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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2017-001013

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SC Court of Appeals

Kathryn Martin Key,

Respondent,

vs.

State of South Carolina,

Appellant.

RECORD ON APPEAL

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

ATTORNEYS FOR APPELLANT

JAMES H. PRICE, III ESQUIRE
E. POWERS PRICE, ESQUIRE

644 E. Washington Street
Greenville, South Carolina 29601
(864) 271-3535

J. FALKNER WILKES, ESQUIRE

114 Whitsett Street
Greenville, South Carolina 29601
(864) 282-1292

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	Case No.: 2016CP2306517
Kathryn Martin Key,	)	Ticket No.: H480200
	)	
Appellant.	)	
	)	ORDER ON APPEAL
vs.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

THIS MATTER CAME BEFORE THE COURT upon the Appellant's Notice of Appeal and Appeal of her conviction from the Greenville County Magistrate's Court. On January 4, 2017, this Court conducted a hearing on the matter. At that hearing, E. Powers Price and James H. Price, III represented the Appellant, and Mitchell Byrd and Elizabeth Gary represented the Respondent. The parties presented argument regarding the validity of the Appellant's conviction, and in particular, the admissibility of the Appellant's toxicology report at trial. Based upon the findings of fact and conclusions of law stated herein, I hereby reverse and remand this matter to the Magistrate's Court for a new trial.

Factual Background

On December, 10, 2105, the Appellant ("Key") was involved in an automobile wreck at approximately 8:47 a.m.. Shortly thereafter, emergency medical personnel ("EMS personnel") arrived on scene. As EMS personnel were removing Key from her vehicle, Trooper Campbell, ("Campbell") the investigating/arresting officer, arrived at the scene of the accident. At that time, Campbell did not speak with Key because she was unconscious.¹ EMS personnel transported Key

¹ From all of the information presented to the Court, Key did not regain consciousness for an extended period of time.

to the emergency room at Greenville Memorial Hospital. Initially, Campbell remained at the scene of the accident in order to conduct an investigation as to the cause of the accident.

While conducting his investigation, Campbell determined that the vehicle that Key was removed from was in fact registered to her. Subsequently, Campbell went to Greenville Memorial Hospital and placed Key under arrest at 10:35 a.m.. At that time, Key remained unconscious from the accident. Campbell read Key the implied consent warnings pursuant to South Carolina Code Section 56-5-2950 at 10:36 a.m.. The Implied Consent Rights Form indicates that Key was not conscious when Campbell read her those warnings. Furthermore, Campbell testified at trial that Key did not give consent for her blood to be drawn. At 10:45 a.m., a registered nurse from the Greenville Hospital System drew a sample of Key's blood. Campbell did not obtain a search warrant prior to directing the nurse to take Key's blood sample. The parties stipulated that a magistrate judge was on duty at the time of accident, arrest and blood draw.²

On August 8, 2016, the parties engaged in a pretrial hearing before the Honorable Mark C. Edmonds of the Greenville Magistrate's Court. That hearing pertained to a Motion in Limine Motion to Suppress concerning Key's blood sample and the corresponding analysis. During that hearing, Key's attorney asserted that the blood evidence should be suppressed because it was obtained pursuant to an unlawful search in violation of the Fourth Amendment to the United States Constitution, Article I, Section 10 of the South Carolina Constitution, and United States Supreme Court precedent.³ The magistrate judge denied Key's suppression motion. On November 8, 2016, a magistrate judge found Key guilty of Driving Under the Influence (1st Offense). Prior to and during Key's trial, Mr. Price, Key's attorney, renewed his Motion to Suppress regarding the

² Magistrate's Court Return, No. 5, Pg. 5.

³ In particular, Key's counsel argued that the search and seizure here violated the precedent established by the Court in *Missouri v. McNeely*. See *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

blood evidence. The State asserted that the blood draw was lawfully completed because Key consented to the blood draw based upon the state implied consent statute, which provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. . . . If the person is physically unable to provide an acceptable breath sample because the person . . . is unconscious . . . the arresting officer may request a blood sample to be taken. Any additional tests to collect other samples must be collected within three hours of the arrest.

S.C. Code Ann. § 56-5-2950 (A)(Supp. 2009).

The magistrate judge denied Key's motions. Additionally, Mr. Price moved for a directed verdict at the close of the State's case; however, the magistrate denied that motion as well. The trial judge found Key guilty based upon the evidence presented, including the blood evidence, during the course of the trial. Key then filed this appeal.

Legal Standard and Findings

The Fourth Amendment provides protection for citizens against unreasonable searches and seizures.⁴ Similarly, the South Carolina Constitution provides protection against unlawful searches and seizures.⁵ A search or seizure does not infringe upon the protections of the Fourth Amendment or the South Carolina Constitution if the search or seizure is initiated with a warrant

⁴ U.S. Const. amend. IV, "The right of the people to be secure in their persons, houses . . . against unreasonable searches and seizures, shall not be violated"

⁵ S.C. Const. art. I, § 10.

supported by sufficient probable cause.⁶ However, a warrantless search or seizure is not unreasonable so long as a recognized exception to the warrant requirement exists.⁷

In *Schmerber*, the United States Supreme Court held that the warrant requirement and corresponding exceptions apply to intrusions into the human body, including blood draws.⁸ Recently, the Supreme Court specifically addressed the warrant requirement in cases involving blood draws collected pursuant to an informed consent statute.⁹ In *McNeely*, the Court declined to establish a per se exigency for the natural metabolism of alcohol.¹⁰ The Court held that the reasonableness of a warrantless blood draw must be addressed on a case-by-case basis using a totality of the circumstances analysis.¹¹ More importantly, the Court noted that police officers should obtain a warrant for a blood draw if doing so does not "*significantly undermine* the efficacy of the search"¹²

Here, the State argued that the blood draw was obtained lawfully pursuant to the informed consent statute.¹³ However, I do not find this argument compelling. In particular, the parties agreed that a magistrate judge was on-duty and available at the time of the blood draw. Therefore, Trooper Campbell had the opportunity to seek a search warrant, and a judge with the authority to issue such a warrant was readily available to him to issue such a warrant. However, Campbell did not obtain

⁶ *State v. Bacus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006), *cert. denied*, 555 U.S. 1074, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008).

⁷ *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (citing *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 298-99 (1978)). *See also*, *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) These exceptions include: "(1) search incident to a lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile exception; (5) the plain view doctrine; (6) consent; and (7) abandonment."

⁸ *Schmerber v. California*, 384 U.S. 757, 770 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966).

⁹ *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696, 81 USLW 4250 (2013). In *McNeely*, the state of Missouri appealed a trial court's decision to suppress blood test results obtained without a warrant during the course of a DUI investigation. In that case, Missouri relied upon an informed consent statute similar to South Carolina's statute.

¹⁰ *McNeely*, 133 S.Ct. at 1561-68 (noting that "the metabolism of alcohol in the blood stream is [one] factor that must be considered in deciding whether a warrant is required.")

¹¹ *Id.*

¹² *McNeely* at 1562 (citing *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1943)).

¹³ S.C. Code Ann. § 56-5-2950 (Supp. 2009).

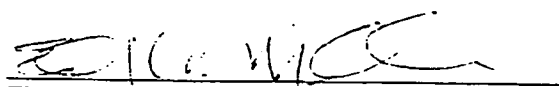
a search warrant even though the statute that he relied upon to obtain the blood sample provides a three hour time period in which blood samples may be obtained.¹⁴ Instead, Campbell waited only (10) minutes from the time of arrest before ordering Key's blood be drawn.

As the Court noted in *McNeely*, blood draws performed pursuant to implied consent statutes, like the statute at issue here, "implicate a significant privacy interest." In light of *McNeely*, I hold that a search warrant should have been obtained prior to Campbell ordering a blood draw from Key. The blood evidence obtained from Key constituted an illegal search and seizure in violation of Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution. Accordingly, I find that the trial court should have suppressed the blood evidence and a new trial is necessary.

THEREFORE, based upon the findings of fact and conclusions of law, it is hereby ordered that the blood test results were obtained pursuant to an unlawful search and should have been suppressed, and absent legally sufficient evidence of impairment, this conviction is reversed and remanded to the lower tribunal for a new trial.

AND IT IS SO ORDERED.

2/14/17


The Honorable Edward W. Miller
Presiding Judge, 13th Judicial Circuit

¹⁴ S.C. Code Ann. § 56-5-2950 (A) (Supp. 2009).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
State of South Carolina.	)	C.A. NO. 2016-CP-23-06517
	)	
Plaintiff.	)	
	)	
v.	)	ORDER
	)	
Kathryn Martin Key.	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court upon Respondent's Motion to Reconsider.
Alter. or Amend. pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

Based upon careful consideration of all the evidence and upon full consideration
of the Plaintiff's motion, this Court is not persuaded to reconsider its ruling in this matter
nor alter or amend the judgment.

THEREFORE, it is ORDERED ADJUDGED AND DECREED that the
Plaintiff's Motion to Reconsider, Alter. or Amend is Denied.

IT IS SO ORDERED.

Dated: _____
Greenville, South Carolina

Edward W. Miller
Thirteenth Judicial Circuit

Electronic signature page to follow



Greenville Common Pleas

Case Caption: Kathryn Martin Key VS South Carolina State Of

Case Number: 2016CP2306517

Type: Order/Other

So Ordered

s/ Edward W. Miller

Electronically signed on 2017-03-27 15:17:11 page 2 of 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	S.C. THIRTEENTH JUDICIAL CIRCUIT
Kathryn Martin Key,	)	Common Pleas Case No.: 2016-CP-23-06517
Appellant,	)	Ticket Nos.: H480200 and H554801
vs.	)	MAGISTRATE'S COURT RETURN
State of South Carolina,	)	
Respondent.	)	

This matter was brought before me on November 8, 2016, as a bench trial on the merits in connection with the above numbered tickets charging Defendant with the offenses of driving under the influence of alcohol (S.C. 56-5-2930) and possession of an open container (S.C. 61-4-110). Testimony was taken from the arresting officer, the nurse who drew the sample of Defendant's blood, and the toxicologist who prepared the report concerning the blood results. By agreement of the parties the remaining witnesses who would normally be required to testify concerning the chain of custody were not called and their chain of custody testimony was stipulated.

The State was represented by Assistant Solicitor Elizabeth Gary. Defendant was present and was represented by the Price Law Firm, P.A. From the file, pretrial matters, and the trial of this case the Court makes the following Findings of Fact/Conclusions of Law:

1. Defendant was charged as referenced above on December 10, 2015, as a result of a wreck that occurred in Greenville County on December 10, 2015, at 8:47 a.m. The investigating/arresting officer, Trooper Campbell, arrived on the scene as EMS was removing Defendant from the driver's seat of a vehicle which was registered to Defendant. Defendant's driver's license was found in the vehicle from which she was removed. Trooper Campbell did

not have the opportunity to talk with the Defendant at the scene or at the hospital due to the fact that she was unconscious. Trooper Campbell initially remained on the scene to investigate the collision and discuss same with the individual driving the other car with which Defendant collided. No other person(s) were located at the scene.

2. A Jack Daniel mini bottle with "wet residue" in the bottom was found in the glovebox of Defendant's vehicle. As a result of Trooper Campbell's investigation at the scene and the mini bottle Trooper Campbell suspected that Defendant was driving under the influence of alcohol.

3. Trooper Campbell then went to the Greenville Memorial Hospital Emergency Room. The Defendant was unconscious in the emergency room. Trooper Campbell placed Defendant under arrest at 10:35 a.m.

4. Trooper Campbell read Defendant implied consent warnings pursuant to Section 56-5-2950 at 10:36 a.m. The implied consent warning form was placed into evidence subject to Mr. Price's objection to the introduction of the blood test results. According to Trooper Campbell's handwriting on the Implied Consent Rights Form and his testimony the Defendant was unconscious at the time that he read the implied consent rights form to her, and she did not understand them. Trooper Campbell further testified that the Defendant did not affirmatively consent to the taking of her blood because she was unconscious. A registered nurse with the Greenville Hospital System took a sample of blood from Defendant at 10:45 a.m., on December 10, 2015. The Chain of Custody Form signed by her at the time that she took the blood sample from the Defendant was also placed into evidence subject to Mr. Price's objection referred to above. According to the Chain of Custody Report and the nurse's testimony the Defendant was

unable to sign the form because she was unconscious at the time that the nurse took the blood sample from her.

5. Trooper Campbell did not obtain a search warrant for Defendant's blood prior to him directing the nurse to take a sample. Trooper Campbell testified that he did not believe that a search warrant was necessary under the law. Mr. Price objected to "law". It was further advised under his training he didn't feel it was necessary. The State and Defendant Stipulated that a Greenville County Magistrate was on duty at the time of Defendant's arrest and prior to having her blood drawn on the morning of December 10, 2015. From Trooper Campbell's testimony.

6. A Motion in Limine/Motion to Suppress was heard by the Court in this matter on August 8, 2016, in which Defendant's attorney argued that the blood test should be suppressed due to violation of the Fourth Amendment to United States Constitution, Article 1, Section 10, of the South Carolina Constitution, and the U.S. Supreme Court case of Missouri v. McNeely, 133 S.Ct. 1552 (2013). No testimony from witnesses or evidence was introduced at the hearing which was limited to argument of counsel. At that time the Court denied the Motion in Limine/Motion to Suppress.

7. Prior to and during the trial of this matter Mr. Price renewed his Motion to Suppress and reargued same. He timely objected to the admission of the blood test results from the sample taken from the Defendant while she was unconscious for the same reasons as previously argued, *i.e.*, Missouri v. McNeely, Supra, and State and Federal Constitutional grounds referred to above. The State's position was that the Defendant's consent to the blood draw was implied pursuant to S.C. 56-5-2950 Implied consent to testing for alcohol or drugs;

procedure; influence of DUI.

(A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.

State also made statement including legislative intent to the law. Mr. Price's objection to the introduction of the blood test results as evidence was overruled, suppression denied, and the results entered as evidence. The State rested its case. At the close of the State's case Mr. Price moved for a directed verdict of acquittal based on the Court's introduction of the blood test results, which was denied. Defense chose to not introduce evidence or testimony. The Defendant was found guilty of DUI on Ticket No. H480200. However, Mr. Price's Motion for a directed verdict of not guilty on the ticket charging Defendant with open container of alcohol was granted.

Respectfully Submitted;


THE HONORABLE MARK C. EDMONDS

Greenville, South Carolina

Dated: 11/17/16

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2) THIRTEENTH JUDICIAL CIRCUIT
3 COUNTY OF GREENVILLE) Common Pleas Case No.:
4 KATHRYN MARTIN KEY,) 2016-CP-23-06517
5 Appellant,) Ticket Nos.:
6 vs.) H480200 and H554801
7 STATE OF SOUTH CAROLINA,) **COPY**
8 Respondent.)

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ATTORNEY GENERALS
OFFICE

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JUDY COMP & ASSOCIATES, INC.

1 APPEARANCES:
2 E. POWERS PRICE, Esquire
3 JAMES H. PRICE, III, Esquire
4 Price Law Firm, P.A.
5 644 East Washington Street
6 Greenville, South Carolina 29601
7 Attorneys for Appellant.
8 ELIZABETH GARY, Esquire
9 Assistant Solicitor
10 Thirteenth Judicial Solicitor's Office
11 305 East North Street
12 Greenville, South Carolina 29601
13 Attorney for Respondent.

14 - - - - -

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16		PAGE
17	COLLOQUY BETWEEN THE COURT AND	3
18	COUNSEL.	

19 - - - - -

20 INDEX OF EXHIBITS

21		PAGE
22	THERE WERE NO EXHIBITS INTRODUCED.	

23 - - - - -

24

1 (In the following transcript, a dash [--]
2 is used to indicate an unintentional or
3 purposeful interruption in a sentence, or to
4 indicate halting speech or an unfinished
5 sentence in dialogue.)

6 - - - - -

7 THE COURT:

8 All right. We're on the record.
9 Today's date is 8/8/2016. This is in
10 reference to two tickets, an open
11 container as well as a DUI, H554801 and
12 H480200. The charging officer is
13 Trooper Campbell. A jury trial was
14 requested by the Price Law Firm. James
15 Price is present as well as the
16 Solicitor. I will open the floor to
17 the Solicitor why we're here.

18 MS. GARY:

19 Thank you, Judge, may it please The
20 Court. This is Mr. Price's Motion,
21 Judge. We are here in the matter of
22 Kathryn Martin Key. I will simply
23 defer to Mr. Price since it's his
24 Motion, and I will respond when he is
25 done.

1 THE COURT:

2 All right.

3 MS. PRICE:

4 Thank you, Your Honor.

5 THE COURT:

6 Yes, ma'am.

7 MS. GARY:

8 I'm sorry. Ms. Price's Motion.

9 MS. PRICE:

10 For the purposes of this hearing we'll
11 agree to stipulate to documents, but if
12 this case does end up going to trial we
13 would require live testimony. I'd like
14 to begin by passing up to The Court the
15 Advisement of Implied Consent Rights as
16 well as the South Carolina Law
17 Enforcement Division Urine and Blood
18 Collection Report. As for the facts of
19 the case, Your Honor, I believe the
20 following is undisputed, but I'm sure
21 the State will correct me if I'm wrong.
22 Ms. Key was involved in an automobile
23 accident at 8:47 a.m. The arresting
24 trooper arrived at the accident
25 location at 8:57 a.m. The Defendant

1 was arrested at 10:35 a.m. Blood was
2 drawn at 10:45 a.m. The Defendant was
3 unconscious so she was unable to give
4 her consent to the blood being drawn,
5 and the arresting trooper did not have
6 a search warrant for the blood. We
7 filed a Motion to Suppress the blood
8 results back in June based on a
9 violation of the Fourth Amendment and
10 also Missouri v. McNeely, a United
11 States Supreme Court case. This
12 morning we filed an Amended Motion
13 based on the same reasons in addition
14 to Section 10 of the South Carolina's
15 -- the South Carolina Constitution. In
16 Missouri v. McNeely The Court held up
17 the natural metabolization of alcohol
18 did not create a per se exigency to
19 justify warrantless blood draws without
20 consent, and The Court further held
21 that exigent circumstances must be
22 decided on a case-by-case basis based
23 on totality of the circumstances. In
24 this case, Your Honor, there was no
25 exigent circumstances because the blood

1 was drawn in a mere ten minutes of the
2 arrest. And as I'm sure you're aware
3 there is a magistrate on call in
4 Greenville County 24 hours a day, seven
5 days a week. And, furthermore,
6 technology makes it very easy for the
7 trooper to call in a warrant. Ms. Key
8 again was unconscious so clearly she
9 did not consent to her blood being
10 drawn. Since that Motion was filed in
11 June of this year the United States
12 Supreme Court came out with another
13 case, Birchfield v. North Dakota, which
14 addressed criminal penalties for
15 refusing breath and blood tests. The
16 Court affirmed McNeely's ruling
17 regarding exigent circumstances but
18 also examined breath and blood tests
19 within the context of search incident
20 to arrest and implied consent. The
21 Court held that search incident to
22 arrest does not apply to blood tests.
23 And then I would direct The Court to
24 pages 36 and 37 of that opinion which
25 are highlighted. The Court stated that

1 -- I'll let The Court get there.

2 THE COURT:

3 The Implied Consent?

4 MS. PRICE:

5 Yes, Your Honor.

6 THE COURT:

7 Go ahead.

8 MS. PRICE:

9 The Court stated that there must be a
10 limit to consequences to which a
11 motorist may be deemed to have
12 consented by virtue of their decision
13 to drive on public roads. The Court
14 went in depth in discussing the
15 differences between breath and blood
16 tests, and the ultimate result hinged
17 on the level of intrusions involved
18 with blood tests. The Court ruled that
19 the penalties for refusing to take a
20 breath test is okay, but not penalties
21 for refusing to take a blood test due
22 to the level of infusion -- intrusion
23 and privacy interests. The South
24 Carolina's Implied Consent Statute was
25 enacted prior to both of these United

1 States Supreme Court cases. Our
2 statute is in violation of both rulings
3 and also the Fourth Amendment, Section
4 10 of the South Carolina Constitution
5 and as far -- or is in violation of
6 both rulings and also the Fourth
7 Amendment, Section 10 of the South
8 Carolina Constitution as far as drawing
9 blood from an unconscious person as it
10 was here. Because our Implied Consent
11 Statute is invalid and there are no
12 exigent circumstances, and there was no
13 consent in this case, the blood results
14 should be suppressed.

15 THE COURT:
16 Solicitor.

17 MS. GARY:

18 Thank you, Judge, may it please The
19 Court. I'll sort of go in reverse
20 order as Ms. Price went. First of all,
21 Judge, if Your Honor would turn -- and
22 I don't know if the printout of
23 Birchfield versus North Dakota that you
24 have has the same pagination as mine,
25 but mine is page 27 at the very

1 beginning of Section Six. The Court
2 very specifically states, Judge, that
3 this case applies only to implied
4 consent statutory schemes that have
5 criminal penalties. It says our prior
6 -- and I'll just tell The Court that
7 South Carolina's Implied Consent
8 Statute only has a civil -- is a civil
9 statute, Judge. I have a case with me,
10 and I do not have copies for The Court
11 -- for the Defense, and I apologize.
12 We can share one. State versus -- and
13 I'll spell it, C-u-c-c-i-a. It's 353-
14 SC-430 that tells us that our Implied
15 Consent Statute does have civil
16 penalties, Judge. And I'm reading from
17 the United States Supreme Court. It
18 says, "Our prior opinions have referred
19 approvingly to the general concept of
20 implied consent laws that impose civil
21 penalties and evidentiary consequences
22 on motorists who refused to comply."
23 And it cites you to a portion of
24 McNeely that again upholds statutory
25 schemes like ours. The Court goes on

1 to say, "Petitioners do not question
2 the constitutionality of those laws,
3 and nothing we say here should be read
4 to cast doubt on them." Judge, the
5 State takes the position that
6 Birchfield versus North Dakota
7 explicitly excludes implied consent
8 statutory schemes just like those we
9 have in South Carolina, and I believe
10 that's the portion in which they do
11 that. So, Your Honor, the State's
12 position will be -- and I apologize for
13 my voice. The State's position would
14 be that Birchfield versus North Dakota
15 does not render our statutory scheme
16 unconstitutional. Judge, I appreciate
17 their argument about McNeely. As Your
18 Honor is probably very aware all that
19 McNeely tells us, and we have -- and
20 the State does not contend the holding
21 of McNeely. All that it tells us is
22 that the Supreme Court refused to adopt
23 a bright-line rule under which they
24 would say that warrantless blood draws
25 in all DUI cases are okay based solely

1 on the fact that alcohol dissipates
2 quickly. That is all that McNeely
3 says. That is what Missouri was
4 requesting in that case. They wanted
5 them to say, "Look, no matter what, in
6 a regular DUI, not a felony DUI, but in
7 a regular DUI arrest you can get that
8 blood without a warrant because alcohol
9 dissipates. The end." And the Supreme
10 Court of the United States said, "We're
11 not going to adopt that bright-line
12 rule. It is a case-by-case decision."
13 That is all that McNeely stands for,
14 Judge, and I would not dispute that.
15 That is exactly what Ms. Price said.
16 That is what McNeely says. Judge, this
17 is not a case where McNeely is
18 triggered. We do not have to get to
19 exigent circumstances. We do not have
20 to have other reasons or ways around
21 the fact they did not get a warrant in
22 this case. And why is that? Because
23 she consented to have her blood taken
24 and tested when she chose to operate a
25 motor vehicle in South Carolina. Our

1 Implied Consent Law specifically says
2 if an officer has probable cause to
3 believe that acts have been committed
4 while driving a motor vehicle under the
5 influence they can -- Your Honor, our
6 Implied Consent Laws are triggered.
7 She's right. We've had this since
8 1962. I'll point -- I have a copy of
9 our Implied Consent Law for Your Honor
10 if you needed it. It's 56-5-2950. It
11 explicitly says, basically lays out --
12 or limits the scope of the searches
13 under the Fourth Amendment. You first
14 have to get a breath test and determine
15 if alcohol is even operating on this
16 person's system. And it sets out you
17 have to do breath first, only then can
18 you move to the other more intrusive
19 tests. Judge, I would cite you to
20 Virginia versus Moore, which is a
21 United States Supreme Court case, 553-
22 US-164. In that case the Supreme Court
23 held states are free to impose higher
24 standards on searches and seizures than
25 required by the Constitution. And our

1 Implied Consent Statute is one of
2 those. It is a higher standard of what
3 has to happen before these searches can
4 occur. Judge, this is not a case where
5 we have to look for exigent
6 circumstances. We are not looking for
7 an exception to the warrant
8 requirement. He did not have to have a
9 warrant to search her blood because
10 number one, she'd already consented to
11 that testing. Number two, there's no
12 dispute she was unconscious, Judge.
13 And in 56-5-2950 it tells us, "If the
14 person is physically unable to provide
15 a breath sample" -- which would be step
16 one - "because the person has an
17 injured mouth, is unconscious or dead,
18 or for any other reason considered
19 acceptable by medical personnel the
20 officer may request a blood sample be
21 taken." Now, Ms. Price is right. Ms.
22 Key did not have the ability to refuse
23 that blood sample, but she did not have
24 the ability to refuse that blood sample
25 because she had rendered herself

1 unconscious by having an accident while
2 driving with a significantly high blood
3 alcohol level. And, Your Honor, if you
4 think about the practical implications
5 of suppressing blood results in this
6 specific factual scenario anyone who
7 drives under the influence and has an
8 accident and is rendered unconscious
9 such that they cannot consent to that
10 blood draw, even though they already
11 have, law enforcement's hands will be
12 completely tied to investigate any sort
13 of accident, felony DUI, any sort of
14 accident in which the driver is
15 unconscious. So the implications of
16 suppressing these blood results are the
17 very reasons why this exception is
18 carved out in Implied Consent. So I
19 apologize for that longwinded
20 explanation, but for those reasons the
21 State would adamantly oppose this
22 Motion and ask Your Honor to uphold --
23 to allow us to admit the breath --
24 excuse me, the blood sample.

