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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Abbeville County
Honorable Donald B. Hocker, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

SHERRY ASHLEY MCMAHAN,

APPELLANT

APPELLATE CASE NO 2019-001156

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# RECORD ON APPEAL

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# INDEX

INDEX ..... i

TRIAL TRANSCRIPT DATED JULY 8-10, 2019 ..... 1

PRE-TRIAL MOTIONS ..... 4

TESTIMONY (IN-CAMERA)

SETH SCOTT
Direct Examination by Mr. Black ..... 7
Cross Examination by Mr. Henderson ..... 16
Re-Direct Examination by Mr. Black ..... 32

JONATHAN PRATT
Direct Examination by Mr. Black ..... 34
Cross-Examination by Mr. Henderson ..... 42

BRENT LYNCH
Direct Examination by Mr. Black ..... 48
Cross Examination by Mr. Henderson ..... 61
Re-Direct Examination by Mr. Black ..... 72
Re-Cross Examination by Mr. Henderson ..... 73

SHERRY MCMAHAN
Direct Examination by Mr. Henderson ..... 76
Cross Examination by Mr. Black ..... 79
Re-Direct Examination by Mr. Henderson ..... 82

PRE-TRIAL MOTIONS (CONT'D) ..... 83

OPENING REMARKS BY THE COURT ..... 122

OPENING STATEMENT BY MR. BLACK ..... 129

TESTIMONY

SETH SCOTT
Direct Examination by Mr. Black ..... 132
Cross Examination by Mr. Henderson ..... 147

COLLOQUY ..... 154

TESTIMONY

BRENT LYNCH
Direct Examination by Mr. Black ..... 161
Cross Examination by Mr. Henderson ..... 185
Re-Direct Examination by Mr. Black ..... 190

STATE RESTS ..... 193

MOTION FOR DIRECTED VERDICT ..... 193

RULING BY THE COURT ..... 198

ADVICE OF RIGHTS ..... 199

DEFENSE RESTS ..... 204

CLOSING ARGUMENT BY MR. BLACK ..... 205

CLOSING ARGUMENT BY MR. HENDERSON ..... 215

CHARGE ON THE LAW ..... 236

VERDICT ..... 238

JURY POLL ..... 238

SENTENCING ..... 243

COURT'S EXHIBIT NO. 4 (PRETRIAL RULINGS) ..... 246

DEFENDANT'S EXHIBIT NO. 4 (APPELLANT'S MAGISTRATE FILE) ..... 249

DEFENDANT'S EXHIBIT NO. 6 (EMAIL TO JUDGE) ..... 275

DEFENDANT'S EXHIBIT NO. 7 (SUPPORTING CASE LAW) ..... 277

INDICTMENT ..... 307

CERTIFICATE OF COUNSEL .....

1

State of South Carolina

County of Abbeville

Court of General Sessions

State of South Carolina )
)
) Transcript of Record
v. ) 2019-GS-01-00027
)
Sherry Ashley McMahan )
)
Defendant. )

July 8-10, 2019
Abbeville, South Carolina

B E F O R E:

The Honorable Donald B. Hocker, Judge; and a jury.

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

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Attorney for the State

Yates Brown, Deputy Solicitor
Attorney for the State

Carson Henderson, Esquire
Attorney for the Defendant

Lisa Scott
Circuit Court Reporter

call in after six o'clock this evening. More than likely, it's going to tell you to call back after six o'clock tomorrow evening. Okay. But I still need for you to call in after 6:00 this evening. Don't forget to do that.

I'm not sure of what other jury work that we have for the remainder of the week. I really hope that I get to see you folks back. We just don't know for sure yet. I know that some of you are probably glad that you were not selected, but I hope that some of you are disappointed that you were not selected. And, hopefully, some time down the road, if you don't get to serve this week, that some time later on that you can be summoned and be able to serve, whether it's a criminal trial or whether it is a civil trial. But with that said, you are free for the remainder of the day. Don't forget to call in. Have a good afternoon.

(At 3:24 p.m., prospective jurors that were not selected was excused for the day.)

THE COURT: Okay. We will -- we'll be in recess. Well, I need to bring the jury out, but we'll be in recess until about 10:00. We'll look at this afternoon and this evening Mr. Henderson's motion to -- to dismiss. And I'm going to try have

something for y'all in the morning.

MR. HENDERSON: Not to dismiss, to remand.

THE COURT: Oh, remand. That's what I meant, remand not dismiss.

MR. HENDERSON: And, Your Honor, I'll go ahead and mark this as a Court's exhibit. But to be candid with you, I misunderstood you. I thought you were saying you were going to ask them none of this.

THE COURT: Oh.

MR. HENDERSON: No. And I was extremely pleased with the voir dire you asked. You actually asked more than I expected, so I did -- I think I did misunderstand what you said, but out of an abundance of precaution, I will ---

THE COURT: Yeah, have it marked as Court's 1.

MR. HENDERSON: And if you would protect me tomorrow afternoon, Your Honor, with Judge Moore.

THE COURT: Okay. Tomorrow afternoon.

(Court's Exhibit No. 1 was marked for identification.)

THE COURT: Okay. Mr. Henderson, you had requested earlier that you had another matter that you need to tend to tomorrow afternoon, so the latest that you need leave here would be when?

MR. HENDERSON: Say one o'clock just out of

THE COURT: Okay. If you folks could just e-mail me and Grayson anything that we need to deal with tomorrow, and we'll see you -- see you in the morning at 10:00.

MR. HENDERSON: Sounds good. Thank you.

THE COURT: Thank you.

MR. BLACK: And, Your Honor, I have a copy of the incident site.

THE COURT: Okay.

MR. BLACK: I'm going to go ahead and hand that to you so you can review it.

THE COURT: Okay. Thank you.

(At 3:48 p.m., proceedings concluded.)

July 9, 2019

THE COURT: All right. Gentlemen, we are back on the record in the *State v. Sherry McMahan* case. We have several pretrial matters that we need to address.

It's my understanding, Solicitor, that you have one of the troopers involved and one of the deputies involved in the case and you're wanting to put up some testimony that would hopefully be of some benefit to the Court when the Court addresses some -- Mr. Henderson's pretrial motions; is that correct?

MR. BLACK: Yes, sir. That's correct. I think their -- their testimony needs to be flushed out and considering both the trooper and the sheriff's deputy worked last night, I was hoping we could take care of that this morning and maybe cut them loose and then address the other issues and view the video after they get done testifying.

THE COURT: Sure. Okay. All right. And just for record purposes, kind of housekeeping matters, the State has elected to nolle pros the open container charge; is that correct, Solicitor?

MR. BLACK: That is correct, Your Honor.

THE COURT: Okay. All right. Very good. You may proceed.

MR. HENDERSON: Your Honor, I just ask that the potential witnesses be sequestered, the one's that -- you know, he's going to call one at a time, and I ask that the other ones be sequestered.

THE COURT: Okay. And do you have a position on that?

MR. BLACK: I think the arresting officer has the right to be here.

THE COURT: Right.

MR. BLACK: So I plan on calling Mr. Scott, this deputy first, and then Mr. Pratt, so...

THE COURT: Well, the arresting officer does have the right to be present. So if he wants to call the deputy first, then ---

MR. HENDERSON: I just ask that Deputy Pratt be sequestered.

THE COURT: Okay. Is that Deputy -- is that Deputy Pratt?

MR. BLACK: Yes, sir.

THE COURT: You plan to put him up too?

MR. BLACK: I think so. He -- he got over here. He was taking care of a lot of stuff this morning. I asked him to be here. He was -- he was there, as well, so I do plan on putting him up.

THE COURT: All right. Deputy Pratt, you'll need to position yourself somewhere outside the courtroom.

THE WITNESS: (Complying.)

THE COURT: All right. Solicitor.

MR. BLACK: The State calls Seth Scott to the stand.

THE WITNESS: (Approaching.)

THE CLERK: Put your left hand on the Bible and raise your right.

THE WITNESS: (Complying.)

THE CLERK: The evidence you're about to give

the Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, ma'am.

THE CLERK: Be seated.

SERGEANT SETH SCOTT,

having been produced and first duly sworn as a witness on behalf of the State, testified as follows:

DIRECT EXAMINATION

BY MR. BLACK:

Q. Deputy Scott, you were -- you work with Abbeville County Sheriff's Department?

A. Yes, sir.

Q. And you were working September the 28th of 2018; is that correct?

A. Yes, sir.

Q. Do you know what your shift would've been that day?

A. If I answered this call at four o'clock, then I would've been working 6:00 a.m. to 6:00 p.m.

Q. Okay. And you received a call through dispatch from my understanding; is that right?

A. Yes, sir.

Q. And what was the nature of the call?

A. The nature of the call, a caller reported a

white car that was wrecked down an embankment on Stevenson Road or close to Stevenson Road on Old Abbeville Highway. He advised while he was going down, he saw a female walking that appeared to be intoxicated. Picked her up and took her to [redacted] Stevenson Road. Called in the fact of the wreck, and then the suspect leaving the scene, and he picked her up and took her to her home.

Q. Okay. And did you respond to this call?

A. I did.

Q. Did you respond to the wreck or the house first?

A. Wreck first.

Q. And what did -- what did you see? Did you see a car in the embankment?

A. I did.

Q. Did you get out and investigate, or do you remember?

A. When I got out, normally what I would do is, get out and run the tag. I don't want to say that's exactly what I did this time. It's not mentioned in the CAD, but it -- I had to confirm who it was that we were trying to find.

Q. Okay. And did you write a report for this incident?

A. I did not.
Q. Do you -- what kind of car were you driving?
A. Charger.
Q. Did you have a video camera in your car?
A. I did not.
Q. Did you have a body cam?
A. At that time we didn't have the greatest of body cameras, so it very much should've been, but it was malfunctioning during that particular time. We have better equipment now.
Q. Okay. And, subsequently, coming here today, have you looked for body cam footage or dash cam footage?
A. I did.
Q. Did you find any?
A. I did not.
Q. Did you look to see if you had written a report?
A. I did.
Q. Did you find a report?
A. I did not.
Q. Okay. So did you run -- you ran the tag at the scene and then you responded to the Stevenson Road address; is that correct?
A. Yes, sir.

Q. And what was that address again?

A. [redacted] Stevenson.

Q. And when you got there, what did you do?

A. I knocked on the door that's in the garage area and spoke with the defendant.

Q. Okay. And that's Ms. McMahan who's sitting over here at this table with Mr. Henderson?

A. Yes, sir.

Q. And was she inside the house?

A. She was.

Q. And did you notice anything when you -- when you first talked to her?

A. At the time she was slurring her words, very strong odor of an alcoholic beverage about her person. I -- I talked to her, and she was very compliant. She never argued or anything. She was very honest with us, told us everything that happened. Said that she was just trying to go get something to eat.

Q. Okay. And so based on the conversation that you had with her, did she eventually get in the car with you and head back to the scene?

A. She did.

Q. Did you arrest her at the house?

A. I did not.

Q. Did you cuff her at the house?
A. I did not.
Q. When she got -- did she end up getting in your car or Deputy Pratt's car?
A. She got in mine.
Q. And y'all went back to the scene. How far away was that from her house? Do you know?
A. Around about a five to six-mile range. That's just a complete guess for me though.
Q. Okay. So that's just an estimate? It's not too far though?
A. No. It -- the wreck happened on Old Abbeville Highway near Stevenson Road. She lived on Stevenson Road.
Q. So maybe not even five miles?
A. Maybe not.
Q. Okay. Did she voluntarily get in the car?
A. She did.
Q. Did she -- did you force her to get in the car?
A. No.
Q. And like -- I think you've already said that you didn't cuff her. Did she -- did she sit in the back seat or the front seat?
A. She sat in the back seat of my patrol car.
Q. Okay.

A. That's just how I transport. We have a cage. I've got my equipment sitting in the front seat, so that's just where I would transfer anybody.
Q. Okay. And did she -- did you actually go in the house at all or did you just ---
A. I was at -- I was at the doorway. Most I did was maybe step right at the -- the door frame while she was grabbing -- I think she was grabbing her purse, her ID, or something at that time.
Q. Okay. And so you were just watching her do that?
A. Yes, sir.
Q. Okay. But you didn't go inside and put hands on her or anything like that?
A. Oh, no, sir.
Q. And then she went back to the scene with you voluntarily?
A. Yes, sir.
Q. When y'all got back to the scene -- well, let me ask you this before we get there. Was there another deputy with you while you were just at her house?
A. There was. I cannot a hundred percent say when he showed up. I don't know if he showed up at the exact same time with me, but I know Sergeant Pratt

was there.
Q. Okay. And did he talk to her, or was it just you that was talking to the defendant?
A. I'm going to assume it was primarily me, but I'm -- I'm sure he did exchange conversation, as well.
Q. Okay. So y'all both went back to the scene where the wreck occurred?
A. Yes, sir.
Q. All right. Can you tell us, just narrow down time frames, when you got to -- when the call came in to you?
A. I was dispatched at 16:21. I was in the area at 16:23. I was on scene at 16:25.
Q. On scene being the house or on scene being ---
A. On scene being the wreck, the car on Old Abbeville.
Q. Was that you by yourself or was that you with Ms. McMahan?
A. That was me by myself.
Q. All right. And what time did you get to her house?
A. I called en route to [redacted] Stevenson Road at 16:27 and arrived on the scene at 16:33.
Q. And then what time did you take Ms. McMahan?

What time did y'all get back to the scene?
A. I left the scene at 16:39 from Stevenson Road, and back on scene at 16:44.
Q. So about five minutes to get back to the wreck?
A. Yes, sir. And to answer your previous question, according to the CAD, Pratt arrived on scene about a minute after me.
Q. On scene being the wreck or on scene being ---
A. On scene being Stevenson Road. My apologies.
Q. All right. And when you got back to the -- when you got back to the scene of the wreck with Ms. McMahan, was Trooper Lynch there already waiting on you, or did y'all stick around and wait on him?
A. He was not there yet. We pulled up. I don't -- I don't think there was much time in between. I think he arrived pretty quick, but I cannot give you an exact time.
Q. And when Trooper Lynch got there, was Ms. McMahan still in your vehicle?
A. She was.
Q. Did you ever cuff her at any point before Trooper Lynch got there?
A. No, sir.
Q. Did you ever Mirandize her or anything of that nature?

A. No, sir.
Q. This would've occurred on September the 28th. What's the weather like typically in September? Is it still warm or is it cooling down or ---
A. I think it was still warm and sunny that day.
Q. Okay. And did she -- did Ms. McHahan remain in your vehicle until Trooper Lynch arrived?
A. She did.
Q. And once Trooper Lynch arrived, did you turn everything over to him?
A. I did.
Q. And he conducted his investigation?
A. He did.
Q. And I know you were referring to a CAD report, is that correct ---
A. Yes, sir.
Q. --- with the time stamps? Just what is that again? That's ---
A. A CAD report is going to be when somebody calls 911, our dispatch keeps a complete record of all our en route times, anything like that, and any statements made by the caller and their information.

Also, just to reiterate. On the defendant coming back to the scene, he even ordered dispatch, using the 10 code of 10-89, which is "I'm just

escorting." So she was not 67, which is "under arrest." I even put over the radio that I was just giving her a ride back.

Q. And that means in police lingo "escorting"?

A. Yes. Giving her a ride.

Q. And then Trooper -- Trooper Lynch ultimately arrested the defendant; is that correct?

A. Yes, sir.

Q. If she had not been arrested, would y'all have transporter her, escorted her back to her house?

A. Yes, sir.

MR. BLACK: I think that's all the questions I have. Please answer any questions Mr. Henderson might have.

THE COURT: Mr. Henderson.

CROSS-EXAMINATION

BY MR. HENDERSON:

Q. Yes. Deputy, how are you?

A. I'm good.

Q. Prior to today, have you discussed your testimony with anybody or what your testimony ought to be?

A. I have not. I was called last night and informed -- and pretty much informed about this.

Q. Okay. You haven't talked to anybody at the

Solicitor's Office about this case before yesterday?
A. Other -- other than the fact of having to be here.
Q. Okay. I'm looking at this CAD report. When did you first see this CAD report?
A. I actually got a copy of it last night.
Q. Okay. I actually got a copy of it just a while ago. Okay. It's showing -- is your copy up at the top left showing it was faxed July the 9th?
A. Yes, sir.
Q. Okay. And, obviously, the time is wrong, but the date appears to be right.
A. Like I said, I got it faxed over probably about that time. I worked last night.
Q. Okay. So ---
A. It very much at two o'clock in the morning probably was the actual time I did have it faxed over.
Q. Faxed over to where?
A. The Sheriff's Office.
Q. Okay.
A. And the reason I do have it is, I want to be as factual as I can with any questions asked, so I wanted to make sure I had it.
Q. And I'm looking at this CAD report. It says

you're Unit 128?
A. Yes, sir.
Q. Are you still Unit 128?
A. I am not.
Q. Okay. And you say you drove what type of vehicle back in September of last year?
A. A Dodge Charger.
Q. Is that a marked vehicle?
A. It is.
Q. Okay. What is your -- and you're telling the Court that car did not have an in-car video in it?
A. It -- it has a system. It was not activated at the time.
Q. When you say "it wasn't activated," do you mean it did not work or you did not activate it?
A. It was not on. It activates with my lights. At that point, I -- at I'm -- I honestly can't tell you whether I deactivated or I just didn't turn the particular one on that activated it, but, no, I had no recorded evidence.
Q. Okay. But I just want to make it clear, you had the ability to record all this?
A. From the dash cam. Yes.
Q. Okay. No doubt about that?
A. At the -- right now, it's not working. I can't

tell you at that point, I don't want to tell you wrong or right on that one.

Q. Okay.

A. It could have been the same condition it is now. It's been that way for a while, but I cannot vouch for whether on that day it was or not.

Q. Are you still -- are you still driving the same vehicle?

A. Yes, sir.

Q. You just have a different unit number?

A. Yes.

Q. Okay.

A. Vehicle number's the same; unit number is different.

Q. I gotcha. What's the vehicle number?

A. Fifty-six, I believe.

Q. Fifty-six. I mean, does Abbeville Sheriff's Department have a policy on ensuring that your in-car video was working?

A. No, sir.

Q. No written video policies at all?

A. A lot of our cars don't even have the in-car systems.

Q. Okay. But -- but you're telling the Court that you have the in-car system?

A. That -- that one in particular did at the time. Whether it was working, I can't honestly say.
Q. Okay. Did you turn on your lights at all during this?
A. I did.
Q. Your blue lights?
A. When I was in the roadway, I did have my blue lights on.
Q. Okay. And you're saying that your blue lights trigger your video?
A. The wigwags trigger it. I honestly can't say whether I -- with the -- there's three different buttons that we flip. The blue lights, if I'm just sitting, I usually flip the two blue lights, so it's the front and back blue lights. I honestly can't say whether I flipped the front one or not.
Q. You just don't know?
A. I don't.
Q. But you had the ability to at the very least be recording all this?
A. If it was functional at the time, yes.
Q. Okay. Have you looked at any records to determine whether or not it was functional at the time?
A. There's no records that I know of that I could

even look at for that information.

Q. I mean, who keeps records about y'all's videos not working or working for that matter?

A. Like I said, most of our cars don't even have them in it. So it's kind of one of those things I believe if we got them, some of them have got tested and put in the car. So we've got cars that has it, a system in place, but there's no...

Q. Assuming it was videoing, how long does Abbeville Sheriff's Office keep videos? What's your retention policy?

A. Body cam, I'm assuming it would stay till whenever. I don't know if there's a particular time on it. Dash cam is a completely different story.

Q. Well, dash cam, assuming it was videoing on your dash cam, how long would it have retained or been retained?

A. Until the in-car system reset itself and started recording over.

Q. And how long is that?

A. As long as the CD lasts.

Q. And then you say you haven't been contacted by any -- by anybody before last night or before yesterday about this matter?

A. I had no clue I needed to be here until

yesterday when I was called.
Q. Trooper Lynch never called you to see copies of your video?
A. No. No. I actually called him to get copies of his report just so I could remember the case.
Q. Okay. When was that?
A. Last night.
Q. Okay.
A. Everything was last night.
Q. Do you have any bod -- body cam that day?
A. I do not. I did look.
Q. Okay. I mean, do you typically wear a body cam?
A. I do.
Q. Okay. Was your body cam -- would you have been wearing a body cam back on the date of Ms. McMahan's arrest?
A. Normally, I would say at the time we did have particular body cameras that were malfunctioning back and forth. I can't honestly say whether mine was or wasn't that day.
Q. Who keeps the records about the malfunctioning body cams?
A. I'm going to assume the chief deputy, and we got a new once since then. So the problem is fixed.

