department procedure for chain of

5 custody?

6 A Yes, I am.

7 Q What procedure do you use when a specimen,

8 for example, is received in the lab at SLED for

9 your analysis, what is the general procedure for

10 that?

11 A The general procedure, it is brought into our

12 log-in department and they do what they do down

13 there. By the time it gets in the toxicology

14 department a technician within the toxicology

15 department goes down to the log-in department,

16 takes the evidence into their custody, brings it

17 upstairs, sees who the case is assigned to,

18 transfers the evidence into our walk-in

19 refrigerator and places that evidence on the shelf

20 of the person that the evidence is assigned to.

21 Q Do you have a particular shelf in the

22 toxicology refrigerator for evidence assigned to

23 you?

24 A I do.

25 Q How is it determined who is assigned what

1 evidence to check?

2 A The computer usually generates it. It
3 randomly just goes through the people in sequence
4 and just assigns the test to a person.

5 Q At some point were you assigned as the
6 analyst for SLED lab L09-00249?

7 A Yes, I was.

8 Q And when did you first come into contact with
9 this evidence?

10 A Do you mind if I look at my chain of custody?

11 Q Please do.

12 A I received it from our toxicology
13 refrigerator and placed it into my custody on
14 January 7th, 2009.

15 Q Do you know who placed it in that
16 refrigerator?

17 A Brandon Williams.

18 Q And when you received this evidence and take
19 it into your custody what does that mean? Does
20 that mean you're physically handling it at that
21 point?

22 MR. MASON: Objection, leading.

23 THE COURT: Sustained, leading.

24 Q When you say, "Take it into my custody," what
25 do you mean, tell them what that means.

1 A All that means is that I, at that point I
2 take control of that evidence. I scan that
3 evidence into my name and that evidence is in my
4 control from that point on until I scan it out of
5 my name and --

6 Q When you first received this evidence from
7 the toxicology what type condition was it in?

8 A I received it in the heat sealed tamper proof
9 evidence bag.

10 Q And when you received that evidence did it
11 appear to have been tampered with in any way?

12 A No, it had not.

13 Q Was the specimen submitted and maintained
14 according to your lab's standard operating
15 procedures?

16 A Yes, it was.

17 Q Did you perform a chemical analysis on this
18 particular specimen, lab number 09-00249?

19 A Yes, I did.

20 Q Tell the jurors how you conduct this
21 analysis. Walk them through those steps.

22 A When a case first comes in, in this
23 particular case it was labeled as a DUI, we run a
24 blood alcohol on it. I sample it, take it out of
25 the evidence, a small amount known as an aliquot,

1 it is taken out of the tube, I place it in straight
2 vials, that is then placed on an instrument with an
3 internal scanner or a known quantity of a substance
4 that we add to it. Once it is placed on the
5 instrument the sample is then heated up and the
6 heat vapor or the gas forms upon heating it, a
7 small amount is taken into the instrument, it
8 travels through the instrument and separates based
9 on its molecular weight and then you use a
10 nanonization where it becomes ionized which means a
11 charged particle is placed on it. Then it goes
12 through a detector. The detector then analyzes
13 those charged particles as an electrical current,
14 and what we see is a peak, as the current splits
15 through a peak shows up, shows the intensity of the
16 peak, depending on how many particles come through.
17 Each peak is assigned a specific compound and each
18 compound has an individual fingerprint and we know
19 when it comes off, where it comes off, what time it
20 should be off and where our internal standard comes
21 off, at what time. We're measuring retention time.

22 We then base that comparison of the ratio
23 between the peaks that come off to the peak of our
24 internal standard, which is what we know is there,
25 and we get a number based off a linear curve or

1 calibration curve that we have set up prior to
2 running the samples.

3 Q Do you do every vial one at a time or batch
4 testing, how do you do that?

5 A We do a batch testing. It makes things
6 easier, a little faster. We run controls, and our
7 controls are run every 15 samples. Again, it's a
8 known quantity, we know what it is supposed to be
9 at and we're just checking to make sure that the
10 instrument is working, that our internal standard
11 is working and our calibration curve is right where
12 it's supposed to be.

13 Q What kind of quality control measures do you
14 have in place to make sure you're not mixing up
15 anyone's samples with anyone else's?

16 A First off, the first rule in our lab, one bag
17 open at a time. You can never have more than one
18 evidence bag open, that way you're sure not to
19 cross contaminate the evidence. That way you can
20 confirm that the evidence that you are working on
21 from that case is assigned to that case and then
22 after that the tubes are hand labeled so you know
23 which case each vial -- I'm sorry, the vials are
24 hand labeled which case each vial is assigned to
25 and then that vial is placed on the instrument that

1 you have assigned it to and you enter that into the
2 computer, saying that that was assigned to that
3 vial which is assigned to that case.

4 Q How would you know in the testing process
5 some evidence had been switched with another, how
6 would you know?

7 A Usually if that happens you will see that
8 your controls are off. If you have misnumbered or
9 mislabeled your control, which is, we run our
10 controls at concentration of a .08. Usually you
11 know if that concentration comes back as a .12 a
12 red flag is thrown up, you have done something
13 wrong. And also we, at this time we run, we ran
14 our cases in duplicate, so we ran them back to
15 back. If the numbers did not match or did not come
16 anywhere close to each other, then again a red flag
17 would be thrown up and we would have to check to
18 see what happened, what went wrong, did you
19 misnumber it, is there a way you misnumbered the
20 vials, but usually when that happens the whole run
21 is scratched, tossed out and you start over.

22 Q And in this case did you perform the testing
23 as you described to the jury?

24 A Yes, I did.

25 Q And did you ever have any indication that

1 there were any samples contaminated?

2 A No, I did not.

3 Q Do you recall what day you ran the test?

4 A Again do you mind if I refer to my data?

5 Q No.

6 A Thank you. The test was actually run on

7 January 13th, 2009.

8 Q Who ran that test?

9 A I did.

10 Q Who did the all aliquots that were tested?

11 A I did.

12 Q Did anyone else handle this blood evidence in

13 any way?

14 A No, they did not.

15 Q After the tests, quantitative test on the

16 13th did anyone do a confirmatory test?

17 A A confirmatory test was run on, it was placed

18 on our mass spec, I placed the sample, again in the

19 allotted slot and filled out our run list sheet

20 saying that it was my sample in that slot and at

21 the end of the day our technician hit the go button

22 once everybody's samples were finished for the day.

23 Q Is it a new sample?

24 A It is not a new sample. It is actually a

25 sample that is taken from the original run, from

1 the quantative run. This is to make sure that what
2 we are actually seeing, what we're actually seeing
3 is ethanol. It is a more confirmatory test. It
4 takes it, it takes that concentration number and
5 breaks it down into individual items.

6 Every compound has a specific fingerprint
7 very similar to how every person has a specific
8 fingerprint unique to themselves. That is what the
9 instrument tells us, is breaking that compound down
10 even further, again having it come off at a certain
11 retention time and giving us a fingerprint. That
12 way we can make 100 percent sure that when our
13 first concentration value comes off that gives us
14 an alcohol level or ethanol level, we can make sure
15 what it is actually reading is ethanol.

16 Q Miss Sorrells, in this case is there some
17 kind of print-out indicating what the results were
18 in this case?

19 A Yes, there is.

20 Q Does it have any other identifying or
21 associated information to it beyond a lab number?

22 A I'm not sure what you mean, I'm sorry.

23 Q Are there any cross references as far as
24 names of defendants or victims to go along with it?

25 A No, there is not.

1 MS. KINZELER: May I approach, Your Honor?

2 THE COURT: You may.

3 BY MS. KINZELER:

4 Q I'm showing you State's Exhibit 19 for

5 identification purposes only.

6 A Oh, I'm sorry.

7 Q Do you recognize that form?

8 A I do, yes.

9 Q How do you recognize that?

10 A This appears to be a copy of my final report.

11 Q Do you have your original final report with

12 you?

13 A I do, yes.

14 MS. KINZELER: May I approach, Your Honor?

15 THE COURT: You may.

16 MS. KINZELER: I will have it marked by the

17 court reporter.

18 MR. MASON: Could I see what is being marked,

19 Your Honor?

20 MS. KINZELER: Your Honor, I would like to

21 have this marked as State's Exhibit 21 for

22 identification purposes.

23 THE COURT: It is asked to be marked for ID.

24 MR. MASON: I don't object to the ID part.

25 BY MS. KINZELER:

- 1 Q Miss Sorrells, I'm handing you State's
2 Exhibit Number 21 for identification purposes only.
3 That form, do you recognize it?
- 4 A It is a form our LIMS system generates once I
5 enter all the data that I have for the case.
- 6 Q Does it include the result of the blood
7 alcohol test you did in this case?
- 8 A It does.
- 9 Q Does it have any associated information with
10 it beyond the lab number?
- 11 A It does. It has when the sample comes in we
12 notate in our LIMS system, or our information
13 system, what the vial is labeled as, and it does
14 have what it is labeled as.
- 15 Q And does it have any names associated with
16 it?
- 17 A It does. The blood I analyzed was labeled
18 Barclay, Walter Douglas.
- 19 Q Does it have another name associated with it
20 as far as the victim is concerned?
- 21 A It does. That is not something I generate
22 into the computer but it does show that the subject
23 in the case is Walter D. Barclay and the victim is
24 Alvero Garcia.
- 25 Q And in this case what were the results of the

1 blood alcohol test that you ran for Mr. Barclay's
2 case?

3 MR. MASON: Objection, Your Honor.

4 THE COURT: Basis?

5 MR. MASON: Foundation.

6 THE COURT: Overruled.

7 THE WITNESS: The results that we found was
8 0.208 concentration.

9 BY MS. KINZELER:

10 Q Tell the jury what that means, a .208, what
11 does that mean?

12 A That is a weight per volume percentage, so as
13 you know, a .08 is what is more commonly known as
14 the legal limit throughout the country. A .208 is
15 close to, or a little more than twice that legal
16 limit.

17 Q Based on your training and education and how
18 alcohol affects individuals, what does a .208 mean?

19 A At a .208 you would usually start seeing the
20 loss of your peripheral vision, you start getting
21 more of a tunnel vision. You will start having
22 slower reaction times. You don't brake as fast,
23 you don't speed up as fast, you start losing that
24 ability to concentrate, you start having some
25 dizziness, some drowsiness, you can be confused.

1 You will also start seeing a little excitement at a
2 .2. You lose that level of inhibition that you
3 have. Suddenly, when you thought you couldn't do
4 anything, you can make that sharp turn going 80
5 miles an hour, when normally you wouldn't be able
6 to. You will weave in and out of traffic better
7 because you just feel like you can, you have that
8 excitement built up if you are at a .2. You also
9 start to lose the ability to multitask. While
10 driving a car that would include, you know, paying
11 attention to road signs, using the gas pedal, to
12 brake while steering the wheel. That is all
13 multitasking, driving a vehicle is a big multitask
14 operation so common we don't see it that way, but
15 you lose that ability to steer and brake all at the
16 same moment because that confusion sets in.