25 THE COURT:

1 Anything else, Ms. Price?

2 MS. PRICE:

3 Yes, Your Honor, I would like to
4 briefly reply. The State has passed up
5 a 2003 case. Both of my United States
6 Supreme Court cases were much later
7 than that. They're a lot more recent.
8 And in Missouri v. McNeely The Court
9 stated that when officers in drunk
10 driving investigations can reasonably
11 obtain a warrant before having a blood
12 sample drawn without significantly
13 undermining the efficacy of the search
14 the Fourth Amendment mandates that they
15 do so. And I would also like to
16 redirect The Court to Birchfield where
17 The Court discusses at length the
18 differences between breath tests and
19 blood tests and how breath tests -- or
20 blood tests should have a search
21 warrant, Your Honor, based on the
22 intrusions of the privacy and the
23 Fourth Amendment, Your Honor.

24 THE COURT:

25 Anything else, Solicitor?

1 MS. GARY:

2 I'll rely on that, Judge. Thank you.

3 THE COURT:

4 Okay. At this time, Ms. Price, I'm
5 going to deny the Motion to Suppress.
6 Anything further?

7 MS. PRICE:

8 No, Your Honor.

9 THE COURT:

10 Anything further?

11 MS. GARY:

12 Nothing from the State.

13 THE COURT:

14 All right. Thank you.

15 MS. GARY:

16 Thank you, Judge.

17 (HEARING ADJOURNED)

18

19

20

21

22

1 STATE OF SOUTH CAROLINA)
2) CERTIFICATE
3 COUNTY OF GREENVILLE)

4 I, RACHEL H. WOOD, a Notary Public, duly
5 commissioned and qualified in and for the
6 State of South Carolina, do hereby certify
7 that the audio file of the Pretrial Hearing
8 taken on August 8, 2016, was transcribed by
9 me; and that this transcript is a true
10 record of said pretrial. I further certify
11 that I am not of kin or counsel to the
12 parties in this case, am not in the regular
13 employ of counsel for any of said parties,
14 nor am I interested in the results of this
15 case.

16 IN WITNESS WHEREOF, I have hereunto set my
17 hand and affixed my official seal this
18 12th day of December, 2016.

19 _____
20 Notary Public for South Carolina
21 My Commission Expires: 03/25/19

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2) THIRTEENTH JUDICIAL CIRCUIT
 3 COUNTY OF GREENVILLE) Common Pleas Case No.:
 4 STATE OF SOUTH CAROLINA,) 2016-CP-23-06517
 5 Appellant,) Ticket Nos.:
 6 vs.) H480200 and H554801
 7 KATHRYN MARTIN KEY,) **COPY**
 8 Defendant.)
 9 - - - - -

10 Audio File of the Bench Trial Hearing taken
 11 in the aforementioned matter was heard
 12 before Magistrate Mark C. Edmonds, at Chick
 13 Springs Summary Court, 2801 Wade Hampton
 14 Boulevard, Taylors, South Carolina, on the
 15 8th day of November, 2016.
 16 - - - - -

20 **RECEIVED**

21 JUN 19 2017

22 **ATTORNEY GENERALS**
 23 **OFFICE**
 24
 25
 26

1 APPEARANCES:

2 **ELIZABETH GARY, Esquire**

3 Assistant Solicitor

4 Thirteenth Solicitor's Office

5 305 East North Street

6 Greenville, South Carolina 29601

7 Attorney for Appellant.

8 Price Law Firm, P.A.

9 644 East Washington Street

10 Greenville, South Carolina 29601

11 Attorney for Defendant.

12 - - - - -

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13	(In the following transcript, a dash [--]	
14	is used to indicate an unintentional or	
15	purposeful interruption in a sentence, or to	
16	indicate halting speech or an unfinished	
17	sentence in dialogue.)	
18	- - - - -	
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1 THE COURT: Solicitor, I have
2 absolutely no information
3 whatsoever.

4 MS. GARY: Okay. I thought that
5 might be the case, Judge. Your
6 Honor, this is the State versus
7 Kathryn Martin Key. I have a copy
8 of the tickets that are barely
9 legible, and I apologize. Ms. Key
10 was charged with driving under the
11 influence and open container on
12 December 10th, 2015.

13 THE COURT: Okay. So these
14 tickets are H554801 and H580200
15 (sic). And I guess we've been set
16 for a bench trial today; is that
17 correct?

18 MS. GARY: Yes, sir.

19 MR. PRICE: Yes, sir.

20 THE COURT: Okay.

21 MS. GARY: Just by way of
22 procedural history in this case,
23 Judge, this case was originally on
24 the docket August the 8th of this
25 year and that was a Monday. On

1 that day we had the roll call in
2 this case. We also argued before
3 Your Honor Mr. Price's Motion to
4 Suppress the blood test results in
5 this case, the test and the results
6 of the test in this case. That --
7 that hearing was held in Your
8 Honor's office. It was put on the
9 record, at least it was recorded at
10 that time. The State's
11 understanding at that time is that
12 Your Honor denied Mr. Price's
13 Motion to Suppress based on a
14 number of things including South
15 Carolina Implied Consent 56-5-2950.
16 So now we are here for the trial
17 today.

18 THE COURT: Okay. I have reviewed
19 that.

20 MS. GARY: Thank you.

21 THE COURT: Just a little bit ago.
22 Yes, sir, Mr. Price.

23 MR. PRICE: What is represented to
24 The Court is true. We did have an
25 in limine hearing where basically

1 at that time I did preserve my
2 right to a trial in the event of an
3 adverse ruling.

4 THE COURT: Yes, sir.

5 MR. PRICE: No testi -- no
6 witnesses were called, no evidence
7 was introduced, and I'm assuming
8 The Court is aware that by -- with
9 the cases I have got to renew my
10 objections and repeat the
11 objections during this trial or
12 else I waive them, which I'm not
13 inclined to do.

14 THE COURT: Certainly.

15 MR. PRICE: So to a certain extent
16 we're going to go through some of
17 that again, but I hope The Court is
18 aware we understand that our
19 arguments are legal in nature, and
20 we have agreed to streamline this
21 trial rather than take a whole day
22 in front of a jury and the like.
23 So we ought to be able to knock
24 this out in an hour and a half,
25 maybe two hours at the most.

1 THE COURT: Very good. Thank you,
2 Mr. Price.

3 MS. GARY: Your Honor, just so
4 we're clear, the State's position
5 is that that was not a Motion in
6 Limine. That was pretrial motion
7 that was potentially dispositive of
8 this case. Had Your Honor ruled in
9 Mr. Price's favor my evidence would
10 have been handicapped such that we
11 would not have been able to proceed
12 to trial. That was not a Motion in
13 Limine such as Your Honor did not
14 make a final decision. Your Honor
15 made a final decision on August 8th
16 as to this issue. It's the State's
17 position that has been preserved
18 for the record and, in fact, the
19 recording does still exist. He
20 made his objections very well
21 known. There's a written brief
22 that he supplied to The Court at
23 that time. We did have arguments.
24 Testimony was not required in that
25 hearing. That was not a -- it was

1 not a factual issue to be decided
2 by The Court or an issue to be
3 preserved for appeal. And I
4 certainly understand Mr. Price's
5 concern about preserving items for
6 appeal. I think that the record in
7 this case is very clean. He has
8 done his job in that case. We do
9 not have any reason to even discuss
10 whether or not Trooper Campbell
11 needed to apply for or ask for a
12 search warrant before he got this
13 blood in this case. That issue has
14 been resolved by Your Honor. So
15 there should be no testimony, it's
16 my position, about that because
17 it's quite -- quite clear from the
18 record Your Honor's decision.

19 MR. PRICE: And I thoroughly
20 disagree. A Motion in Limine is
21 the same thing as a pretrial
22 motion. It's all encompassed. I
23 just gave The Court a copy of State
24 v. Moses. I've got to reargue it
25 to preserve my case. Now, I'm not

1 going to go into any length of
2 time. There are some things that
3 we have discovered since that
4 pretrial motion was argued. The
5 State's big position was that the
6 Implied Consent, South Carolina's
7 Implied Consent Law, allowed such
8 an action to take. The Supreme
9 Courts of both Georgia and South --
10 Georgia and North Carolina have
11 both ruled on that very issue in
12 July of this year that say no.
13 Since Missouri v. McNeely was
14 decided in 2013 implied consent is
15 not enough, and those cases need to
16 be argued to The Court. So I'm not
17 going to repeat everything that was
18 done, but there are some things
19 that have to be brought out to
20 protect my record on this case.

21 THE COURT: Very well. Are you-
22 all waiving opening statements, or
23 are we just --

24 MS. GARY: I'd be happy to do
25 that, Judge.

1 THE COURT: Mr. Price?

2 MR. PRICE: I'll be to glad to
3 waive, Your Honor. I think the
4 closing statement would be --

5 THE COURT: Absolutely.
6 Absolutely. Solicitor, you have
7 the floor.

8 MS. GARY: Thank you, Judge. At
9 this time the State will call
10 Trooper Aaron Campbell.

11 THE COURT: Good afternoon,
12 Trooper Campbell.

13 TROOPER AARON PAUL CAMPBELL,
14 being first duly sworn/affirmed, was
15 examined and testified as follows:

16 THE COURT: Thank you. Have a
17 seat and state your name for our
18 record.

19 THE WITNESS: My name is Aaron
20 Paul Campbell with the South
21 Carolina Department of Public
22 Safety as the Highway Patrol.

23 THE COURT: Thank you.

24 DIRECT EXAMINATION

25 BY MS. GARY:

1 Q. Trooper Campbell, how long have you
2 been with the Highway Patrol?

3 A. It will be five years this year.

4 Q. Okay. What did you do before you were
5 with the Highway Patrol?

6 A. Basically just in the construction
7 industry, paintings and codings from
8 2002 to about 2010.

9 Q. Okay. What are your duties as a
10 highway patrolman?

11 A. In a nutshell to enforce the traffic
12 laws that come out in South Carolina.

13 Q. When did you go to the police academy?

14 A. I started in August of 2011 and
15 graduated there in December of 2011.

16 Q. Okay. When you graduated that academy
17 were you certified to perform field
18 sobriety tests?

19 A. Yes.

20 Q. Were you also certified to perform the
21 DataMaster Test?

22 A. Yes.

23 Q. Are those certifications ones you have
24 to renew periodically?

25 A. Yes, every two years.

1 Q. Okay. When is the last time you had
2 your field sobriety test certified --
3 certification renewed?

4 A. It was December of last year.

5 Q. So December of what year?

6 A. 2015.

7 Q. Okay. Do you ever instruct other
8 troopers to perform those tests? Do
9 you ever teach any classes or anything
10 like that?

11 A. Yes, I'm a field training officer, so
12 when I get the guys out of the -- out
13 of patrol school we go over that with
14 them. I'm not a certified instructor
15 or teacher, but as a field training
16 officer I make -- part of my duties is
17 to make sure they are proficient in
18 performing those tests.

19 Q. Okay. Obviously, some of that -- part
20 of performing those tests is being
21 trained in being able to detect people
22 who are operating under the influence;
23 is that correct?

24 A. Yes.

25 Q. Okay.

1 A. Yes, that's correct.

2 Q. And, again, that is something you were
3 taught to do at the academy?

4 A. Yes.

5 Q. And you've been doing for five years?

6 A. Yes.

7 Q. Okay. Where you were working on the
8 morning of December 10th, 2015?

9 A. I was assigned to Zone 4, which covers
10 basically the southeast part of
11 Greenville County. Zone 4 runs from
12 basically Cherrydale south to 385 and
13 on down into the lower parts of
14 Greenville, Mauldin, Simpsonville and
15 Fountain Inn.

16 Q. Okay. And what does it mean to be on
17 patrol?

18 A. Basically on patrol is I'm open for
19 collisions that happen that day in that
20 area. I'm also patrolling looking for
21 violations that people do on the
22 roadways.

23 Q. Okay. Were you dispatched to a wreck
24 on Muddy Ford Road in -- excuse me, on
25 Muddy Ford Road?

- 1 A. Yes, I was.
- 2 Q. And where is that? Is that in
3 Greenville County?
- 4 A. It is in Greenville County. It's just
5 off of Roper Mountain Road and Blacks
6 Drive area. That part of Greenville
7 County.
- 8 Q. Okay. What time of day were you sent
9 there?
- 10 A. I received the call at 8:47 in the
11 morning.
- 12 Q. Okay. What are you trained to do when
13 you first arrive to a collision scene?
- 14 A. Basically the first steps we have are
15 one is to secure the scene, basically
16 park our patrol vehicles in a way so it
17 doesn't cause another collision.
18 Secondly we are to check on injuries,
19 and thirdly clear the roadway. Those
20 are our top three main priorities. And
21 by clearing the roadway it's calling
22 for wreckers, tow trucks and things
23 like that.
- 24 Q. Okay. What did you see when you got to
25 the scene that day?

- 1 A. When I arrived on scene I saw one
2 Mercedes that had vehicle damage to its
3 driver's side. It was off of the
4 roadway to the left. And then I saw a
5 Nissan Xterra also off to the side of
6 the roadway to the left that had
7 significant front end damage from
8 striking a tree.
- 9 Q. Okay.
- 10 A. It was in contact with that -- with
11 that tree.
- 12 Q. Okay. Were there any other first
13 responders on scene when you arrived?
- 14 A. Yes, the fire department was on the
15 scene, and EMTs were on the scene with
16 an ambulance.
- 17 Q. Okay. So what did you do first when
18 you got there?
- 19 A. Okay. Once I got there and got parked
20 I put my hat on and all that good
21 stuff. I got my notebook. I went out,
22 and I noticed they were loading the
23 driver of the vehicle out of the Xterra
24 at that time. They had her on a
25 stretcher, and by the time I walked up

1 there to her they were loading her in
2 the ambulance.

3 Q. Okay.

4 A. I got the fire department. They handed
5 me her driver's license. They said,
6 "Here's her information." Then I went
7 over and talked to the driver of the
8 Mercedes and just asked her what
9 happened and what she saw.

10 Q. Okay.

11 A. And just continued with the
12 investigation that way.

13 Q. Okay. So did you at any time have the
14 opportunity to -- well, let me back up.
15 You said that the fire department or
16 EMS was pulling someone out of the
17 Xterra; is that correct?

18 A. That's correct.

19 Q. From what seat was that person being
20 removed?

21 A. From the driver's side.

22 Q. Okay. Were you able to speak to that
23 person?

24 A. I was not.

25 Q. Were you able to observe anything about

1 that person at that time?

2 A. I was not.

3 Q. Okay. What did they do with that
4 person?

5 A. As they were loading her onto the
6 ambulance I asked -- it was either one
7 of the EMTs or the fire department --
8 and I asked her, I said, "How bad --
9 how bad is she?" because a lot of times
10 if it's not bad then I can stay -- they
11 can stay and I can talk to them and at
12 least get a name and phone number or
13 something. But they looked at me, and
14 they said, "Man, she needs to go." And
15 I said, "That's fine." So they loaded
16 her up, and they hauled her off to the
17 hospital.

18 Q. Okay. And you mentioned that somebody
19 recovered a driver's license?

20 A. Yes.

21 Q. Did they give that to you?

22 A. Yes.

23 Q. Okay. Who did that driver's license
24 belong to?

25 A. What was -- it was Kathryn Martin Key.

1 Q. Okay. Is that the Defendant in this
2 case?

3 A. Yes, it is.

4 Q. Do you recognize her today from your
5 very brief encounter?

6 A. I believe over there; is that right?
7 There's two that look exactly alike.

8 Q. And you're not the first person to
9 confuse that.

10 A. Dark hair.

11 MR. PRICE: Let the record reflect
12 that an intern from the Solicitor's
13 Office was identified as the
14 Defendant, and we move for a
15 dismissal.

16 THE COURT: So noted.

17 MS. GARY: Let the record reflect
18 there's an uncanny resemblance,
19 Judge.

20 Q. That was perhaps a poor question on my
21 part.

22 A. My bad.

23 Q. You're fine. So what did the - what
24 information -- you said you got her
25 name off the driver's license; is that

1 what you said?

2 A. Yes.

3 Q. And what was that name?

4 A. Kathryn Martin Key.

5 Q. Okay. Okay. And your next step was to
6 talk to the victim; is that correct?

7 A. Yes.

8 Q. Okay.

9 A. Yes.

10 Q. Was the victim hurt in this case?

11 A. No, she had no injury.

12 Q. Okay.

13 A. She did say -- I believe she did say,
14 if I remember correctly, that she --

15 MR. PRICE: Objection to hearsay,
16 Your Honor.

17 THE WITNESS: Well, she talked to
18 me.

19 THE COURT: Sustained.

20 Q. It's okay. You're fine. As a result
21 of your investigation -- you're the
22 investigating officer in this case;
23 correct?

24 A. That's right. That's correct.

25 Q. As a result of your investigation what

1 did you determine -- how did this
2 collision occur?

3 A. Okay. After speaking with the victim,
4 Lauren Metzel --

5 MR. PRICE: And I would object to
6 that testimony unless the proper
7 ground has been laid as far as
8 accident reconstruction expert.

9 MS. GARY: Your Honor, I'm not
10 asking him to offer an expert
11 opinion as to what happened in this
12 case. He is not a member of the
13 M.A.I.T. team nor are we trying to
14 present him as such. He's allowed
15 to testify as the investigating
16 officer as to what he concluded
17 happened in this case. I'm not
18 asking him what the victim told him
19 or what any witnesses told him.
20 I'm asking him what he determined
21 and why he investigated it the way
22 he did.

23 THE COURT: Okay.

24 MR. PRICE: Well, unless he uses
25 what he was told by the other

1 person I don't see any way that he
2 can reconstruct this thing.

3 THE COURT: Well, the objection is
4 overruled for this one.

5 MS. GARY: Okay.

6 THE COURT: So continue, Trooper.

7 Q. Okay.

8 A. The victim driving the Mercedes said
9 that she was driving.

10 Q. Hang on. Don't tell me what she told
11 you. Tell me what you as the
12 investigating officer determined
13 happened in this case.

14 A. Gotcha. Gotcha. Okay. I determined
15 through an investigation that the
16 driver of the Xterra drove left of
17 center and struck the Mercedes and then
18 continued to drive left of center and
19 struck a tree.

20 Q. Okay. And where did the car land?

21 A. When the car came to final rest
22 alongside the road.

23 Q. Okay. Were there any witnesses to this
24 accident?

25 A. Other than the driver and the victim,

1 either driver, there were none.

2 Q. Okay. Was there anyone else in the
3 Defendant's car with her that day?

4 A. There was not.

5 Q. Okay. Was there anyone else on the
6 scene other than first responders and
7 this victim?

8 A. There was not.

9 Q. Okay. Now, after the Defendant was
10 transported to the scene, and you said
11 you spoke with the victim, what are
12 your duties at that point on the scene?

13 A. I'm sorry say that one more time.

14 Q. What are your duties? After you spoke
15 to the victim what did you do next?

16 A. Okay. Complete the accident report.
17 It's a TR-310. I then went to the
18 hospital to check on the driver of the
19 Xterra, and based on what I could see
20 at the collision scene --

21 Q. Hang on. Let me stop you there real
22 quick.

23 A. Okay.

24 Q. Did your patrol car on December 10th,
25 2015 have an in-car video recording

1 system?

2 A. It did.

3 Q. Okay. Was it recording that day?

4 A. It was.

5 Q. Okay. I'm going to show you what I
6 will mark as State's Exhibit-One, and
7 ask you if you recognize that?

8 A. I do recognize this. This is a copy of
9 the video of the accident scene.

10 Q. Okay. And how do you know what that
11 is?

12 A. We reviewed this this morning, and I
13 initialed and dated it.

14 Q. Okay. Is it a fair and accurate
15 representation of the video you
16 recorded that morning?

17 A. It is.

18 Q. Has it been altered in any way?

19 A. It has not.

20 Q. Okay. Thank you.

21 MS. GARY: Your Honor, at this
22 time we offer State's Exhibit-One.

23 THE COURT: Any objection?

24 MR. PRICE: Your Honor, we have
25 been provided that previously. We

1 have no objection as long as my
2 waiver of an objection does not --
3 is not considered as any waiver of
4 any objection to subsequent blood
5 results.

6 MS. GARY: And I don't intend to
7 publish this at this time, Judge.
8 I just wanted to enter it in
9 evidence.

10 THE COURT: Very well. Thank.
11 (Introduction of the pertinent
12 video recording marked as
13 STATE'S EXHIBIT-NUMBER-ONE.)

14 Q. Now, Trooper Campbell, as the
15 investigating officer did you have the
16 opportunity to take photos at the
17 scene?

18 A. I did.

19 Q. And why do you do that?

20 A. Well, it helps -- for me to remember
21 where the cars were at, what kind of
22 damages were done to the vehicles. And
23 a lot of times the photos will pick up
24 things that over time that you forget.

25 Q. All right. Did you take pictures --

1 and you said you did take pictures in
2 this case?

3 A. I did take pictures.

4 Q. I'm going to show you State's Exhibits
5 Two through Seven, and just ask you to
6 look at those without describing them
7 for me.

8 A. Okay.

9 Q. See if you recognize those.

10 A. (Witness reviewing photographs.) Yes,
11 these photos are at -- were all taken
12 on the scene of this particular
13 collision.