It's just at that time.

Q. Would there be any records with the chief deputy. Is that Ms. Tolbert?

A. Yes, sir.

Q. Okay. Would there be any records from Ms. Tolbert indicating back on September 28th of last year that your body cam was malfunctioning or functioning?

A. I doubt it because we had so many at the time that were going down. I didn't report that to her directly.

Q. Okay. So you just don't know if your body cam was working or not?

A. I'm going to -- I'm going to say that it was not because I couldn't find anything on where we store any of our stuff, because I went back and looked through all the hard drives last night and did not find it.

Q. Okay. Where do you keep all your stuff at?

A. On a hard drive.

Q. On a hard drive. And where's that hard drive at?

A. At the Sheriff's Office.

Q. Okay. So when you body cam something or something's recorded on body cam, is it fed directly

into that hard drive, or do you have to go do something to put it on the hard drive?

A. You have to do something to put it on the hard drive.

Q. Okay. What is that that you have to do to put it on the hard drive?

A. Right now with our newer cameras, it's a docking station that we put it down and then it downloads directly. Before it was a plug-in kind of concept that you plug into the computer and manually do it.

Q. And you have done that before, manually done it? You have manually done it before you got the new system?

A. Yes, sir.

Q. Okay. And you just don't remember whether or not it was working or not?

A. I -- like I said, I'm going to say that it was not because I do not have record -- I do not have it in my file.

Q. How do you keep your files organized there?

A. It's actually by deputy. During that time that we used those, I would go to my name and I actually do it my month. So I went over through everything and what I could around that time, but September was

not holding it.
Q. Okay. And I'm looking on this CAD report. Looks like the call came in at 16:18 or 4:18 in the afternoon?
A. The call was delivered -- dispatched at 16:18.
Q. Okay. And I'm looking on down. Looks like that you were on scene to the MVA, to the wreck scene, at 4:25 or 16:25, correct?
A. Yes, sir.
Q. And -- and I think you testified that you got out of the car and got the tag number?
A. That -- like I said, it is not documented through here, but that is normally what I would do to confirm who owns the vehicle. And then at that point once it was confirmed, I made contact with the -- the address that it came back to.
Q. Because the next thing below that it says you're en route to [redacted] Stevenson Road, correct?
A. Yes, sir.
Q. How else would you have know to go to [redacted] Stevenson Road but for you running the tag?
A. The caller stated that's where he dropped her off at.
Q. Okay. And did you ever talk to the caller?
A. I did not.

Q. Okay.
A. The caller was no longer on scene when we got there.
Q. Okay. And it looks like -- it looks like you're on scene there at Ms. McMahan's house at 16:33; is that correct?
A. (No response.)
Q. Or 4:33?
A. Yes, sir. 16:33.
Q. Okay. And you mentioned that you asked some questions that sounded like to Ms. McMahan; is that correct?
A. Yes, sir.
Q. And what did you ask her?
A. Does she know what happened to her car. Like I said, I do not have the body camera and it was a while ago. I'm not -- I can't verify what I did or didn't ask, but at the time she was very cooperative, told us what we asked.

And during that time, it was determined that she said she was hungry and she was really wanting to go get something to eat. I don't know where she said it and -- but during that time, she admitted to me that she was driving the vehicle.

Q. So did you ask her was she driving?

A. During that time, like I said, that's what I concur at the time and verify what I asked and what I didn't ask.
Q. Okay. Did you ask her had she been drinking?
A. I'm sure I did, but it was one of those things that was very obvious to me that she had.
Q. Did you ask her when she'd been drinking?
A. Like I said, if I did or didn't.
Q. Okay. You just don't know?
A. I just don't know.
Q. And looks like you're back on the motor vehicle accident scene it looks like at 16:49 or 4:49?
A. Yes, sir. 16:49.
Q. Okay. Did Ms. McMahan have the right to refuse to go with you?
A. Sure. Because I would've got -- I would've told highway the fact to come to the scene if they needed to talk to her.
Q. Okay. So -- so she'd gotten into the back of your car?
A. (Nonverbal response.)
Q. Is that a yes?
A. Yes, sir.
Q. And in the back, and she's in a cage?
A. Yes, sir.

Q. Okay. And there you can't open it from the inside, can you?
A. No, sir.
Q. Okay. For obvious reasons, right? If somebody's in your cage, you don't want them getting out?
A. No, sir.
Q. Okay. So it looks like from the time that -- I'm just trying to figure out the right number. Again, this is me seeing this for the first time. It looks like -- what time did you leave Stevenson Road? Was that at 16:47?
A. Yes, sir.
Q. Okay.
A. Where I did the 10-89, which was the escort back.
Q. And what time did Trooper Lynch arrive?
A. I can't vouch on that one. It was not -- they don't go through our dispatch, so that wouldn't be logged onto mine.
Q. Okay. Should there be records that indicate when Trooper Lynch arrived?
A. I'm assuming it's going to be through his -- his system.
Q. Have you seen those records?

A. I have not.
Q. Well, I haven't either. Okay. So you just don't know?
A. Yeah, it had -- it would not be long after we got there, he arrived. That's about the extent of what I can do.
Q. Deputy Pratt now, what type of car was he driving at that time?
A. I'm pretty sure he was going to be driving an Explorer.
Q. Was it a marked vehicle?
A. It was not.
Q. Would it have had in-car video in it?
A. I do not think so.
Q. Okay. How about was Deputy Pratt wearing a body cam?
A. Sergeant Pratt is a detective, and normally they do not have one on them. But I can't -- but I'm just talking about it in a normal. I, once again, cannot vouch for that particular.
Q. Okay. Have you discussed this with Deputy Pratt?
A. First time that I talked to Deputy Pratt is when he was sitting right there.
Q. And I think it was your testimony that when

Ms. McMahan got into the back of the vehicle, she couldn't get out, unless you opened it to let her out?

A. If she asked to. The only reason that there would be any inclination is being the fact on the roadway and the conditions that I did see her in, just in terms of that thing, but if asked, she would've been let out. And she was -- she was not held, other than just her sitting there and standing by.

Q. Okay. And you didn't read her any Miranda rights?

A. No, sir. That -- that whole situation is highway patrol coming from a 10-50 or a car accident to the DUI. That's -- we literarily were just standing by to make sure everything's alright.

MR. HENDERSON: May I -- may I have one minute, Your Honor?

THE COURT: Sure.

BY MR. HENDERSON:

Q. So you didn't tell Ms. McMahan that she had to go with you?

A. To my knowledge, no, because as you -- I mean, the only way I'm going to force is if I put somebody in handcuffs and take them with me.

Q. But you just don't remember whether or not you told her she had to go with you?
A. Like I said, I do remember the fact of her being very cooperative. She never gave any kind of problems or anything of that nature. Talked to her about it, her car up there, going back to the scene to figure out what happened and call the highway patrol.
Q. Okay. Now, you would agree that you and Deputy Pratt are both a lot bigger than Ms. McMahan, from a size standpoint?
A. Sure.
Q. Height and weight?
A. Yes, sir.
Q. Okay. And, again, the best evidence of what actually went on up there would be this video and this body cam?
A. Video and body cam of what?
Q. From your car, your in-car video and your body cam on your body, that would be the best evidence of what happened, wouldn't it?
A. Sure.
Q. Okay. And, again, you just don't know whether or not it was working?
A. I know I don't have it, so they don't exist.

So whether or not it was working, I can't verify. I did look last night, and I have no body cam footage and no report on file.

MR. HENDERSON: I don't have anything further, Your Honor.

THE COURT: Solicitor, anything in follow-up?

MR. BLACK: Briefly.

REDIRECT EXAMINATION

BY MR. BLACK:

Q. You said a 10-89, what does that mean again?

A. Escorting.

Q. And I'm going to hand you this CAD report. Can you highlight that on this CAD report?

A. (Complying.)

MR. BLACK: Your Honor, I'm going to mark this as a Court's exhibit for the purposes of this hearing.

THE COURT: Okay.

(Court's Exhibit No. 2 marked for identification.)

MR. BLACK: And this CAD report, Your Honor, has been marked as Court's No. 2.

THE COURT: Okay.

MR. BLACK: And Deputy Scott has marked the 10-89 code at the bottom of that where it shows --

well, it doesn't say "escort," but he's testifying that's what that means, Your Honor. I think that's all the questions I have for Deputy Scott.

THE COURT: Okay. Let me ask one question, Deputy Scott. Did you say in answer to one of Mr. Henderson's questions that if Ms. McMahan wanted to get out of the car at any time, you would've allowed her to do that?

THE WITNESS: I would've allowed her to do that.

THE COURT: And if she had said, "Deputy, take me back home," would you have taken her back home?

THE WITNESS: If that's what she wanted, but at that point, highway patrol would be investigating.

THE COURT: Sure. Okay. All right. Very good. You can step down, sir. Thank you.

THE WITNESS: Yes, sir.

MR. BLACK: Your Honor, I ask that Deputy Scott be allowed to leave. He worked all night last night.

THE COURT: Right. You're free to go. Just stay in touch with -- or make sure that the Solicitor knows how to get -- as far as how we proceed after today.

THE WITNESS: Yes, sir.

THE COURT: Thank you.

THE WITNESS: Thank you, sir.

(Witness excused.)

THE COURT: Solicitor.

MR. BLACK: Can I have just a minute, Your Honor?

THE COURT: Sure.

MR. BLACK: State calls Deputy Pratt.

THE COURT: Okay.

THE WITNESS: (Approaching.)

THE CLERK: Put your left hand on the Bible and raise your right.

THE WITNESS: (Complying.)

THE CLERK: The evidence you're about to give the Court be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, ma'am.

SERGEANT JONATHAN PRATT,

having been produced and first duly sworn as a witness on behalf of the State, then testified as follows:

DIRECT EXAMINATION

BY MR. BLACK:

Q. Deputy Pratt, you work at Abbeville County Sheriff's Department?

A. Yes, I do.
Q. And September the 28th of last year, 2018, were you working?
A. Yes, I was.
Q. And did you respond to a wreck on Old Abbeville Highway about 4:20 in the afternoon that day?
A. Yes, I did.
Q. Okay. What kind of vehicle were you driving?
A. What I was driving?
Q. Yes, sir.
A. I was driving my investigator's. It's a blacked out Ford Explorer.
Q. Okay. And do you -- does it have a dash cam video in that vehicle?
A. That vehicle does not.
Q. Were you wearing a body cam?
A. At that time I was not wearing a body camera. Sergeant Scott on the scene, he was -- he was assigned to the road, so he would've had a body camera.

Investigations, I wouldn't normally wear one on my normal calls because they're follow-ups. So at that point in time I don't usually wear a body camera, unless it's something else involved.

Q. Okay. And when you responded, do you know who

got there first to the scene of the wreck?
A. I can't remember right off hand.
Q. And what -- what do you remember seeing when you first got there?
A. A single-car accident. I believe it ran off the right side of the road. Looks like there was a curved, overcorrected. It looks it was facing outward like it had gone into the curb by its bumper.
Q. All right. And what did y'all do when y'all get there? Did you get out and look at the vehicle? Run the tag? What did y'all do?
A. We -- we checked the scene out, first off, to make sure nobody was there, or if they were there, what their status was. Make sure nobody was hurt. If they needed medical attention. Basically, canvassing the area.

We did check for the tag. You know, we did run the tag and found out who the owner was and we tried to make contact with them.
Q. And did y'all -- did you get a call from your dispatch about the same time about somebody taking an individual back to a house on Stevenson Road?
A. Yes, we did.
Q. Did the tag match that same address?

A. Yes, it did.
Q. Based on that information, did y'all end up going to that particular house?
A. Yes, we did.
Q. And you and Deputy Scott were not riding together; is that right?
A. Yes. He was in his own patrol car. I was following behind.
Q. And when y'all got to the house, did -- did you go make contact with Ms. McMahan, or did he make contact? Y'all do it together?
A. Sergeant Scott made initial contact. I was stationary with the vehicles, but he's the one that made primary contact with her.
Q. Okay. And did you talk to her at all?
A. Just in normal conversation from where I was at. And she was coming up to us, she was making -- they were making their way back to the patrol car and I did have a couple of words.
Q. All right. And did you ever go inside the house?
A. Not to my recollection. I don't remember going into the house.
Q. What about Deputy Scott? Do you remember him ever going in the house?

A. I believe he went in. Like I said, I was station -- I was staying out by the vehicles, but I believe he did go inside the residence. It took us a while to make contact with her.

Q. How'd y'all -- did y'all knock? How'd y'all get her ---

A. Knocked on the door.

Q. She eventually came to the door?

A. Eventually did.

Q. And then did she get in your car or Deputy Scott's car?

A. I don't have a cage in mine. I'm not allowed to transport. She got in Sergeant Scott's.

Q. What do you mean you're not allowed to transport?

A. Well, generally, unless it's something without a cage usually where we transport somebody. Just for officer safety and the person's safety, I don't have a cage in my car and that's the reason we won't transport somebody even for an escort.

Q. Okay. And you said -- you used the word "escort." Is there a certain code for that?

A. Ten code would be 10-89. It says we're escorting a subject back to the location and just generally basically giving them an escort.

Q. Okay. And that's -- what if you arrest somebody? What's the code for that?
A. The code for that is 10-67, meaning at that time the subject is placed under arrest or is under arrest. Anything else would be, if we had detained the subject, not necessarily under arrest but an investigative detention, we would make note for dispatch saying we do have one detained if we were going to do so. Other than that, we say we're giving the subject a courtesy 10-89 to wherever.
Q. And did y'all -- did y'all arrest Ms. MaMahan in this case?
A. No, sir, we did not.
Q. Who handled that part of the investigation?
A. Seeing as how this involved a motor vehicle accident, highway patrol investigates accidents, unless it's involving an injury. At that time we would be. For this case, highway patrol investigated the wreck.
Q. So y'all didn't arrest her at her house?
A. No, sir.
Q. When y'all got back to the scene, did highway patrol immediately arrest her, or did they conduct their investigation?
A. They conducted their investigation. As far as

anything going with the wreck or anything, they did the investigation with everything they had. We just assisted.

Q. And if highway patrol would've not arrested her and cut her loose, would y'all have given her a ride back to the house?

A. Yes, sir. If they didn't arrest her, we would've given her a ride back or they would've given her a ride back, but she would've gotten back to the house. Yes, sir.

Q. Okay. Did you have any further conversations with Ms. McMahan?

A. Just general conversation, either on the scene, just listening to her talk to the other deputies or the highway patrol that showed up.

Q. Okay. And then you basically let highway patrol do their thing?

A. Yes, sir. Like I said, we were there basically to help with either traffic or whatever assistance they might need.

Q. Okay. And you -- we talked this morning basically, and we talked last night; is that correct?

A. Yes, we did.

Q. And you stated that you were going to look for

any kind of body cam or anything on the system?
A. I did.
Q. Did you do that?
A. I looked this morning. I pulled up -- we -- since then, we switched cameras, body cameras. We changed to a new system. And even then, we got a new backup system. I went to the old system that we had on that particular time from and I searched it from -- I could not find any video footage.
Q. Okay. And you looked -- you looked on your computers and your system?
A. I looked under my name. I looked under Sergeant Scott's name, the two that would be there. There's nothing -- there was nothing -- no reason to look under anybody else's because they wouldn't be there. It's registered to that deputy's body camera, so it would have to be under his files.
Q. And you found no body cam?
A. I couldn't find anything.
Q. No -- no dash cam or anything?
A. No, sir.
MR. BLACK: All right. I think that's all the questions I have. Please answer any ---
THE COURT: Mr. Henderson.
MR. HENDERSON: Yes, sir.

CROSS-EXAMINATION

BY MR. HENDERSON:

Q. Deputy Pratt, how are you, sir?

A. So far so good.

Q. Prior to last night, have you talked to anybody about this case at all?

A. Just -- just coming here. I think me and Sergeant Scott probably said that we got a case coming here. Other than that, I didn't talk to anybody else about any detail or nothing.

Q. Okay. Was last night the first time you talked to somebody at the Solicitor's Office?

A. I believe it was made to my aware whenever I got a subpoena to be here. But as far as anything specific, yes, sir, last night was the first.

Q. Okay. Now, it's my understanding that Deputy Scott's car had an in-car video in it -- in-car video system?

A. Yes, sir.

Q. Okay. And -- and you looked for that video?

A. I looked under the video footage that would be stored on the files and drive. Yes, sir. I looked through those.

Q. Is it stored by date?

A. Date or by video file. I looked through

everything and anything during that time period.
Q. Okay. From what time frame did you look? This was September 28th of last year. What was the time frame that you locked under or through?
A. I looked a month ahead and a month back, whatever was on the files under Sergeant Scott's and under mine. I didn't see anything.
Q. Okay. Was there any in-car videos during that time frame?
A. Sergeant Scott's video, it would be under his operation. I don't -- I'm not -- I don't know if he activated at that time. It's his patrol vehicle. It's set to activate either when he turns on his blue lights or a certain one or a combination thereof, so I'm not aware of what he did in his own vehicle.
Q. But during that time frame that you looked in your system and in Deputy Scott's system, were there other videos of Deputy Scott during that time frame, in-car videos?
A. There were other incidents, yes, sir.
Q. Okay. So -- so there -- so it does record?
A. It was does record. Yes, sir.
Q. Okay. On the body cam recording, what time frame did you look through?

A. I looked. There -- there was a file on there, I believe, for September of that time frame, and I did search those files.
Q. Okay. And anything on or near September 28th?
A. I didn't see anything that -- that was of this incident. No, sir.
Q. Okay. How long do you typically keep or how long does Abbeville Sheriff's Office keep the body cam videos?
A. So far, we still got camera footage from the original cameras we had. I'm not sure how long they're going to keep them, but if they're on file or if they're an incident that would be recorded, it would be set in the system.
Q. So you've got a video from day one?
A. Yes, sir. From the first day we got body cameras, they should be somewhere on file on the hard drive.
Q. How long do y'all keep in-car videos?
A. It follows the same protocol, sir.
Q. Forever?
A. Well, I'm not sure about forever, but right now they haven't been deleted ---
Q. Okay.
A. --- to my knowledge.

Q. Okay. And your testimony was y'all got out at the incident site, you and Deputy Scott?
A. Yes, sir.
Q. Okay. Said y'all were looking to make sure nobody was hurt?
A. Right.
Q. Okay. And y'all ran the tag number?
A. Yes, sir.
Q. No doubt about that?
A. Yes, sir.
Q. Okay. And it came back to Stevenson Road?
A. Yes, sir. I believe it did.
Q. Okay. And you said Deputy Scott went in the house?
A. To the best of my recollection, yes, sir. He was the one that made the primary contact.
Q. Okay. Did you ask Ms. McMahan any questions?
A. I can't remember if I carried any specific questions, other than carrying on a conversation.
Q. Okay. And nobody's ever asked y'all to look for these videos before, say, yesterday?
A. If it was handled by highway patrol, I wouldn't have a need to -- unless it was handled that day or that time frame and there were copies made of the video footage for their purposes ---

Q. Okay.
A. --- I wouldn't have the need to, sir.
Q. Do you know if Trooper Lynch ever asked you for any video?
A. I don't recall anything being asked.
Q. Now, Deputy Scott's car, you would agree in the back there's a cage -- there's a cage?
A. Yes, sir.
Q. And then that somebody sitting in the cage can't get out. I mean, they can't open the door and let themselves out?
A. Ideally.
Q. Okay. So my client was put in the cage?
A. She volunteered to go back to the scene. That's where we keep them.
Q. And but once she's in the cage, she's not free to go, is she?
A. If she was to say, "I change my mind," then she would've been returned to her residence.
Q. And you haven't discussed your testimony with anybody else before today?
A. No, sir. Not to my recollection.
MR. HENDERSON: If I may have one minute, Your Honor?
THE COURT: Sure. Take your time.

MR. HENDERSON: I don't have anything further, Your Honor.

THE COURT: Solicitor, anything to follow-up?

MR. BLACK: No, sir, Your Honor.

THE COURT: You can step down, sir.

THE WITNESS: Thank you, sir.

THE COURT: Do you need him to be excused, as well?

MR. BLACK: I don't have any further questions for him.

THE COURT: You're free to go. Just make sure that Solicitor Black can reach you.

THE WITNESS: I'll do that.

THE COURT: Okay. Thank you.

(Witness excused.)

THE COURT: Solicitor.

MR. BLACK: State calls Deputy Lynch to the stand.

THE WITNESS: (Approaching.)