17 MS. KINZELER: That's all I have. If you
18 will, answer Mr. Mason's questions.

19 THE COURT: Cross-examination of the witness?

20 MR. MASON: Yes, Your Honor.

21 THE COURT: You may proceed.

22 CROSS EXAMINATION BY MR. MASON:

23 Q Now, everything you just testified about
24 assumes that you got a sample that was in good
25 condition. Is that a fair statement?

1 A Yes, it is.

2 Q In fact you're supposed to reject samples
3 that are not in good condition. Is that correct?

4 A That is not correct. We test all samples.

5 Q Okay. But if you knew that there was a
6 sample that was in bad condition and you had actual
7 knowledge of it you would write that on some aspect
8 of your report. Is that correct, you would
9 document it?

10 A It would not show on this report but there
11 would be some type of documentation in the LIMS
12 system.

13 Q In other words, if you knew that you had
14 received -- strike that. All your testimony in
15 this case is supposed to be designed to relate to
16 an incident involving Walter Douglas Barclay, is
17 that correct?

18 A That is correct.

19 Q Okay.

20 MR. MASON: Your Honor, may I approach?

21 THE COURT: Uh-huh (Affirmative).

22 Q You have identified State's Exhibit Number 19
23 for identification, is that correct? I think you
24 have 19.

25 A I have two.

1 MR. MASON: We would move to admit State's
2 Exhibit Number 19 into evidence, Your Honor.

3 THE COURT: Any objection?

4 MS. KINZELER: No, ma'am.

5 THE COURT: Marked and entered without
6 objection.

7 (Chemist's report marked and received in
8 evidence as State's Exhibit Number 19).

9 BY MS. KINZELER:

10 Q Please tell the jury what incident date is on
11 that test report.

12 A December 9th, 2008.

13 Q December 9th, 2008. Correct?

14 A Correct.

15 Q Now, you mentioned that visualization is part
16 of your training. Is that correct?

17 A It is not part of the training, no. It just
18 has to be something I was able, happens to be
19 something I was able to experience, it is not
20 actually part of the training.

21 Q I believe your exact words were that you had
22 the benefit?

23 A I had the benefit of it, yes.

24 Q And it is a benefit. Is that a fair
25 statement?

1 A It is, because you can visually see it for
2 yourself.

3 Q And you have not had the benefit of looking
4 at a videotape recording?

5 MS. KINZELER: Objection.

6 THE COURT: Sustained, facts not in evidence.

7 Q Have you looked at any videotape recording?

8 MS. KINZELER: Objection.

9 THE COURT: Sustained, facts not in evidence.
10 Move on.

11 Q You have rendered a statement about how
12 people would act at different levels of alcohol
13 impairment. Isn't that correct, different blood
14 alcohol readings, is that correct?

15 A What you should expect to see, yes.

16 Q What you should expect to see. And you did
17 not see Mr. Barclay, is that correct?

18 A No, I did not.

19 Q And different people are affected by alcohol
20 different ways, is that correct?

21 A Actually it is not correct. Alcohol is a
22 central nervous system depressant in everybody no
23 matter what. No matter what, it is going to cause
24 certain things to happen. You are going to start
25 losing that ability to think, a good example is you

1 start losing that ability to stand up straight, you
2 will start seeing people wobble.

3 Now, what you will see over time in an
4 experienced drinker is when they start to wobble
5 they spread their legs a little more to kind of
6 balance themselves so that it appears that they
7 have built up a tolerance to the alcohol. What
8 they have not done is built up in the blood a
9 tolerance. They have built up a tolerance on how
10 to act, how to appear at a more enebriated state
11 but they are still having the effects of the
12 alcohol on their system the same way everybody else
13 would.

14 Q So, your testimony is how they appear will be
15 different, the effect will be different for
16 different people, how they appear, is that your
17 testimony, they will appear differently?

18 A Experienced drinkers will appear more sober
19 than nonexperienced drinkers because they have had
20 that learning curve, they have gone over that
21 learning curve. The problem is that their mind, in
22 their mind alcohol is still a central nervous
23 system depressant and as long as the alcohol is in
24 the system it is still being a central nervous
25 system depressant.

1 Q Your testimony is that a teetotaler who never
2 drinks any alcohol and someone --

3 MS. KINZELER: Objection.

4 THE COURT: Overruled.

5 Q And somebody who has experience drinking
6 alcohol will be affected the same by the same
7 amount of alcohol. Is that your testimony?

8 A They will be affected the same within the
9 body but their appearance will be different.

10 Q Their ability to walk, talk, handle their
11 maneuvers, whatever it might be, is that correct?

12 A Their ability to adjust will have been
13 different, yes.

14 Q In part of your intake material when you get
15 these cases that are assigned as DUI cases, do you
16 indicate if there was a video taken?

17 A We are never indicated there is a video
18 taken.

19 Q Well, you indicated -- so, your opinions in
20 this case don't relate at all to Doug Barclay, they
21 just simply relate to what you assume somebody
22 would look like at a certain reading, is that
23 correct?

24 A My opinion is based on studies that have been
25 done, many, many studies that have been done over

1 the years that a certain range of alcohol elicits a
2 certain effect on people.

3 Q And I would like to go over with you what
4 some of those affects are. Would you expect to see
5 in a person with a .2, stupor?

6 A It can be seen.

7 Q Would you expect to see loose understanding?

8 A Again, it can be seen.

9 Q Okay. Would you expect to see impaired
10 sensations?

11 A Again, it can be seen. It is all possible,
12 yes.

13 Q Would you expect --

14 A At .2.

15 Q Would you expect to see at .2 severe motor
16 impairment?

17 A Depending on the person, it can be very
18 severe.

19 Q Would you expect to see even potential loss
20 of consciousness?

21 A Not usually at a .2, no, you will not. You
22 can in very early drinkers, you see it a lot of
23 times in some of the, in teenagers, they will start
24 losing consciousness at a .2 but more experienced
25 drinkers will not reach that level, no.

- 1 Q Would you expect to see memory blackout?
- 2 A Certain people have shown that but again that
- 3 is not a major, that is not a really major effect
- 4 at a .2.
- 5 Q Would you expect to see staggering?
- 6 A Yes, you would.
- 7 Q Would you expect to see slurred speech?
- 8 A You can, yes, you would.
- 9 Q Would you expect to see extremely red eyes?
- 10 A It is dependent on the person.
- 11 Q Would you expect to see dilated eyes?
- 12 A Again it is dependent on the person.
- 13 Q Would you expect to see impaired mental
- 14 thought process?
- 15 A Yes, you will.
- 16 Q Would you expect to see impaired mental
- 17 judgment?
- 18 A Yes, you will.
- 19 Q Would you expect to see impaired
- 20 coordination?
- 21 A You can, yes. All of these are possible,
- 22 depending on the person.
- 23 Q Well, that is all you're testifying about, is
- 24 what is possible, depending on the person. Isn't
- 25 that correct?

1 A That is all I can testify to. I can't say
2 for a fact that at this level he was experiencing
3 these things but this is what you would see on
4 average for a person at a .2.

5 Q Would you expect a person at a .2 to be
6 dazed, confused and otherwise disoriented?

7 A It is quite possible.

8 Q Would you expect a person at a .20 to be
9 unable to feel or express pain?

10 A Again its possible, depending on the
11 experience of the drinker.

12 Q Would you expect people at that level to
13 experience nausea and vomiting?

14 A It is possible, again dependent on the
15 experience of the drinker.

16 Q The only reason you're testing blood at SLED
17 is because it has come to you in the course of some
18 criminal investigation, is that correct?

19 A Yes and no.

20 Q Okay. And you have got 400 different cases,
21 approximately, that come in each month?

22 A Yes, we do.

23 Q Okay. And you have described you test these
24 samples in what are called batches, is that
25 correct?

- 1 A Yes, we do.
- 2 Q Okay. And what you do when you test these
3 samples is you take the original vials that come
4 in. Is that correct?
- 5 A The original tubes, yes.
- 6 Q Tubes. You separate them into vials, is that
7 correct?
- 8 A Take a small amount out of the tube and place
9 it into a vial.
- 10 Q Okay. And you then hand write on the vial.
11 Is that correct?
- 12 A I hand write first before I place the blood
13 in the tube so I know the case goes with that vial.
- 14 Q You've got your chain of custody with you, is
15 that correct?
- 16 A I believe I do somewhere.
- 17 Q Let me know when you find it.
- 18 A Yes, I do.
- 19 Q There are no entries in the chain of custody
20 between January 7th, 2009, and January 7th, 2009,
21 isn't that correct?
- 22 A Can you repeat that question, you might have
23 misspoke.
- 24 Q There are no entries in the chain of custody
25 form from January 7th, 2009 at 3:21, until January

1 27th, 2009, at 5:07. Isn't that correct?

2 A From January 7th, 2009, at 4:21, to January
3 27th, 2009, at 5:07, yes, there is no difference in
4 the chain.

5 Q There are no entries in the chain of custody,
6 isn't that correct?

7 A That is correct.

8 Q Okay. And notwithstanding that, these
9 samples came in and out of the refrigerator during
10 that time. Isn't that correct?

11 A Yes. For me to perform analysis on it I had
12 to take it out of the refrigerator.

13 Q And isn't it correct that there is no way to
14 perform analysis on something until the aliquot is
15 created?

16 A Once you create the aliquot that is
17 performing analysis on it.

18 Q Well, it hasn't gone into the instrument yet
19 necessarily, has it?

20 A Not necessarily, no.

21 Q Now let me show you what has been received
22 into evidence as --

23 MR. MASON: May I approach, Your Honor?

24 THE COURT: You may.

25 Q I hand you a document -- I'm sorry, it is

1 already in evidence here.

2 A Here it is right here.

3 Q Thank you. Defendant's Exhibit Number 9?

4 A Yes.

5 Q Defendant's Exhibit Number 9, at the bottom

6 it states last modified January 9th at 5:08, 2009?

7 A Yes.

8 Q Okay. Does it indicate that there is on that

9 form a sample that is referred to as sample number

10 12 in relation to the case that has as part of its

11 designation 249?

12 A Yes.

13 Q Okay. And your testimony is that no sample

14 was created in this case until January 13th of

15 2009. Isn't that correct?

16 A Yes.

17 Q Now, did you order that the blood evidence in

18 Mr. Barclay's case be destroyed?

19 A No, I didn't order it. It was allowed

20 protocol at the time that after we had held the

21 evidence for six months if nobody needs any further

22 testing done or if we have not heard anything

23 further about the case the evidence is destroyed.

24 Q First of all you don't use up all the blood

25 in the testing process, isn't that correct?

1 A No. We actually use very little.

2 Q So, there is a whole bunch of blood left so

3 that if you were to have a test result that

4 somebody questioned after it was run the blood you

5 would still have would be available for testing,

6 isn't that correct?

7 A Yes.

8 Q Okay.

9 A If they required it.

10 Q If they required it or requested it, is that

11 correct?