14 Q. And those are photos you personally
15 took?

16 A. I personally took these.

17 Q. And they have not been altered at all?

18 A. They have not been altered.

19 Q. And they fairly and accurately
20 represent that scene?

21 A. They do.

22 Q. Okay.

23 MR. PRICE: We have been provided
24 these previously, Your Honor, and
25 again no objection subject to

1 they're not being in the waiver.

2 THE COURT: Absolutely. Thank
3 you.

4 MS. GARY: Your Honor, at this
5 time I guess we would offer State's
6 Two through Seven.

7 THE COURT: Okay.

8 (Introduction of the pertinent
9 photographs marked as
10 STATE'S EXHIBIT-NUMBER-TWO,
11 STATE'S EXHIBIT-NUMBER-THREE,
12 STATE'S EXHIBIT-NUMBER-FOUR,
13 STATE'S EXHIBIT-NUMBER-FIVE,
14 STATE'S EXHIBIT-NUMBER-SIX,
15 STATE'S EXHIBIT-NUMBER-SEVEN.)

16 Q. Trooper Campbell, I'm going to ask you
17 to focus specifically on State's
18 Exhibits Two and -- Two, Six and Seven.
19 What are we seeing in State's Two?

20 A. In Number Two this is the Xterra that
21 was -- that come to final rest against
22 the tree. The passenger side door is
23 open, and there's a pocketbook and some
24 other things there in the -- in the
25 driver's seat.

1 Q. Now, what seat?

2 A. I mean I'm sorry. In the passenger
3 seat, passenger seat.

4 Q. Okay. Now, to your knowledge had the
5 interior of that car been searched at
6 this point, or had anybody been moving
7 things around inside that car?

8 A. Other than the EMT getting her out of
9 the car nobody else had gone through
10 the car.

11 Q. Okay. So the objects in the passenger
12 seat in this photo had not been moved
13 to your knowledge?

14 MR. PRICE: Objection. Leading.

15 A. Not to my knowledge, no.

16 THE COURT: Sustained.

17 MR. PRICE: The officer does not
18 know what happened before he got
19 there.

20 Q. What about -- let's talk about State's
21 Exhibit Six and Seven. What are we
22 seeing in those photos?

23 A. Okay. Six and Seven. This is a -- Six
24 --

25 Q. Uh-huh.

1 A. Okay. Six is a picture of the glove
2 box as I opened it. I was there
3 looking for the registration, insurance
4 information as 90 percent of people do
5 put those items in their glove box. I
6 opened up the glove box, and there in
7 the glove box was an open container of
8 -- it says to be a Jack Daniels mini
9 bottle.

10 Q. Okay. And did it have a lid on it?

11 A. It had -- it did have a lid on it. The
12 seal had been broken, and there was wet
13 residue in the bottom of the bottle to
14 indicate that this was freshly
15 consumed.

16 Q. Okay. And why --

17 MR. PRICE: Objection.

18 THE COURT: Sustained.

19 Q. And did you collect that item?

20 A. I did collect it.

21 Q. Okay. Okay. Now, let's talk about
22 what you did when you left the scene.
23 Where did you go?

24 A. Okay. I went to Greenville Memorial
25 Hospital where the driver of the Xterra

1 had been transported.

2 Q. Okay. And what are you trying to do
3 when you first go to the hospital in
4 cases like this?

5 A. ID the person I'm looking for, and then
6 -- in this particular case it was to
7 make a charge driving under the
8 influence and open container.

9 Q. Okay. So how did you come to find the
10 driver of this vehicle in this case?
11 How did you locate her at the hospital?

12 A. Okay. Basically you go in through the
13 emergency room, and there's a desk
14 there with some -- some employees of
15 the hospital. I had her license, and I
16 said, "I'm looking for this patient
17 here." They said, "She's over in the
18 trauma bay." I went over to the trauma
19 bay. She was on the bed there in the
20 trauma bay. She was the only one in
21 there at that time, that morning at
22 that time.

23 Q. Okay. And you -- obviously she had
24 been injured in this accident; is that
25 correct?

1 A. Correct. Correct. But she was
2 intubated. She had been intubated at
3 that time.

4 Q. Okay. So that was my next question.
5 Did you have any chance to speak to
6 her?

7 A. No, I did not.

8 Q. Okay.

9 A. I did speak to her, but there was no
10 response.

11 Q. She was not able to respond?

12 A. Correct.

13 Q. Okay. What did you do next in this
14 case?

15 A. Okay. I then advised, even though she
16 -- you know, she had been intubated, I
17 advised her that she was under arrest
18 for driving under the influence. I
19 read -- did read her Miranda Rights and
20 Implied Consent Form.

21 Q. Okay. I'm going to show you State's
22 Exhibit-Eight and ask you if you
23 recognize that?

24 A. Yes, I do recognize this.

25 Q. What is that?

1 A. This is the Advisement of Implied
2 Consent Rights. This is mine because
3 it's my handwriting.

4 Q. Okay.

5 A. And it's dated the time of the -- the
6 date the collision occurred.

7 Q. Okay. And did the Defendant in this
8 case sign that form?

9 A. She did not.

10 Q. And, again, why not?

11 A. She was unable to.

12 Q. Okay. Did you speak with --

13 MS. GARY: Well, at this time I
14 would offer State's Exhibit-Eight,
15 Judge.

16 THE COURT: Any objection?

17 MR. PRICE: Our response would be
18 the same, Your Honor.

19 THE COURT: Okay.

20 MR. PRICE: This had been given to
21 me previously. I have no objection
22 to it as long as it's not
23 considered a waiver to my objection
24 to the blood.

25 THE COURT: So be it. So entered.

1 (Introduction of the pertinent
2 document marked as
3 STATE'S EXHIBIT-NUMBER-EIGHT.)

4 MS. GARY: Thank you.

5 Q. And let's not talk about what medical
6 personnel told you, but through your
7 conversations with medical personnel
8 did you determine anything about Ms.
9 Key's ability to communicate with you
10 when you said that she was
11 unresponsive? What can you tell us?

12 A. They said due to her injuries and the
13 severity of them that they went ahead
14 and intubated her. I think it was
15 because of the swelling on the brain
16 they intubated her.

17 Q. Okay. Okay. All right. So after you
18 read the Implied Consent you said you
19 also advised her of her Miranda Rights?

20 A. Yes.

21 Q. Okay. Now, none of that was recorded
22 on video; correct?

23 A. That's correct.

24 Q. Okay. What did you do next?

25 A. I then requested a legal blood draw

1 from the nurse.

2 Q. Okay.

3 A. The nurse came.

4 Q. Is it any nurse that can do this for

5 you, or is there a specific nurse you

6 have to ask for?

7 A. I believe it's a charge nurse. I

8 believe that's correct.

9 Q. Okay. And you asked for that

10 particular nurse?

11 A. Uh-huh (affirmative).

12 Q. Okay. Generally what is your role

13 during that procedure?

14 A. During that procedure I'm there to

15 watch to make sure that one, the blood

16 is drawn as it is instructed on the

17 Urine/Blood Collection Report.

18 Q. Uh-huh.

19 A. That's a report that's also filled out

20 and signed by both myself and the nurse

21 that drew the blood. I'm there to make

22 sure that no other people come in

23 contact with the samples, and that once

24 the samples are collected they're given

25 to me in my possession and nobody

1 else's.

2 Q. Okay. Now, you did not offer Ms. Key a
3 breath test in this case?

4 A. No.

5 Q. And why was that?

6 A. The breath test could not be taken.

7 Q. And why?

8 A. A couple of reasons. One, she was
9 intubated so she was unable to do so.
10 The second one was injuries to her
11 head, to her face --

12 MR. PRICE: Objection, Your Honor.

13 A. -- you can't take a breath test.

14 MR. PRICE: That's got to come
15 from a medical person pursuant to
16 the case law.

17 MS. GARY: No, Your Honor, that's
18 part of SLED policy, and he has to
19 follow SLED policy, and that's what
20 he's doing in this case. And I'm
21 trying to make sure there's a clean
22 record here as to why he went
23 straight to the blood test.

24 THE COURT: Overruled.

25 MS. GARY: Thank you, Judge.

- 1 Q. So since you got interrupted. Why did
2 you not offer her a breath test?
- 3 A. She was unable to physically provide a
4 breath test.
- 5 Q. And why?
- 6 A. She was intubated.
- 7 Q. Okay. So when you cannot provide a
8 breath test what do you do? You go
9 straight to what?
- 10 A. Blood.
- 11 Q. Okay.
- 12 A. You get a blood test, a blood draw.
- 13 Q. Okay. Now, in this case the blood was
14 drawn; correct?
- 15 A. That's correct. It was.
- 16 Q. Okay. And I'm going to show you
17 State's Exhibit-Nine since you made
18 reference to it earlier.
- 19 A. Uh-huh (affirmative).
- 20 Q. See if you can identify that for us.
- 21 A. This is a Urine/Blood Collection Report
22 Form. I recognize the handwriting.
23 This is my handwriting. It was filled
24 out and the dates.
- 25 Q. And what agency is that form created

1 by?

2 A. SLED.

3 Q. Okay. So is that a form that you would
4 provide to the nurse?

5 A. Yes, I have -- yes, basically we have
6 these forms in our -- in our cars, and
7 then when we arise to this type of
8 situation we have these forms readily
9 available so we don't have to go
10 looking for them.

11 Q. Okay.

12 MS. GARY: I'd go ahead and move
13 State's Nine into --

14 Q. Well, again, has this form been altered
15 at all?

16 A. It has not.

17 Q. Okay. And you recognize it because of
18 your signature?

19 A. That's correct.

20 Q. Okay.

21 MS. GARY: We'll go ahead and
22 offer State's Nine, Judge.

23 MR. PRICE: And our response would
24 be the same, Your Honor.

25 THE COURT: Very good. So entered

1 the blood collection as Number-
2 Nine.

3 (Introduction of the pertinent
4 document marked as
5 STATE'S EXHIBIT-NUMBER-NINE.)

6 MS. GARY: Thank you, Judge.

7 Q. Now, Trooper Campbell, according to the
8 SLED Urine/Blood Collection Report at
9 what time was the blood drawn in this
10 case?

11 A. 10:45 a.m.

12 Q. Okay. What was the time of arrest in
13 this case?

14 A. 10:35 a.m.

15 Q. Okay. And you said that's your
16 signature at the bottom?

17 A. It is.

18 Q. Okay. And, again, had the Defendant
19 signed this form?

20 A. She did not.

21 Q. Okay. All right. So once the blood
22 was collected what is -- what is your
23 role in cases like this?

24 A. I take the blood and all the forms that
25 we have, and we then submit it to our

1 office, headquarters area. There we
2 fill out some more paperwork. It's the
3 chain of custody. And then we
4 physically put that in with a
5 supervisor in a -- in a refrigerator
6 for temporary storage for it to later
7 be taken down to the facility in
8 Columbia.

9 Q. So once the blood is -- once the blood
10 is securely in that storage you're no
11 longer responsible for it; is that
12 true?

13 A. That's correct.

14 Q. Okay.

15 A. Other than being on the chain.

16 Q. Correct. And just so we're clear,
17 Trooper Campbell, you did not seek a
18 search warrant before you got this
19 blood sample, did you?

20 A. That's correct I did not.

21 Q. And why not?

22 A. It's not -- it's not a requirement by
23 law. Secondly, there was a --

24 MR. PRICE: I would object to the
25 trooper's characterization of the

1 law. Number one, he's not a lawyer
2 or a judge. Number two, I think
3 he's wrong.

4 MS. GARY: Well, Your Honor, with
5 all due respect to Mr. Price his
6 opinion as to -- whether or not he
7 likes the witness' answer is not
8 why we're objecting in this case.
9 This trooper operates under the law
10 as he is told. That's his
11 impression of how he was instructed
12 to perform these -- these
13 procedures, and that's what he's
14 testifying to today.

15 MR. PRICE: I have no problem with
16 this trooper, who I respect, saying
17 "I did not think that I had to get
18 one," but for him to say "that the
19 law says I don't have one" is
20 improper, and he does not have the
21 basis or the background for it.

22 THE COURT: I'm going to overrule
23 it for now.

24 MS. GARY: Thank you, Judge.

25 A. Can I add to that?

1 Q. Sure.

2 MR. PRICE: Objection.

3 THE COURT: Sustained.

4 THE WITNESS: Okay.

5 MS. GARY: That's all my questions
6 for now, Trooper. Thank you.

7 THE WITNESS: Okay. You're
8 welcome.

9 THE COURT: Mr. Price.

10 MR. PRICE: Your Honor, before we
11 start, before I forget I want to
12 make it part of the record that the
13 State and I have agreed to
14 stipulate that at the time of Ms.
15 Key's arrest and at the time and
16 the date that the blood draw was
17 done, there was a magistrate on
18 duty in Greenville County. And we
19 have also agreed to stipulate the
20 chain of custody from the point
21 from Trooper Campbell to SLED. The
22 State provided me with a copy of
23 the chain of evidence stuff, and I
24 saw no sense in bringing five
25 people in here just for that when

1 our issue does not pertain to that.

2 THE COURT: Very good.

3 MS. GARY: And that's true, Judge,
4 but just so we've very clear as to
5 that stipulation as to the chain of
6 custody, it is not just the blood
7 sample's arrival to SLED. It is in
8 fact the chain of custody all the
9 way to the hands of the
10 toxicologist, so requiring us only
11 to bring the trooper, the nurse,
12 and the forensic toxicologist all
13 of whom are here today. I just
14 want to make sure we're very clear
15 about that stipulation.

16 MR. PRICE: No problem with that.

17 THE COURT: Very good.

18 MR. PRICE: I'm fine with the
19 chain from the trooper to the
20 toxicologist.

21 THE COURT: Very good.

22 MS. GARY: Thank you.

23 THE COURT: Thank you.

24 MR. PRICE: Subject to the nurse
25 testifying about her part in the

1 chain.

2 THE COURT: Sure.

3 CROSS-EXAMINATION

4 BY MR. PRICE:

5 Q. Trooper Campbell, how are you today,
6 sir?

7 A. I'm very good, Mr. Price. How are you
8 doing?

9 Q. Oh, I'm just awesome. Thank you, sir.
10 Just a few questions. Your arrest time
11 was at 10:35 in the morning?

12 A. That is correct.

13 Q. And you agree with me this was on
14 December the 10th, which was a
15 Thursday; do you remember that?

16 A. Yes, sir.

17 Q. There were magistrates on duty in
18 Greenville County?

19 A. Yes.

20 Q. And this was at the Greenville Memorial
21 Hospital?

22 A. That's correct.

23 Q. And you were probably three miles away
24 from a magistrate?

25 A. Give or take.

1 Q. Okay. And have you ever called in for
2 a search warrant telephonically?

3 A. No.

4 Q. Okay. You are aware that that can be
5 done on occasion?

6 A. Not over the telephone, no.

7 Q. Okay. But anyway assuming that you had
8 three hours from the time of arrest to
9 get a search warrant you had plenty of
10 time to do so if you had chosen to do
11 so?

12 MS. GARY: Your Honor, at this
13 point I'm just going to object for
14 the record. This issue has been
15 decided by Your Honor. Your Honor
16 has ruled Trooper Campbell is not
17 required to seek a search warrant.
18 I just wanted the State's objection
19 to be clear.

20 THE COURT: Overruled.

21 MR. PRICE: That was not in The
22 Court's ruling, but again Trooper
23 Campbell did not testify. I've got
24 to go into this to protect my
25 record, and I'm going to be brief.

1 THE COURT: And I overruled it so
2 continue on.

3 Q. Okay. You made the decision not to
4 seek a search warrant?

5 A. Correct.

6 Q. Okay. That's fine. Now, when you met
7 -- when you saw Ms. Key in the
8 emergency room isn't it true that she
9 was unable to sign the Implied Consent
10 warnings because she was unconscious?

11 A. Correct.

12 Q. Okay. And with her being unconscious
13 when you read her her Implied Consent
14 warnings she didn't know what you were
15 saying, did she?

16 A. No.

17 Q. Okay. And if she didn't know what you
18 were saying she did not understand her
19 Implied Consent warnings?

20 MS. GARY: Your Honor, this
21 witness doesn't know what the
22 Defendant could or could not
23 understand at that time.

24 MR. PRICE: Well, if he --

25 MS. GARY: Speculation.

1 MR. PRICE: -- he just said that
2 she could not understand, and there
3 was no objection made to that.

4 MS. GARY: It's the same issue,
5 Judge.

6 THE COURT: Overruled. Just
7 continue.

8 Q. Okay. And so without her being able to
9 understand her Implied Consent warnings
10 she did nothing to indicate that she
11 number one, understood her Implied
12 Consent warnings and number two,
13 consented to the blood draw?

14 A. If she's unconscious she would not be
15 able to do that.

16 Q. All right. So she did not consent to
17 the blood draw; did she? She didn't
18 know what was happening, did she not?

19 A. She didn't deny the request either.

20 Q. Okay. All right. The answer is you
21 need to speak out loud for the myriad
22 of tape recorders up there.

23 A. Sure.

24 Q. She did not understand anything about
25 the blood draw; did she?

1 A. That's correct.

2 Q. Because she was unconscious. Thank
3 you. Okay. Now, the State has
4 introduced Exhibit-Eight, and Exhibit-
5 Eight says, if you will read that line
6 beginning with "you."

7 A. Yes, sir. It says, "You do not have to
8 take the test or give the samples, but
9 if you refuse to submit to the test
10 your privilege to drive in South
11 Carolina must be suspended or denied
12 for at least six months with the option
13 of ending the suspension if you enroll
14 in the Ignition Interlock Device
15 Program, and your refusal may be used
16 against you in court."

17 Q. Okay. So despite whatever our Implied
18 Consent Law says you agree that an
19 individual charged with DUI can refuse
20 to give blood samples?

21 A. If they are physically able to refuse,
22 yes.

23 Q. Okay. If they are physically able to
24 refuse, or if they understand what's
25 going on, but Ms. Key did not -- she

- 1 was unconscious. She did not know what
2 was going on, did she?
- 3 A. Wait. Say it one more time.
- 4 Q. If someone understands what is going on
5 the person has the right to refuse?
- 6 A. Correct.
- 7 Q. All right. Ms. Key did not understand
8 what was going on because she was
9 unconscious?
- 10 A. Correct.
- 11 Q. Okay. A couple more. I'm sorry. The
12 open container, I'm showing you the
13 picture of it.
- 14 A. Yes, sir.
- 15 Q. That is a mini bottle?
- 16 A. That's correct.
- 17 Q. And it would have liquor in it under
18 normal circumstances, wouldn't it?
- 19 A. There was a small residue of clear
20 liquid inside the bottle, yes.
- 21 Q. Did you test what was in that bottle?
- 22 A. I do not have the means to test.
- 23 Q. So the answer is "no"?
- 24 A. That's correct.
- 25 Q. Okay. Now, that's a Jack Daniels

1 bottle, and Jack Daniels makes liquor;
2 correct?

3 A. I'm not a drinker. I'll take your word
4 for it.

5 Q. Okay. You didn't notice any beer or
6 wine in that bottle; did you?

7 A. In that bottle?

8 Q. Yes, sir.

9 A. There was something in that bottle.
10 I'm not going to testify to what it was
11 or was not.

12 Q. You don't know?

13 A. That's correct.

14 Q. Okay.

15 MR. PRICE: Your Honor, I don't
16 have any further questions of this
17 gentleman.

18 THE COURT: All right. Solicitor,
19 anything else?

20 MR. PRICE: I need one more -- one
21 more question.

22 THE COURT: Okay.

23 Q. The person that you advised Implied
24 Consent warnings is it your testimony
25 it's this lady over here?

1 A. No, a different twin sitting over
2 there.

3 Q. I just thought I'd try. Thank you.

4 MS. GARY: For the record, Judge,
5 he did finally point to the
6 Defendant in this case.

7 **REDIRECT EXAMINATION**

8 **BY MS. GARY:**

9 Q. Trooper Campbell, I just want to make
10 sure that I asked you this. I'm fairly
11 certain that I did, but to whom was
12 this Nissan Xterra registered?

13 A. To Kathryn Martin Key.

14 Q. And who is that?

15 A. She's sitting there.

16 Q. In this case who is that? What's her
17 role?

18 A. The owner and the driver of the Xterra.

19 Q. Is she the Defendant in this case?

20 A. She is the Defendant.

21 Q. Okay. Very good.

22 MS. GARY: That's all my
23 questions, Judge. Thank you.

24 THE COURT: Anything else, Mr.
25 Price?

1 MR. PRICE: No, sir.

2 THE COURT: All right. Trooper,
3 you may step down. Thank you. The
4 next witness from the State.

5 MS. GARY: Yes, sir, the State
6 will call Amanda Brown.

7 THE COURT: Good afternoon, Ms.
8 Brown.

9 AMANDA JEAN BROWN,
10 being first duly sworn/affirmed, was
11 examined and testified as follows:

12 THE COURT: Thank you. Have a
13 seat and state your name for our
14 record.

15 THE WITNESS: Amanda Jean Brown.

16 THE COURT: Thank you.

17 DIRECT EXAMINATION

18 BY MS. GARY:

19 Q. Ms. Brown, where are you employed?

20 A. Currently St. Francis.

21 Q. Okay. And in what capacity?

22 A. I'm a registered nurse in the emergency
23 department.

24 Q. What are -- let's talk about your
25 background. Where did you go to

- 1 school, what college and beyond?
- 2 A. St. Francis College of Nursing in
- 3 Peoria, Illinois.
- 4 Q. Okay. What degree did you receive?
- 5 A. A bachelor's in science and nursing.
- 6 Q. Are you a registered nurse in the State
- 7 of South Carolina?
- 8 A. Yes, ma'am.
- 9 Q. Meaning you've passed your licensing
- 10 boards, and you are a licensed nurse?
- 11 A. Yes, ma'am.
- 12 Q. Okay. What are your job duties as an
- 13 RN?
- 14 A. To take care of sick patients.
- 15 Q. Okay. And you said you're in the
- 16 emergency department?
- 17 A. Yes, ma'am.
- 18 Q. Okay. So I imagine that's a variety of
- 19 patients?
- 20 A. Yes.
- 21 Q. Where were you working in December of
- 22 2015?
- 23 A. At Greenville Memorial Hospital.
- 24 Q. Okay. Specifically December 10th,
- 25 2015?