THE CLERK: The evidence you're about to give the Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

TROOPER BRENT LYNCH,

having been produced and first duly sworn as a

witness on behalf of the State, then testified as follows:

DIRECT EXAMINATION

BY MR. BLACK:

Q. Trooper Lynch, you work with the highway patrol?

A. Yes, sir, I do.

Q. And you were working September 28th of last year?

A. Yes, sir, I was.

Q. You responded to a wreck on Old Abbeville Highway near Stevenson Road?

A. Yes, sir, I did.

Q. I know this question was asked previously. What time did you respond to the scene?

A. I was dispatched at 16:22. I arrived on scene at 16:51.

Q. And that's in your incident report on the front page, correct?

A. The time that I was dispatched was. The time that I arrived is not on that, but it's on the collision report. The TR-310 was completed that day.

Q. Okay. When you got to the scene, Ms. McMahan, the defendant, was already on the scene, correct?

A. Yes, sir.
Q. And when you got there, where was she located?
A. If I'm not mistaken, she was in the back of Deputy Scott's patrol vehicle. When I got on scene, she was -- she got out and I began to do my investigation.
Q. And when she got out of the vehicle, was she cuffed or anything?
A. No, sir. She was not.
Q. And the weather that day, I know it's September. Do you remember what the weather was like that day?
A. Sunny, clear, and warm.
Q. Still warm at the end of September here in the south?
A. Yes, sir.
Q. And most of y'all's vehicles, I know -- I guess you can't speak for Deputy Scott's vehicle, but most of y'all's vehicles have air conditioning?
A. Absolutely.
Q. And if it's not working, y'all have a policy to get that fixed?
A. Yes, sir.
Q. When you -- when you first made contact with Ms. McMahan, did you ask her about her vehicle?

A. Yeah. I usually, you know, when I make contact, ask them what happened or first off, "Are you okay? What happened?" things of that nature. "Tell me what happened." So that's just how I usually conduct all of my collision investigations.

Q. And during this cursory conversation, was she under arrest at that point?

A. No, she was not.

Q. And she -- did she admit to you that she had had a couple of beers at that point?

A. Once -- yes. While I was speaking with her that I observed the odor of an alcoholic beverage coming from her breath as she was speaking to me, and she admitted to having some.

Q. And you asked that question based on the smell of her breath?

A. The smell of breath; her demeanor; the fact she was having issues with her speech, you know, it was slurred; have a little sway to her; she was kind of unsteady, I guess, on her feet. So, yeah, all those led me to believe that.

Q. And she also -- did she also tell you something at that point about depression and medication that she was taking for depression?

A. I don't remember if it was at that point, but,

yes, some time during, I do remember she talked about the loss of, I believe, her mother. I haven't watched the video. I plan on doing that today, but, yeah. And she did say something about some medication that she had taken, as well.

Q. Okay. And then you ended up giving her some -- some field sobriety tests; is that right?

A. I did. Yes, sir.

Q. They're called the standardized field sobriety tests?

A. Yes, sir.

Q. These are the tests that y'all give a lot of people when they're suspected of driving under the influence; is that correct?

A. Yes, sir.

Q. And you had a -- you had a dash camera in the vehicle; is that correct?

A. Yes, sir, I did.

Q. And it was outfitted and properly working at that time, correct?

A. Yes, sir, it was.

Q. And you provided us a copy of that video; is that correct?

A. Yes, sir, I did.

Q. And so you recorded all these standardized

field sobriety tests?
A. Yes, sir, I did.
Q. The first test that you gave Ms. McMahan was the HGN test; is that correct?
A. Yes, sir, it was.
Q. And what does that standard for?
A. The horizontal gas nystagmus test.
Q. And you're -- what are you trying to do with this test? Are you trying to do something with the defendant's eyes?
A. Yes, sir. You are basically looking for invol -- involuntary jerking of the eye which is called nystagmus through the eye check.
Q. Okay. Now, and you're -- how long have you been with patrol?
A. 2011; January of 2011.
Q. So just over eight years, correct?
A. Yes, sir.
Q. And you've arrested people for DUI before previously, correct?
A. Yes, sir, I have.
Q. The quality of y'all's cameras, is it anything that they have -- like they have in Hollywood? Can they get close-ups, zoomed in, and get all that kind of stuff?

A. I wish. Absolutely not.
Q. Okay. The -- the tests that you conducted, were they recorded in front of your vehicle?
A. Yes, sir.
Q. Do you remember this particular test how she was positioned and how you were positioned and whether or not your camera would've been able to actually get her eyes?
A. I don't remember exactly. I just know I always turn -- tried to turn people so they can see both me and her from a side angle.
Q. Okay. And if she were standing directly in front of your car, you would have to be standing in front of -- well, in between her, the defendant, and your vehicle, correct?
A. Yes.
Q. At that point, the camera wouldn't pick up?
A. No.
Q. And if they were facing the other way, their back would be facing you, correct?
A. That's correct.
Q. So you're saying typically you put them on the side?
A. I try to, yeah. Just sometimes I can't based on the road, but, yeah, that's how I like to conduct

it.
Q. And -- and based on your experience, that seems to be the best solution to this difficulty that y'all have out there?
A. Yes. I usually try to put my back to the road, again, with impaired people. I don't need them falling in the road and stumbling, so I try to be that buffer if at all possible. It just depends on -- every circumstance is a little bit different.
Q. So if they fall, they fall and you can catch them and save them?
A. Exactly.
Q. And if they fall backwards, it's into -- not the pavement, but into the dirt and they're out of the road?
A. Exactly.
Q. Okay. So you did the HGN test on Ms. McMahan at this point. The second test you did was the -- did you do the walk-and-turn test?
A. Yes, sir, I did.
Q. And what do you call that one?
A. It's divided attention test, the walk-and-turn.
Q. And you explained her the instructions?
A. I did.
Q. And did she do this test?

A. She did.
Q. And was this recorded on your video camera?
A. Yes, it was.
Q. Okay. And on -- on this particular test, do you remember how -- after you explained to her the steps of the test, did she -- how did she do on that one?
A. Poorly.
Q. Do you remember exactly what she did?
A. I don't. Like I said, I haven't watched the video or looked over anything as of yet, but I do remember that I made -- after the walk-and-turn test, I made the decision to stop any further tests based on her level of impairment and for her safety.
Q. And if I would've told you -- if I tell you that she just basically took 30 steps to the front of your vehicle and turned around and came back, would that ---
A. I would definitely believe that.
Q. And so based on that, you didn't give her the last test, which would be one-leg stand?
A. Ab -- absolutely. I do remember that her level of obvious impairment, there was no point in going any further and jeopardizing her safety.
Q. Okay.

A. I didn't think she was going to be able to perform that test.
Q. Now at this point, did you place her under arrest?
A. I did.
Q. Okay. And how did you go about placing her under arrest?
A. Just as I do everybody. Walk out to my car, explain to them that they're under arrest, and place their hands behind their back, and then I place handcuffs on them and read the Miranda rights and put them in my patrol car.
Q. And you did that in this case?
A. Yes, sir.
Q. So if you place somebody under arrest, that's when you put the cuffs on them?
A. Yes, sir.
Q. And this -- and in this case, that's what you did, correct?
A. Yes. And we also used the -- notified dispatch we're 10-67, which means we have a person in custody under arrest.
Q. Okay. So 10-67 is the code that's saying to put somebody under arrest?
A. Yes, sir.

Q. Once you place her under arrest, you put her back in her -- of the patrol car; is that correct?
A. Not in back, the front. We transport in the front passenger's seat.
Q. Okay. So she's riding shotgun with you essentially?
A. Yes. We don't have a cage. So without a cage, we don't really like anybody to be behind us, so they go directly beside us.
Q. Okay. And in this particular case, you placed her under arrest and then you transport her to the Abbeville Detention Center; is that right?
A. I do.
Q. And you said you Mirandized her. Did you Mirandized her on the scene?
A. Yes, sir.
Q. And you explained all of her rights?
A. I did.
Q. What are those rights?
A. She has the right to remain silent. She has the right to have an attorney present with her while she's -- if she can't afford one, one will be appointed to represent her at no cost. She can decide at any time to exercise these rights during questioning and make any statements. Ask if she

understood the rights. And having those rights in mind, did she wish to speak to me.

Q. Okay. And then you put her in the car? This is actually recorded, as well, correct?

A. Yes, sir, it is.

Q. And do you remember any statements that she gave after Miranda?

A. Not right offhand without watching it again. I know she stated that she -- I do remember that she was trying to get to Burger King. I think that's what she was telling us. She was hungry. She hadn't eaten, and she was trying to get to Burger King.

I think that's when -- I don't remember when she told me she lost her mother, if it was then or beforehand, but I remember that coming out at some point and that she was having a hard time with it.

Q. And she claimed -- she also said something along the lines of she made a mistake?

A. Yeah.

Q. Did she also mention something after you Mirandized her and placed her under arrest talking about different medications that she was taking?

A. She did. Again, I remember the medications coming up. I don't remember at what part in my

investigation it came up, but I do remember there were a few different medications, I think for depression, that she was on from possibly the loss of her mother if I'm not mistaken.

Q. Okay. And then you took her to the detention center. When you get to the detention center, y'all -- y'all's car actually goes into the detention center; is that correct?

A. Yes. The sally port at Abbeville County goes in and you're shut in on both sides by a roll-up door.

Q. All right. And then once you get her in there, did you take her to the breath testing area?

A. Yeah. As soon as you go in, there's another door right to your right that's got the data master room. It's separated from everything else. Before you actually go, there's another door that you got to go into to enter the holding area.

Q. And as part of an arrest for driving under the influence, which is what you did here, did you read her her implied consent rights?

A. Yes, I did.

Q. And you read the -- you have to read the entire implied consent; is that right?

A. Yes, sir.

Q. You also have to key up the machine, as well?
A. Yes, sir.
Q. And so that takes about 35 minutes or so once it's all started and completed?
A. Approximately, yeah. Paperwork -- any paperwork that has to be done.
Q. Okay. And you gave her a copy of her implied consent rights; is that correct?
A. Yes, sir, I did.
Q. And at this point she's got an option to end the breath sample or not give the breath sample; is that correct?
A. That is correct.
Q. And she ultimately did provide a breath sample; is that correct?
A. Yes, sir.
Q. And she blew an 18, correct?
A. That is correct.
Q. And that's when you -- that's when you knew what, I guess, level to charge her with DUI?
A. Yes, sir.
(Court's Exhibit No. 3 was marked for identification.)
MR. BLACK: And, Your Honor, we have marked the implied consent rights as Court's No. 3 for the

purposes of this hearing.

THE COURT: Okay. All right.

BY MR. BLACK:

Q. Trooper Lynch, you signed down here at the bottom?

A. Yes, sir, I did.

Q. And she signed down here, as well?

A. Yes, sir.

MR. BLACK: I think that's all the questions I have. Please answer any questions Mr. Henderson has.

THE COURT: Mr. Henderson.

MR. HENDERSON: Yes, sir.

CROSS-EXAMINATION

BY MR. HENDERSON:

Q. Trooper, how are you, sir?

A. Good.

Q. And I see where you indicated on the TR-310, the accident report, that you arrived at 16:51; is that correct?

A. That's correct.

Q. That's 4:51?

A. That's correct.

Q. Okay. And when you got there, my client was in the back seat of Deputy Scott's vehicle?

A. If I'm not mistaken, yes, sir.
Q. Or at least one of the deputy's vehicles?
A. If I'm not mistaken, it was Scott's, because I think that's who I pulled up behind. I didn't re-watch the video. I really didn't have time.
Q. I gotcha. But she was in the back seat of a squad car?
A. Sure.
Q. Okay. And you would agree with me, wouldn't you, that -- or, again, you haven't watched the video recently, have you?
A. No, sir.
Q. Okay. Well, I will represent to you then that on the horizontal gaze nystagmus test that -- that my client and you were both sideways to the camera. I think that's how you testified that that's how you like to do it?
A. It is.
Q. Okay. And I'll represent to you that you can't see my client's eyes on the video.
A. I would assume not.
Q. Okay. And were you wearing a body cam?
A. No, sir.
Q. Do you have a body cam?
A. I do.

Q. Okay. Have you worn your body cam before or at any time when administering field sobriety tests?
A. Yes, I have.
Q. Okay. And you can actually see somebody's eyes on the body cam?
A. Not all the time, no. Actually, it's hard. I blade my body. So when blading, usually my camera -- my camera is pointing this way because I wear it in this pocket right here. I can't remember what was going on on this day. I don't know if I had training or something because I remember making a mental note that I wouldn't be getting my body camera. I was like, oh, yeah, I didn't wear it today. But, yeah, I think out of all the -- I've had that body camera, I don't even know how long. Maybe November of '17.
Q. Okay.
A. Out of the DUIs I've made, I think there's one nystagmus case that I actually caught nystagmus on that body camera in all the DUIs I've made. Based on the way I blade and I use my left hand to hold the flashlight. When I cross this side, you look at my arm. When I go this way, is usually the only way. And then it just depends on the person and where their head's at and everything like that, but

most of the time, I step with my left foot in front and blade my body and that puts my firearm away from them. It's just the way I like to do it. Gives me a little bit better reach, as well.

Q. And you agree that, I think you testified that you read my client her Miranda rights?

A. Yes, sir.

Q. And you would agree that one of her Miranda rights is that she has the right to an attorney?

A. Yes.

Q. Okay. And there's some mention on the videos of my client taking some medication?

A. Yes.

Q. And you didn't take her down for a urine test, did you?

A. I did not.

Q. Okay. And you understand you could have?

A. I could have, but an 18, it's kind of pointless.

Q. Okay. But you could've taken her down and confirmed the presence or the absence of prescription drugs?

A. If I felt that it was needed at that time, I could.

Q. Okay. So you -- so you weren't concerned about

the medication?
A. With a level of 18, of .18 of alcohol, I mean, her apparent was obvious alcohol and/or the drugs, but 18 was high enough.
Q. Okay. And, again, that's why you didn't do any follow-up on medication?
A. That is correct.
Q. Okay. And during the test or during this observation period -- and, again, I don't want to misquote, but my client said -- but I've got it in quotes in my notes, so I'm thinking that I've got it accurate, that my client tells you at approximately 5:40 on the video or the time -- or the SLED time that -- that "I'm not taking the test. I'm not going to do it, not until I talk to my lawyer." Do you remember that?
A. I don't.
Q. Okay. I will represent to you that's what she said. Did you allow her the opportunity to make a phone call?
A. No.
Q. Okay.
A. I did not.
Q. Okay. Now, is there a phone nearby?
A. Not in Abbeville that I'm aware of.

Q. They've got a phone there in the building, don't they?
A. That I don't know. I don't work in that facility. They don't in that room. I do know that because I don't go anywhere else usually other than that room from that county.
Q. Okay. Did she have her cell phone with her?
A. I do not recall.
Q. Okay. Did you have your cell phone with you?
A. I don't know. Sometimes I take it in; sometimes I don't. I just don't recall.
Q. Okay. So it's fair enough to say that you didn't take any steps to allow her to make a phone call?
A. I did not.
Q. Okay. And you just previously told her that she had the right to an attorney?
A. Uh-huh.
Q. Is that a yes?
A. Yes, sir.
Q. Now, and I'm looking at the -- I'm looking at the breath test ticket. It's got the observation start time is at 17:33. You would agree that's 5:33?
A. Yes.

Q. And, again, I'm looking at my notes that -- well, back up a little bit -- that you've got on the ticket -- on the breath test ticket that my client was arrested at 17:01. That's 5:01?

A. Yes.

Q. And I will represent to you that at approximately 5:40 or basically seven minutes into the observation period, that's when my client asked for a lawyer?

A. Okay.

Q. And the sample was given at 17:57 or 5:57. So just on that test, there was -- you would agree that 5:57 minus 5:40 is 17 minutes or approximately?

A. If that's what the -- if that's what the video shows, yeah.

Q. Okay. So you would agree that you had 17 minutes there that you could've allowed her at least during this cycle and she could've made a phone call?

A. If there would've been one in the room. I know there's a phone in Greenwood and I've offered people to call multiple times in Greenwood, but there's not a phone in Abbeville, and I'm not -- I don't give up my cell phone for anybody.

Q. Okay. Did you ask her if she had her cell

phone?
A. No.
Q. Okay. But you know there's got to be another phone in the building, isn't there?
A. Again, we're in the data master room. It's our 20-minute time period. We do not exit that room.
Q. Now, it's my understanding now that you've got to give this breath test within two hours of the arrest?
A. That's correct.
Q. Okay. She's arrested at 17:01 or 5:01, that would get us up to about 7:01 to take the test, correct?
A. That's correct.
Q. Okay. So assuming that you stop the test when she asks for a lawyer to go find a phone, let her make a phone call, you've still got ample time before that two-hour period expires? Do you follow the question?
A. I'm waiting on a question, so I guess I haven't understood it. I didn't see a question there.
Q. Okay. Let me run back through it. You've got to offer the breath test within two hours?
A. I do.
Q. And then the two hours, I will represent to

you, would end at 7:01?
A. Uh-huh.
Q. Is that a yes?
A. Yes.
Q. Okay. She asked for a lawyer at approximately 5:40?
A. Okay.
Q. And that's some -- if my math is right, that's some 81 minutes prior to 7:01?
A. Okay.
Q. Okay. And you would agree with me that if you stopped that breath test then, let somebody make a phone call, you can do another breath test sequence within 81 minutes, can't you?
A. Yeah, but we don't -- we don't stop it for that. If I'm not mistaken, there's even case law that we don't have to allow the attorney into -- during the breath test time.
Q. That's not what I asked you. I asked you to make a phone call.
A. But I just said we don't do that -- don't do that.
Q. You just brought in bringing attorneys up and that's not what I asked you. Now, I understand that if I ---

A. We don't -- I mean, as I stated before, we don't leave the room once it's started. If there was a phone in there, she could've used that, but we're not going to let her do that. No.
Q. Okay. Even though you just told us she has a right to an attorney?
A. Yeah.
Q. Okay. And -- and you just basically ignored her?
A. I wouldn't say that. No.
Q. But you didn't -- you didn't honor her request?
A. I don't.
Q. And -- and you would agree, I hope, that if there's 81 minutes still left, that her asking for a lawyer is not impeding her taking this test, or are you -- are you offering the test to her?
A. Again, I don't know how much -- you know, we're in that room. I don't know what else you need me to say. We don't leave that room.
Q. Okay.
A. I'm not going to speculate to what would've happened if we would've left that room. We didn't. So we stayed in that room.
Q. Okay. Even though she asked for the lawyer?
A. That's correct.

Q. You told her she had a right to a lawyer?
A. That's correct.
Q. And her calling the lawyer would not have prevented the breath test from being offered?
A. Again, I don't know. That's completely speculation. I don't know what would've happened. I can't tell you what would happen if I were to change what really happened. I know what really happened.
Q. None of us can rewrite history. I'm with you.
A. Yes. That's what I'm -- so I'm -- you're asking me to speculate on what I could've done on what would've happened if I would've done something that I didn't. I don't know.
Q. You could've given her five minutes to make a phone call?
A. Like I said before, once we're in the room, we don't leave.
Q. Even though you've told her she has a right to a lawyer?
MR. BLACK: Your Honor, it's been asked and answered.
THE COURT: It has. Move on to something else.
MR. HENDERSON: Okay. If I may have one minute, Your Honor.

THE COURT: Sure. Take your time.

MR. HENDERSON: Your Honor, I don't have any further questions.

THE COURT: Solicitor, anything in follow-up?

MR. BLACK: Briefly.

REDIRECT EXAMINATION

BY MR. BLACK:

Q. I know that Mr. Henderson got this and I didn't ask this initially. The arrest time was 17:01?

A. Yes.

Q. And that's in the -- the information of the -- of her -- the breath test results sheet?

A. Yeah. I pulled that from our CAD. We have a mobile CAD that's in the car, and that's where I get all my times from.

Q. Okay. But you put in this sheet ---

A. It's right there on the implied version of the data master printout at 17:01. Yeah, the data master right there.

Q. And going back to the breath site, the data master room. The 20-minute waiting period, that has to be recorded and everything's got to be on video?

A. It does.

Q. And that's statutory?

A. It is.

Q. So you're coming in the room and going out of the room, every time you'd have to start that over, correct?
A. I would.
Q. And I know you said you haven't watched any of the videos yet.
A. I have not.
Q. But if I represent to you that in the data master room she says that "I'm going to call my lawyer on Monday," do you remember her saying that?
A. If it's on the video, it won't lie.
Q. Okay. And September the 28th would've been -- I just looked it up. That -- do you remember that being a Friday?
A. Yeah, I guess, if that's what you're saying. I don't remember what day of the week it was.