12 A Yes.

13 Q And it would be expected that they would have

14 seen your test report --

15 MS. KINZELER: Objection.

16 THE COURT: Basis?

17 MS. KINZELER: Relevance.

18 THE COURT: Restate the question so I can

19 hear all of it.

20 MR. MASON: Thank you.

21 BY MR. MASON:

22 Q You said you stopped destroying evidence

23 after 180 days and you have a different policy now.

24 Is that right?

25 MS. KINZELER: Objection.

1 THE COURT: Basis?

2 MS. KINZELER: Subsequent remedial measure.

3 THE COURT: Sustained.

4 BY MR. MASON:

5 Q With regard to destruction of blood evidence,
6 you have had times when you actually brought blood
7 with you, is that correct?

8 A No, I have never brought the blood with me to
9 court.

10 Q If it was requested you produce it, is that
11 correct?

12 A If it is requested by the agency we return it
13 to the agency. We do not bring it to court.

14 Q I understand. So, the agency wouldn't then
15 be able to bring it to court, you return it to the
16 agency and then they handle it from there, is that
17 correct?

18 A That is correct.

19 Q So you have, after testing, not destroyed
20 blood but returned it to the agency. Isn't that
21 correct?

22 A That is our policy now, yes, it is and it is
23 up to them on whether or not they decide to keep it
24 or destroy it.

25 Q And are you able to tell from any of your

1 records on what date you produced the lab report
2 that relates to an incident of December 9th, 2008?

3 A It appears from what I can tell the report
4 was produced February 4th, 2009.

5 Q Isn't it a fact that the way the agency would
6 get your report would be they can log in to LIMS
7 and --

8 MS. KINZELER: Objection.

9 THE COURT: Basis?

10 MS. KINZELER: Facts not in evidence,
11 relevance.

12 THE COURT: Relevance, sustained.

13 BY MR. MASON:

14 Q Do you know how it is or what date you
15 provided the report to the Solicitor's office?

16 MS. KINZELER: Objection.

17 THE COURT: Basis?

18 MS. KINZELER: Relevance.

19 THE COURT: Overruled.

20 BY MR. MASON:

21 Q Do you know on what date you provided -- what
22 number is this? This is actually Defendant's
23 Exhibit, what is it?

24 A I have State's Exhibit 19.

25 THE COURT: You actually had the State's

1 exhibit marked.

2 MR. MASON: I understand. I move it in
3 evidence, I just didn't know the number.

4 THE COURT: 19 is a copy of the original.

5 BY MR. MASON:

6 Q State's 19, which is the forensic services
7 laboratory report, do you know on what date you
8 delivered that report to the prosecutor's office?

9 A No, I do not.

10 Q Okay. And today is that a report that has
11 not been subject to any amendments or corrections?

12 A This report has not been subject to any
13 amendments or corrections.

14 Q And isn't it a fact that if there is ever a
15 mistake on a blood test report that you have a very
16 specific procedure for correcting mistakes?

17 A Yes, it is.

18 Q And to date that is the report that you
19 testified and the report that relates --

20 A The report marked State's Exhibit 19 appears
21 to be my original report that I brought with me
22 today.

23 Q You brought it with you?

24 A Yes, I did.

25 Q You have no question whatsoever as to the

1 authenticity of that report, isn't that correct?

2 A No, I do not.

3 Q Now, with regard to -- are you diligent about
4 refrigerating blood samples?

5 A Yes, we are.

6 Q Okay. And is the reason for that because
7 there could be microbial fungus or yeast that could
8 get into the blood and they would ferment in the
9 blood, in other words, they would create alcohol?

10 A A small amount can be created in the red
11 topped tubes, is the one we get the biggest
12 problems with. The gray top tubes as in this case
13 contain an anti-coagulant, an antimicrobial that
14 even when left out at room temperature for
15 expensive periods of time you see ethanol.

16 Q Again, you expect procedures related to the
17 handling of blood samples to be followed, isn't
18 that correct?

19 A Yes, I do.

20 Q Isn't forensic laboratory work all about the
21 the goal proper standard for handling evidence?

22 A I'm sorry, I don't understand the question.

23 Q Isn't forensic toxicology all about the
24 procedure and the process, that you do it
25 correctly?

- 1 A Every lab has procedures that have to be
2 followed to make sure that what you do is correct
3 and that you have the checks and balances to ensure
4 accuracy of your results.
- 5 Q And that is everything from refrigeration,
6 correct?
- 7 A Yes.
- 8 Q It is everything from chain of custody, isn't
9 that correct?
- 10 A Yes.
- 11 Q It is everything from making sure your
12 paperwork is proper, isn't that correct?
- 13 A Yes, it is.
- 14 Q And isn't it even -- you referred to the
15 possibilities of misnumbering or mismatching, since
16 there are humans involved.
- 17 A We're human and you deal with human error at
18 times but again that is why we have checks and
19 balances and standards that have to be run to make
20 sure that those errors are caught ahead of time
21 before we send out our reports.
- 22 Q You do not rule out the presence of any
23 micro-organisms?
- 24 A Considering that the sample I got was given
25 in a gray top tube and was refrigerated, no, I did

1 not rule it out.

2 MR. MASON: Your Honor, I have no further
3 questions.

4 THE COURT: Any redirect?

5 MS. KINZELER: Just briefly, Your Honor.

6 REDIRECT EXAMINATION BY MS. KINZELER:

7 Q Mr. Mason was asking you about the 7th and
8 27th on your chain of custody form.

9 A Yes.

10 Q Why is there no entry on that form between
11 those two dates?

12 A Between those two dates evidence is
13 considered to be in my custody. It is in my
14 control, no other person went into that bag, no
15 other person went in and touched that evidence. I
16 was the only one that handled it. On the 27th I
17 was finished with the case and I placed the
18 evidence into a hold bin at that time until it
19 could be disposed of.

20 Q So, what happened on January 9th of 2009?

21 A Apparently on January 9th a run of blood
22 alcohol confirmations was entered into our computer
23 system and saved. At the bottom of the page it
24 says last modified, Friday, January 9th, 2009.
25 According to our Hewlett Packart system, last

1 modified means last saved. We do not go by the
2 last modified date. We label all of our samples,
3 our sequence list is given a certain sequence
4 number, that sequence number includes the date that
5 it was run. Also on our original, or when we print
6 out the data, the date that that data was acquired
7 on is listed at the top of the page and on the top
8 of that page that date was acquired on, or that
9 data was acquired on says January 14th, 2009.

10 MS. KINZELER: That's all I have. Thank you,
11 Miss Sorrells.

12 THE COURT: Any objection to the witness
13 being excused, from the State?

14 MS. KINZELER: No, ma'am.

15 THE COURT: From the defense?

16 MR. MASON: No, Your Honor.

17 THE COURT: Ma'am, you're excused.

18 THE WITNESS: Thank you.

19 THE COURT: You're welcome.

20 (Witness excused).

21 THE COURT: Madam Forelady and ladies and
22 gentlemen, we're going to take advantage of this
23 break in testimony to take our lunch recess. We'll
24 break until 2:15. That gives you about an hour and
25 15 minutes for lunch. During this break please do

1 not discuss the case, please don't do any
2 independent research and please don't allow
3 yourselves to be exposed to any media coverage.
4 When you return to the courthouse please don't have
5 any contact with anyone in or about the courthouse
6 and you will return directly to your jury room.
7 Have a good lunch and please leave your note pad in
8 your seat. Be back at 2:15.

9 (The jury was excused from the courtroom).

10 THE COURT: You may be seated. Miss Sorrells
11 was admitted as an expert subject to objection. I
12 deliberately did not state this on the record
13 because I didn't want to send the jury out. For
14 purpose of the record I admitted her as an expert
15 pursuant to State versus Martin and I find for the
16 record she is qualified, qualified based on her
17 education, training and experience. I find from
18 her testimony she possessed requisite knowledge,
19 experience, training or education and her testimony
20 is reliable. I had the benefit of her testimony
21 in-camera at length and therefore did not need to,
22 and basically her testimony as elicited was exactly
23 the same, therefore I did not need to send the jury
24 out to make that determination. Again, I didn't
25 want to take the time to send them out and bring

1 them back in.

2 Okay, is there anything else before we break
3 for lunch, from the State?

4 MS. KINZELER: No, ma'am.

5 THE COURT: From the defense?

6 MR. MASON: No, Your Honor.

7 THE COURT: Okay, see you all at 2:15.

8 (Recessed at 1:07 p.m.).

9 (Resumed at 2:29 p.m.).

10 THE COURT: Is the State ready to proceed?

11 MS. KINZELER: Your Honor, the State rests.

12 THE COURT: It actually worked out, the jury
13 wanted some additional time so I gave it to them.

14 Now that the State has rested are there any
15 motions from the defense?

16 MR. MASON: Yes, Your Honor.

17 THE COURT: Anything from the State?

18 MS. KINZELER: No, Your Honor.

19 THE COURT: You may proceed.

20 MR. MASON: Yes, Your Honor. Our first
21 motion, Your Honor is, for directed verdict in
22 regards to the indictment pertaining to Jose Santos
23 Davilla. In regard to that, Your Honor, this state
24 requires that there be evidence of great bodily
25 injury, which means bodily injury which creates a

1 substantial, which creates substantial risk of
2 death or causes serious permanent disfigurement or
3 loss of function of any bodily member.

4 Mr. Davilla was walking, he didn't complain
5 of any problems in his right or left extremities,
6 neurologically he was intact, he did not have loss
7 of consciousness, all his vital signs were intact.
8 He actually only spent a day and a half in the
9 hospital and at no point in time did he testify to
10 any protracted loss, continued impairment. There
11 is no testimony whatsoever from him on this point
12 and more importantly, Your Honor, there is no
13 medical testimony in the record whatsoever that any
14 of the injuries that he sustained actually created
15 the statutorily required condition, that being a
16 condition which causes great bodily injury.

17 And also there is no, there was no, even no
18 testimony of what his actual injuries were. It is
19 noteworthy, Your Honor, he was attended to by RN
20 Heath as well. He went back and forth in the
21 emergency department in regards to the treatment of
22 both patients and he didn't testify whatsoever in
23 regards to Mr. Davilla's condition, Your Honor, so
24 it is submitted that the State at this juncture
25 failed to present evidence sufficient to sustain

1 the indictment relating to Jose Santos Davilla.
2 This is the indictment, Your Honor, that came over
3 two years after the accident. It really just isn't
4 evidence in the record from which the statutorily
5 required great bodily injury can be established.

6 THE COURT: You need to make your full
7 argument on the record.

8 MR. MASON: Do you want me to make the others
9 as well?

10 THE COURT: Yes.

11 MR. MASON: Yes, Your Honor. There is no
12 evidence whatsoever in the record of any drug use
13 by Mr. Barclay. The indictment charges him with
14 having used alcohol, drugs or a combination of
15 both. We move, Your Honor, to dismiss, strike any
16 portion of the case relating to alleged drug use,
17 as there is no evidence and we do not wish for any
18 further reference in the Court's charge or
19 otherwise in the statute to even reference drugs or
20 combination, because there is simply no evidence.