- 1 A. Yes, ma'am.
- 2 Q. Okay. What department did you work in
- 3 there?
- 4 A. I was a supervisor in the emergency
- 5 department.
- 6 Q. Okay. So again similar duties at that
- 7 time?
- 8 A. Uh-huh (affirmative).
- 9 Q. Did you have any special duties or
- 10 specific duties as a supervisor in that
- 11 department?
- 12 A. I was the charge nurse that day.
- 13 Q. And what's a charge nurse required to
- 14 do?
- 15 A. We're required to make all the
- 16 assignments and to keep track of
- 17 everything going on throughout the
- 18 department including all the legal
- 19 blood draws.
- 20 Q. Okay. Just so that we're all clear,
- 21 what is a legal blood draw?
- 22 A. When the police department or troopers
- 23 come in stating they need a legal blood
- 24 drawn from a patient.
- 25 Q. Okay. So it just differs from blood

- 1 that you would draw as part of your --
- 2 A. Uh-huh (affirmative).
- 3 Q. -- medical procedures?
- 4 A. Yes.
- 5 Q. Okay. So you said you were serving as
- 6 the charge nurse on December 10th,
- 7 2015?
- 8 A. Uh-huh (affirmative).
- 9 Q. And were you I guess working the day
- 10 shift that day?
- 11 A. Yes, ma'am.
- 12 Q. Okay. I'm going to show you these
- 13 copies of what's already in -- already
- 14 in evidence as State's Exhibit-Nine.
- 15 I'm also going to show you what's
- 16 marked as State's Exhibit-Ten and ask
- 17 you if you recognize that paper.
- 18 A. Yes, ma'am, that's my handwriting.
- 19 Q. Okay. What is this document?
- 20 A. This is the chain of custody form that
- 21 we fill out whenever we have legal
- 22 blood --
- 23 Q. Okay.
- 24 A. -- drawn.
- 25 Q. Yeah, we mentioned that State's

1 Exhibit-Nine is the SLED chain of
2 custody.

3 A. Uh-huh (affirmative).

4 Q. What agency is this for?

5 A. This is ours. Well, the Greenville
6 Memorial Hospital's..

7 Q. So you-all have your own documentation
8 for this stuff?

9 A. Uh-huh (affirmative).

10 Q. And that's what this is?

11 A. Yes, ma'am.

12 Q. Has it been altered at all?

13 A. Not to my knowledge.

14 Q. Okay. And, again, you said that your
15 signature is on it?

16 A. Yes, ma'am.

17 Q. Okay.

18 MS. GARY: Your Honor, at this
19 time we move State's Exhibit-Ten
20 into evidence.

21 MR. PRICE: I don't know if we've
22 seen that one, but my object -- my
23 response would be the same, Your
24 Honor.

25 THE COURT: All right. Thank you,

1 Mr. Price. So entered as chain of
2 custody form.

3 MS. GARY: I'm pretty sure, Your
4 Honor, that he has seen it.

5 (Introduction of the pertinent
6 document marked as

7 STATE'S EXHIBIT-NUMBER-TEN.)

8 Q. All right. Ms. Brown, let's talk about
9 State's Exhibits Nine and Ten.

10 MR. PRICE: Excuse me, what was --

11 MS. GARY: Sir, I can assure you
12 that you've seen it. I know we
13 sent you everything we have. I
14 know you've seen it. Or it's been
15 provided to him, Judge, I can
16 assure you.

17 MR. PRICE: Whatever.

18 MS. GARY: He brought it up. I'm
19 just wanted to respond to it.

20 Q. Let's talk generally, Ms. Brown, about
21 what happens when you get asked to
22 perform a legal blood draw. Where does
23 this happen?

24 A. In the emergency department.

25 Q. Okay. Is there a specific room or just

- 1 anywhere you can ---
- 2 A. Where the patient is at.
- 3 Q. Okay. What's the first step in that
- 4 collection process?
- 5 A. Verifying who is the patient.
- 6 Q. Okay.
- 7 A. To the trooper.
- 8 Q. Okay.
- 9 A. Or the police officer.
- 10 Q. Okay. And in this case how did you
- 11 come to determine this lady's
- 12 identification?
- 13 A. The trooper asked me and told me who he
- 14 needed it on.
- 15 Q. Okay. Perfect. What do you do once
- 16 you verified the person from whom
- 17 you're taking the sample from?
- 18 A. Get all my supplies and the paperwork
- 19 ready.
- 20 Q. Okay. And in this case we're talking
- 21 about a blood draw; is that correct?
- 22 A. Yes.
- 23 Q. So what are the supplies you need to do
- 24 a legal blood draw?
- 25 A. In a legal blood draw you use different

1 cleansing solution. You use betadine
2 instead of the alcohol prep pad.
3 Q. And why is that?
4 A. That's how I've been taught it needs to
5 be done.
6 Q. Okay. Does the betadine solution
7 contain alcohol?
8 A. No.
9 Q. Okay. Go ahead. What else do you use
10 besides that specific cleaning method?
11 A. You use specific color tubes. We use
12 gray top tubes.
13 Q. Okay. And that's the tubes in which
14 you collect the blood?
15 A. Uh-huh (affirmative).
16 Q. Okay. And those are specific to this
17 kind of blood draw, or just to what are
18 those specific?
19 A. That's the color blood draw -- tubes
20 that we use for that, yes.
21 Q. Okay. Perfect. Is there anything else
22 you need to do that procedure?
23 A. I don't think so.
24 Q. Okay. And after you've collected those
25 supplies -- in this case was Trooper

1 Campbell present when you collected
2 this blood sample?

3 A. Based on his signature on there, yes.

4 Q. Okay. I understand you may not have an
5 independent memory. That's fine.

6 Let's talk about -- so State's Exhibit-
7 Nine.

8 A. Uh-huh (affirmative).

9 Q. This top part I don't believe is your
10 handwriting, but let's talk about --

11 A. That's not my handwriting.

12 Q. Okay. So on State's Exhibit-Nine do
13 you indicate the time that the test is
14 taken?

15 A. 10:45.

16 Q. Okay. And that's what time, 10:45?

17 A. A.m.

18 Q. Okay. And on this form have you
19 checked in section -- I'm going to call
20 this Section 2.

21 A. Uh-huh (affirmative).

22 Q. I'm going to let you hold that. Is
23 there a box that you checked to
24 indicate why the sample was being
25 taken?

- 1 A. Yeah.
- 2 Q. And what is that? How does that read?
- 3 A. "Subject is unconscious or otherwise
4 incapable of refusal. Have not taken a
5 breath test and is considered informed,
6 therefore, a blood sample is
7 requested."
- 8 Q. Okay. Now, in this case were you
9 treating Ms. Key while she was in the
10 ER?
- 11 A. I don't recall.
- 12 Q. Okay. Okay. So you were not -- as the
13 charge nurse you may not have been
14 actually treating the person whose
15 sample you're taking?
- 16 A. Right.
- 17 Q. Okay. So tell the Judge, please, just
18 how you go about getting that sample.
19 How does that work?
- 20 A. I find a vein that looks good. I clean
21 it, and I get the blood.
- 22 Q. Okay. And where does that blood go?
- 23 A. Into the blood tubes.
- 24 Q. Okay. Very good. And where do those
25 tubes go?

- 1 A. They get labeled, and then they go into
2 the trooper's hands.
- 3 Q. Okay. And you personally deliver them
4 to Trooper Campbell --
- 5 A. Yes.
- 6 Q. -- in this case?
- 7 A. They never leave my hands until they go
8 into officer or whoever is sitting
9 there.
- 10 Q. Okay. And that chain of custody is
11 reflected on both State's Exhibits Nine
12 and Ten?
- 13 A. Yes, ma'am.
- 14 Q. Okay. Do you send a copy of State's
15 Exhibit-Nine with Trooper Campbell?
16 That's the one in your hand?
- 17 A. Yes, ma'am.
- 18 Q. Okay. And do you retain a copy of
19 State's Exhibit-Ten for the hospital
20 record?
- 21 A. Yes, ma'am.
- 22 Q. Okay. And you said there's a label
23 that's printed. Where does that label
24 come from?
- 25 A. Whenever a patient is brought into the

- 1 ER there's labels generated.
- 2 Q. Okay. So you may not have -- you were
- 3 not the person that created that label?
- 4 A. No, ma'am.
- 5 Q. Okay. But did you affix that label to
- 6 these blood samples?
- 7 A. Yes, ma'am.
- 8 Q. Okay. And did that label contain this
- 9 Defendant's name?
- 10 A. It says Kathryn Martin Key.
- 11 Q. All right. Is that reflected on
- 12 State's Exhibit-Ten?
- 13 A. Yes, ma'am.
- 14 Q. Okay. All right. So once you handed
- 15 the blood samples to the trooper and
- 16 given him the appropriate documentation
- 17 do you have any more responsibilities
- 18 in procedures like this?
- 19 A. No.
- 20 Q. That was a terrible question, and I
- 21 apologize. I believe that is all I
- 22 have for you. If you would just answer
- 23 any questions Mr. Price has for you.
- 24 A. Okay.

25

CROSS-EXAMINATION

1 BY MR. PRICE:

2 Q. Ms. Amanda, good afternoon. How are
3 you?

4 A. Good, thank you.

5 Q. Just a couple of questions. There is
6 no doubt that your involvement with Ms.
7 Key was solely at the request of the
8 trooper, this was legal blood; correct?

9 A. Yes, sir.

10 Q. Whatever you did had nothing to do with
11 hospital treatment or medical treatment
12 of Ms. Key?

13 A. No, sir.

14 Q. Okay. In talking -- well, let me
15 rephrase that. You were present when
16 the trooper testified under oath that
17 Ms. Key was unconscious during this
18 process?

19 A. Yes, sir.

20 Q. And you don't have any evidence to the
21 contrary that she wasn't unconscious
22 during the time she was advised of her
23 Implied Consent warnings and was also
24 unconscious at the time you took the
25 blood?

1 A. Just this statement here that says that
2 she was unconscious.

3 Q. She was unconscious and unable to sign?

4 A. Yes, sir.

5 Q. So she was unconscious when she was
6 advised of warnings by the trooper.
7 She was unconscious when she --

8 A. I don't recall that from memory.

9 Q. Okay. But she was unconscious when you
10 took the blood?

11 A. Based on checking that box, yes.

12 Q. Thank you.

13 MR. PRICE: Nothing further from
14 this witness, Your Honor, I will
15 have no objection that she be
16 excused. It's her day off.

17 MS. GARY: That's where I was
18 headed, Judge. We'd ask for her to
19 be excused at this time.

20 THE COURT: You've very welcome.
21 You may be excused.

22 THE WITNESS: Thank you.

23 THE COURT: Have a good afternoon.

24 MS. GARY: It was nice to meet
25 you.

1 THE WITNESS: You, too.

2 THE COURT: Solicitor, your next
3 witness.

4 MS. GARY: Judge, at this time the
5 State would call Jared Castellani.

6 THE COURT: Good afternoon.

7 JARED CASTELLANI,

8 being first duly sworn/affirmed, was
9 examined and testified as follows:

10 THE COURT: Thank you. Have a
11 seat and state your name for the
12 record, please.

13 THE WITNESS: Jared Castellani.

14 DIRECT EXAMINATION

15 BY MS. GARY:

16 Q. Hey, Mr. Castellani. Where are you
17 employed, sir?

18 A. The South Carolina Law Enforcement
19 Division.

20 Q. And what do you do for SLED?

21 A. I am a forensic toxicologist.

22 Q. Okay. How long have you been in that
23 role?

24 A. I've been employed there since July of
25 2014, so almost two and a half years.

1 Q. Okay. You said you were a forensic
2 toxicologist. Tell us what your --
3 tell us about your job. Tell us what
4 you do.

5 A. A forensic toxicologist is a type of
6 forensic scientist responsible for the
7 analysis of biological specimens and
8 that can range anywhere from blood, to
9 urine, to shoes and liquids. And then
10 we interpret -- interpret those
11 findings. Once we determine the
12 presence or absence of alcohol, drugs,
13 or poisons we interpret those findings
14 for courts of law, pathologists or
15 coroners.

16 Q. Okay. Tell us about your educational
17 background. Where did you go to
18 college?

19 A. I went to the University of Scranton,
20 and I received my bachelor's of science
21 in biochemistry, and I went to Arcadia
22 University where I received my master's
23 of science in forensic science.

24 Q. Okay. Have you received any sort of
25 training specifically towards your

1 duties as a forensic toxicologist?

2 A. Yes.

3 Q. Let's talk about that. Where were you
4 trained to be a forensic toxicologist?

5 A. When we are hired we start an extensive
6 training program at SLED.

7 Q. Okay.

8 A. It's --

9 MR. PRICE: Your Honor, I have
10 been provided his CV. I have no
11 objection to his qualifications as
12 a forensic toxicologist.

13 MS. GARY: All right.

14 Q. Well, let me ask you this because I
15 want everyone to know. Have you ever
16 been qualified as an expert before?

17 A. No.

18 Q. All right.

19 MS. GARY: So at this time, Your
20 Honor, we would present for the
21 first time Jared Castellani as an
22 expert in the field of chemistry,
23 pharmacology, and forensic
24 toxicology.

25 THE COURT: Any objection?

1 MR. PRICE: I have no objection to
2 his qualifications as to blood
3 analysis provided he ties it up
4 with how he did the blood.

5 MS. GARY: Your Honor, I'm not
6 introducing him as an expert in
7 blood analysis. I'm introducing
8 him as an expert in forensic
9 toxicology, pharmacology, and
10 chemistry. If he wants I can
11 continue the voir dire, or he's
12 welcome to do it himself, but I
13 think that encompasses blood
14 analysis, but we didn't get to that
15 point, so.

16 MR. PRICE: I'm fine with his
17 qualifications.

18 THE COURT: All right. He's so
19 noted as an expert witness.

20 MS. GARY: Thank you, Judge.

21 Q. All right. Well, let's talk about your
22 duties as a forensic toxicologist,
23 specifically. We'll talk a little bit
24 generally first. How does a sample for
25 you to test get to SLED, just very

1 generally? Who submits those samples?

2 A. A representative from whatever
3 department -- whatever agency is
4 submitting the sample will come to SLED
5 and deliver the -- the evidence to
6 someone in our log-in department.

7 Q. Okay.

8 A. I can go further into that.

9 Q. No, no, you're fine. That was fine.
10 What type of sample was submitted to
11 you in this case?

12 A. We received two gray topped tubes of
13 blood.

14 Q. Of blood. Okay. Did you perform any
15 analysis on that sample?

16 A. Personally -- I physically did not, but
17 a technician in our department did.

18 Q. Okay. Well, let's talk about that.
19 Let's talk about the hierarchy at SLED.
20 So when a sample comes in generally
21 tell The Court to whom it goes first.

22 A. First there will be a technician who
23 receives -- takes custody of the
24 evidence from our evidence log and --
25 from log-in where we inventory the

1 evidence. That individual will be
2 responsible for taking -- taking
3 pictures of the evidence as we received
4 it. So we document how -- the
5 condition of it, and then they are
6 required to initial and also put on the
7 lab number on all the pieces of
8 evidence.

9 Q. Okay. And where do they get that lab
10 number?

11 A. The lab number is assigned to it when
12 it was logged into the forensic
13 program.

14 Q. Okay. So it's generated by SLED?

15 A. Yes.

16 Q. Okay. Okay. What happens after that?

17 A. Once they're finished logging in the
18 evidence the evidence is stored in our
19 toxicology refrigerator until a
20 technician is ready to perform the
21 blood alcohol testing.

22 Q. Okay. And what does it involve for a
23 technician to perform blood alcohol
24 testing?

25 A. When they -- they take the evidence

1 into their custody, and then they
2 perform two separate tests. There is a
3 headspace gas chromatography-flame
4 ionization detection method, which is
5 how we quantitate or discern how much
6 of a volatile substance is present, and
7 then we confirm it using a method known
8 as headspace gas chromatography mass
9 spectrometry.

10 Q. Okay. Practically speaking, what does
11 that mean the technician does to the
12 samples?

13 A. Essentially they're taking -- they're
14 taking a 200 micro liter sample of the
15 blood and adding to it an internal
16 standard, and then it is being tested
17 to determine the presence or absence of
18 a volatile substance, which would be
19 anything from ethanol, acetone, or
20 methanol or isopropanol.

21 Q. Okay. Now, are these technicians
22 initially testing for alcohol only, or
23 do they also test for alcohol and
24 drugs?

25 A. The vault of the analysis is just

1 looking for alcohols.

2 Q. Okay. Now, what happens next in this
3 process?

4 A. After the initial test if there is
5 alcohol present they will confirm it,
6 and then also do a second test to -- so
7 that we can take an average of the two
8 results to come up with what our --
9 what we report.

10 Q. Okay. An average of -- when you say
11 "come up with an average," an average
12 of what?

13 A. The amount of ethanol that is present.

14 Q. Okay. In that blood sample?

15 A. Yes.

16 Q. Okay. Let's talk specifically about
17 this case. I'm going to show you
18 what's been marked as State's Exhibit-
19 Eleven. I will just ask you without
20 identifying it if you recognize that?

21 A. Yes.

22 Q. And what is that?

23 A. This is the report that I generated
24 concerning this case.

25 Q. Okay. Tell The Court how you know

1 that's the report you generated. Did
2 you sign it?

3 A. Yes.

4 Q. And is there -- we talked about the lab
5 number, is there a lab number on there?

6 A. Yes.

7 Q. Okay. And what is that number?

8 A. L15-16410.

9 Q. Okay. Now, is that a fair and accurate
10 representation of the report you
11 generated in this case?

12 A. Yes.

13 Q. Has it been altered at all?

14 A. No.

15 Q. Okay. Thank you.

16 MS. GARY: Your Honor, at this
17 time we'd offer State's Exhibit-
18 Eleven.

19 MR. PRICE: And I will object to
20 this, Your Honor, and wish to be
21 heard.

22 THE COURT: Go ahead, Mr. Price.

23 MR. PRICE: Number one, the
24 witness said that the technicians,
25 he kept referring to them as

1 "they." "They do this." "They do
2 that." He never did say "I tested
3 this," so I would object on that
4 ground. Number two, I would object
5 to the blood coming in regardless
6 of who tested it on the
7 constitutional grounds of Fourth
8 Amendment to the United States
9 Constitution and Article 1, Section
10 10 of the South Carolina
11 Constitution as far as the right to
12 privacy. My points being number
13 one, a person, as the trooper
14 mentioned, has a right to refuse a
15 blood test. Number two, that's
16 contained in the Statute 56-5-2950.
17 Number three, the burden of proof
18 is on the State of South Carolina
19 to prove that a person such as Ms.
20 Key knowingly and willfully
21 consented to having her blood
22 drawn, because this is a
23 warrantless situation. There was
24 no search warrant, so the burden of
25 proof is on the State to prove

1 consent. There are a number of
2 cases that I have, but I think
3 that's clear. I draw The Court's
4 attention to Missouri v. McNeely
5 which we have previously argued. I
6 think I gave you a copy of it.
7 That was decided in 2013, and the
8 McNeely Court said that a person
9 must get a search warrant for a
10 nonconsensual blood testing, such
11 as -- or blood taking such as this.
12 Ms. Key did not give her consent to
13 have her blood drawn. And The
14 Court further stated that simply
15 because alcohol dissipates over
16 time that that in and of itself is
17 not an exigent circumstance which
18 excuses the getting -- the taking
19 of a warrant. In this case there
20 were magistrates on duty that could
21 have provided the trooper with a
22 warrant. He had a three hour
23 window to get one, but chose not
24 to. During the previous time we
25 argued this the State relied on the

1 argument that our Implied Consent
2 Statute gives a trooper the
3 authority or ability to forcefully
4 take blood. That decision has
5 never been -- or that issue has
6 never been decided in South
7 Carolina. It has been decided in
8 our sister states of Georgia and
9 North Carolina. And I will pass
10 these cases up to The Court and to
11 opposing counsel.

12 MS. GARY: Thank you.

13 MR. PRICE: And we went to the
14 trouble of highlighting and
15 tabbing. If The Court looks back
16 at the tab on the Court of Appeals
17 of Georgia, which was decided in
18 July of this year, over on the left
19 it says, "In light of McNeely
20 courts from other jurisdiction
21 generally have found that implied
22 consent of an unconscious suspect
23 is insufficient to satisfy the
24 Fourth Amendment." That was the
25 ruling in the Georgia court, and

1 that should be the ruling here.
2 North Carolina State v. Romano
3 reached the identical conclusion.
4 On the tab that I have on the last
5 page the Romano North Carolina
6 court says, "It is true as the
7 state contends that this court has
8 a firm" -- what is basically their
9 implied consent statute - "to
10 justify warrantless blood draws of
11 unconscious DWI defendants.
12 However, these cases did not have
13 the benefit of the United State
14 Supreme Court guidance in McNeely
15 which sharply prohibits pro se or
16 per se warrant exception for blood
17 withdrawals." So both North
18 Carolina and Georgia have ruled on
19 this, Your Honor, after McNeely.
20 They have ruled on this within the
21 last two months. You cannot take
22 blood from an unconscious person
23 without getting a search warrant.
24 There are no -- unless there are
25 exigent circumstances. In this

1 case there was no testimony of
2 exigent circumstances so the blood
3 draw was an illegal taking. It
4 really can't be any clearer than
5 that, Your Honor. Missouri v.
6 McNeely requires a search warrant.
7 There are no exigent circumstances.
8 The trooper did not get one. I
9 believe he acted in good faith, but
10 good faith does not apply unless a
11 warrant was obtained. There was no
12 warrant. We have given you two
13 sister states Supreme Court
14 decisions right on line with this
15 case, and according to this the
16 blood should not be admitted into
17 evidence.

18 THE COURT: Solicitor.

19 MS. GARY: Thank you, Judge. If I
20 may first respond to the first
21 objection, I understand perhaps I
22 jumped the gun and introduced this
23 exhibit too early, Judge. I have a
24 significant number of questions left
25 for Mr. Castellani that will

1 establish his role in this process,
2 his generation of this report, what
3 this report reflects and how he
4 interprets the findings of this
5 report and as relates to this
6 Defendant in this case. I intended
7 to allow the Defendant -- excuse me,
8 the witness to use this document to
9 explain his role in that process.
10 So we will let Your Honor rule as to
11 that objection whenever you want.
12 As to the second objection, Judge,
13 this is the very argument that we
14 decided -- or rather that Your Honor
15 decided back on August 8th when Your
16 Honor decided to rule -- to deny Mr.
17 Price's Motion to Suppress. I will
18 start first by reading to The Court
19 Section 56-5-2950, the South
20 Carolina Code as it exists today.
21 Implied Consent to testing for
22 alcohol or drugs. Among other
23 things it provides. "A person who
24 drives a motor vehicle in this state
25 is considered to have given consent

1 to chemical tests of the person's
2 breath, blood or urine for the
3 purpose of determining the presence
4 of alcohol, drugs or the combination
5 of the two if arrested for an
6 offense arising out of acts alleged
7 to have been committed while the
8 person was driving a motor vehicle."
9 Skipping down to the middle of that
10 paragraph. "If the officer has
11 reasonable suspicion that the person
12 --" Or excuse me, I skipped too
13 far. "If the person is physically
14 unable to provide an acceptable
15 breath sample because the person has
16 an injured mouth, is unconscious or
17 dead or for any other reason
18 considered acceptable by medical
19 personnel the arresting officer may
20 request a blood sample be taken."
21 Judge, this is not a case in which
22 this Defendant failed to consent to
23 this blood test. It is implied by
24 her operating a motor vehicle, and
25 under a valid license in South

1 Carolina she has consented to this
2 testing. Certainly there are cases
3 where folks are able to revoke that
4 consent. She did not do that in
5 this case because she was
6 unconscious, and our legislature
7 specifically provides for that
8 factual circumstance, Judge, when a
9 person is unable to speak because
10 they rendered themselves
11 unconscious. When we first argued
12 this motion, Judge, I told The Court
13 that to -- that my interpretation of
14 this -- the legislative intent
15 behind this statute, Judge, is that
16 we do not reward people for
17 consuming alcohol or drugs to the
18 level that they have rendered
19 themselves unconscious. And we are
20 not -- the legislature did not
21 structure this statute such that
22 they could somehow stand as an
23 impediment to law enforcement's
24 ability to investigate or to take
25 that sample. To find otherwise I

1 think would be a gross
2 misinterpretation of the statute.
3 As to Mr. Price citing these two
4 cases Bailey versus State out of
5 Georgia and North -- excuse me,
6 North Carolina versus Romano out of
7 North Carolina, with all due respect
8 to those courts, Your Honor, this
9 issue is not -- first of all those
10 courts obviously are not
11 precedential to this court. They
12 have no binding effect to this court
13 or any court in South Carolina.
14 Whether or not our Implied Consent
15 Law as it exists today somehow
16 violates the Constitution or stands
17 in the face of McNeely is not before
18 Your Honor today. What is before
19 Your Honor today is whether or not
20 the Defendant in this case -- or
21 rather whether or not -- what is
22 before Your Honor today is how the
23 Implied Consent Law of South
24 Carolina reads today. And I will
25 just for the record clarify the

1 holding of McNeely. Mr. Price is in
2 my opinion incorrect as to that
3 holding. All the McNeely case tells
4 us is that the Supreme Court
5 declined to adopt a bright-line rule
6 saying that the dissipation of
7 alcohol alone is an exigent
8 circumstance such that no search
9 warrant is required. That is all
10 the McNeely court case tells us. It
11 does not tell us that a search
12 warrant is required. It tells us
13 simply that they declined to say in
14 every case the dissipation of
15 alcohol is enough. In this case,
16 Judge, there will be testimony from
17 the toxicologist about the
18 dissipation of alcohol and how --
19 how that affects samples such as
20 this. We've just not gotten to that
21 point yet. I would just remind Your
22 Honor of our argument that is
23 already on the record about our
24 Implied Consent Law in South
25 Carolina limits the scope of

1 searches under the Fourth Amendment
2 to breath, blood and urine tests.
3 Thank you, Judge.