MR. BLACK: Okay. I think that's all the questions I have, Your Honor.

THE COURT: Okay.

RECROSS-EXAMINATION

BY MR. HENDERSON:

Q. And I will represent to you it was on a Friday, the day of the arrest.
A. Okay.
Q. And I will also represent to you that the

Solicitor was correct and at 5:37 on the tape, she says, "I'm going to call my lawyer Monday morning." But then at 5:40, she says, "No. I'm not doing this till I talk to my lawyer." She asked to talk to -- basically call her lawyer. You understood her wanting to talk to her lawyer, didn't you?

A. I don't know. I'll have to watch the videotape. I mean, you're throwing out all these numbers. I don't know.

MR. HENDERSON: Okay. I don't have anything further, Your Honor.

THE COURT: You can step down, sir.

(Witness excused.)

THE COURT: Okay. Solicitor, I assume there's no more witnesses to put up.

MR. BLACK: Unless Mr. Henderson has something else, I don't -- I think that covers most of everything that he put on there. As we mentioned back in chambers and I told Mr. Henderson this morning, the issue about the open container. We're not going forward on that, so I think that kind of takes care of some of the items that he was looking into.

THE COURT: All right. Mr. Henderson, do you have any testimony that you want to put up as it

relates to any pretrial matters?

MR. HENDERSON: I do, Your Honor. I'd like call my client.

THE COURT: Okay.

THE DEFENDANT: (Approaching.)

THE CLERK: Put your left hand on the Bible and raise your right.

THE DEFENDANT: (Complying.)

THE CLERK: The evidence you're about to give the Court be the truth, the whole truth, and nothing but the truth?

THE DEFENDANT: Yes, ma'am.

THE COURT: Ms. McMahan, let me explain just a couple things to you. The fact that you are offering testimony pretrial in no way affects your ability to decide not to testify in the case in chief. You understand that, ma'am?

THE DEFENDANT: Yes.

THE COURT: You need to speak up.

THE DEFENDANT: Yes, sir.

MR. HENDERSON: And, Sherry, you're really soft spoken so...

THE COURT: But you understand too, ma'am, that if you do decide to testify in the -- in the trial, anything you say in pretrial could be used against

you in some fashion. Do you understand that, ma'am?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you very much. Mr. Henderson, you may proceed.

SHERRY MCMAHAN,

having been produced and first duly sworn as a witness on behalf of the Defendant, then testified as follows:

DIRECT EXAMINATION

BY MR. HENDERSON:

Q. Just a couple very limited points, Sherry. Do you remember the deputies coming to your house?

A. Yes, sir.

Q. Did they knock on your door?

A. Yes, sir.

Q. Did you open the door?

A. Yes, sir.

Q. Okay. Did they ask you what happened or what was going on?

A. They just asked me -- well, they told me that I needed to go with them.

Q. Did they give you a choice about going with them?

A. No, sir.

Q. Okay. Did you have -- in your mind's eye at

that time, did you feel that you could deny their request?

A. I -- huh-uh. I could not deny it.

Q. Okay. Now you saw the two deputies that testified, didn't you?

A. Yes, sir.

Q. They're both bigger than you?

A. Yes, sir.

Q. They're both taller than you?

A. Yes, sir.

Q. And Deputy Scott, did he come in your house?

A. Yes, sir.

Q. Did he tell you you're going with him?

A. Yes. He told me I had to go.

Q. Okay. No doubt about that?

A. No doubt about that.

Q. And he put you in the back seat of the car?

A. Yes, sir.

Q. You were in that cage?

A. Yes.

Q. Okay. And did you -- and could you have gotten out of the car?

A. I don't know.

Q. Did you try to get out?

A. Probably I -- no. I didn't try, but I felt

like I, you know, was in there, you know.
Q. Did you feel like you were free to go?
A. No, sir.
Q. Did you feel like you had the option to not go with these deputies?
A. No, sir.
Q. Okay. Now, you agree they didn't put cuffs on you?
A. No, sir. They did not.
Q. They never told you in so many words that you're understand arrest?
A. That's right.
Q. But they told you, you got to come with us?
A. That's right.
Q. And you felt that you didn't have a choice to go with them?
A. That's right.
MR. BLACK: Judge, I'm just going to object. They're very leading questions at this point.
THE COURT: Try not to lead.
BY MR. HENDERSON:
Q. Okay. Going to the data master tape, do you remember telling Trooper Lynch that you weren't going to take this test until I talked to my lawyer?
A. I do.

Q. And he didn't let you call a lawyer, did he?
A. No, sir.
Q. Okay. And you asked him expressly, "I want to talk to my lawyer"?
A. Yes, I did.
Q. Okay. And he didn't -- he didn't allow it?
A. No, sir.

MR. HENDERSON: I don't have anything further, Your Honor.

THE COURT: Okay. Solicitor, anything of this witness?

CROSS-EXAMINATION

BY MR. BLACK:

Q. And you did say that the deputies knocked on your door, correct?
A. Yes, sir.
Q. You said you felt like you had no choice to go?
A. Well, he said that I had to go.
Q. But I think your testimony was you felt that you had no choice; is that right?
A. Yes, sir.
Q. Did they put any handcuffs on you?
A. No. Not at that time.
Q. He didn't -- he didn't put handcuffs on you and lead you to the car?

A. No, sir.
Q. And you stated you didn't try to get out of the car?
A. No, I did not.
Q. You also didn't ask to -- for them to take you back home, did you?
A. No.
Q. First time you got placed in handcuffs was when Trooper Lynch put you in handcuffs after you did the field sobriety tests?
A. Yes, sir.
Q. And you also admitted to Trooper Lynch when he got there that you had been drinking, correct?
A. Yes, sir.
Q. And you were also very depressed because of the recent passing of your mother, correct?
A. Yes, sir.
Q. So it's fair to say you were going through a lot emotionally?
A. Yes, sir.
Q. Maybe physically, as well?
A. I wouldn't say physically.
Q. You also stated that you hadn't been drink -- you hadn't eaten anything in a couple days?
A. Exactly.

Q. And people get hangry when they haven't eaten anything; is that right?
A. Get what?
Q. Hangry. You ever heard that term?
A. I don't believe so.
Q. Like you're hungry and upset and angry because you hadn't had anything in three days?
A. Sitting at my house, I do not believe that I was angry.
Q. I'll move on. Trooper Lynch gave you the Miranda warnings on the scene, correct? He told you you had the right to have an attorney?
A. I do not remember.
Q. You don't remember?
A. (Nonverbal response.)
Q. He gave you an implied consent rights in the data master room, correct?
A. Sir?
Q. He gave you implied consent rights in the data master room, correct?
A. Yes, sir.
Q. Court's Exhibit No. 3?
A. Yes, sir.
Q. And he read these to you?
A. No. He did not read those to me.

Q. He didn't read them to you?
A. No.
Q. He gave you a copy?
A. Yes.
Q. And then you signed down here, correct?
A. Yes, I did.
MR. BLACK: That's all the questions I have.
THE COURT: Anything to follow-up, Mr. Henderson?

REDIRECT EXAMINATION

BY MR. HENDERSON:

Q. Just to clarify. Sherry, did you feel that you -- again, I'm using the verb "feel," but did you feel that you had the right to refuse to go with those deputies?
A. Say -- say that again.
Q. Do you believe -- did you have the right to refuse to go with the deputies?
A. No, I did not.
Q. Any doubt about that?
A. No doubt.
Q. Did they tell you you had to go with them?
A. Yes, sir.
Q. And you -- and you considered that an order by a police officer?

A. I -- yes, sir.

MR. HENDERSON: I don't have anything further, Your Honor.

THE COURT: Okay. You can step down.

THE DEFENDANT: (Complying.)

THE COURT: Okay. What -- what I want to do is take a break and watch this video. That's going to put us up to a little past twelve o'clock. Then I'll take any argument on the pretrial matters, understanding that Mr. Henderson's got to get out of here at 1:00. So I want -- just keep in mind that I want all the pretrial arguments in by one o'clock. I don't want anything lingering, so keep that in mind as you, you know, craft your -- whatever arguments you want to make to the Court. So we'll be in recess for about a half hour. I'll take a look at the video, and then we'll come back on it.

MR. BLACK: Yes, sir, thank you.

THE COURT: I will say one other thing. Anything you think that can be resolved in looking at Mr. Henderson's e-mail that raises the pretrial matters, I would encourage the lawyers to do that. And, again, I've said this several times. Again, if I grant the motion to remand, then all these other matters are moot at this time, but go ahead and see

what you can resolve, and we'll be back in about a half hour.

MR. BLACK: Yes, sir. Thank you.

(From 11:35 a.m. to 12:20 p.m., recess.)

THE COURT: All right. We're back on the record in the McMahan case.

Mr. Henderson, your e-mail that lists out the various pretrial motions, I'm going to have that marked as a Court's exhibit.

MR. HENDERSON: Your Honor, I've actually already marked it as a defense motion exhibit, but it would be fine as a ---

THE COURT: So long -- it just needs to be a part of the record.

MR. HENDERSON: It is, Your Honor. And I've also marked several other items. I'm trying to -- and I've given the Solicitor a copy. I've got Defense No. 1, a Defense No. 2. I believe you still have my Defense No. 4 from yesterday that dealt with the remand because I gave you the original with the blue sticker on it.

THE COURT: Let me -- let me look.

MR. HENDERSON: Because it was the Magistrate's Court file.

THE COURT: Yes, I have four.

MR. HENDERSON: Okay. And I'd like to make -- put that in the record, as well.

THE COURT: Okay.

MR. HENDERSON: I put up 7, Exhibit 8, Exhibit 9, Exhibit 10, Exhibit 11, and my e-mail to you, I had marked as Defense No. 6.

THE COURT: Okay. And my argument will be fairly briefly -- brief, Your Honor.

THE COURT: Okay.

MR. HENDERSON: But I think these documents, if you wanted to take the exhibits with you would give you some idea.

THE COURT: I plan -- I plan to. Let's go ahead and what I want you to do is address -- and I'm using your numbers -- 3, 4, 5. Certainly, 6 needs to be redacted as far as prior conviction. I -- I didn't hear that, but you say it's in there so I'm sure it is. I just didn't hear that when I looked at the video. So 6 needs to be redacted, and then 7 and 8. So address 3, 4, 5, 7, and 8.

MR. HENDERSON: And I also handed up some more stuff, Your Honor, on the remand issue in this packet too.

THE COURT: Okay.

MR. HENDERSON: Your Honor, on my Number 3, the

Rule 5 and Brady, I've entered into the Court Exhibit No. 1 are my discovery request. Exhibit No. 2 is what the State provided. Those are all the State's discovery responses, until I got this CAD report this morning. Because, again, when I saw the witness list yesterday, and it had Deputy Pratt on it and Deputy Scott on it, that's the first mention I heard of their involvement in this matter, period.

You can see that there's a deputy on the video. His Honor I'm sure just watched it. You can see that there's a deputy in the background, but I had no idea who they were. When I asked for these discovery requests on November 1st of last year and now we're coming up on, you know, past July 1st, some seven months down the line, that I don't know if these videos existed or not. I don't think these officers know if the body cam video or the in-car existed, but if the Solicitor had asked for them immediately.

Your Honor, again, that's -- that's my concern. The Government's -- I specifically asked for that type of stuff. I asked for the videos, the body cams of all officers on the scene, not just, quote, unquote, the arresting officer. You'll see that in my discovery request. I specifically asked for this

stuff.

And, again, when you sit on your hands, six, seven, eight months and these videos go missing, again, they don't -- it sounds -- I don't know what type of recordkeeping they've got over at the Abbeville Sheriff's Office.

THE COURT: Right. The only videos that are in existence are the trooper's incident site and breathalyzer site. Are you saying that you just got those videos?

MR. HENDERSON: No. No. No. I'm talking about the deputy's videos.

THE COURT: Well, there are none.

MR. HENDERSON: Well, he says there are none now, but if they'd investigated this six, seven, eight months ago, they might very well have been there.

THE COURT: Well, I didn't interpret Deputy Scott's testimony that there was some videos, but they no longer exist. He can't say whether there were or not. He said he didn't know if the machine was working or not. That's how I understood his testimony. I may -- I may have took it wrong.

MR. HENDERSON: But it seems they should've been asking that question six, seven, eight months

ago, not July 8th, yesterday, one day before trial. That's my concern. Because, again, if I had known if they could produce these names to me, I would've got on them and gone to start looking at videos.

But, again, when I hear these guy's names yesterday for the first time, I mean, that's -- that's why -- that's why my e-mail says, "Hey, look. If this is the first time the State has produced any discovery to me, that's got these guy's names." When I see this CAD detail this morning. There's a lot of stuff in that CAD detail, you know, would've loved -- would've loved to have a chance to get into it, but obviously I know -- I think the State's going to be prohibited from getting into a lot of that just by the rules of evidence and who they've listed as a witness.

THE COURT: Solicitor, you want to respond to number -- this is by -- by the numbers -- respond to Number 3. Mr. Henderson said he didn't know about these deputies until yesterday.

MR. BLACK: I find that very hard to believe if he watched the video, which I'm certain that he did. Mr. Henderson is very thorough and the deputies can clearly be seen on the video that Your Honor did view.

I actually was going back and looking at some stuff. I -- I sent Mr. Henderson an e-mail on June the 10th just confirming that he had had the video. And he responded back, "Yes, I have Trooper Lynch's video." And, you know, discovery, yes, it's on the State to get the defense their -- their discovery, and the videos, and the incident reports, everything associated with a case, but quite frequently with defense attorneys, I know with the public defender, I had an e-mail from Mr. Grose last week, "Hey, can you shoot me the search warrant? I don't have this page of the search warrant."

"Sure. I'll be glad to do it."

Mr. Henderson could've easily asked, hey, can you check on these videos? And I would've certainly checked on those videos.

He responded back on June the 10th, "Yes. I have Trooper Lynch's videos." I know he viewed the video. He could've asked, hey, can you check on the Abbeville County deputies' videos, and we wouldn't have to go through this today -- this morning, but he didn't do that.

I say all that to just say that he knew that -- that Sergeant Pratt and that Deputy Scott were on the video. They're clearly seen. And we could've

gone through this a lot earlier. He's not taken by surprise that Abbeville County deputies were involved and being out here at this wreck.

I'm not really sure what relief he's asking for, but I -- as far as I see it, there's really no Rule 5 or Brady violation because they're -- they're clearly seen on the video.

And as you heard the testimony, Judge, they didn't write any reports, they'd gone through all their systems looking for body cam, for in-car videos, and they -- there's none that they can find at this point.

MR. HENDERSON: And, Your Honor, to be clear. I never said I didn't know the deputies were involved. I mean, I can watch the video clear as day and see deputy vehicles there. But as far as names, it's incumbent on the Government. I mean, I asked them for this stuff in discovery. I mean, I asked them for this. I mean, I've got probably as thick a discovery request as -- as anybody asking for specific items.

And, again, that's Defendant's Exhibit No. 1 and Defendant's No. 2 is what the Government gave me, other than this CAD report that I got this morning when I got to court. You know, I'm not sure

why the Solicitor is wanting to start producing discovery and identifying witnesses the day before trial and the day of trial.

And, again, Your Honor, I think -- if you're looking for relief -- looking for relief, need to keep out anything about these deputies -- any testimony of these deputies, their involvement in this matter, other than, you know, starting to watch a -- you know, when you see them on the video -- on Trooper Lynch's video. I'm referring to that video. Again, they're just waiting till the last minute to produce this stuff, and it's -- it's very relevant to Rule 5. It's definitely Brady material.

THE COURT: What -- the CAD report. How -- how relevant -- I realize it has dispatch times, arrival times, that sort of thing. How important is that to this case, this -- the CAD report? I'm asking Solicitor first, then you can certainly respond.

MR. BLACK: I think it's -- I think it's somewhat important because it does give a time stamp as to, you know, when they arrived on scene, when they arrived at the house, and when they got back to the scene to show that it was -- I mean, it wasn't -- it wasn't a long time between -- between the -- between the initial contact and by the time

they got back to the scene. I do think it's important.

THE COURT: Okay. All right.

MR. HENDERSON: I think it's extremely important, Your Honor, because right here, you've got somebody who made a call. It looks like a Mr. Burdett made this call. I mean, just reading it, it looks like it was made at 4:18 or 16:18. And, again, I don't know when -- how long after he dropped my client off at her house, he made this call. I don't have a clue. Was it one minute? ten minutes? an hour? Don't have a clue.

And, again, time is extremely crucial here for a variety of reasons, without giving up any trial defenses. I mean, time is a crucial issue here. And, again, when this is thrust on me here at the last ---

THE COURT: Are you suggesting the CAD report contains some exculpatory information for you? Is that what you're suggesting, Mr. Henderson?

MR. HENDERSON: I would say yes, but, again, I'm not sure if exculpatory is quite the right word.

THE COURT: Well, of course, when you're looking at Brady, exculpatory is a -- is the key point there.

MR. HENDERSON: Right. And it would allow me to flesh out my defense if I had this document. I got the rest of this discovery on November 21st of last year, 20 days after I served my discovery request. I mean, this should've been in it.

THE COURT: Okay. Let's -- let's go down to Number -- Number 4. Let's -- let me make sure -- yeah, let's talk about Number 4, Mr. Henderson.

MR. HENDERSON: Your Honor, when -- when you're looking, being in custody is would a reasonable person believe that their freedom has been curtailed? Has nothing to do with custodial arrest at all, that they -- the Government wants to make a big deal. Did my client have cuffs on her, hadn't been, quote, unquote, you're arrested.

I agree none of that was done, but her testimony was they made her get into that patrol car or deputy's car. Said she did not have a choice, and you're looking at what a reasonable person in my client's position or in this position would believe. Is their freedom to move being curtailed? And when you're ordered to get into a police car or put into a cage that you can't get out of, yes.

And in my e-mail, I think I quoted the language, "Suspect's freedom of movement has been

restricted in any significant way." Yes. I mean, you're -- you're put into a squad car and ordered to go back to the, quote, unquote, scene of the crime.

The police -- you heard the deputy say he'd already been out here investigating this. They went to the accident site. They get out looking for bodies and hurt people. I agree. That's what they should be doing. Ran the report. Seems like somebody else might've called in over dispatch to go -- go to this address. They go to this address. They know there's a wreck, obvious. And they smelled alcohol. Again, they know the first thing that's going to pop in their mind is she's drinking and driving.

Again, they don't have any -- that's their first gut instinct it sounded like, that, yes, of course, they're going to order her to go back to the scene so the highway patrol can investigate.

And, again, I think under Burker -- Burkmer, and I put that in the materials over here, Your Honor, as a Court exhibit and also Easler, is one of our Supreme Court -- State Supreme Court cases that this is not just a regular traffic stop. And the U.S. Supreme Court's made it clear that U.S. -- that on just a generic garden variety traffic stop, you

don't -- you're not entitled to Miranda protections. I understand that.

But here, this is not the garden variety traffic stop. This is one where there's been a wreck. They're going out here looking for the person. They find out where she's at. They go to her. They make her come back, according to my client's testimony. That's custody made for the Miranda prong.

And then it sounds like the officers were also asking her -- the deputies were asking her questions, what happened, blah, blah, blah. Trooper Lynch was definitely interrogating her. "Were you driving? What happened? Were you drinking?"

I think all that combined, Your Honor, I think this should've been Mirandized from a Constitutional standpoint, a Fifth Amendment standpoint, not necessarily from the videotaping standpoint.

THE COURT: So what you're wanting -- what you're wanting out is any -- anything that your client may have said starting at the point she was put in the deputy car ---

MR. HENDERSON: Yes.

THE COURT: --- up until when is your position?

MR. HENDERSON: I would say until the point

that she's Mirandized by Trooper Lynch, but I think U.S. Supreme Court has said that on the field sobriety tests, the nonverbal portions of it, they don't consider that covered by Miranda. So I'm thinking the fact that she might've taken, you know, did a horizontal gaze nystagmus test. And, again, I'm asking for the Court to redact it. But if the Court doesn't redact it, I don't think that's suppressible under a Miranda violation because it doesn't involve any counting.

THE COURT: Well, what -- what we're considering is -- is verbal statements made by -- made by your client. That's -- that's what we're focusing on?

MR. HENDERSON: Yes, sir.

THE COURT: You're wanting from the time she's put into the deputy car up until when?

MR. HENDERSON: Up until Trooper Lynch actually Mirandizes her on video. And, again, I agree that he properly Mirandized her on video, so...

THE COURT: Okay. All right. Solicitor, response?