21 It is noteworthy that they did ask for
22 testing for marijuana when they sent the test
23 results to SLED but SLED either didn't test for
24 that or it came back negative but in any event,
25 there is no evidence whatsoever in the record that

1 would indicate there was any drug use by this
2 defendant and to allow the jury to speculate that
3 not only he had been drinking but because he's got
4 long hair or something, maybe he was using drugs,
5 too, that would not be proper, based on the
6 evidence, so we are asking that any reference to
7 drugs be stricken from the record.

8 In regards to the accident itself, we would
9 move for a directed verdict on the charges as it
10 relates to, as it relates to the death of Alvero
11 Antonio Garcia. Neither of the officers witnessed
12 the accident and there is not sufficient evidence
13 in the record that Mr. Barclay proximately caused
14 or was a cause of the accident.

15 In addition, the indictment sets out two
16 specific alleged violations of an act of neglect
17 that they claim caused the collision. One is
18 crossing the centerline and/or reckless conduct.
19 Your Honor, we would ask that any portion of the
20 charge relating to alleged reckless conduct --

21 THE COURT: I'm not hearing anything
22 regarding the charge.

23 MR. MASON: The charge against Mr. Barclay,
24 not the jury charge, the indicted charges against
25 Mr. Barclay, we would move to dismiss any

1 indictment based on reckless conduct.

2 And those are our motions, Your Honor.

3 THE COURT: The State may respond.

4 MS. KINZELER: Yes, Your Honor. With regard
5 to the first motion, the great bodily injury charge
6 for the injuries sustained by Jose Davilla, I
7 believe with respect to both charges we have
8 actually presented more than sufficient evidence
9 for each element regarding DUI, violation of state
10 law or great bodily injury and proximate cause.

11 When it comes to Jose Davilla's injuries we
12 heard from medical personnel at the scene he had to
13 be airlifted, his injuries were life threatening,
14 if he did not get airlifted as opposed to ground
15 transport he could have died. He had
16 hemopneumothorax, and he explained what those
17 things were, which was that he couldn't hear the
18 left side of his lungs, his organs could have
19 collapsed. He listed several things in his
20 testimony and then explained that he actually, when
21 Mr. Mason asked what it mean he said it actually
22 called for life support. This statute doesn't say
23 anything about how long these injuries have to be
24 or when they are supposed to qualify as a risk of
25 death. I don't think just the fact he is later

1 okay means that when this accident happened he
2 didn't say the injuries caused substantial risk of
3 death and I don't think they airlifted him to save
4 his life negates any criminal responsibility in
5 this case nor does it mean we haven't put forth
6 sufficient proof to establish that charge.

7 With respect to the death of Alvero Garcia,
8 my argument is the same there, I think we have put
9 forth more than sufficient evidence. The testimony
10 and marks regarding the crossing of the centerline
11 before this collision, obviously no one disputes
12 there was in fact a collision between Mr. Barclay
13 and Mr. Garcia, I think we more than sufficiently
14 met our burden.

15 THE COURT: He also made a motion regarding
16 mention of drugs in the indictment as well as
17 reckless conduct.

18 MS. KINZELER: I haven't made a mention of
19 drugs or reckless conduct. I don't necessarily
20 intend to use either of those words in our
21 argument. I mean, it is our position that it is
22 reckless conduct but what we're saying as for as
23 violation of state law is the neglect of a duty
24 imposed by law is the crossing of the centerline.
25 Because the indictment says and/or, I would submit

1 to Your Honor that it should remain the same,
2 unchanged, but if you see it differently that is a
3 decision for you. And we aren't, Your Honor,
4 making any allegation of drug use in this case.

5 THE COURT: Considering the evidence in a
6 light most favorable to the State on the directed
7 verdict the Court is concerned with the existence
8 or non-existence of evidence and not weight. The
9 Court does not act as a fact finder, the Court is
10 looking at whether the evidence raises above a mere
11 suspicion of guilt. The Court, however, does not
12 have to find that the evidence infers guilt to the
13 exclusion of any other reasonable hypothesis. If,
14 there is direct evidence or substantial
15 circumstantial evidence reasonably tending to prove
16 the defendant's guilt it is appropriate that the
17 motion be denied and the case be submitted to the
18 jury.

19 Taking the arguments in the order that they
20 were made, the motion for directed verdict
21 regarding Jose Santos Davilla is denied. There is
22 direct evidence as well as substantial
23 circumstantial evidence reasonably tending to prove
24 and establish pursuant to 56-5-2945, Subsection B,
25 that he suffered great bodily injury, which is

1 defined as bodily injury which creates substantial
2 risk of death or which causes serious permanent
3 disfigurement or extended loss or impairment of
4 function of any bodily member or organ.

5 It is clear from the testimony of the medical
6 personnel present at the scene as well as the
7 condition of the vehicles as well as Mr. Davilla's
8 testimony as he made some reference to his ribs, as
9 I can recall, I can go back back more specifically
10 through my notes to cite exactly what his testimony
11 was regarding his injury, but clearly the medical
12 testimony is sufficient in and of itself and it is
13 direct evidence of the significant injuries
14 sustained by Mr. Davilla as a result of this
15 accident and therefore the motion is denied.

16 As regards reference to drugs as well as
17 reckless conduct in the indictment, I have already
18 indicated case law is very clear that an indictment
19 is simply a notice document. It is to put the
20 defendant on notice as to what he is charged with
21 and the charges he is facing and what he has to
22 answer. So, there would be no basis for the Court
23 to grant a directed verdict on either of those
24 bases.

25 As regards Mr. Garcia, the directed verdict

1 on that basis, there is direct and substantial
2 circumstantial evidence reasonably proving that Mr.
3 Barclay was the proximate cause of this accident.
4 There is direct testimony of Officer Brinson
5 regarding the point of contact, who crossed the
6 centerline and who proximately caused this
7 accident. Ultimately it will be for the jury to
8 determine how the accident actually happened in
9 their province as fact finders but the State is
10 only required to prove that the defendant, I'm just
11 going to summarize 56-5-2945 without going very
12 specifically through each of the elements, but to
13 prove the offense the State simply must prove that
14 the defendant was driving the vehicle while under
15 the influence of alcohol, that the vehicle was in
16 motion prior to it causing the accident, that the
17 defendant was impaired, either that he dranked an
18 alcoholic beverage or took a drug that would impair
19 him -- well, actually they don't have to prove
20 that, they just have to prove he was impaired and
21 that a reasonable person, reasonably prudent person
22 would not have driven. It is not necessary to show
23 that he was helpless, passed out or intoxicated.
24 The fact that he may have dranked prior to
25 the incident is evidence of it but it is merely an

1 evidentiary fact the jury can consider and give it
2 the weight they think it should deserve but the
3 State does not have to prove that he was, that he
4 was intoxicated. The blood alcohol content is
5 merely an inference from which the jury can
6 determine whether in fact he was under the
7 influence as required by statute.

8 The State must also prove beyond a reasonable
9 doubt that there was some act or negligence that
10 proximately caused the great bodily injury or death
11 and in this instance the State relies on some
12 common law duty one is to keep a proper lookout,
13 the other is to keep their vehicle under control
14 and the other is driving the car in its proper lane
15 and maintaining the car in its lane while on the
16 highways properly divided by the appropriate
17 markings.

18 The other thing that the State must prove as
19 causation is causation, which in other words, that
20 the defendant's actions were the proximate cause of
21 the accident and proximately caused the injuries
22 and the death. And as I have already articulated
23 for the record, the act of two or more persons may
24 combine together to be the proximate cause of an
25 injury and/or death. The defendant's acts may be

1 regarded as proximate cause if it is a contributing
2 cause of injury to a person and/or death of the
3 victim. The fact that there are other causes that
4 contribute to the injury and/or death does not
5 relieve the defendant of responsibility.

6 There is direct evidence in the form of
7 Officer Brinson's testimony as well as the forensic
8 pathologist who testified this accident was the
9 proximate result of the decedent's death without
10 going through all his testimony regarding the
11 significant internal as well as external injuries,
12 but the internal injuries were those that
13 precipitated and were the cause of Mr. Garcia's
14 death, which were directly attributable to the
15 automobile collision, as well as Deputy Brinson's
16 testimony regarding the cause of the accident or
17 who crossed the centerline. That testimony in and
18 of itself is sufficient, even without Mr. Davilla's
19 testimony, that they were properly in their lane
20 driving and that the defendant crossed the
21 centerline and hit their vehicle. All of those
22 things combined are direct as well as substantial
23 circumstantial evidence which reasonably tend to
24 prove the defendant's guilt and therefore the
25 motion for directed verdict is denied.

1 Now, sir, if you would stand for me, please,
2 so that I can advise you of your right in terms of
3 your ability to testify in this case. If you would
4 raise your right hand for me, please, and be sworn.
5 WALTER DOUGLAS BARCLAY, after being first duly
6 sworn, stated as follows:

7 THE COURT: You can put your right hand down,
8 sir. State your full name for the record.

9 THE DEFENDANT: Walter Douglas Barclay.

10 THE COURT: Mr. Barclay, speak up a little
11 bit for me, that would be helpful. Can you state
12 your name again?

13 THE DEFENDANT: Walter Douglas Barclay.

14 THE COURT: Thank you, sir. Sir, I'm now
15 going to explain to you certain of your rights. If
16 you do not understand something I say please let me
17 know, if you need me to repeat something please let
18 me know. Do you understand?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: We have now reached the stage of
21 the trial where you may present your defense. You
22 have the right to claim the protection given to you
23 by the Fifth Amendment to the Constitution of the
24 United States and that Amendment states in part
25 that no person shall be compelled in any criminal

1 case to be a witness against themselves. This means
2 that you cannot be required to testify. You have
3 the right to testify, however no one can make you
4 testify. This is a personal right and no one can
5 waive that right except you.

6 If you decide to testify you will be subject
7 to the same rules that govern other witnesses and
8 you may be examined, cross examined on any relevant
9 issue in this case. In addition, if you have any
10 convictions involving dishonesty or false statement
11 or for crimes punishable by imprisonment for more
12 than one year and this Court determines that the
13 probative value admitting this evidence outweighs
14 its prejudicial effect to you the Solicitor will be
15 able to introduce your record to attack your
16 credibility.

17 If you decide to testify, this decision on
18 your part must be made freely, voluntarily and
19 intelligently, with knowledge of the protections
20 given to you by the Fifth Amendment and the
21 consequences of your decision to testify.

22 If you decide not to testify I will instruct
23 the jury that they cannot give that fact any
24 consideration whatsoever, that there is no
25 prejudice to you because you did not testify and

1 that they cannot discuss that matter in any manner
2 whatsoever during their deliberations and there is
3 to be no prejudice to you. Sir, whether you decide
4 to testify is solely your decision. You may talk
5 with your attorney, your family members or friends
6 but ultimately the final decision is yours.