4 THE COURT: All right. I'm going
5 to sustain -- go ahead. That was
6 on our part A, okay, if that helps
7 you out.

8 MR. PRICE: I'm not sure where
9 that puts me. I did want to
10 respond just -- just --

11 THE COURT: Certainly.

12 MR. PRICE: -- just three
13 sentences, Your Honor. Number one,
14 I want to read from Missouri v.
15 McNeely, and I quote, "When
16 officers in drunk driving
17 investigations can reasonably
18 obtain a warrant before having a
19 blood sample drawn without
20 significantly undermining the
21 efficacy of the search the Fourth
22 Amendment mandates that they do
23 so." They have to get a warrant.
24 Number two, South Carolina's
25 Implied Consent Law was passed

1 years and years ago. I want to say
2 close to 50 years. It was passed
3 well before Missouri v. McNeely.
4 McNeely was decided three years
5 ago. Why the legislature hasn't
6 done something I don't know. But I
7 think that you and This Court have
8 the authority and the ability to
9 decide a constitutional issue when
10 something is not right, when
11 something doesn't pass the smell
12 test. And when we have a United
13 States Supreme Court case that says
14 one must get a search warrant
15 absence exigent circumstances, but
16 yet a blood draw is done from an
17 unconscious person without a search
18 warrant that doesn't pass it.
19 Thank you.

20 THE COURT: I'm going to sustain
21 your first motion in reference to
22 allowing Exhibit-Eleven to come in
23 because foundation hasn't quite
24 been established yet and,
25 Solicitor, the weight can be on

1 your shoulders. And based on the
2 second motion I'm going to overrule
3 that in reference to a blood draw.
4 Go ahead, Solicitor.

5 MS. GARY: Thank you, Judge. I
6 apologize for jumping the gun on
7 that one.

8 Q. All right. Mr. Castellani, let's talk
9 -- I believe when we left off we were
10 discussing the second testing by the
11 technician. That was my understanding
12 at least.

13 A. Okay.

14 Q. And you said that -- just so that we're
15 all clear again: What did you say that
16 the technician is testing for in that
17 second round?

18 A. To just -- the identical -- the same
19 thing as the first time.

20 Q. Okay.

21 A. Because it's any type of volatile
22 substance.

23 Q. Okay. So is that test just to ensure
24 consistency?

25 A. Yes.

1 Q. Okay. Once that second test is
2 completed what happens to the sample?

3 A. At this point -- it depends on the type
4 of case. In this instance because it
5 is a DUI case and alcohol level above a
6 .08 was achieved, and there was no
7 mention of drugs provided to us to by
8 the officer, the case is then finished
9 with testing and then it gets sent to a
10 toxicologist where they review and
11 write up the case.

12 Q. Okay. And that's where you come in?

13 A. Yes.

14 Q. Okay. So let's talk specifically about
15 this case. Again, we're talking about
16 SLED L15-16410. When the sample comes
17 to a toxicologist what do you do first?

18 A. The first thing is that I review all --
19 all of the quality control associated
20 with the testing that was done on the
21 sample.

22 Q. Okay. How many different levels of
23 quality control does SLED employ in
24 samples like this?

25 A. After the testing is completed by an

1 analyst, or a technician a quality
2 control pack is put together, and then
3 it is given to one of our supervisors,
4 and they review the quality control.
5 After that it's been -- it's then
6 scanned into our system, and it's open
7 to all the analysts that can then check
8 it to verify for themselves that it --
9 that all quality control has been met.

10 Q. Okay. And you mentioned earlier
11 "internal standard." Is that the right
12 -- the phrase you used?

13 A. Yes.

14 Q. Okay. Tell The Court what an "internal
15 standard" is and how it's used in your
16 testing of the sample.

17 A. Essentially it's just -- in this
18 instance we -- what we do is that we
19 add an internal standard --

20 MR. PRICE: Your Honor, I object
21 unless the witness personally
22 observed what was done in this
23 particular test.

24 MS. GARY: Your Honor, he does not
25 have to personally observe what is

1 done. He is telling The Court he
2 has -- he's already testified he's
3 been trained by SLED at their in-
4 house training program. This is
5 part of the procedure that he
6 oversees and that he himself
7 follows. He does not have to
8 personally perceive these events
9 when I'm asking generally how do
10 they employ these internal
11 standards.

12 THE COURT: Anything else, Mr.
13 Price?

14 MR. PRICE: I have no problem with
15 him testifying how there were
16 internal standards, but I do have a
17 problem with him testifying what
18 someone else did if he did not
19 oversee it or observe it.

20 THE COURT: I can concur with
21 that. Maybe you'll redirect your
22 questions, Solicitor.

23 MS. GARY: Well, Judge, I'll just
24 point you to Rule 703. He has
25 already been qualified as an expert

1 in this case. Rule 703 tells us,
2 "The facts or data in a particular
3 case upon which an expert bases an
4 opinion or inference may be those
5 perceived by or made known to him
6 at or before the hearing." The
7 procedures that the technicians
8 followed in this case were made
9 known to him. We're getting to
10 that. We're getting to his role in
11 this case, Judge. Those procedures
12 and what they have done were made
13 known to him when he became
14 involved in this case, and he has
15 certainly reviewed that prior to
16 testifying today.

17 THE COURT: As long as you make
18 that known.

19 MS. GARY: I'm trying, Judge.

20 THE COURT: Okay. Well, continue
21 on.

22 MS. GARY: That's where we're
23 headed.

24 Q. All right. Let's talk very generally
25 about internal standards and how those

- 1 are used in the testing process.
- 2 A. Okay. Essentially it's a known --
- 3 known amount of the substance and then
- 4 compare the response that we get of
- 5 another volatile to that response. And
- 6 the reason that we do that is because
- 7 we also imply -- we also use a series
- 8 of controls throughout the run, which
- 9 are known amounts of -- of ethanol, and
- 10 then we compare those.
- 11 Q. Okay. And are those controls and those
- 12 internal standards the same for every
- 13 sample you test?
- 14 A. Yes.
- 15 Q. Okay. All across the board at SLED?
- 16 A. Yes.
- 17 Q. Or in the toxicology department that
- 18 is?
- 19 A. Yes.
- 20 Q. Okay. So you said that the first step
- 21 in your role in this case is examining
- 22 the controls; is that correct?
- 23 A. Yes.
- 24 Q. Okay. What is your next step?
- 25 A. After I review all the quality control

1 associated with each of the tests that
2 were done on the sample then I proceed
3 to write up the case verifying that the
4 evidence that -- the evidence that was
5 tested making sure that the labeling is
6 correct for when I report it out the
7 labeling on the tube is what I am
8 reporting. I verify that the two --
9 the two tests that were done are
10 consistent with one another, and then I
11 sign -- sign the report.

12 Q. Okay. All right.

13 MS. GARY: Now, at this time I'm
14 going to introduce State's Exhibit-
15 Eleven for Mr. Price's review.

16 MR. PRICE: I'd like to ask some
17 more questions before it's
18 introduced based on what she just
19 did.

20 THE COURT: Very well.

21 MS. GARY: Do you want it?

22 **CROSS-EXAMINATION**

23 **BY MR. PRICE:**

24 Q. Going back to your technicians you did
25 not -- does the same technician do both

1 tests, or do you know?

2 A. I would need to check the chain of
3 custody.

4 Q. Right now you can't tell me?

5 A. I couldn't tell you.

6 MS. GARY: Your Honor, that has no
7 bearing on his finding in this
8 case. Mr. Price has already
9 stipulated to This Court as to the
10 chain of --

11 MR. PRICE: Your Honor, I don't
12 interrupt --

13 MS. GARY: Hang on, please.

14 MR. PRICE: I don't interrupt her
15 during her examination and I get
16 the same courtesy, Your Honor.

17 Q. Now, sir, you can't tell me --

18 MS. GARY: Your Honor, may I
19 object at this time?

20 THE COURT: I think you can both
21 approach.

22 MS. GARY: Yes, sir, thank you.

23 THE COURT: I think we can very
24 well do that.

25 MS. GARY: Yes, sir.

(BENCH DISCUSSION BETWEEN
THE COURT AND COUNSELS)

THE COURT: Go ahead, Mr. Price.

Q. All right, sir. You can't tell whether the same tech did both tests or not?

A. Not off the top of my head, no.

Q. All right. How long prior -- so basically you're just signing off on what other people did?

A. I -- I -- the technicians do not have -- aren't able to interpret results. Because I'm a forensic toxicologist, I am. So that's why they do the -- they do -- they perform testing, and then it is forwarded to an analyst to review and sign the report.

Q. So they perform testing, and you said two tests were run?

A. Yes.

Q. And then on the two tests, the two tests results are combined to average it out?

A. An average is -- yes.

Q. And that would be the average of what the so called alcohol level is?

1 A. Yes.

2 Q. And do the techs do that, or do you do
3 that?

4 A. We both do.

5 Q. All right. So they -- they test, they
6 get results, they average it out, and
7 they do the work, and you review their
8 work and sign off on it?

9 A. Yes.

10 Q. You don't do any independent testing at
11 all?

12 A. I did not in this case.

13 Q. You did not observe the techs as they
14 did it themselves?

15 A. No.

16 Q. The only thing you can testify to is
17 that in your opinion they observed SLED
18 policy but you did not test and you did
19 not witness?

20 A. Correct.

21 MR. PRICE: That's all that I
22 have, Your Honor.

23 THE COURT: Ms. Gary.

24 MS. GARY: Yes, sir, thank you.

25 REDIRECT EXAMINATION

1 BY MS. GARY:

2 Q. Mr. Castellani, just so I understand
3 your role at SLED did you just testify
4 that the technicians are the ones who
5 origin -- excuse me, initially handle
6 the samples and generate a number or a
7 -- let me start over. You said you --
8 the toxicologist at SLED are the only
9 ones who are qualified, perhaps
10 educated, to interpret this data; is
11 that correct?

12 A. Correct.

13 Q. Okay. So when this data is in the
14 hands of these technicians it's just
15 simply that, it's just data; correct?

16 A. Correct.

17 Q. They are not rendering opinions as to
18 the effect of those numbers on a
19 person?

20 A. Correct.

21 Q. They are not rendering opinions as to
22 what that substance is?

23 A. Correct..

24 Q. Okay. And they are not qualified to
25 nor are they rendering opinions as to

1 the actual blood alcohol percentage in
2 specific cases?

3 A. I'm sorry. Can you say that again?

4 Q. Are the technicians -- do they write
5 reports?

6 A. No.

7 Q. Okay. Do they issue opinions at all?

8 A. No.

9 Q. So in this specific case did a
10 technician determine the blood alcohol
11 result?

12 A. They -- they did the testing on it, an
13 average was obtained, and then they
14 gave the report to me.

15 Q. Okay. So this report --

16 A. Not the report, but they gave the data
17 to me.

18 Q. Okay. They gave the number to you, and
19 who interpreted that number?

20 A. I do.

21 Q. Okay. And that is reflected in the
22 fact that you signed this report?

23 A. Yes.

24 Q. Or you signed a report?

25 A. Yes.

1 Q. Okay. And did you sign a report in
2 this case?

3 A. Yes.

4 Q. Okay. Did the technician sign a report
5 in this case?

6 A. No.

7 Q. None of the two if there were two?

8 A. No.

9 Q. Okay. Okay.

10 MS. GARY: At this time, Judge,
11 the State would offer State's
12 Exhibit-Eleven into evidence.

13 MR. PRICE: We would renew our
14 objection, Your Honor, that this
15 gentleman did not do the testing.
16 We agreed to stipulate to the
17 toxicologist as being -- we assumed
18 he was going to test it, but he did
19 not do the testing, and the people
20 that are necessary that did the
21 testing are not here, this evidence
22 should be inadmissible.

23 THE COURT: Overruled. We'll
24 enter it as State's Exhibit-Number-
25 Eleven.

1 (Introduction of the pertinent
2 document marked as
3 STATE'S EXHIBIT-NUMBER-ELEVEN.)

4 MS. GARY: Thank you, Judge.

5 Q. All right. Mr. Castellani, I'm going
6 to show you State's Exhibit-Eleven and
7 ask you is that the report we -- you've
8 already told us, but is that the report
9 you generated in this case?

10 A. Yes.

11 Q. Okay. What type of -- excuse me. Did
12 you locate a substance in this
13 Defendant's blood?

14 A. Yes.

15 Q. And what was that?

16 A. Ethanol.

17 Q. And what is ethanol?

18 A. It is the alcohol -- alcohol that is
19 commonly found in alcoholic beverages.

20 Q. Okay. And you mentioned earlier that
21 there is some volatiles for which SLED
22 is testing these samples. Is ethanol
23 one of those volatiles?

24 A. Yes.

25 Q. Okay. How does ethanol or alcohol

1 affect a person?

2 A. It acts as a central nervous system
3 depressant.

4 Q. Okay. Tell The Court what that means.

5 A. Essentially it's going -- do you want
6 me to go into like the effects that you
7 would see at specific levels or --

8 Q. No, just generally speaking how does a
9 depressant act on a human body?

10 A. It's going to alter their -- alter
11 their mood, affect their -- affect
12 their -- their psychomotor, cognitive
13 functions.

14 Q. Okay. Does alcohol always act as a
15 depressant in everyone?

16 A. Yes.

17 Q. Okay. Can alcohol have different
18 effects on different people?

19 A. At different -- it's still going to act
20 as a central nervous system depressant.

21 Q. Okay. Are there certain physical
22 characteristics of a human being that
23 would alter the way in which alcohol
24 affects them?

25 A. Based on having a single drink one

1 person might -- might obtain a
2 different level of alcohol than another
3 based on things like weight, sex, how
4 much they're drinking, what type of
5 drink they're actually consuming.

6 Q. Okay. Now, in this case what is the
7 blood alcohol result that you
8 interpreted from the testing of the
9 sample?

10 A. It showed that there was a .213 percent
11 ethanol level.

12 Q. Okay. Describe for The Court, if you
13 will, the effect of someone who has a
14 .213 blood alcohol level.

15 A. At a .213 an individual's ability to --
16 to -- an individual will exhibit
17 symptoms such as slurred speech. They
18 may appear -- they'll experience
19 dizziness, uncoordinated. They will
20 have muscle -- they -- I don't want to
21 say that. Their reaction times are
22 going to be slow. They are not going
23 to be able to -- their eyes, their
24 vision is going to be affected, both
25 peripheral vision. At a .2 you'll

1 start to see signs of double vision, so
2 it's not only that it's blurred now
3 it's going to be double vision. A
4 person's ability to multitask is going
5 to be affected, which is really key
6 when you're driving a motor vehicle.
7 Essentially their divided attention is
8 going to be impaired. So when you're
9 driving a motor vehicle it's probably
10 one of the most complex things you do
11 on a daily basis because you're not
12 only -- you're not just trying -- going
13 from point A to point B. When you're
14 driving a vehicle you have to maintain
15 lane position, stay within the confines
16 of your lane, make sure that there's no
17 oncoming traffic in front of you,
18 behind you. You're checking your
19 mirrors, your speed. You're thinking
20 about how you're getting from point A
21 to point B, like what path you want to
22 take. So you're thinking about a
23 multitude of things, and your ability
24 to multitask and spread your mind over
25 all these different things is going to

1 -- is going to be affected.

2 Q. Now, do you as a forensic toxicologist
3 in this case have an opinion as to the
4 level of impairment a person would
5 obtain when their blood alcohol level
6 is a .213?

7 A. At a .213 I would say that their
8 ability to drive a motor vehicle would
9 be materially and appreciably impaired.

10 Q. Okay. I believe that's all I have
11 right now, sir. Thank you very much.
12 Answer any questions Mr. Price has.

13 MR. PRICE: I have no questions
14 for this gentleman, Your Honor.

15 THE COURT: Okay. You're done.

16 MS. GARY: No, sir, that's all.
17 Thank you.

18 THE COURT: You may step down.
19 Thank you.

20 MS. GARY: We'd ask that he be
21 released if he wishes.

22 MR. PRICE: No objection.

23 THE COURT: Okay. You are
24 excused.

25 MS. GARY: Your Honor, that would

1 be the State's case at this time.

2 THE COURT: Mr. Price.

3 MR. PRICE: Your Honor, at this
4 time I have several Motions to
5 make.

6 THE COURT: Certainly.

7 MR. PRICE: I would move most
8 respectfully for a directed verdict
9 on the charge involving -- the
10 alcohol charge. I'm looking for
11 that charge now. What did I do
12 with that?

13 THE COURT: You're talking about
14 the open container.

15 MR. PRICE: The open container,
16 Your Honor.

17 THE COURT: Yes, sir.

18 MR. PRICE: The open container
19 statute that has disappeared off of
20 my desk.

21 MS. GARY: I think I have it.

22 MR. PRICE: The one that was
23 written --

24 THE COURT: I actually have it
25 right here --

1 MS. GARY: Very good.

2 THE COURT: -- because I was
3 actually reviewing it myself.

4 MR. PRICE: That pertains to beer
5 and wine. I think The Court can
6 take judicial notice that Jack
7 Daniels is liquor. There's no
8 testimony that there was any beer
9 and wine in that container much
10 less liquor. If there was liquor
11 then it's the wrong statute, but
12 there was no testing done, so as a
13 matter of law the State has not met
14 its burden of that and it's the
15 wrong statute. There's no telling
16 what was in -- there's no testimony
17 or no evidence of what was in that
18 bottle.

19 THE COURT: Okay. Solicitor.

20 MS. GARY: Your Honor, there's
21 also no testimony as to whether it
22 was not beer or wine. Other than
23 that I think Your Honor can review
24 the evidence and lighten the burden
25 to the State at this time.

1 THE COURT: I accept the directed
2 verdict on the open container.
3 It's dismissed.

4 MR. PRICE: On the DUI, Your
5 Honor, we move for a directed
6 verdict renewing our Motion to
7 Suppress or object to the
8 introduction of the blood test for
9 the arguments that were made. I'm
10 assuming you don't want me to
11 repeat all of those, but they would
12 be the same thing. Constitutional
13 arguments pertaining to both the
14 Fourth Amendment of the United
15 States and also Article 1, Section
16 10 of the South Carolina
17 Constitution.

18 THE COURT: Okay. Solicitor,
19 anything?

20 MS. GARY: No, sir, Judge, we
21 renew our arguments. Of course I
22 won't go back into them either.
23 Again, the standard on directed
24 verdict is reviewing all the
25 evidence and in -- if there's any

1 direct evidence or substantial
2 circumstantial evidence we should
3 move on in this case, Judge. There
4 is more than substantial
5 circumstantial evidence to support
6 the DUI charge at this time.

7 THE COURT: All right. I would
8 agree, so I would overrule that.
9 So we'll move on.

10 MS. GARY: Thank you, Judge.
11 Well, at this time the State -- I
12 mean if Mr. Price has a case. I
13 don't know.

14 MR. PRICE: We are not going to
15 present a case, Your Honor.

16 THE COURT: Okay. Do you-all want
17 closing arguments at this point?

18 MR. PRICE: I would think that in
19 my opinion we just kind of both
20 made them.

21 MS. GARY: I would like a moment,
22 Judge, if you don't mind just to --
23 to -- I did not take my directed
24 verdict opportunity to make my
25 closing statement, so I would like

1 to say a few words, yes, sir.

2 THE COURT: Okay. Very good.

3 MR. PRICE: I have no objection.

4 THE COURT: Okay. Go right ahead,
5 Solicitor.

6 MS. GARY: Thank you, Judge, and
7 may it please The Court. I don't
8 believe I said that earlier, and I
9 apologize. Your Honor, at the
10 close of our case here obviously
11 this is a DUI charge, and the State
12 takes that burden very seriously to
13 prove those elements to Your Honor.
14 Of course that first element being
15 that Ms. Key drove a motor vehicle
16 in the State of South Carolina.
17 The State's position is that there
18 is substantial circumstantial
19 evidence to show that Ms. Key did
20 in fact drive the car in this case.
21 She was as Trooper Campbell
22 testified he personally observed
23 her being removed from the driver's
24 seat from this Nissan Xterra. He
25 testified that there were no other

1 occupants of that car and, in fact,
2 no other individuals on scene .
3 besides first responders and the
4 victim in this case and Trooper
5 Campbell himself. We also heard
6 his testimony as to his locating
7 Ms. Key's driver's license in the
8 car and the fact that the car was
9 registered to her. We finally
10 heard Trooper Campbell's testimony
11 as to his determination of how this
12 collision occurred as based on his
13 role as the investigating officer,
14 and he determined that Ms. Key
15 crossed the center line, hit the
16 victim, and then landed herself
17 against the tree putting her as
18 operating that motor vehicle. Of
19 course we talked about this
20 occurring in Greenville County
21 which is in the State of South
22 Carolina. As the most important
23 element, Judge, that material and
24 appreciable impairment. Your
25 Honor, we have not only the fact

1 that -- well, first of all, you
2 have Jared Castellani's expert
3 testimony as to what a .213 blood
4 alcohol level -- how that affects
5 someone's ability to drive and
6 their -- how that impairs an
7 individual. He testified that in
8 his opinion that arises to the
9 level of material and appreciable
10 impairment. He testified to the
11 fact that at a .213 he would expect
12 an individual, and in this case, to
13 be drowsy, have slurred speech and
14 have an impaired ability to divide
15 one's attention, which of course is
16 -- the crux of operating a motor
17 vehicle. Your Honor, we have the
18 circumstantial evidence -- excuse
19 me, Trooper Campbell locating
20 alcoholic beverage or at least the
21 container of an alcoholic beverage
22 within reach of Ms. Key in her car.
23 Of course he could not testify as
24 to whether or not that had been
25 consumed, but he did testify to

1 having located that in her vehicle,
2 Judge. But the State would rely
3 primarily on that .213 blood
4 alcohol level and the forensic
5 toxicologist's testimony thereto.

6 THE COURT: Okay.

7 MS. GARY: Thank you.

8 THE COURT: Mr. Price, anything?

9 MR. PRICE: Just briefly in
10 response --

11 THE COURT: Sure.

12 MR. PRICE: -- Your Honor. I have
13 great respect for this trooper, but
14 he was not qualified as an accident
15 reconstruction expert. There is no
16 way that he could have determined
17 how this wreck occurred without the
18 testimony or the out-of-court
19 statements of the other person
20 there as he interviewed no one
21 else. So I think that that again
22 should have been stricken, but
23 that's neither here nor there. You
24 have made your rulings, and as you
25 know from my long time in front of

1 you I have respect for your
2 rulings. I have respect for you,
3 and we deal with that. I do want
4 to point out, Your Honor, that this
5 happened back when Ms. Key was
6 unemployed. She felt that she had
7 been given some type Mickey, or
8 somebody had slipped something to
9 her that night. In fact, we
10 investigated that for a solid week
11 trying to run it down. This had a
12 great impact on her. She was in
13 the hospital for five days
14 unconscious. She has changed her
15 life around. She is employed. She
16 is doing well as -- at an
17 engineering firm. She is a
18 recognized engineer getting honors
19 right and left. She's a single
20 parent. Her child turns five years
21 old tomorrow. She is remorseful
22 about this. It is totally out of
23 character. I can't speak highly
24 enough for this young lady.