MR. BLACK: Yes, sir. Based on the testimony of the deputies and, you know, I think that they both testified that they briefly got to the scene.

They did a -- they were listening to dispatch, they ran the tag, and they end up going around the corner to Stevenson Road where this individual, Ms. McMahan, lives.

Testimony by Trooper -- or by Deputy Scott who was the one that made contact with Ms. McMahan is that he knocked on the door, she came to the door voluntarily. He did -- I think he said that he stepped inside the house while she was grabbing her purse and whatnot just to make sure. And I think we can all assume that's for officer safety, but otherwise he stated that he remained outside and she came to him, voluntarily got in the car.

I think the factors to consider there were the fact that she was never cuffed. Yes, they put her in the back, but apparently that's their policy, which was testified to by Deputy Pratt and Deputy Scott.

And they -- and the code, like I stated, you know, 10-67 is an arrest and 10-89 is a transport, and that's -- it's in the CAD. It's testified to by the troopers -- or by the deputies and they -- they made a note of that during their testimony. I think ---

THE COURT: Let me just stop you, Solicitor.

Don't you look at this issue from the eyes of the -- the individual because it is -- well, in this case, her statements that were made. So don't you have to look at it from the viewpoint of a person and not necessarily from the viewpoint of the officer?

Now, I understand as far as what the officer did is -- is important, but it's all got to be kept from the viewpoint of the -- from the individual himself or herself. Certainly, it's got to be reasonable for her to believe. And that's what I've got to make the determination, was it reasonable or not for Ms. McMahan to believe that she was in custody in some form, so...

MR. BLACK: I think that that is a correct summation of what the Courts have kind of forced us to look at, whether or not a person believes they're free to leave, but I think we also have to take her testimony into account, as well. Because during her testimony, she -- she stated clearly that she didn't remember Miranda and she didn't remember implied consent, but then she gets up on the stand and says, "He forced me to get in the car."

Well, clearly in the video, Miranda's read, and clearly in the video, implied consent is read. I don't think you had an opportunity to view the data

master video, but it's ---

THE COURT: I haven't yet.

MR. BLACK: --- it's read.

THE COURT: But I'm not so certain I am because I think the only issue with respect to the data master video is her claim to want to talk with a lawyer, whether or not that is, you know, important or not. So I don't know if there's anything else in dispute where I need to look at the data master video or not.

MR. BLACK: Yes, sir.

THE COURT: Because the only issue is the lawyer -- request for a lawyer.

MR. BLACK: Yes, sir.

THE COURT: And, I mean, I think I can rule on that without having looked at the -- the video, unless Mr. Henderson's times are not correct that he puts in his e-mail.

MR. BLACK: Yes, sir. Well, the point -- the point about the implied consent was it was read. And if it wasn't read, Mr. Henderson would've made a motion because I think according to statute, that -- it's got to be read and a copy's got to be given to the defendant.

THE COURT: Sure.

MR. BLACK: So the point is, she testified that those two things didn't happen just momentarily, but clearly they did and there's evidence to show that that's what happened. She admitted that she had been drinking, she had a wreck, and she clearly admitted on the video that she was going through some kind of depression and she was taking medication. I think all that shows that at that point her viewpoint is distorted.

What actually happened is the officer said that they asked her to come outside and go with them. That's what the evidence suggests in the CAD report and that's -- I mean, they even testified that they would've taken her back if the trooper would've ended his investigation.

So it's a reasonable -- I think there's a reasonable standard to it, but it's of a reasonable standard of a viewpoint that's not distorted, which I think in this case is kind of what happened, Your Honor.

THE COURT: Okay. All right.

MR. HENDERSON: Just very briefly rebuttal, Your Honor. Saying to the lay person implied consent rights, I think once -- once the Solicitor showed her the form, she said, "Yes, those were read

to me."

THE COURT: Yeah, my -- for whatever it's worth, my notes indicate "do not remember Miranda," but -- and she also said "did not -- did not read implied consent to her either." That's what my notes say.

MR. HENDERSON: Right. And I think once the Solicitor showed her the form, she said, yes, you did. But, again, you're using terms a lot of lay people aren't going to understand. We as lawyers, of course, that's a yes. I mean, don't -- don't hold that against my client or any other lay person for not understanding legal jargon.

But, again, you know, I think, you're right. You're looking at it from a reasonable person in her position, would they believe that their freedom of movement had been curtailed?

THE COURT: All right. Let's go to -- let's go to Number 5 very briefly. I think the two primary cases on the HGN test would be Waters, and then I think maybe one you cited Gordon. So let's not spend a whole lot of time on that, but, Mr. Henderson, do you want to address that?

MR. HENDERSON: I do very briefly. This Cody Roy Gordon from our Supreme Court, 2015. Right. I

mean, this isn't a dismissal issue. My client's on the video. Her head's on the video, but you can't see her eyes. And I think Justice Beatty basically lays it out very clearly that when you can't see the eyes, I mean, there's just -- there's no way for the jury to determine what happened. And no party is prejudiced by that being redacted and suppressed.

I mean, if the Government thinks they can prove their case, there's plenty of other evidence out here they can rely on, other than my client and Trooper Lynch is standing sideways to the video, and we would have to rely solely on Trooper Lynch's testimony about something that we can't see.

THE COURT: All right. So now if you're wanting -- if you're wanting the -- that portion of the video redacted, are you saying then that you would want any testimony from Trooper Prince redacted or suppressed concerning what he observed about the HGN test?

MR. HENDERSON: Absolutely. Because, again, the videotaping session is there to give a jury direct evidence so that they can make a determination about whether someone's guilty of driving under the influence.

And, again, if that direct evidence is not

there, you know, I don't think it's fair to have somebody testify about something that's -- that nobody else can see. And, again, I think -- I just ask that the video section be redacted and nobody be allowed to testify about it.

THE COURT: All right. Solicitor Black, you want to respond?

MR. BLACK: Yes, sir, Your Honor. I think the HGN test, Mr. Brown and I were discussing that most lay people don't even know what that is or what -- what they're -- what they're looking for to begin with. So to supplement what's going on on the video, you have to have the trooper's testimony about what he's seeing, what he's looking for, and why's he doing what he's doing.

As you know, it's very difficult to get everything up front, you know, Hollywood produced on the roadside. We just don't have that capability, and I don't think that the statute, when it was written, had in mind that we have everything Hollywood production and everything, absolutely has to be up close and personal. I think the conduct is what's important, what the Supreme Court was looking for.

And there's been numerous cases that have been

issued since Gordon. Well, basically the purpose of the statute is to make sure that the conduct is displayed. And I think that based on what they have, what options they have available, that's what was done on scene.

So, you know, I think that while Gordon, you know, when it was written in 2015, I think is somewhat on point. I think that there's been more development kind of flushing out what we're actually trying to get and show on these particular dash cam videos and whatnot, so the jury understands, hey, this is why the troopers are making the arrest. This is why they're doing what they're doing. So I don't think it should be redacted, Your Honor.

MR. HENDERSON: And, Your Honor, just on kind of a side note. If you're looking at the written discovery produced by the State and also listening to Trooper Prince that -- Trooper Prince -- Trooper Lynch -- my apologies -- never given any indication of how, quote, unquote, my client failed the horizontal gaze nystagmus test, none whatsoever. Nothing in the -- nothing in his incident report. Nothing in his testimony today. State hasn't produced any evidence about how she failed that test. Another reason it ought to be suppressed and

redacted.

THE COURT: All right. Okay. And then very briefly on Number 7 about the -- about her requesting to call a lawyer. What relief are you seeking? Are you wanting the breathalyzer results suppressed?

MR. HENDERSON: I want the whole data master test suppressed, Your Honor, because -- cause it gives -- because if you let a jury watch part of the data master video and then you just don't show a result, I mean, that -- that's just -- I mean, that just leads to all sorts of rampant speculation.

And, of course, the Government, all they got to do is offer somebody the breath test. I mean, they -- they're not required to put up any breath test in their case in chief to prove somebody guilty of DUI at all.

Your Honor, I've handed up some cases as one of the exhibits. And correct me if I'm wrong, but I haven't seen any South Carolina law on this exact issue.

THE COURT: I was mentioning to Grayson when we were back there looking at the video. It seems like to me there was a case, and I may be completely wrong, but it seems like there was a case that came

out five plus years in South Carolina about this issue. And I may be wrong or I may be not directly on point, but just -- and we're going -- we're going to look for it to see if -- if I'm mistaken or not, but you got -- you got some cases from other jurisdictions?

MR. HENDERSON: From Arizona.

THE COURT: Arizona.

MR. HENDERSON: And very briefly. They've dealt with this issue a lot over the years, and basically what their Supreme Court has said that if somebody asks for an attorney in the data master room, yes, you've got to give them the right to make the telephone call, so long as making that call doesn't impede the ongoing investigation, meaning that you can't call and say, hey, I'm going wait two hours till my lawyers gets here. They said, no, that ain't going to happen, but -- but if you do ask for the right to call your lawyer, I want my lawyer. Yes, you've got to give them that opportunity, if that opportunity will not impede or hinder the ongoing investigations.

And, in fact, you didn't hear any testimony from Trooper Lynch that that would've impeded the ongoing investigation at all. If you -- if you look

at the times on the breath test ticket, there's ample time here to allow Ms. McMahan to have called her attorney.

Now, whether or not she could reach him or her, who knows. I mean, all he's got to do is give her the opportunity, which he did not do. And the Arizona Supreme Court has basically said, hey, if it doesn't hinder the investigation and you don't allow them to at least try to contact a lawyer, the proper remedy is to suppress the data master and the results.

THE COURT: I would be curious to know whether or not Arizona has -- or what type of implied consent law that they -- that they have.

MR. HENDERSON: Read the cases that I put up there. They are eerily similar.

THE COURT: Okay.

MR. HENDERSON: And you'll see some stuff in their implied consent warnings about Miranda.

THE COURT: Okay.

MR. HENDERSON: Which doesn't necessarily have to do anything with here, but it's some entertaining reading on an issue that's not exactly on point, so...

THE COURT: Okay. All right. Solicitor, you

want to respond to -- to this?

MR. BLACK: If we were to follow the Arizona law or, you know, the kind of cases that have come out as -- out of Arizona, I think that you -- this -- her, you know, going to stop the test, exit the room, go call a lawyer, come back in the room, restart, that would impede the investigation. I would -- I would -- I would argue that while in the data master room and while still trying to collect a breath sample, that's still part of the investigation of the -- of the DUI.

I just think that an exercise of getting up, exiting the room, coming back, that would be hindering the investigation, and so that would kind of fall contrary to what the Arizona law is -- what they've come -- what they've come out with.

In the video, and I know Your Honor hasn't had a chance to look at it. At 10:53, she makes the statement that, "I'm going to call my lawyer on Monday." It's been testified to that this was a Friday evening, Friday afternoon.

Trooper Lynch makes a statement about two minutes later saying, "Fifteen minutes left until you can blow."

She talks about wanting to talk to a lawyer

again. And then she says about a minute and a half later, "I've already admitted to drinking." And then 40 seconds after that, she -- she says, "I guess I'll just blow into the thing." So she talks about talking to a lawyer, but she also during the course of this investigation that's still going on in the data master room, she makes a decision that she's going to blow into the machine and she ultimately does that.

THE COURT: All right. Thank you. And then the last issue is assuming that I do not suppress any of her statements, then does her statements concerning prescription medication still come out or stay out? Mr. Henderson?

MR. HENDERSON: I think they do, Your Honor, because, again, the only evidence of prescription medication is my client's testimony. And, again, the Government's got no witness who can tie together, you know, any -- any of my client's testimony about how that would have affected her behavior.

Trooper Lynch agreed he could've easily taken her down there and tested her for urine at the hospital if he was concerned about drugs. He says his concern was alcohol, so at some point irrelevant

that she might've been taking prescription pills. I mean, it's irrelevant. It's prejudicial.

I mean, there's a way that the Government, if were concerned about my client taking prescription drugs -- because, again, we don't have any evidence or any knowledge about, you know, what her dosage is, how often she's supposed to take it, how often she does take it, what does her prescription say? And it's just going leave stuff to all sorts of rampant speculation if you let in the fact that she said, "I'm taking my prescription medication."

THE COURT: All right. Solicitor.

MR. BLACK: Your Honor, the statute for DUI is both alcohol and/or medication, whether it be prescription medication or drugs that are illegal.

When Trooper Lynch makes contact with her, he smells the alcohol. She volunteers the information about the alcohol, that she's had a couple of beers. She starts talking voluntarily about depression medication and how she's been depressed because of the situation with her mother. These are all not necessarily questions by Trooper Lynch, but she's volunteering information.

And because the statute talks about alcohol, combination of drugs, including prescription drugs,

I think it's -- I think it's highly -- I think it's -- has everything to do with driving under the influence. And just because it's prejudicial, I mean, most of the evidence that we're introducing is prejudicial.

We're -- we're trying to prove the case that we have against her, the charges that she's been charged against. And the statute clearly identifies alcohol and/or drugs as a reason for an arrest. Because she's making these statements, she makes them pre-Miranda, before she's been arrested, and she makes them after Miranda and after implied consent, I think they should be allowed to come in.

THE COURT: All right. How important is it, if it is, when the trooper testified earlier that -- and I'm going to paraphrase what he says, not quoting verbatim, but paraphrasing. He said he really wasn't concerned about medication with an 18. Does that affect, from the arresting officer's viewpoint, does that have any affect on the admissibility of any statements made about pain medication? I'm just throwing that out as a question.

MR. BLACK: I mean, I think -- I think it just kind of adds to how impaired she really was, and

just kind of -- everything kind of flows from that, Your Honor.

THE COURT: Okay.

MR. HENDERSON: But there's just no evidence of any impairment by medication, none. The only evidence of medication is my client said, "I take medication."

Trooper Lynch could've easily remedied that and say, "Ma'am, we're going down to the hospital. Will you give me urine?"

THE COURT: All right. Thank you very much. I appreciate y'all's hard work. I'm going to look at this this afternoon. And what my plan is, excuse me, is to e-mail y'all my riling on each issue. And -- and then we'll -- we can put anything on the record tomorrow concerning my -- my rulings. And, of course, the threshold question that I have to make a decision on, is the motion to remand. And then if I rule against the defense on that, then naturally I'll consider all these other -- these other issues. Okay. So I'll be in touch some time before the end of the -- end of the day. Okay.

All right. Mr. Henderson, we got -- I got six till 1:00, so you're in pretty good shape.

MR. HENDERSON: Absolutely. Thank you, Your

Honor. I appreciate y'all working with me.

THE COURT: Sure. All right.

(At 12:54 p.m., proceedings concluded.)

July 10, 2019

THE COURT: All right. We are on the record in the *State v. Sherry McMahan* trial. The Court had issued its rulings on the various pretrial matters that were argued yesterday. I'm going to have my written rulings made a Court's exhibit. There's one correction that needs to be made concerning Number 6, wherein it states that I deny the motion. That's with respect to some reference to a prior DUI that should've been that motion is granted, so I made the correction there.

Now, both sides I think want to put on the record certain points related to the -- to the pretrial rulings, so I'll allow the State to go first.

MR. BLACK: Yes, sir, Your Honor. Regarding number -- I believe it's Number 4, your ruling basically limiting the State from any -- from any statements that the defendant made by the time she got back on the scene with the deputies and made contact with the trooper up until Miranda when she was arrested includes -- including suppressing not

only the statements, but the field sobriety tests. We're asking that you reconsider that motion.

When I went back and watched the trooper's dash cam video last night, the trooper explained at minute -- about minute 5:30 of the video. There's no time on the top, so it's when the video is playing continuously.

So it's about a 30, 31-minute video. And at minute five and a half, he tells her basically that he offered her the field sobriety tests. He says if you -- if you fail the test, you're going to be placed under arrest. If you -- if you refuse to take the test, you're going to be placed under arrest, but if you pass the test, you will be allowed to go back home.

And so I think this further confirms that she was informed that she essentially was not under arrest at that point. And then her testimony yesterday where essentially she doesn't remember Miranda being read, which is clearly on video and the implied consent being read to her in the data master room, but she, you know, has a clear memory of her being forced and the deputy coming into her house and making her get into the vehicle. I just think it's kind of -- it's somewhat contradictory.

And so I think based on everything that was argued yesterday, including the fact that the deputies testified that -- and even the code in the CAD report says that they were escorting her back to the scene clearly indicates that she wasn't under arrest and we're asking that you -- asking for you to reconsider your ruling and allowing the statements in addition to the field sobriety tests to be allowed into evidence.

THE COURT: Okay. Thank you, Solicitor. Certainly, I understand your argument, but I'm going to deny your request for me to reconsider Number 4. However, as we discussed the issue in chambers, certainly nothing prevents -- I think I alluded to this in my rulings. Nothing prevents Trooper Lynch from testifying as to his observations. He can also said that, you know, based upon his investigation conducted at the scene, he made the decision to place Ms. McMahan under arrest. Just can't be any references to field sobriety tests.

MR. BLACK: Yes, sir. And he can basically say I conducted a brief investigation ---

THE COURT: Right.

MR. BLACK: --- and made the decision to place her under arrest.

THE COURT: Sure.

MR. BLACK: Yes, sir.

THE COURT: No problem there. All right. Mr. Henderson, I think there were a couple of points you wanted to put on the record, as well.

MR. HENDERSON: There were, Your Honor. And I've given the Solicitor the times post-Miranda. In the -- in -- on Trooper Lynch's video, there's one reference to the field sobriety tests, and we'd ask that that be muted out and redacted.

THE COURT: Sure.

MR. HENDERSON: And on the data master video, I've given the Solicitor the times. There's three indications where they're talking about field sobriety tests, and I'd ask that those be muted out, redacted. And after the deputy testifies, we're going to confirm the times.

THE COURT: Right.

MR. HENDERSON: And then also, Your Honor, we discussed back here at least two times post-Miranda Trooper Lynch brings up the medication. Solicitor has told me -- and, again, I don't have it in my notes. Again, we're going to watch it, but he believes one time post-Miranda my client brought up medication, but I want to go back. And we're going

to look at these times when we take a break after Deputy Scott testifies.

THE COURT: Right.

MR. HENDERSON: Just to make sure -- because obviously if she brought up -- if she actually brings it up post-Miranda, the other two times I'm more concerned about will be coming in.

THE COURT: Right. And I think as we talked in chambers, if, in fact, Trooper Lynch brings it up first, then naturally that would need to be redacted.

But if on the other hand post-Miranda, if Ms. McMahan brings it up first, then certainly it can -- then Trooper Lynch's statements can come in. Just saying, you guys just have to look at that video and just see how that shakes out.

MR. HENDERSON: And, again, Your Honor, I was going to call the Court's attention to my client requesting a lawyer. You cite *State v. Degnan*, D-e-g-n-a-n.

THE COURT: Right.

MR. HENDERSON: And that was decided in August of 1991 by our Supreme Court where under a Sixth Amendment analysis, our Supreme Court said that being in the data master room is not a critical

stage where you're entitled to counsel, but I would call the Court's attention that this was long before our videotaping statute came into play in 1998, which mandated Miranda -- actually, used to mandate a whole lot more Miranda than it does now. And, again, our argument about suppressing -- or suppressing the data master results for failure to allow her to contact a lawyer is a Fifth Amendment argument, not a Sixth Amendment argument. And I just want to make sure the record is protected on that.

THE COURT: Right. And -- and -- and I realize that the Degnan case is not directly on point, but I think you even mentioned yesterday that you could not find any South Carolina cases on point. This is the closest that we could find, so I'm relying on it even though it's not directly on what we have. So -- but your -- your -- your point is so noted in the record.

MR. HENDERSON: And let me ask, is that a final ruling on the matter? Because I just want to make sure I don't need to object again when it comes up.

THE COURT: No. That's a final ruling, so you -- you're okay on the record.

MR. HENDERSON: Okay. Thank you.

THE COURT: All right. So as far as what we're going to do is bring the jury out.

I think, Mr. Henderson, you've indicated that you're going to reserve your opening until later on.

I'll give the preliminary charge. We'll take up some testimony from Deputy Scott, and then take a break to give each of you guys a chance to look at the video, make sure that the necessary redactions are -- are in place.

Okay. Anything else on the record before we -- before we bring the jury out, Solicitor?

MR. BLACK: No, sir, Your Honor.

THE COURT: Okay. Mr. Henderson?

MR. HENDERSON: No, sir, Your Honor.

THE COURT: Okay.

MR. HENDERSON: And, Your Honor, one other thing I thought about it. The Solicitor and I discussed ---

THE COURT: Hold that thought.

(Court's Exhibit No. 4 was marked for identification.)