7 Does Mr. Barclay have any record the State
8 would seek to introduce to impeach his credibility?

9 MS. KINZELER: No, Your Honor.

10 THE COURT: That is not an issue, then.

11 Sir, have you understood your rights as I
12 have explained them to you?

13 THE DEFENDANT: I do but my attorney has a
14 question before I answer.

15 THE COURT: For me?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: I need to finish questioning him,
18 then I will get to you.

19 Sir, do you understand your rights as I have
20 explained them to you?

21 THE DEFENDANT: Yes, I do.

22 THE COURT: Do you have any question about
23 what I have explained?

24 THE DEFENDANT: No, I do not.

25 THE COURT: Have you discussed with your

1 attorney whether you should or should not testify?

2 THE DEFENDANT: We have discussed it, we
3 haven't made a decision.

4 THE COURT: Okay.

5 Yes, sir, Mr. Mason?

6 MR. MASON: Your Honor, in order for him to
7 make his decision he needs two things, and the
8 first thing that he needs to know is we have
9 already gone over the fact there are no convictions
10 so there will be no evidence of that, we have
11 already gone over that, but what he wants to know
12 is whether he would be questioned about any events
13 other than the events this particular day which are
14 the subject of this criminal charge. In other
15 words, are they going to be able to go into his
16 life's history beyond this day of this event, and
17 he needs to know that before he can make up his
18 decision.

19 THE COURT: I don't know. The State is not
20 required to tell you what they're going to ask,
21 other than by my advising you you're subject to
22 examination on any issue of relevance in this case.
23 You are going to have to make that substantive
24 decision. It is, it is a, what is the word I'm
25 looking for, it has a number of unknowns, I guess

1 is the best way I can put it. The State is not
2 required to disclose what they plan to question you
3 about.

4 Of course I would assume your attorney would
5 make contemporaneous objections to anything that
6 would not, that would not come within the rules of
7 evidence. They are only required to disclose to me
8 if you have a record that they would intend to
9 introduce to impeach your credibility, I would have
10 to make a decision about that right now so you
11 would be fully informed about that but they have
12 indicated you have no criminal record that they
13 would seek to impeach your credibility on.

14 Do you all need more time to talk?

15 MR. MASON: There is one other item, Your
16 Honor. The other item is this. Without him
17 knowing whether the Court is going to charge to the
18 jury on a lesser included offense of driving under
19 the influence which as Your Honor said is going to
20 be for the jury to decide whether he had any causal
21 role in this accident, there is a scenerio where
22 they could conclude that Mr. Barclay did not have
23 any causal, direct, indirect role in this accident
24 but still determine that he had operated a motor
25 vehicle and determine that he had consumed some

1 alcohol but not caused anybody's death or not
2 caused the accident, so he can't make up his
3 decision to testify unless he knows what he's
4 actually going to be charged with at the end of the
5 case, which involves a decision about --

6 THE COURT: I'm not going to know that
7 decision until I have heard all the evidence, so
8 that is another strategic decision you will have to
9 make in consultation with your client. I'm not
10 going to make a decision about instructions until I
11 have heard all the evidence. That in large part is
12 up to you all.

13 MR. MASON: I certainly respect that but I
14 guess the question is more of a legal question
15 whether, assuming that the facts support either
16 charge, and again you can't --

17 THE COURT: I can't rule on a hypothetical
18 and I can't give an advisory opinion, I can only
19 make a decision based on what is actually before
20 me.

21 MR. MASON: We filed a motion that states
22 that we believe that DUI, driving under the
23 influence, is a lesser included offense.

24 THE COURT: I haven't received a copy of that
25 motion but I still wouldn't make, I mean, I will

1 read it, you don't necessarily have to file a
2 motion, you can just make me aware of that at the
3 charge conference but I'm not going to make a
4 decision about the charge until I have heard all
5 the testimony. I think that is the right way to do
6 it.

7 MR. MASON: If I can, Your Honor, in other
8 words, the reason it is important for his decision,
9 because --

10 THE COURT: You want me to tell him in
11 advance what I'm going to instruct, and that is not
12 fair to him and not fair to the Court because I
13 could change my mind and then he made a decision
14 based on that and then it works as a substantial
15 prejudice to him. I listen to the facts, the law
16 requires me to charge the law based on legal
17 principles and facts as they are presented and you
18 have to make the strategic decision about what your
19 theories will be and what your defense is going to
20 be after that. It cannot be relying on what the
21 Court is going to instruct.

22 MR. MASON: Your Honor, if he were to testify
23 that he didn't cause the accident and explain that,
24 then that would clearly, I think it is already
25 before the jury right now without that, but that

1 would clearly make it such that they could conclude
2 he was driving, maybe he had something to drink but
3 he didn't cause the accident.

4 THE COURT: I'm not prepared to make any
5 decisions about instructions until the case is
6 over.

7 MR. MASON: I understand, but the reason it
8 is leaving him in a difficult situation is if at
9 the end of the case he doesn't know what is going
10 to be charged.

11 THE COURT: It is really not a difficult
12 situation because strategically you should know
13 what your strategy is, the State has been
14 presenting evidence a long time. You have a case
15 has been pending a long time, you should have a
16 strategy, it is just how that strategy plays out.
17 It is a matter you're going to have to, a scenerio
18 you are going to have to determine, because I do
19 not make any charging decisions until I have heard
20 the entire case, and I have had lawyers try to box
21 me in and do that before and I have regretted it
22 every single time because my decision may change
23 three or four times before the end of the case
24 because it is fact driven and fact dependent, I
25 have to hear all the evidence and what happens is I

1 cannot anticipate, the Court is not an advocate,
2 I'm the only objective and neutral voice in this
3 courtroom, I'm going to instruct what is played out
4 by both sides.

5 The only thing I'm to explore is there is a
6 level playing field and that everybody plays within
7 the rules. I don't know what all the testimony is
8 going to be and I'm not going to make a decision
9 until I have heard all of it, so you're going to
10 have to make a strategic decision about that. I
11 don't know what the substance of the defense is, I
12 can glean some of what you may present, that is
13 based on what you just said, but you're going to
14 have to make a strategic decision about that with
15 your client and decide whether that is something
16 that is viable for you but I am not making any
17 assurances about what I'm going to instruct, I'm
18 not going to rule in a vacuum, I'm not giving an
19 advisory opinion about it, I'm not going to make a
20 decision about instructions until the entire case
21 has been heard, all the motions have been heard and
22 until we have a charge conference.

23 MR. MASON: This is not a motion related to
24 the charge. It is a motion requesting a legal
25 ruling whether or not DUI first offense is a lesser

1 included offense of felony DUI.

2 THE COURT: I'm not making a ruling on
3 charging anything until I have heard all the facts,
4 and I don't care how you craft the statement, I'm
5 not going to change my response. There is case law
6 that says what the lesser included offense are and
7 you can look at that, you can determine, and
8 because something is a lesser included offense
9 does not mean it is applicable in every factual
10 situation.

11 For example, involuntary manslaughter, or
12 voluntary, I always get them confused, whichever
13 one is in the heat of passion is a lesser included
14 offense of murder, it is not applicable in every
15 case, sometime you may charge it, sometimes not,
16 you only charge it when the facts support it. I'm
17 not going to make any decision about instructions
18 until I have heard all the facts, all the
19 testimony. There is sufficient case law out there,
20 if you decide, determine, our Supreme Court and
21 Court of Appeals has articulated what the lesser
22 included offenses are of every offense, you don't
23 need me to clarify that.

24 MR. MASON: That is what the problem is, Your
25 Honor, we have read all the cases, you are

1 absolutely correct, the hypothetical you gave, the
2 murder and involuntary manslaughter situation, if
3 Mr. Barclay was charged with murder I wouldn't be
4 asking this question because I would know that if
5 he testified and there was an issue of self defense
6 or other issues that went to the difference in the
7 two charges, that he might get that charge. I have
8 researched the issue thoroughly, Your Honor, and
9 the problem is I can't go to a case where I can see
10 that our Supreme Court has said --

11 THE COURT: According to our case law there
12 are no lesser included offenses to felony driving
13 under the influence, at least not that I have been
14 able to glean, and I keep a montly chart of what
15 our courts have articulated as lesser included
16 offenses.

17 MR. MASON: That is why this is a novel
18 question.

19 THE COURT: I would have to apply the
20 elements test and I'm not certain that it would
21 meet the elements test. Of course the elements
22 test means that the lesser included has to have and
23 consistently have all the elements of -- well, the
24 greater offense always has to include all the
25 elements of the lesser offense, although our courts

1 have made exceptions for other things that have not
2 met that test, so I don't know. But absent there
3 being some case law to articulate that, I mean, I
4 would consider it if you requested it, I would
5 apply the appropriate case law which is the
6 elements test but I'm not giving you any assurances
7 as to what that decision would be because I don't
8 know. I don't know, I would have to look at it.

9 First of all I have to determine if it is
10 factually applicable, then I have to look at the
11 case law to determine if it is in fact a lesser
12 included offense but as the case law stands in
13 South Carolina at this time they have considered
14 the following and concluded that none of them are
15 lesser included offenses, involuntary manslaughter,
16 reckless homicide, reckless driving and assault and
17 battery of a high and aggravated nature. Our
18 Supreme Court has looked at all those and they are
19 not lesser included offenses.

20 MR. MASON: We're not asking about any of
21 those but we think in a DUI case where you could
22 have driving, could have under the influence and
23 maybe, let's say I was sitting at a traffic light,
24 Your Honor, and I got rear ended but I was drunk.

25 THE COURT: He wouldn't be charged with

1 felony DUI.

2 MR. MASON: Well --

3 THE COURT: He has a legal right to be at a
4 stand still at a light, it would not be the
5 proximate cause.

6 MR. MASON: You don't know what the State
7 would charge him with or wouldn't charge him with.

8 THE COURT: They couldn't, if he was at a
9 rest at a redlight and someone rear ended him there
10 is no way he could comparatively under our case law
11 be the cause of that accident.

12 MR. MASON: Then maybe a better example is a
13 closer case where maybe he was and maybe he wasn't,
14 which is really the case we've got here, so that's
15 why, when I looked, we understand you can say that
16 legally, yes, he would get it but factually it
17 doesn't fit, we understand that, and I'm not
18 arguing with the Court at all on that point, I just
19 can't glean the law, and I filed the motion and a
20 little brief on it, and for him to make his
21 decision about whether he wants to testify, he
22 just, I need the legal clarity, not whether you
23 will do it but just whether the Court concludes as
24 a matter of law that --

25 THE COURT: I would have to take the time and

1 pull the elements test and and look at it. I would
2 still argue the point there is no case law
3 articulating that. Probably part of that is
4 because the State does not have to prove, actually
5 the language that our case law chooses is that they
6 have to prove that he was, let's see, the first
7 element is that they have to prove he drove a
8 vehicle while under the influence of alcohol or
9 drugs, then they must prove that he was
10 sufficiently under the influence to impair his
11 ability to drive with reasonable care with due
12 regard for others, himself or as a reasonably
13 prudent person would drive. It is not necessary to
14 show that he was in a helpless condition, passed
15 out or intoxicated. Let's see. The fact he
16 dranked just immediately prior to the accident is
17 not sufficient to prove he was driving under the
18 influence.