25 THE COURT: Thank you, Mr. Price.

1 Based on the testimony and the
2 evidence that's presented to The
3 Court, Ms. Key, The Court will find
4 you guilty of the charge of driving
5 under the influence. Is the
6 recommendation from the State in
7 reference to a fine or jail time?

8 MS. GARY: The State will be fine
9 with -- we will be fine with a
10 fine, Judge.

11 THE COURT: And, Mr. Price, you
12 indicated that she's spent five
13 days in the hospital; is that
14 correct?

15 MR. PRICE: She was in ICU five
16 days, yes, sir.

17 THE COURT: I'll give her credit
18 for time served for that. Okay. I
19 think that's well enough for a fine
20 amount here. So no jail time.
21 Credit time served based on the
22 hospitalization. Anything further?

23 MS. GARY: No, sir.

24 THE COURT: All right.

25 MR. PRICE: Enjoyed the trial.

1 THE COURT: Thank you, Mr. Price.

2 MS. GARY: Thank you, Judge.

3 (HEARING ADJOURNED)

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1 STATE OF SOUTH CAROLINA)
2) CERTIFICATE
3 COUNTY OF GREENVILLE)

4 I, RACHEL H. WOOD, a Notary Public, duly
5 commissioned and qualified in and for the
6 State of South Carolina, do hereby certify
7 that this transcript is from the audio file
8 of the Bench Trial Hearing held on November
9 8, 2016, that said Witnesses were duly
10 sworn; that their testimonies were
11 transcribed by me; that this transcript is a
12 true record of said testimony. I further
13 certify that I am not of kin or counsel to
14 the parties in this case, am not in the
15 regular employ of counsel for any of said
16 parties, nor am I interested in the results
17 of this case.

18 IN WITNESS WHEREOF, I have hereunto set my
19 hand and affixed my official seal this
20 14th day of December, 2016.

21

22 My Commission Expires: 03/25/19

23

24

25

State of South Carolina
County of Greenville

Court of Common Pleas

Kathryn Martin Key	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2016-CP-23-06517
	)	
State of South Carolina	)	
	)	
<u>Defendant.</u>	)	

January 4, 2017
Greenville, South Carolina

B E F O R E:

The Honorable Edward Miller, Judge.

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

E. Powers Price, Esquire
Attorney for the Plaintiff

Mitchell Byrd, Assistant Solicitor
Attorney for the State

Lisa Scott
Circuit Court Reporter

I N D E XWITNESSPAGE

No Witnesses.

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits.

P R O C E E D I N G S

* * * * *

THE COURT: Okay. Who's...

MS. PRICE: And, Judge, this is an appeal from a bench trial. It's a DUI, I'm told, on August 8th of 2016.

Just a factual background. Our client, Ms. Key, was involved in an automobile accident on December 10, 2015, at 8:47 a.m. The arresting trooper, Trooper Campbell, arrived at the accident location at 8:57 a.m.

Ms. Key was arrested at the hospital while she was unconscious at 10:35. As a result of the accident, she was rendered unconscious. She went straight to the hospital, and that's where the trooper met her.

While she was still unconscious, the trooper read her her implied consent rights at 10:36 a.m. That was just one minute after she was arrested at the hospital.

The trooper testified at trial that Ms. Key was not able to understand her advised -- her advisement of implied consent rights because she was unconscious.

Ms. Key's blood was drawn at 10:45 a.m. That

1 was just a mere ten minutes after her arrest at the
2 hospital. The arresting trooper did not attempt to
3 obtain a search warrant for Ms. Key's blood. He did
4 testify at trial that the magistrate's office was
5 approximately three miles from the hospital.

6 And it was agreed upon at trial that -- or
7 stipulated that the Greenville County has at least
8 one magistrate on duty 24 hours a day, 7 days a
9 week, and they're available to issue search warrants
10 in person or telephonically.

11 We're asking the Court today for a ruling that
12 the blood results were improperly admitted at trial
13 and a reversal based on that ruling.

14 Your Honor, in *Missouri v. McNeely*, the United
15 States Supreme Court said that there is no
16 bright-line rule as to the natural metabolism of
17 alcohol being a -- an exigent circumstances -- an
18 exigent circumstance to justify an exception to the
19 warrant requirement. Instead, these cases must be
20 evaluated on a case-by-case basis based on the
21 totality of the circumstances.

22 Again, in this case, the trooper -- the Court
23 is aware, had three hours from the time of arrest in
24 order to have the blood drawn. He waited a mere
25 ten minutes. There was plenty of time to get a

1 search warrant. The trooper did not even try to get
2 a search warrant, and there was absolutely no
3 testimony about exigent circumstances at trial.

4 Absent exigent circumstances, the blood draw is
5 in violation of the Fourth Amendment to the United
6 States Constitution, Article 1, Section 10, of the
7 South Carolina Constitution, as well as the Supreme
8 Court ruling in *Missouri v. McNeely*.

9 Article 1, Section 10, of the South Carolina
10 Constitution provides significantly more privacy
11 protection and protection to citizens. It not only
12 prevents against illegal searches and seizures, but
13 it also protects against unreasonable --
14 unreasonable invasions of privacy.

15 Your Honor, despite the implied consent
16 statute, every individual in South Carolina has a
17 right to refuse testing. On the magistrate's
18 return, State's Exhibit 8, it's the advisement of
19 implied consent rights. It specifically says that
20 you do not have to take the test or give samples.

21 *Missouri v. McNeely*, the United States Supreme
22 Court also stated that where officers can reasonably
23 obtain a search warrant without significantly
24 undermining the advocacy of the search, the Fourth
25 Amendment mandates that they do so.

1 As to implied consent, Your Honor, I have two
2 cases to pass up to the Court today. One is North
3 Carolina v. Romano and the other is Bailey v.
4 Georgia. These are Court of Appeals cases out of
5 those states. I've highlighted the relevant
6 portions.

7 As to the North Carolina case, Your Honor, the
8 defendant in that case was never conscious to be
9 advised of his implied consent rights and,
10 therefore, he never refused the blood draw or signed
11 the advice of rights form.

12 None of the officers obtained search warrants
13 from the magistrate office, which similar to this
14 case was only a couple of miles from the hospital.
15 The officer in that case did not believe that any
16 exigency existed. Instead, he relied on the hearsay
17 exception.

18 The Government in that case relied upon older
19 cases, which affirmed the use of that statute to
20 justify the warrantless blood draws of unconscious
21 defendants, but the Court specifically stated that
22 those cases did not have the benefit of the United
23 States Supreme Court's guidance in McNeely which
24 sharply prohibits hearsay warrant exceptions for
25 blood draw searches.

1 The Court further notes that the State's
2 actions did not overcome the presumption that the
3 warrantless search is unreasonable and the
4 defendant, the Fourth Amendment, the State
5 Constitution, and McNeely as the parties seeking the
6 warrant exception. The State did not carry its
7 burden of proving the exigency for that situation,
8 which made the warrantless course imperative.

9 Under the totality of circumstances considering
10 the alleged exigencies of that situation, the
11 warrantless blood draw was not objectively
12 reasonable.

13 And in the *Bailey v. Georgia* case, the
14 defendant in that case was also unconscious when the
15 state trooper arrived at the hospital and had blood
16 drawn without a search warrant.

17 And in that case, the State failed to
18 demonstrate the exigent circumstances, and the Court
19 held that in light of McNeely, the defendant's
20 implied consent was insufficient to satisfy the
21 Fourth Amendment and he could not have given actual
22 consent to that search and seizure of his blood and
23 urine as he was unconscious.

24 That Court in *Bailey* further noted that other
25 jurisdictions generally have come to similar

1 rulings. That under McNeely, implied consent of an
2 unconscious suspect is insufficient to satisfy the
3 Fourth Amendment. Those states have concluded that
4 the State must either obtain a warrant or show
5 exigent circumstances for a warrantless search under
6 the totality of the circumstances.

7 In this case again, Your Honor, Ms. Key was
8 unconscious; therefore, she could not give actual
9 consent. There was no testimony of any exigent
10 circumstances. The trooper had three hours from the
11 time of arrest to get a search warrant, but he
12 waited a mere ten minutes. He simply chose not to
13 get a search warrant.

14 The blood was drawn in violation of the Fourth
15 Amendment to the United States Constitution, Article
16 1, Section 10, of the South Carolina Constitution,
17 and the Supreme Court's ruling in McNeely.

18 Your Honor, the results -- the blood test
19 results in this case were improperly admitted and,
20 therefore, this case should be reversed.

21 THE COURT: All right. Thank you.
22 Yes, sir.

23 MR. BYRD: Thank you, Your Honor. I want to
24 precede my remarks by handing up copies of the
25 transcripts of the pretrial suppression hearing as

1 well as the trial.

2 THE COURT: Wow.

3 MR. BYRD: I will ask the Court's forgiveness
4 for the voice.

5 THE COURT: Y'all seen that?

6 MS. PRICE: Yes, sir.

7 MR. BYRD: Yes, sir.

8 THE COURT: Okay.

9 MR. BYRD: I'm a little hoarse today. So if I
10 don't come across loud enough, please let me know.
11 I'm just a little froggie.

12 I want to hand up an original copy of our
13 brief. Mrs. Gary, I believe, filed one
14 electronically yesterday, but in case one didn't
15 reach the -- the system today, we hand up a
16 duplicate copy.

17 I want to start out by saying that Trooper
18 Campbell followed Section 2950 to the letter in this
19 case and drew blood according to the statutory
20 scheme. There are a couple of factual disputes that
21 the record will clear up.

22 Number one, counsel for the defendant has
23 stated in defendant's brief as well as in argument
24 today that warrants are available tele --
25 telephonically.

1 There's no support for that in the record in
2 this case. The trooper was examined on that issue,
3 and it is found on page 44 of the transcript. And
4 he indicated to the Court under oath that he was not
5 aware of any ability to obtain warrants
6 telephonically in Greenville County.

7 There's no other evidence in the record to
8 support the allegation that warrants are available
9 telephonically. And, certainly, there was no
10 evidence that a -- a warrant was available
11 telephonically back in December of 2015 when this
12 blood draw occurred.

13 There's also been an argument made that there
14 were no -- no evidence of exigent circumstances.
15 The record is replete with exigent circumstances,
16 not the least of which was this was a wreck.

17 There was testimony about the wreck. There was
18 an interview with the victim of the wreck. The
19 officer spent close to two hours at the wreck scene
20 investigating the wreck before he was able to go to
21 the hospital.

22 And when he learned that Ms. Key was
23 unconscious and intubated and unable to give a
24 breathalyzer examination, he did what the South
25 Carolina statutory scheme requires, which is to

1 request a blood draw.

2 There is no precedent that contradicts that.
3 The reference to McNeely as a precedent adverse to
4 the officer -- to the trooper's decision is
5 misplaced.

6 McNeely's facts are different than the facts of
7 our case. And McNeely -- for example, it was a
8 routine traffic stop, and McNeely refused the
9 breath -- the breathalyzer examination as well as
10 the blood test. Our case is a wreck case, and Ms.
11 Key did not revoke her consent.

12 The counsel mentioned that in refusal cases,
13 people have a -- a right to refuse. Certainly they
14 do, but the consent, implied consent, must be
15 revoked, clearly revoked, and it was not revoked in
16 this case, so the trooper had a right to proceed
17 according to the statutory scheme and asked to
18 request a blood draw.

19 We think the reliance upon the *Missouri v.*
20 *McNeely* case is misplaced, and we'd ask Your Honor
21 to -- to take a moment if you can to just take a
22 look at that case and -- and -- and I think the key
23 to it is, it refers to the prior precedent which we
24 think is controlling in this case, *Schmerber v.*
25 *California*.

1 And Schmerber was a case where a blood -- blood
2 draw was taken and the high court ruled that it was
3 proper based upon the exigent circumstances. They
4 referred to the exigent circumstances as being a
5 method by which you view the circumstances as they
6 appear to the trooper prior to the blood draw.

7 Looking at the totality of the circumstances,
8 it's Trooper Campbell's view, when he gets to the
9 hospital and two hours has already expired, that he
10 may not be able to obtain a warrant timely to obtain
11 the essential evidence of alcohol content in the
12 blood. It's not looking backwards; it's looking
13 forwards. That's primarily where we disagree with
14 counsel.

15 It's not that you have three hours after
16 arriving at the hospital and placing her under
17 arrest. It's that it's exigent for you when you're
18 in the hospital and you know that the alcohol has
19 dissipated for at least two hours at that point in
20 time, and the statute authorizes you to request a
21 blood draw and there is no precedent at that moment
22 that says, "You may not do that. You must have a
23 warrant."

24 McNeely does not dictate that, neither do the
25 precedents that counsel has referred to from other

1 states, which we contend are in absentia of the
2 facts of our case.

3 But even if you consider McNeely and its
4 prodigy Burtsfield, a more recent DUI case, as
5 somehow implicating the constitutional requirement
6 for a search warrant, which we disagree with in this
7 case, then the bigger question here, Judge, is what
8 do we do?

9 Ms. Key was obviously guilty. The factfinder
10 found her guilty based upon all the evidence, direct
11 and circumstantial. Do we retroactively apply an
12 exclusionary rule sanction to the case? We don't
13 think that's appropriate.

14 Trooper Campbell was operating on good faith.
15 He was operating without culpability. He was
16 operating objectively reasonable under the
17 circumstances, and therefore, it would be an unfair
18 sanction to now rule that the toxicology analysis
19 should be suppressed and the verdict should be
20 reversed.

21 That -- that's contrary to the case of *State v.*
22 *Brown* which we cite. It deals with precedent. We
23 think there are two precedents in this case that
24 warrants affirmation of the verdict. Section 2950
25 which tells a trooper what to do if he has probable

1 cause to believe that a driving under the influence
2 offense has occurred and the purported defendant,
3 the suspect, is either unconscious or dead, he may
4 request a blood draw. That's what he did.

5 The only precedent that would have affected
6 that out -- contention or -- or procedure would've
7 been the Schmerber case which authorizes the blood
8 draw. So we don't think this is a proper case,
9 factually or legally, to reverse the verdict in this
10 case. We think Ms. Key is guilty and the verdict
11 should be affirmed.

12 THE COURT: Well, aren't you shifting the
13 burden when you say, "If she doesn't revoke
14 consent"? That's sort of constitutional shifting of
15 the burden.

16 MR. BYRD: No. No. She has the right to
17 revoke the consent. A person who is unconscious is
18 considered to be informed and not to have withdrawn
19 a consent provided by Subsection A.

20 THE COURT: Where are you -- what's that?

21 MR. BYRD: That's 2950(h), Section --
22 Subsection 2950(h).

23 The point being, if she's unconscious and has
24 not, prior to that, revoked her consent, then the
25 consent is still active. It's still valid. It's an

1 implied consent, but there's -- there's no
2 affirmative revocation on her part. She -- she's
3 not required to do anything. She just has a right
4 to.

5 THE COURT: She was incompetent.

6 MR. BYRD: Well, again ---

7 THE COURT: She's unconscious or however you
8 want to term it. She was not competent to revoke
9 it.

10 MR. BYRD: Don't disagree with that. The point
11 being, the legislature has said in that instance
12 when someone is incompetent or unconscious or dead,
13 the State has the right to proceed to request a
14 blood draw.

15 Our point is ---

16 THE COURT: So what you're saying -- let me
17 just ask you this. Let's say she didn't have a
18 driver's license at all. She -- you're saying that,
19 "Whoop, well, she has never consented to it. She's
20 not competent to deny any consent, so we can't draw
21 blood"?

22 MR. BYRD: I think that the legislative intent
23 is if you operate a vehicle on the roads in South
24 Carolina, you imply consent to testing.

25 Now -- and, again, if the Court's consideration

1 of McNeely which was at the time this test was
2 conducted, was the only precedent exigent. McNeely
3 was in 2013. The blood draw was in 2015. We don't
4 think McNeely dictates a reversal based on a
5 constitutional defect.

6 But if Your Honor does, then we would urge you
7 to consider not excluding the test based on *State v.*
8 *Brown* which clearly says a law enforcement official
9 who's operating based on what he understands the law
10 to be -- and the trooper clearly in the record in
11 this case said, "I understood the law to permit me
12 to request a blood draw" -- then the -- the
13 exclusion sanction is just not appropriate. It's --
14 it's -- there's not no culpability.

15 *State v. Brown* I think ---

16 THE COURT: I'm not sure I would characterize
17 it as a sanction.

18 MR. BYRD: Well ---

19 THE COURT: We're not sanctioning the State or
20 the officer.

21 MR. BYRD: Well, it's a sanction to the State
22 in the sense that to suppress -- retroactively
23 suppress the toxicology -- toxicology report and
24 analysis, impacts the case itself.

25 Meaning, if you were to -- our contention is

1 that there was evidence in addition to the
2 toxicology report that the factfinder could have
3 found Ms. Key guilty based upon.

4 THE COURT: Yeah.

5 MR. BYRD: But to suppress the toxicology
6 report impacts that case should it be reversed or
7 remanded for -- for a new trial. So we -- we think
8 the verdict should be upheld regardless of the
9 constitutional issue based upon the fact that
10 Trooper Campbell was operating under what he
11 understood to be the applicable precedent at the
12 time.

13 THE COURT: So you're of the opinion that the
14 toxicology report really doesn't -- is of no ---

15 MR. BYRD: No. No. No. It's important. It's
16 an important piece of evidence. That's why I say,
17 we don't think the proper course should be to
18 exclude the toxicology report, even if as the
19 defendant contends Trooper Campbell was on some --
20 under a constitutional obligation to go -- leave the
21 hospital and go try to find a magistrate and seek a
22 warrant before requesting the blood draw.

23 I think the toxicology report's evidence is
24 important in this case and should not be excluded.

25 THE COURT: Yes, ma'am.

1 MS. PRICE: Yes, Your Honor. If I could just
2 previously respond.

3 We did stipulate at trial that a magistrate was
4 on duty at that time. It's not like Trooper
5 Campbell had to go all over Greenville County
6 searching for one. He had 2 hours and 50 minutes to
7 go get a search warrant.

8 THE COURT: Well, they disagree with that.

9 MS. PRICE: Yes, sir. But under the statute,
10 the trooper has three hours from the time of arrest,
11 not the time of the accident. He had plenty of
12 time.

13 There's no finding of any exigent circumstances
14 by the magistrate.

15 And as to the good faith argument, that's not
16 applied when a search warrant ---

17 THE COURT: This is -- in my mind, this is
18 coming down to whether or not an incompetent person
19 just doesn't have any right to revoke consent. Does
20 that -- am I right? Is that what we're talking
21 about here?

22 MR. BYRD: Again, our position is just simply
23 that the statute spells it out.

24 THE COURT: So the statute overrides the
25 Constitution?

1 MR. BYRD: No. No. No. The statute provides
2 the framework for the trooper's proceeding. At that
3 moment, 2015, he considers what he's doing to be
4 following the statute in a constitutional way.
5 There's no opinion -- we don't think McNeely
6 dictated at that moment that he go get a warrant.

7 We think Schmerber dictated that he proceed to
8 request the blood as per the statute.

9 MS. PRICE: Your Honor, McNeely was two years
10 before this blood draw. The statute is over
11 50 years old. McNeely clearly indicates that if at
12 all practicable, a search warrant must be obtained.

13 THE COURT: Okay. Well, let me just think
14 about this one. I need to read the case a little
15 bit more. Okay.

16 MR. BYRD: Thank you, Your Honor.

17 MS. PRICE: Thank you, Your Honor.

18 THE COURT: I'm probably not going to read your
19 depositions or the transcripts.

20 MR. BYRD: That's fine. I just wanted to be
21 available.

22 THE COURT: All right. Thank you.

23 (The proceedings concluded at 10:32 a.m.)

24 * * * * *

25

C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

I, the undersigned, Lisa Scott, Circuit Court Reporter for the Thirteenth 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 the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Greenville County, South Carolina, on the 4th day of January, 2017.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

June 6, 2017

/s/Lisa Scott

Lisa Scott

Lisa Scott
Circuit Court Reporter

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

State of South Carolina)

v.)

Kathryn Martin Key,)

Defendant.)

IN THE MAGISTRATE COURT
THIRTEENTH JUDICIAL CIRCUIT

Ticket Nos.: H480200 and H554801

AMENDED
MOTION TO SUPPRESS **RECEIVED**

AUG 08 2016

Chick Springs
Summary Court

Defendant hereby moves to suppress the blood test results in connection with this case for the following reasons:

1. Defendant did not give her consent to have blood drawn. Defendant was unconscious at the time the arresting officer directed that a blood sample be taken by hospital personnel for "legal blood."
2. The above is in violation of the holding in the case of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).
3. The above is also in violation of Article Ten of the South Carolina Constitution.
4. Although the South Carolina Implied Consent Statute purportedly gives an arresting officer the authority to draw blood for an unconscious defendant said statute was passed prior to the holding in *Missouri v. McNeely* and said statute is in violation of the holding in *Missouri v. McNeely* as far as the drawing of a blood sample from an unconscious person is concerned.
5. Although the automobile wreck in which defendant was involved occurred at 8:47 a.m. defendant was not arrested until 10:35 a.m. The arresting trooper directed that blood be drawn at 10:45 a.m. Therefore, there were no exigent circumstances that would have prevented the trooper from getting a search warrant either in person or via telephone/computer.

Respectfully submitted,

BY: E. Powers Price
E. Powers Price
SC Bar No.: 100214
Attorney for Defendant
644 East Washington Street
Greenville, SC 29601
(864) 271-3535
(864) 242-6560 – Facsimile

Greenville, South Carolina

Dated: Aug. 8, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

State of South Carolina)

v.)

Kathryn Martin Key,)

Defendant.)

IN THE MAGISTRATE COURT
THIRTEENTH JUDICIAL CIRCUIT

Ticket Nos.: H480200 and H554801

DEFENDANT'S BRIEF
IN SUPPORT OF MOTION TO SUPPRESS

RECEIVED
AUG 08 2016
Chick Springs
Summary Court

FACTS

The following facts are undisputed: (1) The defendant was involved in an automobile accident at 8:47 a.m.; (2) The arresting trooper arrived at the accident location at 8:57 a.m.; (3) The defendant was arrested at 10:35 a.m.; (4) The defendant's blood was drawn at 10:45 a.m.; (5) The defendant was unable to give her consent to have blood drawn because she was unconscious; and (6) The arresting trooper did not have a Search Warrant for Defendant's blood.

ARGUMENT

THE DEFENDANT'S BLOOD WAS DRAWN IN VIOLATION OF THE FOURTH AMENDMENT, SECTION TEN OF THE SOUTH CAROLINA CONSTITUTION, AND UNITED STATES SUPREME COURT CASE LAW

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." See also SC Const. Sec. 10. Search warrants protect privacy in two ways. See Birchfield v. North Dakota, slip op. 14-1468 (June 23, 2016). First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Id. at 28. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search. Id.

The United States Supreme Court has held that natural metabolism of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment's search warrant requirement for nonconsensual blood testing in all drunk-driving

cases, and instead, exigency must be determined case by case on the totality of the circumstances. Missouri v. McNeely, 133 S.Ct. 1552 (2013). When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Id. at 1555.