THE COURT: And one more matter, Mr. Henderson?

MR. HENDERSON: Your Honor, the Solicitor and I have discussed this too, that it's my understanding Deputy Scott's going to have the CAD report in his

hands reading times. I don't have any problems with that, but there is a lot of hearsay material in this. And I think the Solicitor understands that Deputy Scott can't go into the hearsay ---

THE COURT: Right.

MR. HENDERSON: --- but we don't have any problems with giving dispatch times, what time they got called, what time they arrived someplace.

THE COURT: Sure. Okay.

MR. BLACK: And -- and, Judge, I have talked to Deputy Scott about it and I think what is allowed is, he's allowed to talk about information he's receiving from dispatch. Basically -- not really where he -- where this information is coming from, but he received secondary information about this address. They run the tag. That address is confirmed. They end up going to that address, speaking to a woman there, and making contact, and that's kind of how they get involved. I think that's fair game.

MR. HENDERSON: I think that's fair game too, but there -- there's just a lot of egregious stuff in the CAD report.

THE COURT: Well, I think so far what has been mentioned, I think we're okay. If, Mr. Henderson,

you feel like possibly Deputy Scott crosses the line, then I'm sure you will bring that to the Court's attention.

MR. HENDERSON: I will, Your Honor.

MR. BLACK: And I -- and I might lead a little bit during that too, Your Honor, just so we can kind of keep it clean.

THE COURT: Right.

MR. HENDERSON: Your Honor, I lead all the time too, so I don't have a problem with that, so...

THE COURT: Okay. Thank you. All right. Let's bring the -- okay. Let's bring the jury out.

THE BAILIFF: (Complying.)

(At 9:55 a.m., jury entered the courtroom.)

THE COURT: Y'all can have a seat when you get to the...

THE JURORS: (Complying.)

THE COURT: Let the record reflect the jury is back in.

Good morning, ladies and gentlemen. I hope you're doing well and ready to get started today.

There are a couple of housekeeping matters. The first housekeeping matter is, you need to be sworn in as the trial jury in this case. So, Madam Clerk, can you take care of that for me, please?

THE CLERK: Please stand and raise your right hand.

THE JURORS: (Complying.)

THE CLERK: Do you solemnly swear that you'll well and truly try the issues before this Court and a true deliverance make and a true verdict render according to the evidence and law presented so help you God? If you accept this oath, please indicate by saying "I will."

THE JURORS: (Collectively:) I will.

THE CLERK: You may be seated.

THE JURORS: (Complying.)

THE COURT: All right. The second housekeeping matter is I need to appoint a foreperson of the jury. Now, if it is a male, it's a foreman. If it is a female, it's forelady. Now, let me explain to you what a foreperson of a jury does.

First of all, the vote of the foreperson carries no greater weight than the vote of everybody else. Okay. But the foreperson of the jury wears several hats. One, I need a spokesperson from the jury to the Court. So if there's any issues that arise during the course of this case that needs to be brought to my attention or if when you begin your deliberations that there are any questions that need

to be asked, then I need someone to write that down, sign it, and then that can be handed to the bailiff to hand to me. So I need a go-between between the jury and the Court.

Secondly, I need someone to make sure that all of my instructions are being followed. For example, I've already instructed you don't begin any discussion about this case until I tell you to begin your deliberations. So I need someone to make sure that all my instructions are being followed, even though that's really everybody's responsibility, not just the foreperson.

And, third, is when I tell you to begin your deliberations, to reach a unanimous verdict in this case, I need someone to get the deliberations started and to supervise and organize those -- those deliberations. I'm confident that any one of you 14 would make excellent forepersons of the jury. Quite naturally, I can only have one.

So, Ms. Harper, I'm appointing you as the forelady of this jury. When you come back in after our first break and throughout this trial, you will always maintain that front seat there. Okay.

The alternates, you are seated in the correct seats. You will always maintain those two seats.

Let me explain your role. Even though this -- this case is a relatively short case, we should be finished up with it today. There may be a need for me to excuse 1 of the 12 because of a sudden illness or maybe an emergency at home or something like that and I need someone to fill those shoes, so your role is -- is very important. If that does not happen, then of course you cannot participate in the deliberations.

Now, let me give you several things to think about as we go through this trial. As I said, it's certainly anticipated that we will finish this case today, but it's very important you pay attention throughout this whole trial.

I don't permit note taking. And the reason why I don't permit note taking is that I have found that when jurors are allowed to take notes, they pay more attention to the note taking, as opposed to what they hear from the -- from the witness stand. So be alert. Be attentive. Listen to everything that -- that goes on. So when you do go back to the jury room to begin your deliberations, you'll have a pretty good memory of what has taken place.

Now, your role as jurors, you are the sole judge of the facts in this case. You make a

determination of the facts of what happened in this case. And the same law that makes you the sole judge of the facts makes me the sole judge of the law. And at the end of this case, I will give you an instruction. We call it a jury charge. I will give you an instruction as to what the law is and the law for you to use to apply to the facts in this case as you find the facts to be.

And the -- yesterday -- oh, not yesterday, but Monday I think it was, is when you were selected, I indicated that the State was -- had indicted Ms. McMahan on two charges. They're only going forward on one charge, that being the driving under the influence charge.

And as I told you on Monday, the fact that Ms. McMahan has been indicted in this case is not proof, not evidence, and you cannot use the fact that she's been indicted in your decision making process in determining guilt or innocence in this case. Again, it's just the -- it's the document to get the case where we are today at trial.

Keep in mind as we go through this case, the burden is on the State to prove guilt beyond a reasonable doubt. And I'll explain more about that at the end of the -- end of the case.

The defendant in this case, Ms. McMahan, has no burden of proof. She does not have to prove innocence. She does not have to prove anything. It's on the State to prove to you to your satisfaction beyond a reasonable doubt.

And as Ms. McMahan sits here in this courtroom today, she is presumed innocent, and that presumption of innocence will remain with her throughout, unless you find that the State has met their burden of proof and has proved this case to you beyond a reasonable doubt.

Now, again, even though this is a relatively short case, there may be times today that the lawyers make an objection indicating that they have a matter of law to take up with the Court. I may have to send you back to the jury room. We do that only when necessary, but the reason why we do that is that in ruling on a particular objection or legal issue that the lawyers have raised, it may require me to discuss the facts. And I certainly don't want to discuss the facts in your presence, because, again, you are the sole judge of the facts in this case.

Now, I mentioned to you on Monday, the prohibition against don't begin any early

discussions about this case among yourselves, anybody that you come into contact with, and not to do any research into this case. Again, as I stated, we all know, you know, we've got a wealth of information at the click of a button, you know, the internet, social media, and the like.

And I think I told y'all on Monday that I was going to give you a real life situation of what happened. I'm not going to go into all the details, but this happened about six months ago. I was trying a case in Laurens and I had given the instruction to the jury, as I have given you, not to do any research into this case, and they completely violated my instructions. Not only did they begin some early discussions about the case, but several jurors did some research into the defendant in this case and received some information that was totally inadmissible. And if we had not found about it and it was just by chance that I found out what they did, they could've very well have convicted that individual based upon inadmissible evidence.

You are to base your decision in this case 100 percent on what is brought out in this courtroom and from no other source. So if you go out and do some research on your own, while the information may

very well be incorrect information, certainly what we find on social media for those who engage in social media, a lot of information is incorrect. You may have information that's incorrect. You'll have information that's not brought out in this courtroom. You may have information that is inadmissible and I don't want you to do that.

So during the lunch break, don't get on your cell phones, on your laptops, or whatever and engage in any of that. Okay. Because if you violate my instructions, then you could be held in contempt of court and there are serious consequences for that to happen so don't do it. Okay. After this case is over with, have at it. Do whatever you want on that. Okay.

Lastly, keep an open mind. Don't make any judgments about anything related to this case until all of the evidence is in, the lawyers have made their closing arguments, and I have instructed you on the law in this case.

All right. State have any objections or exceptions to the Court's preliminary charge?

MR. BLACK: No, sir, Your Honor.

THE COURT: And from the defense?

MR. HENDERSON: No, sir, Your Honor.

THE COURT: Okay. Thank you. All right. State ready to make its opening?

MR. BLACK: Yes, sir. Thank you, Your Honor. May it please the Court?

THE COURT: Yes.

MR. BLACK: Good morning.

THE JURORS: Good morning.

MR. BLACK: September the 28th of 2018, so last September, officers with Abbeville County Sheriff's Department and highway patrol responded to a single car wreck on Abbeville Highway -- the Old Abbeville Highway near Stevenson Road.

The officers got there. They noticed the car was off the side of the road in a ditch. What officers did, they ran the tag, received further information, and ultimately responded to [redacted] Stevenson Road. Made contact with the defendant, Ms. Sherry McMahan.

Highway -- or highway patrol ended up responding to the scene. County deputies responded to the house. They ended up bringing Ms. McMahan back to the scene. A brief investigation was done. And after all the observations, the brief investigation, ultimately Ms. McMahan was placed under arrest for driving under the influence. She

was transported to the detention center. She was offered a breath test. She blew a .18 and she was arrested.

Folks, I'm going to be brief. How the DUI law works in South Carolina is that, for a person to be guilty of driving under the influence, they've got to be driving a motor vehicle, it's got to be in Abbeville County, and they've got to be under the influence of drugs or alcohol or a combination of the two such that their ability to drive is materially and appreciably impaired.

You're going to see evidence in this case that this wreck occurred on Friday afternoon, September the 28th, about 4:30 in the afternoon. It wasn't raining. The skies were clear. It was a sunny day. You're going to hear what she told the officers. You're going to hear the observations that the officer made on the scene, in the data master room, and ultimately the results of the data master test. And, ultimately, it's your determination to find out if she indeed was driving under the influence.

We have to prove -- like the judge said, we have to prove our case beyond a reasonable doubt. And when you think of beyond a reasonable doubt, it's not beyond a shadow of a doubt. It's not

beyond every possible doubt out there. It's not beyond all conceivable doubt that's possibly out there. We -- we can never do that. There are few things in this world that we know for absolute certainty. And the law does not require us to prove our case beyond absolute certainty. It just requires us to prove the case beyond a reasonable doubt.

So when you hear that, think of being firmly convinced of something. After you hear the testimony, after you see the evidence, are you firmly convinced that Ms. McMahan was driving under the influence on September the 28th of 2018?

Folks, when you walked in this morning, the most important thing you brought with you was your common sense. When you go back to the jury room and deliberate at the close of this case, take your common sense with you. You'll have plenty of evidence. You'll have video evidence. You'll have testimony. You'll hear everything. You'll see everything. We're asking that you return a verdict of guilty of driving under the influence for Ms. McMahan. Thank you guys for being here.

THE COURT: Thank you, Solicitor. Mr. Henderson.

MR. HENDERSON: Your Honor, I'd like to reserve my opening.

THE COURT: Sure.

MR. HENDERSON: Thank you.

THE COURT: You have every right to do that. All right. Solicitor, you want to call your first witness?

MR. BLACK: Yes, Your Honor. The State calls Seth Scott.

THE WITNESS: (Approaching.)

THE CLERK: Put your left hand on the Bible, raise your right.

THE WITNESS: (Complying.)

THE CLERK: The evidence you're about to give the Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, ma'am.

SERGEANT SETH SCOTT,

having been produced and first duly sworn as a witness on behalf of the State, then testified as follows:

DIRECT EXAMINATION

BY MR. BLACK:

Q. Detective Scott, can you introduce yourself to the jury, please?

A. Yes, sir. I'm Sergeant Scott. I work with Abbeville County Sheriff's Office. I've been there about six years, and about 13 years total law enforcement.

Q. And you actually worked last night; is that correct?

A. Yes, sir.

Q. And you haven't gone to sleep yet?

A. No.

Q. Well thank you for being here. We do appreciate it, and I know you're tired. You -- were you working on September the 28th of 2018, so last September?

A. Yes, sir.

Q. Do you remember what your shift was that day?

A. The call in question was at four o'clock, means I would've been working a 6:00 a.m. to 6:00 p.m. shift.

Q. All right. And so you received a call from dispatch about a wreck; is that correct?

A. Yes, sir.

Q. And where was that wreck located?

A. It was going to be located Old Abbeville Highway near Stevenson Road.

Q. And this may sound like a silly question, but

is that in Abbeville County?
A. It is.
Q. And did you respond to that wreck?
A. I did.
Q. When you got to the wreck, what did you see?
A. A car backed down an embankment where it looked like it lost control. Dispatch gave the information of what I was looking for. I did find it. Ran the information all on scene. And then we went to another address on Stevenson Road.
Q. Okay. Well, let me back up before we get there. On scene, was there anybody there with the vehicle?
A. There was not.
Q. Was there anybody -- what kind of vehicle was it? Do you remember?
A. I do not off the top of my head. Let's see if it was logged. (Reading.)
Q. And it -- it may not be in there, but...
A. I'm not sure.
Q. Let me ask you this: Did -- did you go down the embankment and look for any individuals?
A. I would've had to gone down the embankment to at least get the tag.
Q. Okay. Did you -- and you didn't see anybody

down there?
A. I did not.
Q. But that's one thing you were looking for, to see if there was anybody injured or anything like that, correct?
A. Yes.
Q. So you got a tag number. Did you end up running that tag?
A. It would have been run through dispatch to confirm the owner.
Q. Okay. Is there an address listed typically with that?
A. Yes.
Q. All right. Was there another deputy with you?
A. There was.
Q. And who was that?
A. Sergeant Pratt.
Q. All right. And Sergeant Pratt and you were at the scene, kind of assessing everything initially, correct?
A. Yes, sir.
Q. And based on the information, the tag number, do you know what that address was?
A. [redacted] Stevenson Road.
Q. Okay. So that's -- is that off of Old

Abbeville Highway?

A. It's off of -- yes.

Q. Okay. It's kind of just around the corner; is that right?

A. Yes, sir.

Q. So did you end up going to that address based on the tag number?

A. I did.

Q. All right. And Deputy Pratt was with you, as well?

A. He was not going to be exact second for second, but very soon after.

Q. Y'all weren't riding in the same car ---

A. No, sir.

Q. --- but y'all did respond?

A. Yes, sir.

Q. Okay. When you got to that address, what did you do? Did you knock on the door?

A. I knocked on the door. After a little bit of time, the defendant did come to the door and spoke with us.

Q. And you're talking about the lady over here between Mr. Henderson?

A. Yes, sir.

Q. Okay. And she -- when you got to the -- when

she got to the door, did you learn anything about her?

A. A very strong smell of alcoholic beverage. She was slurring her words and unsteady on her feet.

Q. And this -- about what time was this? Was it in the afternoon?

A. It was.

Q. Do you remember if was a rainy day? If it was -- what the weather was like?

A. From everything that I can recollect, it was going to be a warm sunny day.

Q. Okay. All right. And I know you've got some times and stuff written down. Do you have the time when you first responded to the accident on the roadway?

A. No.

Q. Do you know when that was?

A. Do you want the en route, or when I actually got on scene?

Q. When you -- when you actually got on scene?

A. I arrived on scene at 16:25, 4:25 p.m.

Q. 16:25. And that is 4:25 p.m., correct?

A. Yes, sir.

Q. And you're telling -- and just for everyone's benefit. You tell dispatch this, and they keep a

log of this; is that correct?
A. Yes, sir. Everything that I do, whether I move from one place to another, it would all be logged and kept with my number. And on this, it's actually the CAD printout sheet that's got me and the other deputies separated in different times.
Q. Okay. And so they do that so that, you know, it's a safety issue so everybody knows where you are, correct?
A. Yes, sir.
Q. One of those situations. All right. So 16 -- you said 16:25, correct, when you arrived on scene?
A. Yes, sir.
Q. And when did you leave the scene and head to the -- to the house?
A. I called en route to [redacted] Stevenson Road at 16:27, 4:27 p.m.
Q. 16:27. So you were -- you were there about two minutes?
A. Yes, sir.
Q. All right. And so what time did you actually get to the address at Stevenson Road?
A. 16:33, so 4:33 p.m.
Q. So that's about 16 minutes -- or I'm sorry -- 6 minutes later; is that correct?

A. Yes, sir.
Q. And do you know what time dispatch got the initial call about this wreck?
A. The call came in at 16:18. And the call was created and sent out to -- sent out to us over the radio at 16:20.
Q. So the initial call came in at 16:18. You got the call at 16:20, and then you arrived at 16:25?
A. Yes, sir.
Q. So you arrived about five minutes after you got the call, correct?
A. Yes, sir.
Q. And I know this seems like mundane details, but I appreciate you going through -- through this with us.
A. That's fine.
Q. So you got to the house at 16:33, about 13 minutes after you received the initial call; is that correct?
A. Yes, sir.
Q. All right. So how long were you at that address at [redacted] Stevenson Road?
A. I arrived on scene at 16:34. I advised dispatch that I was heading back to the -- hold on. 16:44 is when I arrived back on the scene.

Q. 16:44 you arrived back at the scene, so that's 4:44. And at this point you -- is Ms. McMahan with you?

A. (No response.)

Q. Is Ms. McMahan with you in the vehicle?

A. Yes.

Q. So by my calculation, that's about 11 minutes?

A. Yes, sir.

Q. Now during this 11 minutes, did you have a conversation with Ms. McMahan?

MR. HENDERSON: Your Honor, I think we need to take up a matter. Maybe I didn't understand his question.

THE COURT: Okay. All right. Repeat your question. Don't answer, Deputy, and see if there still is an objection. Okay.

MR. HENDERSON: Okay. Repeat your question.

MR. BLACK: Did you have a conversation with Ms. McMahan when you arrived at the house?

MR. HENDERSON: Don't have any problems with that question.

THE COURT: Okay. All right. You can answer that question, sir.

THE WITNESS: Okay. Yes.

MR. BLACK: Okay.

THE WITNESS: During that time there was conversation.

BY MR. BLACK:

Q. And what was the -- what was the basis of the conversation?

A. Going there and talking to her, my key point would be to figure out what -- what happened. So during that time would be normally probably trying to get details about what was going on, what was happening, what her side of the story was.

Q. Okay. And while you were having this conversation, did you notice anything about her?

A. Same thing as before, that's going to be the slurred speech, she was very uneasy on her feet, very strong smell of alcohol in terms of the visual notice.

Q. And where did this conversation take place?

A. In her garage, slash, carport, whichever you would call it.

Q. Is that like a -- is it an open concept kind of garage?

A. It is a -- if I remember correctly, it would be the one that's got like a small wall on the outside from the house that does have a roof on it that goes up maybe a couple of stairs into the house.

Q. Okay. So she -- she came outside and y'all had this conversation?
A. Yes, sir.
Q. And did you ask her about her car that was around somewhere on Old Abbeville Highway?
A. I did.
Q. And what was her response?
A. Like I said, Ms. -- she was very nice. There was no argument. There was no -- she was very -- told me everything. She stated to me that she was hungry and that she was wanting to get something to eat. It had been like three days since she had ate. She stated I believe -- I believe that it was an overcorrection is what caused the wreck, but she did tell me that she was driving the vehicle and her goal was to go to Abbeville to get something to eat.
Q. And did you ask her if she had had anything to drink?
A. I -- I did and it was -- she -- she -- she agreed that she did. I cannot tell you exactly what the number she told me at the time it was.
Q. Did she say what she had had to drink, like an alcoholic beverage or something else?
A. An alcoholic beverage.
Q. Did she -- she specify?

A. Not that I can a hundred percent testify to exactly what it was.
Q. Okay. And was there anybody else that you could -- I know -- did you go inside the house?
A. Door frame. So right there at the edge of the door would be as far as I went into the home.
Q. And did you see anybody else in the house?
A. I did not.
Q. Did you hear anybody else in the house?
A. I did not.
Q. Did you ask her to come back to the scene with you?
A. Yes.
Q. And she ultimately did that, correct?
A. Yes, sir.
Q. And I believe your testimony, you got to the house about 16:33, and then y'all got back to the scene at 16:44, which is 4:33 at the house and then back on the scene at 4:44, so about 11 minutes later, correct?
A. Yes, sir.
Q. And at that point, Sergeant Pratt, he was with you. He was kind of in the -- was he in the driveway observing everything?
A. He was -- whether it be where we pulled our

cars in that carport area right there. Me and him both wasn't going to fit through that door, so I was the only one that went farther in. That's when she was going to get her ID for CAD purposes.

Q. Okay. And then y'all ultimately got back to the scene. And at that point, did you meet Trooper Lynch on scene?

A. He was not on scene right when I got there, but he arrived on scene pretty closely after.

Q. And then at that point -- well, let me ask you this: Did you -- did you place her -- did you -- did she come back with you you said?