19 The next thing they have to prove is that he
20 did an act forbidden by law or neglected to do a
21 duty imposed by law, which is simple negligence,
22 which means the State must show that he, in other
23 words, neglected a duty imposed on him, in other
24 words, prove simple negligence or negligence per
25 se, and then the State must prove beyond a

1 reasonable doubt that that negligent act or
2 omission proximately caused great bodily injury or
3 death to another person.

4 MR. MASON: Your Honor, maybe if we would
5 hand up our brief, whether you look at it now or
6 not.

7 THE COURT: Why didn't you give it to me
8 first thing this morning? When did you all file
9 it?

10 MR. MASON: When you asked me about charges
11 we filed it, we filed it, actually filed it on
12 Monday, Your Honor.

13 THE COURT: Why didn't you give it to me
14 then? When you file it it doesn't come to me, it's
15 a piece of thousands of pieces of paper gets filed
16 every day.

17 MR. MASON: May I approach?

18 THE COURT: Uh-huh (Affirmative).

19 MR. MASON: Thank you.

20 MR. VOIGT: For the record, Your Honor --

21 THE COURT: Wait a minute, let me read
22 something.

23 Okay, you were going to say something?

24 MR. VOIGT: We were just stating we hadn't
25 had any notice of the motion either until just now.

1 MS. KINZELER: He just gave us a copy, Mr.
2 Matthews just gave us a copy.

3 THE COURT: What is the State's position as
4 to whether DUI is a lesser included of felony DUI?

5 MR. VOIGT: I don't think it is. As the
6 Court has articulated, there has been no ruling on
7 that specifically. One of the unique reasons the
8 State would oppose this instruction would be we
9 have two felony DUI charges here and I believe the
10 jury would by law be prohibited from finding lesser
11 included on both, with double jeopardy. I believe
12 there is actually a legal impediment to that charge
13 going forward.

14 THE COURT: You're saying they couldn't find,
15 yes, I guess that would be considered.

16 MR. VOIGT: That would be --

17 THE COURT: No, they could decide he wasn't
18 the cause of the death, they could decide --

19 MR. VOIGT: If they were to decide --

20 THE COURT: If they were to decide he wasn't
21 the proximate cause, then it is not guilty.

22 MR. VOIGT: But if they were to decide --

23 THE COURT: Correct?

24 MR. VOIGT: If they were to decide he wasn't
25 the proximate cause it would be a not guilty.

1 THE COURT: That would be a failure of one of
2 the elements.

3 MR. VOIGT: That's exactly right.

4 THE COURT: It almost becomes another issue.

5 MR. VOIGT: Definitely. It is potentially
6 confusing to the jury.

7 THE COURT: Well, actually, Mr. Mason, if I
8 follow your logic, which is your client, assuming
9 the hypothetical you announced to the Court, which
10 is your client presumably could have been driving
11 on that night on the highway but didn't cause the
12 accident, under that theory he would be not guilty.
13 They have to prove all those elements beyond a
14 reasonable doubt, they don't just prove he was
15 drinking and driving, they have to prove he was the
16 proximate cause of the accident and the proximate
17 cause of death, so if those two elements fail then
18 the State's case fails and he is not guilty.

19 MR. MASON: I understand but the whole
20 purpose of a lesser included offense is to give the
21 jury who may want to --

22 THE COURT: A lesser included is not a
23 compromise verdict. They have to prove their case
24 beyond a reasonable doubt.

25 MR. MASON: And if they don't quite prove

1 it, the lesser included is for the benefit of
2 the defendant, it gives the defendant the
3 possibility --

4 THE COURT: A lesser included offense is when
5 in fact the State has over charged someone and they
6 have not proven the elements of the offense. In
7 other words, usually, using the murder example
8 again, where they fail to prove actual or
9 constructive malice, I'm getting my terms confused,
10 mixed up, the definition of actual malice,
11 nevertheless, I was getting far too complicated.

12 MR. MASON: I understand where you're going.

13 THE COURT: But in a murder case if the State
14 fails on one of the elements, that being malice,
15 then the purpose of a lesser included offense is
16 where there is failure of a burden of proof. In
17 other words, a person is charged with one thing but
18 they are really guilty of something that is lesser
19 included encompassed within that greater offense.
20 The way these facts have been presented to the
21 Court, either he is guilty of this, because either
22 he did it, he caused the accident, he is the
23 proximate cause of it.

24 Under your scenario if the State fails to
25 prove proximate cause he's not guilty. There is no

1 compromise verdict, either he did it or he didn't.
2 It is sort of a black and white issue, so to speak,
3 because if the State fails in that burden of proof,
4 that is probably why there is no lesser included
5 offenses for felony DUI because all those elements
6 have to be met. There is no, "Well, we can prove
7 you were drinking and driving," but not proximate
8 cause. You have to prove proximate cause of the
9 accident and of the injury or death and if that
10 element fails, then there is no option for the jury
11 but not guilty. There is no -- the purpose of
12 lesser included is not to compromise on a verdict.

13 MR. MASON: That is exactly why we made the
14 motion and exactly why we think that, because the
15 elements, all the elements of the lesser offense
16 are included in the greater offense. That is why
17 we think we're entitled as a defendant to ask for
18 this ruling.

19 THE COURT: Most people ask for lesser
20 included when they really think they're guilty of
21 something else than what they were charged with. I
22 don't follow the logic and I don't think it is
23 supported. I will think about it, I will read your
24 memo and everything but either the State meets
25 their burden of proof or doesn't to prove probable

1 cause or not. The purpose of lesser included is
2 not a compromise verdict, it is usually when the
3 State has over charged the case or have failed in
4 some direct element of proof where the jury could
5 determine yes, the State has charged him with this
6 and these are the elements of this but actually the
7 State has only proven, probably I guess another
8 example would be an assault and battery of a high
9 and aggravated nature versus, I'm trying to think
10 of a lesser included of what ABHAN would be, or
11 ABHAN would be a lesser included of murder, where
12 they can't prove the aggravating circumstances. I
13 mean, it's not for the purpose of compromise. The
14 State still has to meet their burden of proof. If
15 they couldn't prove proximate cause then Mr.
16 Barclay is not guilty.

17 MR. MASON: I guess it either meets the legal
18 test of being lesser included or it doesn't.

19 THE COURT: I've got to think about it. At
20 this moment I'm not inclined to do that but I have
21 to study it tonight and see because I wasn't given
22 advance notice and I'm not going to try to figure
23 it out in ten minutes.

24 MR. MASON: I understand, and Mr. Barclay
25 doesn't need to decide right this minute if he

1 needs to testify because he wasn't going to be the
2 first witness anyway.

3 THE COURT: Do you have witnesses here
4 present?

5 MR. MASON: Yes. We're ready, Your Honor.

6 THE COURT: How many witnesses do you have?

7 MR. MASON: There is three, there is four out
8 in the hall this second Your Honor and others
9 enroute.

10 THE COURT: I'm not going beyond 5:00 o'clock
11 today. The jury has indicated to me they're tired
12 and would like to go home, actually they would like
13 me to adjourn like 4:30, a quarter of 5:00.

14 MR. MASON: I'm at your disposal. I want to
15 get some rest myself, Your Honor.

16 THE COURT: I think we all need to rest,
17 actually because, because the jury doesn't know we
18 worked two days on motions before we started and I
19 think we're all a little emotionally fatigued.

20 MR. MASON: Your Honor, our medical expert
21 has a sister dying of cancer in North Carolina.

22 THE COURT: Are they here?

23 MR. MASON: We told him he didn't have to be
24 here on Friday.

25 THE COURT: Do you want him to be here on

1 Monday?

2 MR. MASON: He is available Monday.

3 THE COURT: Fine. I don't see that as a
4 problem.

5 MR. MASON: So if you are going to work
6 tomorrow I don't know how much I can fill up.

7 THE COURT: I will follow you all's, if you
8 all don't want -- if you all want time off I will
9 give you tomorrow off.

10 MS. KINZELER: It is up to you all.

11 THE COURT: The jury has sort of indicated
12 they needed a break. I was, based on that, going
13 to work until about noon. I was actually going to
14 work until about 3:00 and let them go but after I
15 looked at the logistics of it, when you start court
16 and then you break and then you go to lunch, I
17 think we would just be having them come back for an
18 hour, which from my perspective, if I were them it
19 would frustrate me a little bit, go to lunch, spend
20 \$10 to eat downtown and you bring me back. I would
21 love to buy them lunch, they are very generous with
22 our jury but it is sort of an insult to injury to
23 send them out to eat and then bring them back for
24 like an hour and a half and say you go home for the
25 rest of the weekend, because there are lots of

1 things people do on Friday, go to the bank,
2 football season, all those things in high school.
3 It is up to you all. Who knows, they might rather
4 us break and tell them we're going to start fresh
5 on, we'll finish up with some witnesses today, we
6 were going to have an abbreviated schedule tomorrow
7 but for logistics reasons we're going to let you
8 have the day at home tomorrow.

9 MR. MASON: I prefer to start on Monday.

10 THE COURT: We already planned for the case
11 to go over and all the jurors have indicated they
12 don't have a problem with that, and the State has
13 already adjusted the docket for next week, so I
14 think we'll be okay. Or if you all want to call a
15 couple witnesses that's fine, too.

16 MR. MASON: Well, do you want to just see at
17 the end of the day, let's see how far we get, if I
18 have people up here, I can fill up the morning,
19 Your Honor, if we don't get very far, but if I rip
20 through them, then, you know, we may not need to
21 come in on Friday.

22 THE COURT: It's up to you.

23 MR. MASON: Can we wait to see how many we
24 get through?

25 THE COURT: Sure.

1 MR. MASON: Thank you.

2 THE COURT: All right, we're ready.

3 Mr. Barclay, do you need addition time to
4 discuss with your attorney whether or not you
5 testify? What I will do, when we come to that
6 point I will then question you again and determine
7 if you have any questions of the Court and we'll go
8 from there, okay?

9 THE DEFENDANT: And I will discuss it with my
10 wife.

11 THE COURT: Oh, absolutely. You should
12 discuss it, as I have indicated to you, you should
13 discuss it with anyone you feel is important to you
14 and you feel like but ultimately remember that
15 decision is yours.

16 THE DEFENDANT: I understand.

17 THE COURT: Okay.

18 All right, are we ready to proceed?

19 MR. MASON: Yes, Your Honor.

20 THE COURT: Is the State ready?

21 MS. KINZELER: Yes, ma'am.

22 THE COURT: Please bring the jury in, Mr.
23 Robinson.

24 (The jury returned to the courtroom).