More recently, in Birchfield v. North Dakota, the United States Supreme Court addressed the constitutionality of warrantless blood tests and discussed in the detail the differences between breath tests and blood tests regarding privacy interests. Birchfield, slip op. 14-1468 (June 23, 2016). The Court described blood tests as described blood tests as “searches involving intrusions beyond the body’s surface,” which implicate important “interests in human dignity and privacy,” Id. at 32.

The Search Incident to Arrest Doctrine does not apply to warrantless blood draws, and therefore, only exigent circumstance could possibly serve as an exception to the warrantless taking of blood, which must be decided on a case-by case basis. Birchfield v. North Dakota, slip op. 14-1468 (June 23, 2016), see also Missouri v. McNeely, 133 S.Ct. 1552 (2013). In the case of an unconscious person who is unable to do what is needed to take a breath test, police may apply for a warrant if need be. Id. at 35.

This Court is well aware that the arresting trooper must draw blood within three (3) hours of arrest. S.C. Code Ann. Sec. 56-5-2950. In the case at hand, the arresting trooper had the defendant’s blood drawn within a mere ten (10) minutes from arrest. Exigent circumstances could not possibly support the drawing of blood without a warrant. Even if calculating the amount of time to draw blood from the time of the accident, which would nonetheless be improper, the arresting trooper still had almost an entire hour to seek a warrant. There were no exigent circumstances that would have prevented the trooper from getting a search warrant either in person or via telephone/computer. Furthermore, the defendant was unconscious and could not possibly consent to having blood drawn.

To the extent that the State relies on South Carolina Implied Consent Statute, this statute was enacted prior to both Missouri v. McNeely and Birchfield v. North Dakota. The Court in Birchfield held that motorists could not be deemed to have consented to submit to a blood test on pain of committing a criminal offense. Birchfield at 37. “There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to

drive on public roads.” Birchfield at 36. South Carolina Implied Consent Statute is in violation of the holding in Missouri v. McNeely and Birchfield v. North Dakota as far as drawing a blood sample from an unconscious person is concerned.

It is clear that the defendant’s blood was drawn in violation of Fourth Amendment and United States Supreme Court case law. Therefore, the blood results should be suppressed.

Respectfully submitted,

BY: E. Powers Price

E. Powers Price
SC Bar No. 100214
Attorney for Defendant
644 East Washington Street
Greenville, SC 29601
(864) 271-3535
(864) 242-6560 - Facsimile

Greenville, South Carolina

Dated: Aug. 8, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Kathryn Martin Key,)
)
Appellant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THRTEENTH JUDICIAL CIRCUIT

Common Pleas Case No.: **2016-CP-23-06517**

Ticket No.: H480200

NOTICE OF CRIMINAL APPEAL

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2016 NOV 8 PM 3:27

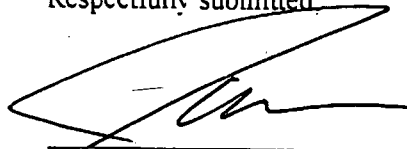
The Appellant in the above-captioned action hereby gives notice of appeal from judgment of the Magistrate's Court in the above action, to the Circuit Court of Common Pleas, in the County of Greenville.

This notice of appeal is made subsequent to verbal notice of the judgment which was rendered on the 8th day of November, 2016. Written decision has not been received.

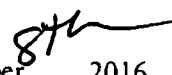
The Appellants' exceptions to the judgment of the magistrate are set forth as follows:

1. The Trial Court erred by allowing the blood test results into evidence in violation of the Fourth Amendment of the U.S. Constitution and Article I, Section 10 of the South Carolina Constitution;
2. The Trial Court erred by failing to direct a verdict of not guilty at the close of the State's case.

Respectfully submitted,



James H. Price, III
S.C. Bar No.: 04562
E. Powers Price
S.C. Bar No.: 100214
644 E. Washington Street
Greenville, SC 29601
(864) 271-3535 (telephone)
(864) 242-6560 (facsimile)


Dated: November __, 2016
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Kathryn Martin Key,

Appellant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Common Pleas Case No.: 2016-CP-23-06517

Ticket No.s: H480200 and H554801

BRIEF OF APPELLANT/DEFENDANT

FACTS

The following facts are undisputed: (1) The defendant was involved in an automobile accident at 8:47 a.m.; (2) The arresting trooper arrived at the accident location at 8:57 a.m.; (3) The defendant was arrested at 10:35 a.m. at the hospital while unconscious; (4) The arresting trooper read the defendant her Implied Consent rights at 10:36 a.m. while the defendant was still unconscious; (5) The defendant's blood was drawn at 10:45 a.m.; (6) The defendant was unable to give actual consent to have blood drawn because she was unconscious; (7) The arresting trooper did not even attempt to obtain a Search Warrant for Defendant's blood; and (8) Greenville County has at least one (1) magistrate on call twenty-four (24) hours per day, seven (7) days per week to issue Search Warrants in person or telephonically.

ARGUMENT

I. THE DEFENDANT'S BLOOD WAS DRAWN IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, ARTICLE ONE, SECTION TEN OF THE SOUTH CAROLINA CONSTITUTION, AND UNITED STATES SUPREME COURT CASE LAW

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no Warrants shall issue, but upon probable cause.” Article One Section Ten of the South Carolina Constitution similarly states: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.” (emphasis added); see also State v. Forrester, 343 S.C. 637, 645 (SC Sup. Ct. Feb. 12, 2001) (“The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors and interpretation offering a higher level of privacy protection than the Fourth Amendment.”).

Search warrants protect privacy in two ways. See Birchfield v. North Dakota, slip op. 14-1468 (June 23, 2016). First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Id. at 28. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search. Id.

Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. See State v. Wright, 391 S.C. 436, 706 S.E2d 324 (SC S Ct 2011). The United States Supreme Court has held that natural metabolism of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment’s search warrant requirement for nonconsensual blood testing in all drunk-driving cases, and instead, exigency must be determined case by case on the totality of the circumstances. Missouri v. McNeely, 133 S.Ct. 1552 (2013). When officers in drunk-driving investigations can reasonably

obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Id. at 1555.

More recently, in Birchfield v. North Dakota, the United States Supreme Court addressed the constitutionality of warrantless blood tests and discussed in the detail the differences between breath tests and blood tests regarding privacy interests. Birchfield, slip op. 14-1468 (June 23, 2016) (holding that motorists could not be deemed to have consented to submit to a blood test on pain of committing a criminal offense). The Court described blood tests as “searches involving intrusions beyond the body’s surface,” which implicate important “interests in human dignity and privacy,” Id. at 32. Blood tests require piercing the skin to extract a part of the subject’s body, and unlike a breath test, place in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Id. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested. Id.

In this case, the State incorrectly relies on the South Carolina Implied Consent Statute as an exception to the warrant requirement. Drivers in South Carolina have an absolute right refuse blood draws (see South Carolina Advisement of Implied Consent Rights, “You do not have to take the tests or give the samples,”). It is a well-settled rule that when the State seeks to rely upon consent to justify the lawfulness of a search, it must prove that the consent was, in fact, freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543 (1968). It is also a well-settled rule that defendants may limit the scope of their consent to search as well as revoke consent. See State v. Forrester, (S.C. 2001) 343 S.C. 637, 541 S.E.2d 837, and State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (SC Ct. App. Jan. 21, 2003). In determining whether consent to

search was voluntary, the burden on is on the State. State v. Dorce (S.C.App. 1995) 320 S.C. 480, 465 S.E.2d 772.

There is no supporting case law in South Carolina holding that a warrantless blood draw is admissible based on the Implied Consent Statute of an unconscious defendant in light of Birchfield and McNeely. Furthermore, the Implied Consent Statute was enacted more than fifty (50) years prior to both McNeely and Birchfield during a time of relatively limited technology for obtaining search warrants quickly. As the Court in Birchfield stated, "There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." Birchfield at 36.

Courts in other states, including Georgia and North Carolina, have ruled that the implied consent of an unconscious defendant is not an exception to the Fourth Amendment warrant requirement absent exigent circumstances. (See Bailey v. Georgia, 790 A.E2d 98 (Ct App. GA, July 13, 2016), "[c]ourts from other jurisdictions have found that, under McNeely, implied consent of an unconscious suspect is insufficient to satisfy the Fourth Amendment. Those states have concluded that the State must either obtain a warrant or show exigent circumstances for a warrantless search under the totality of the circumstances." (relying on Williams v. GA, 296 Ga. 817, 771 S.E.2d 373 (March 27, 2015) "[m]ere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant."); See also Texas v. Ruiz, -S.W.3d-, 2015WL5626252, No. 13-13-00507-CR (Ct. App. Tx., Aug. 27, 2015), holding that the implied consent statutes involved in this case are not recognized exceptions to the warrant requirement under the Fourth Amendment, and the State's reliance on these statutes in this case to establish that the warrantless search was reasonable is constitutionally infirm.; See

also Idaho v. Charleson, 160 Idaho 610, 377 P.3d 1073, No. 42201, 2016 Opinion No. 87 (Aug. 5, 2016) holding that because the Implied Consent statute in that case authorizes a civil penalty for refusing to submit to the test, the better reading of McNeely is that Implied Consent is no longer a per se exception to the warrant requirement. "Therefore, Idaho's implied consent statute must jump two hurdles to qualify as voluntary: (1) drivers give their initial consent voluntarily; and (2) drivers must continue to give voluntary consent." See also N.C. v. Romano, 785 E.E.2d 163, 2016 WL 1569452 (Ct. App. NC, April 19, 2016) "[t]he Defendant was rendered unable to meaningfully receive and consider his blood test rights, unable to give or withhold his informed consent, and/or unable to exercise his right to refuse the warrantless test." (holding that the Good Faith Exception to the warrant requirement did not apply because officers never attempted to obtain a search warrant prior to the blood draw).

II. NO RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT JUSTIFIES THE ADMISSION OF DEFENDANT'S BLOOD RESULTS.

A warrantless search may be proper under the Fourth Amendment if it falls within one of the well established exceptions to the warrant requirement which are: (1) search incident to lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. U.S.C.A. Const. Amend. 4; See Robinson v. State, 497 S.C. 169, 754 S.E.2d 862 (SC S.Ct. Feb. 26, 2014). Clearly, hot pursuit, stop and frisk, automobile exception, plain view, and abandonment do not apply in this case. Regarding a search incident to arrest, the United States Supreme Court has ruled that the Search Incident to Arrest Doctrine does not apply to warrantless blood draws. Birchfield v. North Dakota, slip op. 14-1468 (June 23, 2016), see also Missouri v. McNeely, 133 S.Ct. 1552 (2013). As stated above, implied consent is not a recognized exception to the warrant requirement. Therefore, only

exigent circumstance could possibly serve as an exception to the warrantless taking of blood, which must be decided on a case-by case basis. Birchfield v. North Dakota, slip op. 14-1468 (June 23, 2016), see also Missouri v. McNeely, 133 S.Ct. 1552 (2013).

This Court is well aware that the arresting trooper must draw blood within three (3) hours of arrest. S.C. Code Ann. Sec. 56-5-2950. In the case at hand, the arresting trooper had the defendant's blood drawn within a mere ten (10) minutes from arrest. Exigent circumstances could not possibly support the drawing of blood without a warrant in this case. Even if calculating the amount of time to draw blood from the time of the accident as opposed to the time of arrest, which would nonetheless be improper, the arresting trooper still had almost an entire hour to seek a warrant. There were no exigent circumstances that would have prevented the trooper from getting a search warrant either in person or via telephone/computer from one of the Greenville County Magistrates on call twenty-four (24) hours per day seven (7) days per week.

It is clear that the defendant's blood was drawn in violation of the Fourth Amendment of the United States Constitution, Article One Section Ten of the South Carolina Constitution, United States Supreme Court case law, and the guiding case law from other states. The blood results in this case should have been suppressed.

Respectfully submitted,

PRICE LAW FIRM, P.A.

BY: /s/ James H. Price, III
James H. Price, III
SC Bar No. 04562
644 East Washington Street
Greenville, SC 29601

(864) 271-3535
(864) 242-6560 – Facsimile
Attorney for Petitioner

Greenville, South Carolina

Dated: 12/27/16

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT

State of South Carolina

CA# 2016-CP-23-06517

Respondent

vs

In Re: UTT# H480200 (DUI)

Kathryn Martin Key

Appellant

BRIEF OF RESPONDENT

FACTS

At 8:47a.m. on December 10, 2015, Trooper Aaron Campbell of the South Carolina Highway Patrol was dispatched to a two car wreck on Muddy Ford Road in Greenville County. Upon arrival he secured the scene and began investigating. He witnessed the Defendant Kathryn Key being extracted from the driver's seat of her car by EMS, who immediately transported her to Greenville Memorial Hospital. Trooper Campbell's investigation would later reveal Ms. Key's car crossed the center line, struck an oncoming vehicle, ran off the road, and struck a tree, where it came to rest. Trooper Campbell was unable to speak to Ms. Key at the scene due to her serious injuries, but did obtain her South Carolina driver's license and learned that the car she was operating was registered in her name. No one else was in Ms. Key's vehicle at the time of the wreck.

Trooper Campbell investigated the wreck by interviewing the driver of the other vehicle, taking photographs, and filling out required reports. During his investigation, Trooper Campbell discovered a nearly empty Jack Daniels mini bottle containing wet residue located in the glove compartment of Ms. Key's car. Trooper Campbell proceeded to the hospital emergency room where he learned that Ms. Key was unconscious and intubated. Suspecting Ms. Key had been driving under the influence and based on probable cause, Trooper Campbell placed Ms. Key under arrest for DUI at 10:35 a.m., read her the applicable implied consent rights form, and instructed the on-duty charge nurse to draw a blood sample. Ms. Key's blood sample was taken at 10:45 a.m. and later analyzed by the South Carolina Law Enforcement Division. The toxicology report revealed that approximately two hours after the wreck, Ms. Key's blood alcohol content was 0.213%, nearly three times the legal limit. In his closing argument at trial, Ms. Key's counsel asserted that "[s]he felt that she had been given some type of Mickey or somebody had slipped something to her" the night before the wreck.

At a pretrial hearing on August 8, 2016, Ms. Key moved to suppress the forensic toxicologist's report and analysis of the blood sample on the ground that it resulted from an unconstitutional, non-consensual, warrantless search. The trial court denied the motion.

A bench trial was held on November 10, 2016. Trooper Campbell, charge nurse Amanda Brown, and SLED toxicologist Jared Castellani testified. Numerous documents and exhibits were introduced into evidence, including the toxicology report, subject to Ms. Key's objection. Ms. Key moved for a directed verdict on the grounds asserted in her motion to suppress the toxicology analysis, and the motion was denied. Ms. Key did not present a case. Following argument of counsel, the trial court found Ms. Key guilty.

ISSUES

1. Did the trial court err by allowing the toxicology analysis into evidence?
2. If the trial court erred, should the verdict be upheld?

STANDARD OF REVIEW

On appeal from a motion to suppress based on Fourth Amendment grounds the Court reviews questions of law de novo. *State v Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014). The appellate court must affirm if there is any evidence to support findings of fact and may reverse only for clear error. *State v Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012). All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Joytime Distribs. & Amusements Co. v State*, 388 S.C. 634, 649, 528 S.E.2d 647, 650 (1999).

ARGUMENT

1. The trial court did not err by admitting the results of Ms Key's blood alcohol analysis. Trooper Campbell did not have to seek a search warrant because Ms. Key consented to the testing. It is well settled law that obtaining forensic samples from a defendant constitutes a "search" under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). It is also well settled that Fourth Amendment searches do not require a warrant where the subject of the search has provided consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *see also State v. McKnight*, 352

S.C. 635, 576 S.E.2d 168 (2003). The key inquiry in determining if consent to search was given is whether the consent was “voluntary” or was the product of duress or coercion, express or implied, and that inquiry is a question of fact to be determined from the totality of the circumstances. *State v. Greene*, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997). South Carolina’s implied consent statute provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person’s breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. . . . If the person is physically unable to provide an acceptable breath sample because the person . . . is unconscious . . . the arresting officer *may request a blood sample to be taken*.

S.C. Code Ann. § 56-5-2950 (A) (emphasis added). Ms. Key argues in her brief to this Court that she was unable to consent to the taking of her blood because she was unconscious at the time of the taking. Both Trooper Campbell and the nurse testified at trial that Ms. Key was in fact unconscious at the time of the blood draw; however, by operation of the implied consent statute, it is of no consequence that Ms. Key was unconscious because she voluntarily consented to the blood draw at the moment she chose to operate her motor vehicle, and there is no evidence her decision to drive her car on December 10, 2015, was the product of duress or coercion. “A person who is unconscious . . . is considered to be informed and not to have withdrawn the consent provided by subsection (A) of this section.” S.C. Code Ann. § 56-5-2950 (H). This is exactly the factual scenario present in Ms. Key’s case.

Missouri v. McNeely

In her argument for suppression, Ms. Key cites both the Fourth Amendment to the United States Constitution and Article One, Section Ten of the South Carolina Constitution, which prohibits “unreasonable searches and seizures and unreasonable invasions of privacy”. In *Schmerber*, the United States Supreme Court held the use of a blood test was a highly effective means of determining the degree to which a person was under the influence of alcohol, and held

it is a minimal intrusion to the Defendant's Fourth Amendment protection against such searches. *Schmerber*, 384 U.S. at 771.

Ms. Key's reliance on *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), is misplaced. In *McNeely*, the United States Supreme Court addressed a circuit split arising out of its holding in *Schmerber*. *McNeely* involved a "routine DUI investigation" where the Defendant was subjected to a traffic stop. *McNeely*, 133 S.Ct. at 1556. The officer in *McNeely* noticed several signs of intoxication. *Id.* After *McNeely* performed poorly on field sobriety tests, the officer presented *McNeely* with a portable breathalyzer and asked him to provide a breath sample. *Id.* at 1556-57. He declined. The officer then placed him under arrest and began to transport him to the station house, but when *McNeely* indicated that he would not submit to a breath test there, the officer changed course and took him straight to a hospital. *Id.* At the time of *McNeely*'s arrest, Missouri had an implied consent statute. *Id.*; see Mo. Ann. Stat. § 577.020.1, 577.041 (West 2011). Upon arrival at the hospital, the officer requested that *McNeely* submit to a blood test. *McNeely*, 133 S. Ct. at 1557. The officer read *McNeely* his implied consent rights and informed him of the consequences of failing to take the test. *McNeely* still refused, and the officer directed hospital personnel to draw a blood sample over *McNeely*'s objection. *Id.*

On appeal to the United States Supreme Court, Missouri argued broadly that the nature of drunk driving cases will always justify warrantless blood draws because the dissipation of alcohol in a person's blood is akin to the exigent circumstance of "destruction of evidence," one of the major holdings of *Schmerber*. *Id.* at 1560. Missouri urged the Court to adopt the bright line rule that warrantless blood draws are per se reasonable in all driving under the influence cases involving alcohol because of the exigent circumstance created as alcohol dissipates in the blood stream. *Id.* The Court rejected this argument and declined to adopt such a rule, holding instead that the reasonableness of a warrantless search based on an exigent circumstance should be assessed on a case-by-case basis. *Id.* at 1561. The Supreme Court's ruling did not overrule its holding in *Schmerber*, but merely stated that a case-by-case analysis must be applied and that the proposed bright line, per se rule could not pass constitutional muster.

The *McNeely* court adhered to the decision in *Schmerber*, which found blood draws constitutionally appropriate. *Schmerber*, 384 U.S. at 771. That court imagined a factual scenario identical to the facts in this case, stating:

The officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence" . . . [p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."

Id. (internal citation omitted). Nothing contained in the *McNeely* decision overrules *Schmerber*, nor does *McNeely* hold, as Ms. Key believes, that the dissipation of alcohol cannot be an exigent circumstance excusing the need for a warrant. *McNeely* reaffirms the "special factors" and exigent circumstances analysis which obviates the need for a warrant in certain situations such as those present in Ms. Key's case.

Additionally, there are a number of factual differences between the *McNeely* case and Ms. Key's case. First, Ms. Key's case involves a traffic accident and is not a "routine DUI" where an individual is stopped for a traffic violation and discovered to be under the influence. When an accident occurs, as demonstrated in *Schmerber*, the investigation may require hours to complete before the investigating officer can arrive at the hospital to initiate the blood draw procedure -- in Ms. Key's case it was approximately two hours. All the while, the alcohol that was affecting Ms. Key was rapidly dissipating from her blood stream, effectively destroying or diminishing the State's evidence. Second, Ms. Key, through counsel, admitted at trial to the possibility that she was impaired by a combination of drugs and alcohol, in contrast to *McNeely*. Officers may not always know what particular substance is causing impairment. Many substances with substantial impairing effects have an unpredictable shelf-life and may not remain in the blood stream for long at all. The evidence of that additional impairing substance could have been completely eliminated if Trooper Campbell had to take time to obtain a search warrant

at the completion of his investigation. Additionally, and in greatest contrast to Ms. Key, McNeely refused the blood test and his blood was taken over his objection, without a search warrant. McNeely did not render himself unconscious as a result of intoxication. He was able to speak with the arresting officer, comprehend the implied consent warnings as they were read to him, and voice his refusal of both the breath and blood tests. Ms. Key, in contrast, rendered herself unconscious and unable to revoke her implied consent. Trooper Campbell did not have to seek a search warrant because Ms. Key's consent was still in place. Finally, the *McNeely* court highlights improvements in technology that allow officers to obtain warrants faster, but those improvements are not in place in Greenville County. Trooper Campbell testified at trial that he did not, as Ms. Key would like this Court to believe, have the means to seek a warrant by telephone at the time of Ms. Key's arrest. He would have had to leave the hospital to obtain a warrant in a magistrate's presence, taking critical time that erodes the reliability of any test conducted of Ms. Key's blood. See S.C. Code Ann. § 17-13-140.

Birchfield v. North Dakota

Ms. Key's reliance upon the United States Supreme Court's opinion in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), is likewise misplaced. *Birchfield* held that a warrantless, non-consensual blood draw is impermissible where an implied consent statute provides criminal penalties for a refusal. *Birchfield* states "[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. See, e.g., *Birchfield, supra*, at... 133 S. Ct. 1552, 185 L. Ed. 2d 696, 710 (plurality opinion). "Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.* South Carolina's implied consent law imposes only civil penalties and thus it, and warrantless blood draws taken in compliance with it, are not affected by *Birchfield*. See *State v. Cuccia* 353 S.C. 430, 578 S.E.2d 45 (Ct. App. 2003). The *Birchfield* decision is likewise inapplicable to this case because it was issued after Ms. Key's arrest. See *State v. Brown*, 401 S.C. 82, 736 S.E.2d 263 (2013) (holding the exclusionary rule does not apply when an officer relies upon appellate precedent existing at the time he conducted the search).