A. Uh-huh.

Q. You place her in cuffs or anything?

A. No, sir.

Q. Was she in the -- was she in the front seat with you or the back seat with you?

A. She's in the -- she was in the rear seat so she was in the cage of the car, but that is how we transport. I got all my personal belongings and equipment sitting in my front seat and they -- it doesn't matter who it is, that's where I transport.

Q. Is that Abbeville County policy?

A. It's how we do it.

Q. Okay.

A. I don't want to say that it's written, but that's pretty much across the board.
Q. That's what you've been trained to do?
A. Yes, sir.
Q. Okay. So she rode back with you back to the scene?
A. Yes, sir.
Q. And then at that point, once you got back to the scene, you turned everything over to Trooper Lynch; is that correct?
A. Yes, sir. As soon as I -- she got out of my car and started speaking to him, my time in it was done other than observing.
Q. Okay. And y'all ultimately, you and Deputy Pratt, y'all stayed back and waited. Did y'all wait for the vehicle to be towed afterwards, or did y'all at least clear out before then?
A. In a normal case scenario with highway patrol helping out, we would normally do that. I do not know if I stayed there or he was there when the wrecker got there.
Q. Okay. And just so I have these times right, the initial call to dispatch, you said, came in at 16:18, which was 4:18, and you got -- you got the call two minutes later at 16:20?

A. If you want to get even more in depth, 16:18 and 49 seconds is when the call came in, and I was dispatched at 16:20:33.

Q. And you didn't make that initial call, correct? Did -- you didn't make the initial call?

A. The 911 call?

Q. Yeah. You didn't -- you didn't report the wreck?

A. No. It was reported from a third party.

Q. Okay. And then you received a call about a minute and a half later. And then at that point, you responded and you got there about five minutes after that initial call, correct?

A. Yes, sir.

Q. And that would've been 4:25 when you first arrived on scene?

A. I arrived on scene at 16:25.

Q. And then you arrived at her house at 16:33, which is 4:33?

A. Yes, sir.

MR. BLACK: Okay. I think that's all the questions I have. Please answer any questions Mr. Henderson has for you.

CROSS-EXAMINATION

BY MR. HENDERSON:

Q. Hey. Good morning, Deputy. How are you doing?
A. Good morning.
Q. Did you do a full and thorough investigation of this matter?
A. Did I?
Q. Yes.
A. No.
Q. Okay. So you're telling the jury you didn't do a full and thorough investigation?
A. This is going to be a highway patrol call from beginning to end. They work wrecks and also when it comes to the DUI aspect, that would be theirs, as well. My -- my role in it would more or less support. First on scene kind of consequence.
Q. Now, it sounds like you asked my client had she been drinking. Did I -- did I hear that testimony right?
A. Yes, sir.
Q. And I think you said you just don't recollect what type of alcohol she said she was drinking?
A. Yes, sir.
Q. Okay. Did you ask her when she drank that alcohol?
A. I'm sure it came up in conversation, but I can't honestly tell you one way or another.

Q. Did you not take any notes?
A. No, sir.
Q. Okay.
A. Like I said, this is not me going out and investigating for my purposes, just to sit there and try to put it together so that I can give it over.
Q. Now, I'm looking at this CAD detail report that you have in your hands.
A. Yes, sir.
Q. And the call it looks like again came in to 911 at 16:18 and 49 seconds; is that correct?
A. Yes, sir.
Q. That would 4:18 in the afternoon?
A. Yes, sir.
Q. Did you ever ask my client what time she arrived home?
A. In terms of that day after the wreck or ---
Q. Or -- that day, right.
A. I couldn't tell you if I did or didn't.
Q. You just don't know?
A. Don't know.
Q. And you can't tell the jury over here. You don't know how long she'd been home before you got there, do you?
A. Before the wreck? No, sir.

Q. I mean, she could've been there an hour?
A. Could have.
Q. A couple hours? You just don't have a clue?
A. In terms I went from the wreck from the 911 call to what was given to me. I responded to the scene, found her car, and went with that next step.
Q. And you're acting off what 911 tells you?
A. That's where I get all of my information.
Q. Okay. And, again, you can't sit here and tell these 12 ladies and gentlemen what time she was drinking alcohol that day?
A. Like I said, I was not investigating to the point that that would be something I would try to.
Q. Okay. You didn't ask her whether or not she drank all the alcohol before she left home, or did you ask her that after she -- after she got back home? You just didn't ask her, did you?
A. It's not the investigation I was trying to do.
Q. Okay. It sounds like your memory is just somewhat vague of that conversation?
A. It was almost a year ago.
Q. Okay. And you didn't take any notes?
A. I did not.
Q. Okay. When my client answered the door, did she have a drink in her hand?

A. I don't recall.
Q. Just don't recall?
A. Don't recall.
Q. Okay.
A. There's going to be a lot of details over a year ago that I'm not -- I don't want to testify and be wrong to, so...
Q. Okay. But, again, you just don't have any evidence that you can tell this jury, do you, based upon whatever investigation you did that my client was drink -- that my client drove a vehicle after she drank alcohol?
A. Other than her telling me, that's the only thing that I've got that put her even there, is that she was going to Abbeville to get something to eat.
Q. I asked you a different question.
A. Okay.
Q. You testified that she told you she was driving, but you never asked her was she driving after she had consumed alcohol; is that correct?
A. I -- I -- I already answered that.
Q. Okay. You just kind of -- you just don't know?
A. Like I said, when I sit there and talked to her, you're -- you're asking me as if I was investigating for me to charge her with this. That

was not my goal at the time. When I went, I'm just trying to gather all the information for when highway patrol arrives where they can take control of the scene.

Q. Okay. And you never saw my client driving a vehicle?

A. I did not.

Q. Okay.

A. I responded to the wreck scene.

MR. HENDERSON: Okay. If I may have one minute, Your Honor.

THE COURT: Sure.

BY MR. HENDERSON:

Q. Now, when you -- when you were first at the wreck site, when you got the 911 call ---

A. Yes, sir.

Q. --- did you go down and touch the hood of the car?

A. Like I said, little small details I wouldn't remember. The information would've had to been gained on who owned the vehicle.

Q. Okay. So you don't know -- so you don't know how long the car had been there?

A. I do not.

Q. Don't know. Could've been there a day? Do you

have any idea?
A. I can only talk in terms of what people driving down the road, normally somebody's going to call 911 if that's sitting over a long period of time. Wouldn't take very long, in my opinion, for somebody to call. That's purely my opinion.
Q. Well, you know when the 911 call, when dispatch got the call?
A. Yes, sir.
Q. But you just don't have any idea how long the vehicle had been there before that call was made?
A. No, sir.
Q. Don't have a clue?
A. No.
MR. HENDERSON: Okay. One more minute, Your Honor.
I don't have anything further, Your Honor.
THE COURT: Redirect, Solicitor?
MR. BLACK: I think that's all the questions I have. Thank you.
THE COURT: You can step down, sir. You're free to leave the courthouse, or you're welcome to remain with us, either way. I know that you worked last night.
THE WITNESS: Thank you, sir. Y'all have a

good day.

(Witness excused.)

THE COURT: Okay. I think based upon our previous conversation, we need to take a little break for you two to work on something.

MR. HENDERSON: That's correct, Your Honor.

THE COURT: All right. Very good. All right. Madam forelady, ladies and gentlemen of the jury, we're going to take a break. The lawyers need to do something before we proceed forward. I remind you once again, don't have any discussions about anything related to this case.

And when you come back out, madam forelady, if you'll have a seat there. The alternates are still in their right seats. You can sit in the same seat, or you don't have to. That's totally up to the remaining members of the jury. Okay. So if you'll go back to the jury room, please.

(At 10:31 a.m., jury left the courtroom.)

THE COURT: Okay. We'll be in a short recess.

(From 10:31 to 10:58 a.m., recess.)

THE COURT: Ready?

MR. BLACK: I guess there's a couple of things before we have the jury out I think we need to put on the record.

THE COURT: Okay.

MR. BLACK: Mr. Henderson and I went back and looked at the roadside video. And at 14:58, there's -- I think it's maybe 14:52, 14:58, that area. The defendant brings up her prescription meds voluntarily, so I think that takes care of that issue. So any mention of that thereafter I think is allowed to come in ---

THE COURT: Right.

MR. BLACK: --- whether the trooper brings it up or whether the defendant brings it up. I think Mr. Henderson agrees with that.

THE COURT: Mr. Henderson, do you agree that your lady, in fact, did bring it up first?

MR. HENDERSON: Right. Pursuant to your ruling ---

THE COURT: Right.

MR. HENDERSON: --- that's the correct analysis. Obviously, I take exception to your ruling.

THE COURT: Sure.

MR. HENDERSON: And, again, I think that's the final ruling on the matter.

THE COURT: Sure. Right.

MR. HENDERSON: Okay. But, yeah, consistent with your ruling, she brings it up at around 14:54,

so...

THE COURT: Okay. All right. Very good.

MR. BLACK: As far as the roadside video, Your Honor, we've looked at 26:31, 27 -- I'm sorry -- 26:31 through 27:25. And this is viewing it in VLC. We're going to mute that about a minute interaction because there is a back and forth about the field sobriety tests, which we disagree with, but this falls in line with your ruling.

THE COURT: Sure. And I think would it not be a proper thing to do to instruct the jury that there are parts of the video that have been either removed or muted and would just emphasize the fact that we want them to consider what has been admissible evidence. Don't you think that would be proper to give such a curative instruction?

MR. BLACK: I think so just because otherwise they're going to be wondering why I'm jumping up and down and hitting the mute button.

THE COURT: Right. Mr. Henderson, do you agree with that?

MR. HENDERSON: Your Honor, I -- I object to that. I think calling the attention to it is the wrong thing to do. You know, just by muting it out, nobody will ever say a word about it.

And then if they ever ask a question, you know, if they write a question during deliberations, "Why did you mute out some stuff?" then, obviously, you could bring them out here and say, hey, I took out -- you know, there was just some stuff that was inadmissible evidence.

THE COURT: Okay.

MR. HENDERSON: I just don't want to draw attention to it up front.

THE COURT: All right. The -- so the video is going to start essentially when Trooper Lynch places Ms. McMahan under arrest, puts handcuffs on, and then throughout the ride -- well, before the ride, but then the ride to the detention center; is that right?

MR. BLACK: Yes, sir. Starting at 11:20 all the way to the end, with the exception of that one minute that we agree needs to be redacted.

And then there's more redactions on the data master. There are multiple conversations about the test, and I've got those times for Your Honor.

THE COURT: I typically do like to give some curative instruction when -- when there has been a redaction to a video or other piece of evidence and address the fact that there are portions that are

muted, and they are to give that no significance whatsoever. I am going to give such a basic curative instruction. Your position is noted on the record.

MR. HENDERSON: Thank you, Your Honor.

MR. BLACK: And, Your Honor, the redactions on the data master are 5:33:05 to 5:33:15, talking about the ink pen, the HGN test; 5:33:32 through 5:33:43; also 5:40:02 to 5:40:25.

THE COURT: Okay.

MR. BLACK: And we've agreed on those.

THE COURT: Is that a correct statement, Mr. Henderson?

MR. HENDERSON: That's correct, Your Honor. We've watched all of them.

THE COURT: Very good. Well, I appreciate it very much that both of you have been able to come to an agreement and not have it left to the Court as far as what to redact or mute, so I do appreciate that for the record.

MR. BLACK: You may have spoke too soon. We do have one issue that we do have an exception with, Your Honor, and that's -- it's 5:32:01 until 5:32:10. And I've actually got -- I'll pass both -- both of these implied consent rights. I plan on

putting these into evidence, and Mr. Henderson is wanting one particular phrase redacted. And it's the phrase that says that "you have the right to have a qualified person of your own choosing conduct additional independent tests at your own expense and the officer upon request shall provide you affirmative assistance."

Mr. Henderson believes that's burden shifting and is asking that that be eliminated. I don't feel that that's burden shifting. I think it's part of the implied consent rights. Obviously, the legislature is comprised of mostly lawyers, and they agree to it. I just feel like that's the standard implied consent and feel that this should just be put in without any kind of redaction made to the implied consent.

THE COURT: Okay. Mr. Henderson.

MR. HENDERSON: Your Honor, it only becomes burden shifting when you get to the courtroom. It's basically telling my client or any other accused in the data master room that they have a right to go out and get evidence on their own behalf. And, again, she -- we're not trying to put up any evidence that she went out and got any evidence on her own behalf.

So I don't want the jury to take the wrong inference that, hey, she had the opportunity to go clear her name, and she didn't. And that -- that's -- that's my concern. I always like to get that redacted. I think *State v. Henderson* is the case. I do not have a copy of it with me, but I know it's easily found.

THE COURT: Okay. Let me take a look at that case then. Do you know about how old the case is roughly?

MR. HENDERSON: I'm guessing 15 years. And I can't remember if it's Court of Appeals or Supreme Court.

(Brief recess.)

THE COURT: All right. We're back on the record. This Henderson case is 347 S.C. 455. It is 2001 case. While the posture of the case is a little bit different than ours, but I think this case probably would -- would benefit the -- the defendant. And I'm going to allow the -- that one little portion in the implied consent document to be redacted.

Solicitor, I'll be glad for you to take a look at this case. And, again, the posture is a little bit different, but I view it that way.

MR. BLACK: Okay. I understand your ruling.

THE COURT: All right. Very good.

MR. BLACK: So I will mark the implied consent that Mr. Henderson has provided with the redaction, and we'll just admit that as evidence. And then we'll also delete it or we'll mute that, as well.

THE COURT: All right. Very good. All right. We ready for the jury now?

MR. BLACK: Yes, sir.

THE COURT: All right. Let's bring the jury out, please.

THE BAILIFF: (Complying.)

(At 11:10 a.m., jury entered the courtroom.)

THE COURT: Let the record reflect the jury is back in. Solicitor, you may proceed, sir.

MR. BLACK: Your Honor, the State calls Brent Lynch to the stand.

THE COURT: Okay.

THE WITNESS: (Approaching.)

THE CLERK: The evidence you're about to give the Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, it is.

TROOPER BRENT LYNCH,

having been produced and first duly sworn as a

witness on behalf of the State, testified as follows:

DIRECT EXAMINATION

BY MR. BLACK:

Q. Trooper Lynch, can you introduce yourself to the jury, please?

A. My name is Trooper Brent Lynch. I've been with the Highway Patrol since January of 2011. That's when I started my law enforcement career and currently I'm the rank of corporal.

Q. You still work with the highway patrol obviously?

A. Yes, sir.

Q. Were you working September the 28th of last year?

A. Yes, sir, I was.

Q. Okay. And did you receive a call to a wreck here in Abbeville County?

A. Yes, sir, I did.

Q. All right. And your vehicle that you have, is it outfitted with a dash cam video?

A. Yes, sir, it is.

Q. And was your -- was your video playing that day when you arrived on scene?

A. Yes, sir. As soon as I hit my blue lights, my

video automatically starts up. It actually backs up 30 seconds.

Q. And that's how your car video system operates; is that right?

A. Yes, sir. Every time I hit it.

Q. Do you remember what time you arrived on scene?

A. I arrived at 16:51, 4:51 p.m.

Q. Okay. Do you know what time the -- the call came out?

A. The call came out to the highway patrol dispatch at 16:22, would be 4:22 p.m.

Q. And so I guess doing a little math, that would be about 30 minutes by the time you got there to that scene?

A. Close to it. Yes, sir.

Q. All right. And when you -- your shift that day, were you working -- were you working dayshift at that point?

A. I was on it. I actually think I had training because some of the other people in the video, I usually don't work with. I'm usually on nights when they're on days, so I think there was -- I think I had training or something that day. I don't know my exact shift, but I -- I've had -- conducted my training, completed it, and then I came back out to

work the road for a little bit.

Q. And so you've arrived at 4:51 p.m.?

A. Yes, sir.

Q. And on September the 28th, would that have been in the daytime?

A. Yes, sir.

Q. Still relatively warm outside?

A. Yes, sir, it was.

Q. Was it raining or anything that you remember?

A. No. Clear sky -- clear blue skies.

Q. And I marked State's No. 2 and it's actually in the DVD player. That's a picture of your dash cam when you're first arriving; is that correct?

A. Yes, sir, it is.

Q. Okay. Can you describe for the jury what you're seeing there?

A. Yes. It's basically the Toyota that's down the embankment right there to the right. You can see the front end. It was traveling north on Old Abbeville Highway. It dropped off roadside right. I don't even think -- you may be able to catch a little bit of the black mark there on the left corner above my hood. It lost control, came back in the roadway, spun around back down the embankment like this.

Q. So the way you're looking at the vehicle, is the car -- looks like the car and the windshield's facing up towards the road; is that right?
A. That is correct.
Q. And that's based on how the overcorrection happened?
A. Yes, sir. She was -- the vehicle was originally going in the same direction as my vehicle is pointed right now.
Q. And with the highway patrol, you -- you -- you go to different classes and you have to do certifications; is that right?
A. Yes, sir.
Q. And you've done like an accident reconstruction kind of class; is that ---
A. I've had the at-scene investigation, yes. It is two weeks I think approximately. Well, about a week course there to where they take us out in the field and do different scenarios and they do different collisions.
Q. Okay. And that's part of your responsibilities as the highway patrol?
A. Yes, sir, it is.
Q. You were -- you often times respond to wrecks and help clear them up and do an investigation; is

that right?
A. Yes. A lot.
Q. Okay. And so this was -- this was no different, correct?
A. Right.
Q. Was it -- and this was a single car; is that right?
A. It was.
Q. There were no other cars involved in this?
A. No, sir. No other cars.
Q. And you're -- you're a certified law enforcement officer, correct?
A. That I am.
Q. Went to the criminal justice academy and got your certifications?
A. Yes, sir.
Q. When did you do that? You said '11?
A. Yes, sir. I think the graduation from criminal justice -- I had a highway patrol graduation and a criminal justice graduation. I graduated highway patrol in -- on May the 20th, and then criminal justice would've been about eight weeks. Somewhere around the first part of April I think. Somewhere in there.
Q. You've been doing it ever since?

A. Ever since.
Q. Okay. All right. When you got to the scene, you said there were other deputies and other troopers as well that were kind of there assisting; is that correct?
A. The Abbeville County deputies were there and Trooper -- the other Trooper Prince, he showed up after.
Q. After?
A. A little later after the investigation, towards the end of the investigation. That's -- that's why I know I never -- I trained with Prince, but once I trained him, he was cut loose to my sister shift to where he worked days when I work nights. So that's why I say I know I was out earlier or something was a little odd with this shift that day.
Q. Okay. But when you first got there, there were Abbeville County deputies there, correct?
A. Yes, sir, there were.
Q. And Deputy Scott's car was actually positioned in front of your vehicle, correct?
A. That is correct.
Q. And when you got there, Ms. McMahan was with Deputy Scott; is that -- is that correct?
A. Yes, she was.

Q. And then when you got there, did you -- did you talk with other officers -- without saying what they said or anything. I know there's already been testimony, but did you confer with deputies to kind of figure out what's going on?

A. Yes, I did.

Q. A brief con -- just a brief conversation figuring out, hey, this is what we got, this is what we're doing?

A. Yes.

Q. And that's -- is that standard?

A. Absolutely. A lot of times we cover Greenwood and Abbeville. Sometimes our response time -- actually, most of the time -- is a little bit longer than the deputies. So, usually, they're the first ones on the scene. Therefore, when we show up, that's usually the first person I look for to give me a little quick briefing, and then I talk to subjects involved in the collision.

Q. Okay. In this case, you did conduct a brief investigation of this, correct?

A. Absolutely.

Q. And what did you -- did you -- did you make contact with Ms. McMahan?

A. I did.

Q. And is she sitting here in the courtroom?
A. Yes, sir, she is.
Q. And can you point her out very quickly?
A. Right beside Mr. Henderson there.
Q. Okay.
A. Sitting in the middle.
Q. And what -- what did you notice about her when you first made contact with her?
A. A strong odor of alcoholic beverage. Getting out of the car, I noticed she needed some help, unsteady on her feet and propping on the car is what we call it. Slurred speech. Kind of thick tongued, almost deliberate trying to think about words as she's trying to put them together and trying to process.
Q. Okay. And, ultimately, after your brief investigation, you did place her under arrest for driving under the influence?
A. Absolutely.
Q. And you -- you ultimately read her her Miranda rights; is that right?
A. Yes, sir, I did.
Q. And that's standard, correct?
A. Yes, sir, it is. In front of the vehicle.
Q. And that's -- that's actually on this video,

correct?