25 BAILIFF: All present, Your Honor.

1 THE COURT: Thank you.

2 You may be seated.

3 Ladies and gentlemen, we appreciate your
4 patience. We had some matters of law we needed to
5 take up that hopefully will make the proceedings
6 move a little quicker in the afternoon. I'm going
7 to let, and I anticipate that we'll break a little
8 earlier than we have been, we've kept you all late
9 almost every day and we greatly appreciate your
10 patience but we're going to try to make some
11 accommodations for that and do our best to do a
12 little makeup that we hope will make things a
13 little better so you all can take care of your
14 other responsibility this afternoon.

15 The State may proceed.

16 MS. KINZELER: Your Honor, the State rests.

17 THE COURT: Ladies and gentlemen, the State
18 has rested their case. The Court has already taken
19 up the matters of law that would be appropriate at
20 that juncture. We will now proceed with the
21 defense.

22 Mr. Mason, you may proceed when you're ready.

23 MR. MASON: Thank you, Your Honor. We would
24 call Barbara Jones to the witness stand.

25

1 BARBARA JONES, after being first duly sworn,
2 testified as follows:

3 THE CLERK: State your full name and spell
4 your last.

5 THE WITNESS: Barbara Jones, J-o-n-e-s.

6 THE COURT: You may proceed with questioning.

7 DIRECT EXAMINATION BY MR. MASON:

8 Q Mrs. Jones, where do you live?

9 A I live on Edisto Island.

10 Q And are you married?

11 A Yes.

12 Q And do you have any children?

13 A No.

14 Q Do you work?

15 A I work at Island Family Medicine.

16 Q What is it that you do there?

17 A I am a doctor's assistant.

18 Q Who is the doctor you work for?

19 A Dr. Rebecca Borders.

20 Q And how long have you worked for Dr. Rebecca
21 Borders?

22 A Since 1998.

23 Q What is her relation to Walter Douglas
24 Barclay?

25 A She is his wife.

- 1 Q Okay. And, so, since you have worked for Dr.
2 Borders what has been your occasions to interact
3 with Doug Barclay?
- 4 A Social events. It's a small practice, we get
5 together, Thanksgiving meal one time, we talk in
6 the office on occasion, simple conversation.
- 7 Q With regard to the --
- 8 A Phone conversations.
- 9 Q With regard to phone conversations, have you
10 had multiple occasions to speak with him on the
11 telephone?
- 12 A Uh-huh, yes.
- 13 Q Okay. And tell me what your level of
14 familiarity is with his voice and his mannerisms
15 and that type.
- 16 A I'm not sure --
- 17 Q Are you familiar with his voice?
- 18 A Oh, yes.
- 19 Q Okay. And have you talked to him a lot of
20 times?
- 21 A Yes.
- 22 Q Okay. Now, were you working on Monday,
23 December 8th, 2008?
- 24 A Yes, I was.
- 25 Q What is your job there at Island Family

1 Medical Practice?

2 A I do a variety of things there. I check the
3 patients in, I do vital signs, xray, I answer the
4 phone from time to time when the receptionist is
5 busy, I do the nightly deposits, assist the doctor
6 as needed.

7 Q Okay. With regard to that, did you receive a
8 call from Doug Barclay on December the 8th, 2008?

9 A Yes, I did.

10 Q Okay. Do you recall approximately when that
11 was?

12 A It was sometime between 4:30 and a quarter to
13 5:00.

14 Q Okay. And did you speak with him?

15 A Yes.

16 Q And without relating to me what he said, did
17 you hear his words on the phone?

18 A I did.

19 Q Okay. Describe for the jury how he sounded.

20 A He sounded fine, to the point. I didn't
21 notice any slurring problems. He called to relay a
22 message to his wife.

23 Q Okay. And as a result of that conversation
24 did you pass some message on to Dr. Borders?

25 A I did.

1 Q And what was the message you passed on to Dr.
2 Borders?

3 MS. KINZELER: Objection.

4 THE COURT: Basis?

5 MS. KINZELER: Hearsay.

6 THE COURT: Sustained, hearsay. She can say
7 what she did as a result.

8 BY MR. MASON:

9 Q What is it, don't tell me what Dr. Borders
10 said and don't tell me what Mr. Barclay said, I'm
11 asking you what you did, what you said. What did
12 you say to Dr. Borders after you had the
13 conversation with Mr. Barclay?

14 A I told her that Otis phoned.

15 MS. KINZELER: Objection.

16 THE COURT: Sustained, hearsay.

17 Q Did you relay a message to Dr. Borders?

18 A I did.

19 Q Okay. And without saying what was said, what
20 did it relate to?

21 A It related to relaying a message to her to go
22 to the house just to pick up some apples and run
23 back out to where they were working on the fence.

24 Q Okay. And did she then finish with her
25 patients, did you observe her finish up with her

1 patients?

2 A Yes. It was the end of the day, we were

3 finished with patients.

4 Q Okay. And after she was finished with the

5 patients did you have any conversation with her?

6 I'm not asking what was said yet, but did you

7 converse with her?

8 A After --

9 Q After she finished treating the patient did

10 you say good-bye to her or anything like that at

11 the end of the day?

12 A Yes. We always do.

13 Q Okay. And what was the end of the day at

14 that point, approximate time?

15 A We leave at 5:00.

16 Q Okay.

17 A If we can.

18 Q And on December 8th, 2008, was it the case

19 that the office closed up at 5:00?

20 MS. KINZELER: Objection.

21 THE COURT: Basis?

22 MS. KINZELER: Leading.

23 THE COURT: Sustained, leading. You may

24 rephrase it.

25 BY MR. MASON:

1 Q When did the office close on December 8,
2 2008?

3 A We closed at 5:00 and left at 5:00.

4 Q Okay. Now, December 8th, 2008, how long ago
5 was that from today?

6 A Over two years.

7 Q Well, how is it that you remember this
8 conversation?

9 A I wrote it down.

10 Q And why is it you wrote it down?

11 A I wanted to be sure I had everything
12 accurately.

13 MR. MASON: May I approach?

14 THE COURT: Yes.

15 Q Did you bring with you the original of your
16 notes?

17 MS. KINZELER: Objection, Your Honor.

18 THE COURT: Basis?

19 MS. KINZELER: Leading.

20 MR. MASON: If she needs it to refresh her
21 memory --

22 THE WITNESS: I have it with me.

23 BY MR. MASON:

24 Q And do you recall what date you made the note
25 that you recall the conversation?

1 A It was Thursday, December 8, 2008.

2 Q And does your note properly --

3 MS. KINZELER: Objection.

4 THE COURT: Basis?

5 MS. KINZELER: Leading.

6 THE COURT: I don't know, I haven't heard the

7 full question.

8 BY MR. MASON:

9 Q What is it that your note documents?

10 A It documents --

11 MS. KINZELER: Objection.

12 THE COURT: She can state what, she cannot

13 state the content of what the document says, she

14 can state she had a conversation and that is what

15 she did.

16 Q What is it your note documents?

17 A It documents some conversation with Mark

18 Mason.

19 Q Okay. And the phone conversation you had

20 with me, okay, did you as a result of that make

21 that note?

22 MS. KINZELER: Objection.

23 THE COURT: Basis?

24 MS. KINZELER: Leading, relevance, 801, all

25 of it.

1 THE COURT: Be very careful, Mr. Mason.

2 Proceed.

3 BY MR. MASON:

4 Q What type paper is it you used to make this
5 note?

6 A It's one of our papers we use in the
7 patient's chart.

8 Q Did you make the note with the same degree of
9 accuracy you would have recording something in the
10 patient's chart?

11 A Uh-huh (Affirmative), yes.

12 MR. MASON: Please answer any questions the
13 State would have.

14 THE COURT: Any cross-examination for the
15 witness?

16 CROSS EXAMINATION BY MS. KINZELER:

17 Q Miss Jones, how long was that phone
18 conversation you referenced when the defendant
19 called?

20 A With Otis?

21 Q How long was the conversation?

22 A Maybe two minutes.

23 Q And you said Otis. Who is that referring to?

24 A I'm sorry, that is Doug Barclay.

25 Q The defendant at Mr. Mason's table?

1 A Yes. It's a nickname.

2 Q You hadn't seen him that day?

3 A No.

4 MS. KINZELER: That's all I have. Thank you.

5 THE COURT: Redirect?

6 MR. MASON: No, Your Honor.

7 THE COURT: Any objection to the witness

8 being excused, from the State?

9 MS. KINZELER: No, ma'am.

10 THE COURT: From the defense? Any objection

11 to the witness being excused?

12 MR. MASON: No, Your Honor.

13 THE COURT: Ma'am, you're excused.

14 THE WITNESS: Thank you.

15 (Witness excused).

16 THE COURT: You may call your next witness.

17 MR. MASON: Yes, Your Honor. We would call

18 Louis Sease.

19 THE COURT: Come around and be sworn.

20

21

22

23

24

25

1 LOUIS SEASE, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Please state your full name and
4 spell your last name.

5 THE WITNESS: My full name is Louis Earl
6 Sease and my last name is spelled S-e-a-s-e.

7 THE COURT: You may proceed.

8 DIRECT EXAMINATION BY MR. MASON:

9 Q Mr. Sease, where is it that you live?

10 A I live on John's Island.

11 Q And are you married?

12 A Yes, I am.

13 Q Okay. And are you presently employed or
14 retired? What is your job?

15 A I am retired.

16 Q Okay. What was it that you did during your
17 working years?

18 A I was an insurance agent for the Prudential
19 Insurance Company for thirty years.

20 Q How long is it you have lived in what I will
21 call the Greater Charleston area?

22 A All my life.

23 Q Do you have any particular hobbies?

24 A I love to deer hunt.

25 Q Okay. And that brings me to the next

1 question. Did you have occasion to go deer hunting
2 on December 8th of 2008?

3 A I did.

4 Q Okay, and is there a plot on Edisto Island
5 that you can hunt at?

6 A Yes.

7 Q Tell me about that.

8 A That property belongs to my father-in-law
9 Bill Bailey and is at the corner of 174 and Point
10 of Pines Road. It is approximately 100 acres.

11 Q Okay. And do you have an area on that
12 property where you have a deer stand or something
13 like that?

14 A I have approximately four deer stands.

15 Q And on December 8th of 2008 do you recall
16 being in one of those deer stands?

17 A Yes.

18 Q And particularly in the afternoon hours,
19 which of the deer stands was it you were in?

20 A I was in what we refer to as a 22 foot steel
21 stand on the edge of a five acre field that is
22 probably as the crow flies about 300 yards from
23 Point of Pines Road.

24 Q Is there a driveway leading to Point of Pines
25 Road in the vicinity of that field?

1 A Yes. There is only one and it comes off
2 Point of Pines Road and goes back to the field.
3 Q And were you by yourself that afternoon?
4 A Yes.
5 Q Okay. And did you drive to the hunting site?
6 MS. KINZELER: Objection.
7 THE COURT: Basis?
8 MS. KINZELER: Leading.
9 THE COURT: Sustained.
10 BY MR. MASON:
11 Q How is it you got to the property?
12 A I drive my truck and we keep a locked gate at
13 the entrance, I unlocked the gate, drive in just
14 about maybe 200 yards and park and then walk to my
15 deer stand.
16 Q And what type truck is it that you drive?
17 A It is a 2005 Dodge Power Wagon.
18 Q Okay. What color is it?
19 A It's gray.
20 Q And in the afternoon hours what time was it
21 you got into the deer stand?
22 A Probably at that time of year about 4:00
23 o'clock.
24 Q Okay. And while you were up in the deer
25 stand, tell me what happened.