Other jurisdictions

Ms. Key's cites opinions from various other states to persuade this court that the implied consent of an unconscious defendant is not an exception to the Fourth Amendment warrant requirement. In *Bailey v. State*, 338 Ga. App. 428, 790 S.E.2d 98 (Ct. App. 2016), the court found implied consent insufficient to satisfy the warrant requirement based on the fact that the State produced no evidence of exigent circumstances at all. In Ms. Key's case, Trooper Campbell testified as to his duties as the investigating officer at the scene, the amount of time he spent investigating, and the fact that he had no means to seek a warrant other than in the presence of a magistrate. Ms. Key's counsel in closing argument spoke to the possibility that Ms. Key was under the influence of an unknown substance, evidence which could have been destroyed had Trooper Campbell sought a warrant. Ms. Key also cite *State v. Charlson*, 377 P.3d 1073 (2016), for the proposition that consent under Idaho's implied consent statute must be voluntary and must be continuously given. *Id.* at 1076 (citing *State v. Wutt*, 337 P.3d 575 (2014)). Ms. Key completely misrepresents the holding of this case, and in fact this case supports the State's argument here. Unlike Ms. Key, Charlson was able to converse with law enforcement, requested to provide a breath sample, and was conscious for the warrantless blood draw. Idaho has an implied consent statute almost identical to South Carolina's, under which Charlson was deemed to have consented to testing of his blood upon a qualifying arrest. Charlson challenged the warrantless blood draw on the grounds that his implied consent was not voluntary and that he withdrew his consent to the testing. *Id.* The court affirmed the denial of Charlson's motion to suppress, finding there was no evidence he was under duress or coercion when he chose to drive, indicating his consent was voluntary, and "under Idaho law, a driver's implied consent continues if it is not revoked before the time of the evidentiary testing." *Id.* at 1081 (citing *State v. Rios*, 371 P.3d 316, 319 (2016)).

Conclusion

Ms. Key consented to the testing of her blood when she voluntarily drove her car on the morning of December 10, 2015. The facts in the present case fit squarely with those of *Schmerber* and are not inconsistent with the decisions in *McNeely* or *Birchfield*. This case involved a wreck that required an extensive investigation on scene while Ms. Key was transported to the hospital. The dissipation of alcohol in Ms. Key's blood for two hours and the

concomitant threatened destruction of evidence added to the exigencies confronting Trooper Campbell at the hospital. Ms. Key rendered herself unable to revoke her consent thus permitting Trooper Campbell to request a blood draw without a warrant. He chose to follow the law as it existed that morning and the verdict in this case should be upheld.

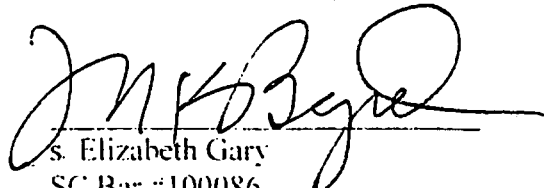
2. If the trial court erred, the verdict should be upheld for the following reasons:

- A. If this court finds South Carolina Code subsection § 56-5-2950 is unconstitutional and that exigent circumstances did not exist to justify the sample collection, then the court should not utilize the exclusionary rule to suppress the evidence based on the "Good Faith Exception." The exclusionary rule does not require the suppression of evidence obtained by an officer acting in objectively reasonable reliance on a statute that is later declared to be unconstitutional.
- B. Ms. Key was guilty of driving under the influence beyond a reasonable doubt, as established by the totality of the evidence presented at trial.
- C. Trooper Campbell's act of requesting a legal blood draw was objectively reasonable in the totality of the circumstances.
- D. The fact finder found Ms. Key guilty based upon direct and substantial circumstantial evidence including *but not limited to* the toxicology analysis.
- E. The exclusionary rule should not apply in this case because Trooper Campbell relied upon existing appellate precedent at the time he conducted the blood draw. *See State v. Brown*, 401 S.C. 82, 736 S.E.2d 263 (2012). When asked on direct examination why he did not seek a search warrant before he obtained the blood sample, Trooper Campbell responded "It's not - - it's not a requirement by law." He was correct. On December 10, 2015, South Carolina implied consent law permitted a warrantless blood draw from an unconscious person suspected of driving under the influence under the circumstances as they existed. There were no South Carolina or federal appellate decisions to the contrary.
- F. There was no culpable misconduct by Trooper Campbell necessitating a sanction pursuant to the exclusionary rule. *Id.* at 92.
- G. If the State can show by a preponderance of the evidence that the information it sought would ultimately or inevitably have been discovered by lawful means, then the

evidence is admissible. The State does not have to prove the absence of bad faith on the part of the police. *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501 (1984) (where police would have discovered victim's body even if defendant had not given information as result of improper interrogation).

Wherefore, having fully replied, the State urges this Honorable Court to affirm the verdict and judgment below.

Date: January 3, 2017



s. Elizabeth Gary
SC Bar #100086
Mitchell Byrd
SC Bar #1067
Thirteenth Circuit Solicitor's Office
305 East North Street, Suite 325
Greenville, SC 29601
864-467-8701
864-467-8290

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT

State of South Carolina

CA# 2016-CP-23-06517

Respondent

vs

Kathryn Martin Key

Appellant

**NOTICE OF MOTION AND MOTION TO
RECONSIDER AND VACATE ORDER**

TO THE APPELLANT, HER COUNSEL AND THIS HONORABLE COURT

PLEASE TAKE NOTICE that on the tenth day hereafter or as soon as the Court may deem it necessary, the undersigned, on behalf of the State of South Carolina, will move and does hereby move for an order amending and vacating the Court's order dated February 14, 2017 and filed electronically that same day, upon the following grounds:

1. The search in this case was reasonable, lawful and constitutional. *Schmerber v California* 384 U.S. 757 (1966), *Missouri v McNeely* 133 S. Ct. 1552 (2013), *S.C. Code Ann. § 56-5-2950 (A)* (Supp. 2009).
2. No warrant was required for the blood draw in this case as the defendant consented to the search.
3. The blood draw in this case was conducted in strict accordance with state law and was therefore reasonable.
4. Implied consent is voluntary consent unless or until it is affirmatively revoked by the defendant.
5. South Carolina's implied consent statute only imposes civil penalties and is constitutional. *Birchfield v North Dakota* 136 S. Ct. 2160 (2016).
6. This case was not a routine traffic stop requiring a warrant as contemplated by the court in *McNeely, Id.*
7. This case involved a wreck, serious injuries, one law enforcement officer and a lengthy investigation thus *McNeely* is inapposite.

8. South Carolina's implied consent statute is presumed to be constitutional and the defendant failed to overcome this burden.
9. The exigent circumstances in this case permitted a warrantless search.
10. Facts establishing exigent circumstances are reflected in the record as well as the Magistrate's return.
11. There is no evidence in the record that Trooper Campbell would have had sufficient time to obtain a warrant before dissipation of intoxicating substances in defendant's blood.
12. Special facts in this case, in addition to dissipation of alcohol in defendant's blood, amount to exigent circumstances obviating the need for a warrant under a totality of circumstances analysis.
13. Potential dissipation of the toxic substances from defendant's blood was an exigent circumstance which combined with the other undisputed circumstances existing at and before the time of the requested blood draw pursuant to state law eliminated the necessity of a warrant.
14. Approximately 2 hours if not more had expired from the time of the collision, Trooper Campbell's arrival at the scene, his investigation and arrival at the hospital. These objective facts and circumstances permitted the warrantless search in this case. *Schmerber, Id.*
15. *McNeely* does not overrule *Schmerber*.
16. The blood draw in this case was an appropriate incident to defendant's arrest. *Schmerber, Id.*
17. There was no precedent extant when Trooper Campbell requested the blood draw in this case that mandated he first obtain a warrant.
18. Defendant was guilty of driving under the influence and the verdict should be upheld.
19. Trooper Campbell acted in good faith, with no misconduct and in objective compliance with existing law and precedent therefore defendant's guilty verdict should be upheld even if a warrant should have been obtained prior to the blood draw in this case. *State v Brown* 401 S.C. 82, 736 S.E.2d 263 (2013)

20. The court should consider the entire record of the proceedings below in deciding this case.
21. There is no evidence in the record that supports a finding that a magistrate was “readily” available to sign a warrant. The fact that a magistrate was on duty doesn’t mean he or she was readily available or that a warrant could have been obtained before toxic substances in defendant’s blood dissipated.
22. The fact finder found defendant guilty based upon all of the testimony and evidence, including but not necessarily dependent upon the toxicology evidence and therefore the verdict should be upheld.
23. The propriety of the search in this case should be analyzed prospectively based upon the totality of the circumstances confronting Trooper Campbell prior to his request for the blood draw, not in hindsight.
24. *Schmerber, Id.* was the controlling precedent in addition to the implied consent statute and both permitted the warrantless blood draw in this case.
25. Defense counsel conceded that defendant contended she was slipped a “mickey” and this is additional evidence supporting the fact finder’s guilty verdict.
26. The exclusionary rule should not apply in this case because Trooper Campbell acted in an objectively reasonable manner in accordance with state law.
27. Suppression of the toxicology report would not deter misconduct as contemplated by the exclusionary rule.
28. Justice dictates that the verdict be upheld, even if the toxicology evidence is suppressed.
29. The State incorporates by reference and reiterates all arguments raised in its Brief of Respondent dated January 3, 2017 provided to the Court prior to and at the hearing of this appeal on January 4, 2017.
30. Such other grounds as may be argued orally by the State should the Court deem it appropriate to hold a hearing on this motion.

WHEREFORE, the State respectfully requests the Court to reconsider and vacate its order of February 14, 2017 and affirm Defendant's conviction.

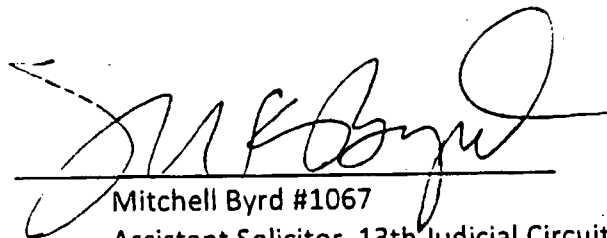
February 22, 2017



s/ Elizabeth Gary
S.C. Bar # 100086
s/ Mitchell Byrd
S.C. Bar # 1067
13th Circuit Solicitor's Office
305 E. North St. Ste. 325
Greenville S.C. 29601
864-467-8701

The undersigned certifies that he has served upon opposing counsel for the Defendant the State's Notice of Motion and Motion to Reconsider and Vacate the order of February 14, 2017 by depositing same in the United States Mail, to the address listed below with sufficient postage affixed thereto, this 23rd day of February, 2017:

E. Powers Price, Esquire
James H. Price , III, Esquire
644 East Washington Street
Greenville SC 29601



Mitchell Byrd #1067
Assistant Solicitor, 13th Judicial Circuit
305 E. North St., Suite 325
Greenville, SC 29601
864-467-8701
mbyrd@greenvillecounty.org

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME _____ MIDDLE NAME _____ LAST NAME _____

STREET AND NO. _____ CITY _____ STATE _____ ZIP CODE _____

STATE LICENSED DRIVER'S LICENSE NO. _____ COI. _____ UNL. TAG CLASS _____

VEH. LIC. NO. _____ STATE _____ MAKE OF VEH. _____ YEAR _____ COM. YR. _____ AUTO _____ MISC. _____ OTHER _____

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT _____ STREET AND NO. _____

DATE OF TRIAL _____ TIME OF TRIAL _____ CITY _____ STATE _____ ZIP CODE _____

VIOLATION - COURT APPEARANCE REQUIRED YES NO _____ VIOLATION SECTION NO. _____

OWNER OF VEHICLE _____ DATE OF ARREST _____

ADDRESS OF OWNER _____ DATE OF VIOLATION _____

BAIL DEPOSITED _____ NAME TO APPEAR START OF BAIL _____

DESCRIPTION OF ACCIDENT _____ COUNTY _____

DATE AND TIME OF VIOLATION _____

CASE BEFORE _____

COURT COURT _____ JUDICIAL COURT _____

NAME OF TRIAL COURT _____

DEFENDANT: DID NOT APPEAR _____ APPEARED _____

SCALE PROCEEDED _____

TRIAL BY _____

VEHICLE OF _____

COMMITTED TO _____

CERTIFIED CORRECT _____

H 554801

TRIAL COURT COPY

court date 2-3-16 @ 10 AM

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME _____ MIDDLE NAME _____ LAST NAME _____

STREET AND NO. _____ CITY _____ STATE _____ ZIP CODE _____

STATE LICENSED DRIVER'S LICENSE NO. _____ COI. _____ UNL. TAG CLASS _____

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CASE BEFORE _____

COURT COURT _____ JUDICIAL COURT _____

NAME OF TRIAL COURT _____

DEFENDANT: DID NOT APPEAR _____ APPEARED _____

SCALE PROCEEDED _____

TRIAL BY _____

VEHICLE OF _____

COMMITTED TO _____

CERTIFIED CORRECT _____

H 480200

TRIAL COURT COPY

Katherine Martin Key
Subject's Name (Print)

[REDACTED]
Driver's License Number



12/19/1982
Date of Birth

South Carolina
State License

ADVISEMENT OF IMPLIED CONSENT RIGHTS

DRIVING UNDER THE INFLUENCE ADVISEMENT

State's Exhibit
8

- (A) Will test be video recorded? If answer is Yes, start here - Inform subject of video recording.
If answer is No, start here - Inform subject of type samples requested
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 19
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive or denied for at least six (6) months, with the option of ending the suspension if you enroll in the Ignition Interlock be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month, with the option of ending the suspension if you enroll in the Ignition Interlock Device Program.
 - You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, shall provide you affirmative assistance.
 - You have the right to request a contested case hearing within thirty (30) days of the issuance of the notice of suspension.
 - If you do not request a contested case hearing or if your suspension is upheld at the contested case hearing, you shall enroll in an Alcohol and Drug Safety Action Program.

If applicable, perform the following procedures:

- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.)
(D) Enter biographical data into DataMaster DMT. (Required for all tests, including refusals.)
(E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.)

ADVERTENCIA Y LECTURA DE DERECHOS POR MANEJAR BAJOS LOS EFECTOS DE ALCOHOL O DROGAS (DUI)

- (A) ¿Se grabará el análisis en video? Si la respuesta es Si, empiece aquí - Informe a la persona que va a ser grabada en video.
Si la respuesta es No, empiece aquí - Informe a la persona de las muestras que se requieren (ejemplos: soplar, sangre, orina).

- (A) Dele a la persona una copia escrita de la advertencia siguiente y lea la advertencia al sujeto:
(B) Dele a la persona una copia escrita de la advertencia siguiente y léasela a la persona:
- Usted está arrestado por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código Legal de Carolina del Sur de 1976, según su enmienda.
 - El policía que efectuó el arresto dispuso que le sacaran muestras de alcohol y/o drogas para ser analizadas.
 - Se obtendrán y analizarán las muestras según la Sección 56-5-2950 y las normas del SLED.
 - Usted no está obligado a hacerse los análisis ni a proporcionar muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar su privilegio de manejar en Carolina del Sur por lo menos durante seis (6) meses con la opción de terminar la suspensión si se inscribe en el Programa del Dispositivo de Bloqueo del Arranque. Negarse a ello podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o proporciona las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0.08%) o más, podría ser acusado en vez de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2933.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0.15%) o más, su privilegio de manejar en Carolina del Sur debe ser suspendido por lo menos durante un (1) mes con la opción de terminar la suspensión si se inscribe en el Programa del Dispositivo de Bloqueo del Arranque.
 - Usted tiene el derecho de que una persona que usted elija y que esté capacitada para hacerlo, realice por su cuenta los análisis adicionales que usted tendrá que pagar y en ese caso, el agente debe brindarle ayuda si usted la solicita.
 - Usted tiene el derecho de solicitar una audiencia para disputar el caso dentro de los treinta (30) días a partir de la fecha en que se emitió la notificación de la suspensión.
 - Si usted no solicita una audiencia para disputar el caso o si se le confirma la suspensión en la audiencia para disputar el caso, usted tiene que inscribirse en un Programa de Medidas de Seguridad para el Consumo Responsable del Alcohol y las Drogas.

Si es pertinente, haga lo siguiente:

- (C) Inspicione la boca de la persona y quite todo material extraño de la boca. (No se requiere si se niega la persona.)
(D) Ingrese los datos biográficos en el DataMaster DMT. (Obligatorio para todos los análisis aunque se niegue la persona.)
(E) Observe a la persona un mínimo de (20) minutos antes de obtener una muestra de su aliento. (No se requiere si se niega la persona.)

Unable to sign
Subject's Signature
Firma de la Persona (recibió una copia)

[Signature] 12/10/15 10:36
Officer's Signature date/time
Firma del Agente fecha/hora

SOUTH CAROLINA LAW ENFORCEMENT DIVISION - URINE/BLOOD COLLECTION REPORT

Subject: Key Katherine Martin
Last Name First Name Middle Name

Subject's Address: [REDACTED] Greenville, SC 29617

Driver's License Number: 100571111 State: SC DOB: 12/13/1987 Sex: F

Arresting Officer: Nixon P. Campbell Agency: SCHP

Date of Arrest: 12/10/15 Time of Arrest: 10:35 AM/PM AM Traffic Ticket Number: H4802a

Date of Test: 12/10/15 Time of Test: 1045 AM/PM AM Location of Collection: Greenville

State's Exhibit
9

CHECK THE FOLLOWING (CHECK BOTH IF APPLICABLE)

- ☒ Subject is under arrest for Section 56-5-2930, 56-5-2933, 56-5-2945, 56-1-2120, 50-21-112, 50-21-113 or 23-31-415; or is in violation of Section 56-5-2945, 50-21-113 or 56-1-286 of the 1976 South Carolina Code of Laws as amended.
- ☒ Subject has been advised in writing of his/her Implied Consent Rights.

CHECK THE CORRECT ONE (ONLY ONE CAN APPLY)

- ☐ Subject has completed a valid breath test (DataMaster reading: _____) and the officer has reasonable suspicion that the subject is under the influence of drug(s) other than alcohol therefore a urine sample is requested.
- ☒ Subject has not completed a valid breath test and a voluntary blood sample has been requested to test for the presence of volatiles and/or drugs.
- ☒ Subject is unconscious or otherwise incapable of refusal (has not taken a breath test) and is considered informed, therefore, a blood sample is requested.
- ☐ A blood sample is requested by the arresting officer because a licensed medical person has informed the officer that the subject is unable to take a breath test at this time due to any reason deemed acceptable by that licensed medical person.

Name and Title of Licensed Medical Personnel: A. Browner

Signature of Licensed Medical Personnel: A. Browner

- ☐ Subject is under arrest for, or in violation of, Section 56-5-2945 (Felony DUI) or 50-21-113 (Felony BUI), and, pursuant to Section 56-5-2946 or D-21-116, a blood sample or a blood and urine sample is/are requested.
- ☐ A blood sample is requested by the subject for his/her own independent test.

THIS SECTION TO BE CHECKED BY SAMPLE COLLECTOR

- ☒ Using a non-ethanol prep, a blood sample was collected into an unused, uncontaminated vial and given directly to the arresting officer (or to the subject requesting sample for his/her independent test) after collection.
- ☐ A urine sample was collected into an unused, uncontaminated container and given directly to the arresting officer after collection.

Name of Licensed or Trained Collector: A. Browner

Signature of Licensed or Trained Collector: A. Browner

FINAL CHECKS FOR LAW ENFORCEMENT OFFICER

- ☒ Sample collection was under my direct supervision.
- ☒ Sample container is properly labeled with the subject's name and time of collection.
- ☒ Sample is properly sealed and ready for transport.

Signature of Officer: Nixon P. Campbell

Date: 12/10/15

I, unable to sign
 (Subject's Signature)

received a copy of this report on 12/10/2015
 Date

Copy to: Subject, Hospital, SLED

State's Exhibit

10

**CHAIN OF CUSTODY
GREENVILLE HOSPITAL SYSTEM LABORATORIES**

This form must accompany all specimens that have medico-legal implications (drug screens, blood _____, rape cases, DUIs, etc.). Submit a separate form for each specimen type.

ABH _____ MMOB _____
CHOS _____ NGH _____
GMH ☒ PMC _____
HH _____ UTWR(Ex) _____

Other (please specify) _____

NAME	MARTIN KEY, KATHRYN	DOB	
SSN	CAMUNAS*MD, JOSEPH A	Admit Date - 12/10/15	
SUR		Date of Birth	
ACCOUNT #		PHYSICIAN	

Test to be performed

Legal blood draw Patient Status alive

STATEMENT OF ORIGIN

Type of Specimen: Urine _____ Blood ☒ Vitreous Fluid _____ Saliva _____ Other (please specify) _____

Site from which obtained: right hand

Technique used for obtaining: site cleaned & non-ethanol prep pad

Specimen obtained by: Sign A. Brown Print A. Brown

DESCRIPTION OF SPECIMEN

Include model #, identifying marks, condition, etc. when appropriate.

pts red blood collected into two unused gray top blood tubes

Urine temperature within range: Yes, 90-100°F / 32-38°C _____ No, record temperature here ✓ N/A

Specimen described by: Sign A. Brown Print A. Brown

CHAIN OF CUSTODY

Each person signing below certifies that the above described specimen was transferred to him/her in the condition described (unless otherwise noted) and he/she holds themselves responsible for the specimen until relinquished to the next person.

DATE	TIME	SPECIMEN RECEIVED/RELINQUISHED BY:	REMARKS
12/10/15	1100	Sign <u>A. Brown</u>	Given to Trooper Campbell
		Print <u>A. Brown</u>	
12/10/15	1100	Sign <u>Trooper Campbell</u>	Post C. Evidence
		Print <u>Trooper Campbell</u>	
		Sign _____	
		Print _____	

Case # 15GV243296HP23
SCDPS EVIDENCE
Item #1 | Record #CAMPBELL
Name: KEY, KATHRYN MARTIN
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY REPORT

State's Exhibit

NIKKI R. HALEY
Governor



A.P. Campbell
S.C. Highway Patrol Troop #3
211 Century Dr. / Suite 210 C Century Plaza
Greenville, SC 29607

TOXICOLOGY DEPARTMENT
January 05, 2016
SLED No: L15-16410
Your Case No: 15GV243296HP23
Incident Date: 12/10/2015

[S] Kathryn Martin Key

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Mark A. Keel, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE

Item: 1 Sample Type: Blood (Toxicology) - labeled "MARTIN KEY, KATHRYN"

Analysis by Headspace Gas Chromatography (GC) and/or Headspace Gas Chromatography/Mass Spectrometry (GC/MS)

Analyte	Result	Units	Threshold
Ethanol	0.213 ±0.017	% (g/dL)	0.010

The above range is calculated at 99.7% confidence.

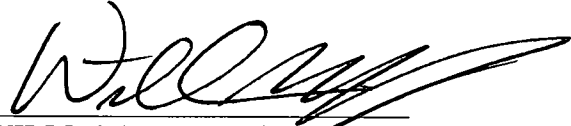


ALI-359-T

AN ASCLD/LAB-International ACCREDITED TESTING LABORATORY SINCE 09/19/2014
P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 

WILLIAM M. BLITCH, JR.
Senior Assistant Attorney General
S.C. Bar Number 15608
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

March 7, 2018

RECEIVED
MAR 07 2018
SC Court of Appeals

6

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Edward W. Miller, Circuit Court Judge
Appellate Case Tracking No. 2017-001013

RECEIVED
MAR 07 2018
SC Court of Appeals

State of South Carolina,

Appellant,

vs.

Kathryn Martin Key,

Respondent.

PROOF OF SERVICE

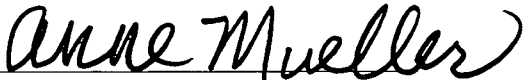
I, Anne A. Mueller, certify that I have served the within Record on Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

James H. Price, III Esquire
E. Powers Price, Esquire
644 E. Washington Street
Greenville, South Carolina 29601

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.

This 7th day of March, 2018.


ANNE A. MUELLER
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

March 7, 2018

RECEIVED

MAR 07 2018

SC Court of Appeals

James H. Price, III Esquire
E. Powers Price, Esquire
644 E. Washington Street
Greenville, South Carolina 29601

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

Re: The State v. Kathryn Martin Key
Appellate Case Tracking Number: 2017-001013

Gentlemen:

Enclosed please find a copy of the Record on Appeal, along with proof of service, in the above-referenced State's appeal.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Attorney General

WMB/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (original & 14 copies enclosed)
Victim Advocacy Division