1 A After sundown and as dark is approaching is
2 generally the best time to try to take a mature
3 animal, and since there were several deer in the
4 field but it wasn't quite dark, and I heard an
5 explosion that sounded very much like a shotgun or
6 a rifle being shot which I thought had come from
7 the vicinity of my property or closer to the road
8 and I thought that possibly I had a trespasser and
9 I came down as quickly as I could because I would
10 like to have apprehended him or her or whoever it
11 could have been, and I got to my truck, stored my
12 gear, drove the truck to the entrance of the
13 property and saw a horrible accident right at my
14 gate.

15 Q And what did you do when you got to the place
16 where the accident was?

17 A I got out of the truck, I observed an
18 individual standing up against the car and I
19 observed the individual standing right outside the
20 truck.

21 Q You approached -- first let me ask you about
22 the individual in the car. Did approach that
23 individual?

24 A Eventually, yes, but about that time what I
25 assume was a fireman or a volunteer fireman arrived

1 with someone else and he asked if I had a
2 flashlight and I went to my truck, I got the
3 flashlight and gave it to him and he, I observed
4 him going to the driver of the car who was still
5 behind the wheel and examining that individual and
6 said that this man was dead.

7 Q And was the passenger that was there at the
8 car, the person that was standing outside the car,
9 was the passenger already out of the car at that
10 time?

11 A Yes.

12 Q Okay. And was that the case when the fireman
13 came up, was the passenger already out of the car
14 when the fireman came up?

15 A Yes, he was already out of the car. When I
16 got there he was already out of the car.

17 Q And the fireman came up after that?

18 A Yes.

19 Q Did you have occasion to go speak with the
20 passenger of the car?

21 A I did. After observing both individuals who
22 appeared to be in the accident and I could see no,
23 no injuries that I could help with, there were no
24 emergency or first aid or anything I could do, I
25 asked both individuals if there was anything I

1 could do and they either indicated to me or said
2 no, that there was nothing, and once that happened
3 I thought it was better that I get out of the way
4 here, and I secured my gate, got in my truck and
5 left the scene.

6 Q Okay. Now, with regard to the hispanic
7 individual standing outside the car, did you
8 directly ask him --

9 MS. KINZELER: Objection.

10 THE COURT: Basis?

11 MS. KINZELER: Leading.

12 THE COURT: Sustained, leading.

13 BY MR. MASON:

14 Q What is it that you recall asking him?

15 A I asked him if there was anything I could do
16 for him.

17 Q What is it you recall he said?

18 A He either --

19 MS. KINZELER: Objection.

20 THE COURT: Basis?

21 MS. KINZELER: Hearsay.

22 THE COURT: Sustained, hearsay. You can ask
23 what he did as a result of the conversation.

24 BY MR. MASON:

25 Q What did you do as a result of the

1 conversation?

2 A I assumed there was nothing I could do for
3 him and I turned to the individual who was standing
4 by the truck and I asked him the same question.

5 Q Okay. Now, with regard to the individual
6 standing by the truck, can you tell the jury about
7 what distance you got from that person when you
8 spoke to him?

9 A I would say probably from the distance of
10 this wall right here, which would probably be five
11 or six feet.

12 Q Okay. Did he appear to you to understand
13 what --

14 MS. KINZELER: Objection.

15 Q How did he appear to you?

16 A He was leaning up against his truck and it
17 was my assumption, I could see nothing, no, as I
18 said, no injuries, looked like he had been involved
19 in an automobile accident and was disturbed about
20 having been there. That is the only thing I
21 observed.

22 Q Did he appear in any way --

23 MS. KINZELER: Objection.

24 THE COURT: Basis?

25 MS. KINZELER: Leading.

1 THE COURT: Sustained, leading, rephrase it.
2 BY MR. MASON:
3 Q Did he appear to be intoxicated?
4 MS. KINZELER: objection.
5 THE COURT: Basis?
6 MS. KINZELER: Leading.
7 THE COURT: Sustained, leading.
8 BY MR. MASON:
9 Q Did you observe him in a sufficient way to
10 tell whether or not --
11 MS. KINZELER: Objection, leading.
12 THE COURT: You need to ask him what he
13 observed.
14 Q With regard to the person in the truck, can
15 you tell me what you observed?
16 A I observed an individual who appeared to be
17 in an automobile accident, was standing upright,
18 leaning against the truck, did not appear to have
19 any bleeding or open wounds. He did not seem to be
20 unsteady, did not appear to be unsteady on his feet
21 and I could not smell anything at all to lead me to
22 believe that he had been drinking.
23 Q Did you observe him --
24 MS. KINZELER: Objection.
25 THE COURT: Basis?

1 MS. KINZELER: leading.

2 THE COURT: Rephrase.

3 BY MR. MASON:

4 Q Were you able to hear what took place at
5 least during the time you were there? In other
6 words, sounds that were taking place in the area?

7 A Not that I remember.

8 Q Did you hear anyone yelling or screaming or
9 anything like that?

10 A No.

11 Q Did you see anyone do anything at the scene
12 that looked in any way inappropriate?

13 A The only thing I can remember is the two
14 individuals that were there, the gentleman that was
15 standing up against the car and the other
16 individual against the truck weren't getting any
17 aid. I remember the weren't getting any aid. I
18 remember the fireman coming up, or the individual,
19 examining the driver of the car and saying this
20 individual is dead, and I don't remember them doing
21 anything for either one of the two other people but
22 I was only there a brief time.

23 Q I understand. And do you recall
24 approximately, in terms of -- let me ask you about
25 law enforcement personnel or EMS personnel or fire

1 department personnel. How many of them had shown
2 up by the time you left?

3 A By the time I left?

4 Q Yes. In other words, who was there at the
5 time you left?

6 A Well, I looked to my right, which is back
7 toward 174, and I could see that there were
8 vehicles and emergency vehicles down the street and
9 that is why I left on Point of Pines Road, turned
10 to my left on Point of Pines Road and went on down
11 to Indigo Hill and left that way.

12 Q And before your testimony today have you
13 spoken with anybody from the Solicitor's office,
14 including Miss Kinzeler?

15 A I had a call from the Solicitor's office.

16 MR. MASON: Please answer any questions that
17 the State would have.

18 THE COURT: Miss Kinzeler or Mr. Voigt, any
19 cross-examination?

20 MS. KINZELER: Nothing from the State, Your
21 Honor.

22 THE COURT: Any objection to the witness
23 being excused, from the State?

24 MS. KINZELER: No, ma'am.

25 THE COURT: From the defense?

1 MR. MASON: No.

2 THE COURT: Sir, you're excused.

3 THE WITNESS: Thank you.

4 THE COURT: You're welcome.

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1 PETER GILLYARD SANDERS, After being first duly sworn,
2 testified as follows:

3 THE CLERK: Please state your full name and spell
4 your last name.

5 THE WITNESS: Peter Gillyard Sanders,
6 S-a-n-d-e-r-s.

7 THE COURT: You may proceed.

8 DIRECT EXAMINATION BY MR. MASON:

9 Q Mr. Sanders, where do you you live?

10 A Pardon?

11 Q Where do you live?

12 A Edisto Island.

13 Q And how long have you lived on Edisto Island?

14 A Since 1987.

15 Q How long has your family been on Edisto Island?

16 A Hundreds of years.

17 Q That's a long time.

18 A My grandmother was born and raised on Edisto, as
19 was her mother and her grandmother.

20 Q And have you ever held any positions in the Old
21 Post Office Restaurant?

22 A Yes, sir.

23 Q Tell me about that.

24 A I was the general manager there from 1988, when it
25 opened, until it closed under its first owner in 2007.

1 Q And are you familiar with the Point of Pines
2 Road?

3 A Yes, sir.

4 Q How familiar?

5 A I used to travel down it daily.

6 Q And did you have occasion to witness an accident
7 on Point of Pines Road?

8 A Yes, sir.

9 Q Tell me about that.

10 A I was heading north toward my house, which is down
11 Oak Island Road, on Highway 174 and I was run off the
12 road.

13 MR. VOIGHT: Objection.

14 THE COURT: Basis?

15 MR. VOIGHT: Could we, Your Honor, could we
16 clarify as to what date?

17 THE COURT: Is that the only objection?

18 MR. VOIGHT: It may change my objection,
19 depending on what date we're talking about.

20 THE COURT: You need to specify time and date.

21 BY MR. MASON:

22 Q Okay. Let me ask you first, did you come to know
23 an Alvero Antonio Garcia?

24 A Yes, sir.

25 Q Okay. And how is it you came to know Alvero

1 Antonio Garcia?

2 A He was the driver in a vehicle --.

3 MR. VOIGHT: Objection, relevance.

4 THE COURT: Madam Forelady, ladies and
5 gentlemen, I have a brief matter of law I need to
6 take up outside your presence. During the break
7 please do not discuss the case, please leave your
8 note pad in your seat.

9 (Jury excused from the courtroom.).

10 THE COURT: What is going to be the substance
11 of this witness' testimony?

12 MR. MASON: Your Honor, previous in the case we
13 related to you that Mr. Garcia had wrecked his car
14 off the right-hand side of Point of Pines Road 600 feet
15 away from where this accident happened in which he
16 died, and I told you that I had other witnesses that
17 were going to further link up that testimony which has
18 been received into evidence to some extent. I
19 represented I had a person who had firsthand, personal
20 knowledge of this accident to the Court, this is that
21 witness who found Mr. Garcia in the car where it had
22 gone off the road, right side of the road
23 and struck a tree, and of course he's one of a number
24 of witnesses that we have that relate to the issue of,
25 you know, the decedent's lack of driving experience,

1 you know, scared of driving at night and particularly
2 on that --

3 THE COURT: How is he going to relay any of that,
4 by virtue of not having seen the accident?

5 MR. MASON: We have yet to put up anybody with
6 absolute firsthand personal knowledge. He is not
7 going to relate any of that. Also it contradicts, it
8 is for impeachment purposes because it contradicts the
9 testimony of Mr. Davilla in regards to the driving of
10 Mr. Garcia.

11 THE COURT: Mr. Davilla didn't testify to anything
12 with regard to his driving.

13 MR. MASON: He went back and forth as to whether
14 he had one car or two cars.

15 THE COURT: He didn't go back and forth, he just
16 didn't answer your question, he didn't have any
17 personal knowledge. That is not extraneous evidence to
18 prove a prior inconsistent statement. I'm trying to
19 figure out how a wreck is relevant to this. You told
20 me you had witnesses where he would have demonstrated
21 to these witnesses who had enough knowledge of him of a
22 habit that he was scared of this road and had
23 apprehension about this road.

24 MR. MASON: Right.

25 THE COURT: And one accident does not --