A. Yes, sir, it is.

Q. And what are those rights? I'm sure we've all heard them before, but can you just over them, please?

A. You have the right to remain silent. Anything she says can and will be used against her in a court of law. She has the right to have an attorney present with her while she's being questioned. If she cannot afford to hire an attorney, one will be appointed to represent her at no cost. She can decide at any time to exercise those rights and not answer any questions or make any statements. Then I confirm that she understood those rights. And having those rights in mind, does she wish to speak with me.

Q. Okay. And that's something you do any time you place anybody under arrest?

A. Yes, sir.

MR. BLACK: Your Honor, at this point the State moves Number 2, which is the Trooper's dash cam video into evidence, and we wish to publish that to the jury.

THE COURT: Okay. To my knowledge, it's already on the record.

MR. HENDERSON: Absolutely, Your Honor. No objection, subject to that.

THE COURT: Right. And, ladies and gentlemen of the jury, it's my understanding there will be portions of the video where the sound has or will be muted. You are to place no significance whatsoever to the fact that portions have been muted as it relates to the audio.

MR. BLACK: And, Your Honor, this was acting up on me earlier. I might have to exit out of it, but I'm going to try it without.

THE COURT: Okay. If you need -- if you need some time, we'll certainly give you whatever time you need.

MR. BLACK: Yes, sir. Thank you.

(Playing video.)

BY MR. BLACK:

Q. Trooper Lynch, this was your in-car video?

A. Yes, sir, it was.

MR. BLACK: Your Honor, I think the State's already moved Number 2 into evidence. I just want to make sure that that's the case.

THE COURT: Okay. Subject to what is on the record, Number 2 into evidence for the State.

(State's Exhibit No. 2 was received into

evidence.)

BY MR. BLACK:

Q. Trooper Lynch, at the very end of the video, y'all pulled into the Abbeville Detention Center; is that correct?

A. Yes, sir. That's correct.

Q. And -- and looks like there's a hatch that goes down. You -- your car actually goes into the detention center; is that correct?

A. Yes, sir. They've got a roll-up garage door on the front and the back where you pull straight through.

Q. And that video basically showed the time you got on the scene and then Miranda and Miranda forward, the time you placed her under arrest, correct?

A. That is correct.

Q. Okay. And you ultimately placed her under arrest based on your observation; is that correct?

A. Absolutely.

Q. And based on what you gleaned from the other deputies involved?

A. Yes.

Q. And also your brief investigation that you did, as well?

A. Yes, sir.
Q. And I noticed that you were wearing your sunglasses for the most part ---
A. Yes, sir.
Q. --- is that correct?
A. Yes, sir.
Q. Still daylight?
A. Absolutely.
Q. Sunny, clear skies?
A. Yes, sir.
Q. And that roadway, were there a lot of vehicles that were going past the roadway?
A. I'd say a moderate amount. It wasn't like SC-72, but Old Abbeville Highway is a pretty well-known cut through road. There's a moderate amount of traffic on that.
Q. But it's relatively wide open?
A. Yes.
Q. And on the video, she -- she did call you mean; is that right?
A. She did what?
Q. She called you mean?
A. Yes.
Q. She also mentioned her medication; is that right?

A. That is correct.
Q. And she told you what that was, correct?
A. Yes.
Q. And based on your -- your training and experience, you've learned about different types of drugs, whether it be elicit drugs or prescription medicine; is that right?
A. Yes, sir. I'm actually 1 of 130 DREs in this state, drug recognition experts.
MR. HENDERSON: Your Honor, I'm going to object to some of this.
THE COURT: Are you going further with this?
MR. BLACK: I'm not -- I'm not qualifying him as an expert.
THE COURT: Right. Are you getting him to render some opinions along these lines?
MR. BLACK: No, sir. Maybe we need to have a brief sidebar.
(Sidebar discussion.)
BY MR. BLACK:
Q. Trooper Lynch, as part of your training that you've done and part of the highway patrol, you have taken classes about drugs and how they affect people; is that correct?
A. Absolutely.

Q. Okay. And that's prescription medication and/or elicit drugs?
A. Yes, sir.
Q. All right. So when you got to the -- to the detention center, where did you take Ms. McMahan?
A. They have a little separate room for the data master room. You go through the first door before you go through a second door, it's the holding facility, there's a door to the right. It is actually labeled "data master." And I escorted her into that room.
Q. And for those of us that may not be aware, what is the data master room and what's in there?
A. The data master room is actually where we -- it's a separated room where we have two data master machines inside the one in Abbeville, and I think there's only one now, but's it's where you take your subject and they provide you with a breath sample for the results of the BA.
Q. And is that also on video?
A. Yes, sir, it is.
Q. And as part of that, do you check the mouth to make sure nothing's in the mouth?
A. Yes, sir.
Q. And you did that here?

A. Yes, sir.
Q. And you give the person a copy of what they call "implied consent rights"?
A. Yes, sir.
Q. You also read that out load to them?
A. I do.
Q. Okay. And the data master machine, is it -- what -- is it like a computer machine? How is that?
A. It's got a keyboard and you also got a screen behind you. Well, Abbeville is actually to the side. You got a lock behind you where you hit the button to the door. You've got a keyboard type-in and it just holds my information with her information. It's small questions about the incident like, was there a collision? Was this, you know, wreck a result of the collision? And if so, how many injuries? Things like that.
Q. And so after you get done with the test, it'll printout a ticket with a lot of that information on there?
A. Yes, sir.
Q. Okay. And in this particular case, did the defendant give a breath sample?
A. She did.
Q. Okay. And there's a 20-minute waiting period

by the time you start the machine and by the time she's actually eligible to give a breath sample; is that correct?

A. That is absolutely correct.

Q. And why is that?

A. That's to let any residual alcohol dissipate in the mouth, so that voids a true blood alcohol level from -- a breath alcohol level from her lungs and nothing in her mouth that would add to that level. It's actually where she's at in her body.

Q. And at this point, are they allowed to eat anything or drink anything or anything like that?

A. No, sir. Nothing in the mouth. You can't even bite your fingernails.

Q. And you're -- and you're watching and observing this the whole time?

A. I am.

MR. BLACK: And I'm going to approach the witness, Your Honor.

THE COURT: Certainly.

BY MR. BLACK:

Q. I'm showing you what's been marked as State's No. 1. Can you identify that?

A. It should be the breath site video of Ms. McHahan from September 28th.

Q. And have you had a chance to look at that?
A. I have briefly.
Q. Okay. And you were there during this, correct?
A. Yes, I was.
MR. BLACK: Your Honor, the State moves Number 1 into evidence.
THE COURT: All right. Subject to what is noted on the record, any further objection?
MR. HENDERSON: Right. Any prior objection, true, Your Honor.
THE COURT: So admitted into evidence as State's No. 1.
MR. BLACK: Thank you.
(State's Exhibit No. 1 was received into evidence.)
BY MR. BLACK:
Q. And, Trooper Lynch, were you -- are you certified to operate the data master machine?
A. Yes, sir, I am.
Q. Is that a separate training?
A. It is. It's -- if I'm not mistaken, it's a three-day class. I took it back in 2011. That was part of the eight-week curriculum that we received there.
Q. And how long does that certification last?

A. I think it's every two years. Yeah, that would be -- that would be correct. Yeah, I think it's every two years.
Q. This one actually expired yesterday. Are you certified again?
A. I am.
Q. You took the class recently again?
A. Yes. I took it -- I think it was June 25th and submitted that test. I'm just waiting for them. It takes them up to 30 days to get an updated certificate, but I took the course, passed the test no issues.
Q. So do you have to go back somewhere to take the test, or is it just an online test?
A. Once you go through the initial three-day class, then you just have to do the online course. It's a few hours worth of videos and a test at the end.
Q. And State's No. 3 is a copy of your certificate that you were able to operate the data master machine at that time?
A. That is correct.
Q. And it expired yesterday, that one did?
A. That is correct.
Q. But right now, you're saying you're still

eligible to operate it?

A. Absolutely.

MR. BLACK: Okay. Your Honor, the State moves Number 3 into evidence.

THE COURT: All right. Mr. Henderson?

MR. HENDERSON: Without objection.

THE COURT: Without objection, Number 3 comes in.

(State's Exhibit No. 3 was received into evidence.)

BY MR. BLACK:

Q. And State's No. 5, can you tell us what this is?

A. That would be the implied consent rights that I filled out, and this would a copy of the subject's copy that I read out loud. This is the copy that I provided her and read my other copy to her.

Q. And she -- and she signed that at the bottom once -- once it was all over?

A. The other copy she did, the subject copy.

Q. Okay. But she ultimately did sign that?

A. Yes, she did.

Q. And did you sign that one, as well?

A. Yes, I did.

MR. BLACK: Your Honor, the State moves Number

5 into evidence.

MR. HENDERSON: No objection.

THE COURT: All right. With no objection, five for the State.

(State's Exhibit No. 5 was received into evidence.)

MR. BLACK: And, Your Honor, at this point, the State moves -- wishes to publish State's No. 1 for the jury.

THE COURT: Okay.

(Playing videotape.)

BY MR. BLACK:

Q. Trooper Lynch, the video that we just watched, that was the video in the data master room and the breath site video?

A. Yes, sir.

Q. The computer, the data master machine, at the very outset of the video, you were keying it up; is that correct?

A. Yes.

Q. You were getting it started, all that?

A. Yes.

Q. If it's not working, what -- what happens?

A. It'll shut down. There's multiple errors it can have. It'll shut down or continue on, just

depends, but we may have to retest if that's case. And -- but it just verifies it's working properly. If not, we'll have to make another arrangement.

Q. So if it's not working, it won't even let you ---

A. Right.

Q. --- provide a sample?

A. No, it won't. It'll -- you'll either have to retest that machine or jump over to a separate machine. If there's something that pops up again, I usually give it one other shot before I switch over to a different machine.

Q. Did any of that happen here?

A. No, sir.

Q. This machine was working properly?

A. Yes, it was.

Q. And then when it got done after the machine provided the sample, does it printout like a ticket of sort that has the result?

A. Yes, sir.

Q. Okay. That's been marked as State's No. 4; is that correct?

A. Yes, sir.

Q. And does it provide the result that she had?

A. It does.

Q. And what was that result again?
A. .18.
Q. And she signed it?
A. Yes, she did.
Q. And you signed it?
A. Yes, I did.
Q. And dated it?
A. Yes, I did.
Q. And the time?
A. Yes.
Q. What time was it?
A. It was 6:02 p.m. when she put the time.
MR. BLACK: Okay. Your Honor, the State moves Number 4 into evidence.
THE COURT: Any additional objections, other than what's already noted?
MR. HENDERSON: No, sir.
THE COURT: All right. Number 4 into evidence for the State.
(State's Exhibit No. 4 was received into evidence.)
BY MR. BLACK:
Q. And, Trooper Lynch, as part of your training as part of the highway patrol, you're instructed different traffic laws, correct?

A. Yes.
Q. And how -- how DUIs work. You understand the laws for that?
A. Yes, sir.
Q. And you were trained and you understand how DUI law works here?
A. Yes.
Q. And this was 2018. You said you've been working the road for -- since 2011; is that right?
A. That's correct.
Q. So this wasn't your first arrest?
A. Absolutely not.
Q. Not for a DUI?
A. No, sir.
Q. And you've made multiple arrests?
A. Yes, sir.
Q. Okay. And you -- you said something about an inference level. You said something about being twice the inference level?
A. Yes, sir.
Q. What -- what is that?
A. The inference level is .08.
Q. Okay. Do you know what that -- know what that means?
A. It means that you're actually impaired too much

to be driving. Considered under the influence at that time.

Q. And that's guided by -- is that guided by statute?

A. Yes.

Q. Okay. She admitted between the two videos that she had had alcohol to drink?

A. Yes, sir.

Q. She admitted that she had been taking her -- her medication?

A. Yes, sir.

Q. And what medication was that?

A. She mentioned Valium and a couple of others. I think one was Wellbutrin maybe. There was another anxiety medicine, but most anxiety. I know for a fact that Valium was also another central nervous medicine.

Q. Okay. And she -- she admitted to taking those?

A. She did.

Q. As -- as prescribed, but still taking them?

A. Absolutely.

Q. And you noticed on the video, she was slurring her words during the course of y'all's conversation?

A. Yes, sir.

Q. That occurred throughout the videos?

A. Yes, sir.
Q. And did you -- did the smell of alcohol when you first made contact during that, did that linger throughout the process that y'all were with her -- that you were with her?
A. The entire time. From the first time I smelt it, I was approximately 4 or 5 feet away from her when I first picked up the odor of alcohol.
Q. And was it coming off her clothes or her breath or could you tell?
A. I -- it seemed to get stronger as she talked. So when I was standing away from her, and she tried to talk, it seemed like it was coming off of her as she spoke.
Q. And that's based on your training and experience in dealing with these types of things?
A. Yes, sir.
MR. BLACK: I think that's all the questions I have. Please answer any questions Mr. Henderson might have at this time.
THE COURT: Cross-examination?
MR. HENDERSON: Yes, sir.

CROSS-EXAMINATION

BY MR. HENDERSON:
Q. Trooper, how are you today, sir?

A. Good, sir.
Q. Do you remember the video, your trooper video, that was on the screen when you started testifying? It was a still image.
A. My what video?
Q. Of you in-car video, your trooper video.
A. The still image? Yes, sir.
Q. Right. It was stopped. I believe it was at .40 seconds?
A. Sure.
Q. And, you know, you're -- you're parked. You're looking forward, and there's a car over there pointing towards you?
A. That is correct.
Q. And, again, it's off the road?
A. It is.
Q. But is it fair to say, did -- let me ask you, did ever touch the hood of the car?
A. No.
Q. Okay. Now is it fair to say -- again -- I'm just pretending that still shot is still on the screen there, but I think the jury should remember it -- that in order to look at the tag, to get the tag number, you're going to have to walk down the hill and go behind the car; is that fair to say?

A. Yes, sir.
Q. Okay. And is it fair to say too that -- say it was you going down there to get the tag number. I know it wasn't ---
A. Okay.
Q. --- but let's assume it was you. If you'd walked down there, would you probably put your hand on the hood?
A. Possibly.
Q. Possibly? Okay.
A. Never can tell.
Q. Okay. But, again, you didn't touch that?
A. I did not.
Q. And, again, you know, this was a -- I think it looked like a sunny day. You testified it was a sunny day?
A. Yes, sir.
Q. The sun was shining?
A. Yes.
Q. So that ain't the -- the car had been recently driven. Is it fair to say the hood would probably be hot?
A. Yes, sir.
Q. Okay. But you didn't touch the hood?
A. I did not.

Q. Okay. And you didn't never see my client driving, did you?
A. No, sir.
Q. Okay. Do you have any idea or do you know of your own knowledge when this accident occurred? What time?
A. Yeah. I actually, on my collision report, I put 16:17, which basically is -- I usually take five minutes or so from the time I was notified and our dispatch was notified. The reason why I put that, it may be a couple minutes off. The reason why I put that is, when my dispatch notified me of it, they had also informed me that the person that called in the collision had picked up Ms. McMahan, the driver.
MR. HENDERSON: Object to that. Object to that, Your Honor.
THE COURT: Well, he -- you asked the question. He's entitled to -- to answer it.
MR. HENDERSON: He's -- he's going -- he's not answering the question and going into stuff.
THE COURT: Repeat the question that you -- that you asked then.
BY MR. HENDERSON:
Q. Of your independent knowledge -- of your

independent knowledge, do you know what time the wreck occurred, of your independent knowledge?

A. My independent knowledge would be what I'm provided by my dispatch of the wreck.

Q. That's not independent knowledge. Of your own independent knowledge?

A. I mean, I wouldn't even know there was a wreck occurred if I didn't ---

Q. Bingo. So you don't know of your own -- is it fair to say of your own independent knowledge, you don't know what time the wreck occurred, of your independent knowledge? You didn't see it, did you?

A. No.

Q. Okay. Do you know of your own independent knowledge what time Ms. McMahan had anything to drink that day?

A. Not the exact time. No.

Q. You don't have any idea?

A. No.

Q. Y'all never had that discussion, the exact time discussion?

A. She just said earlier.

Q. Okay. And earlier means a lot of things, doesn't it?

A. Could be.

Q. I mean, earlier is earlier?
A. She -- I think at one point she said, "Before I drank."
Q. Okay. Where was that on the tape that we just watched?
A. I don't know which part it was on that.
MR. HENDERSON: Okay. Let me have one minute.
THE COURT: Sure.
MR. HENDERSON: I don't have anything further, Your Honor.
THE COURT: Any redirect, Solicitor?
MR. BLACK: Yes, sir. Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. BLACK:
Q. You first got the call at what time, you said?
A. I was notified at 16:22. That would be 4:22 p.m.
Q. And that's from your dispatch, correct?
A. Yes. That was my dispatch that contacted me. I do not operate with the same dispatch that Abbeville County does. Our dispatch is stationed in Greenville, South Carolina.
Q. And that's how -- that's for the highway patrol?
A. Highway patrol only. And they handle the

upstate highway patrol out of that facility.

Q. Okay. And your dispatch, you said, received information. What time was this third-party call?

A. They received the information through Abbeville County dispatch, and they had told that the person that called in the collision was also -- also picked Ms. McMahan up.

MR. HENDERSON: Objection.

THE COURT: You can testify as to when the call was received by dispatch, but not the nature of the call.

MR. HENDERSON: Correct. No problem with that, Your Honor.

MR. BLACK: I think Mr. Henderson has opened the door to this ---

MR. HENDERSON: No. He didn't answer the question I asked him.

THE COURT: Y'all come on over here.

(Sidebar discussion.)

BY MR. BLACK:

Q. And just to reiterate, Trooper Lynch. Just specifically, your dispatch, your highway patrol dispatch out of Greenville, notified you at 4:22, 16:22?

A. That is correct.

Q. Okay. And they received information from Abbeville County dispatch, which is actually over there at the administrative complex, correct?
A. That is correct.
Q. They got that at 16 -- or I'm sorry -- 4:20, correct?
A. I don't have that exact time. That would be probably Abbeville's CAD number. They -- they let me know what time they notified me.
Q. But you were out here when ---
A. Yes.
Q. --- Deputy Scott was our here and he testified to that?
A. Yes. That's correct.
Q. And they received -- that dispatch actually had received a call from a third party at 16:18:49, which is 4:18:49?
A. That is correct.
MR. BLACK: Okay. Thank you.
THE COURT: Okay. You can step down, Trooper. Thank you.
THE WITNESS: Thank you, sir.
(Witness excused.)
THE COURT: Solicitor.
MR. BLACK: State rests, Your Honor.

THE COURT: Okay. All right. Ladies and gentlemen, what I want you to -- we'll be breaking for lunch here shortly, but I want you to go back to the jury room for just a few minutes. Let me talk with the lawyers and see if -- kind of get an idea as far as when we need to resume back after lunch. So if you'd just go back to the jury room for a few minutes. Again, I remind you, no discussions about this case, and we'll get you back out here in just a little bit.

(At 12:42 p.m., jury left the courtroom.)

THE COURT: Okay. Mr. Henderson, do you have any motions you'd like to place on the record at this time?

MR. HENDERSON: Absolutely, Your Honor. And I'd ask that the Court grant a directed verdict based upon the State's failure to present insufficient evidence -- or sufficient evidence of corpus delecti of DUI.

Your Honor, you've got an admission of driving. We don't know when the driving occurred. You've got an admission of driving.

You've got an admission of drinking. You don't know when the drinking occurred at all. That's for starters. Again, when the deputy -- and, again, I

believe Trooper Lynch never offered any testimony on this either. They have no idea what time my client had anything to drink alcoholic at all. She said earlier in the day. And then that's what the evidence is. I mean, earlier is earlier. It could be plenty of hours. There is no evidence.

And I heard Trooper Lynch say somewhere on this video that she admitted to drinking before driving, at least on the portion that was played. That's not into evidence. I don't remember that being on the portion of the video that got played to the jury. That may very well have been on the redacted expressed portion of the video, but I don't think it was in the portion that went before the jury. So there entirely, we don't know when the driving occurred.

Don't even know when the wreck occurred. Just because somebody calls in that there is a wreck is knowing the Trooper Lynch tried to say, oh, it's about five minutes before the call. You saw this picture over here, as well. This car is buried off the road. It blends in with the bushes. There's no testimony about the car hood being hot. It could've been sitting there who knows how long.

And then you start looking at the corpus

delecti cases too, especially these wreck cases where they find the person at the scene of the wreck. That wasn't the case here. My client was not found at the scene of the wreck.

They also talk about in a lot of these corpus delict cases failing field sobriety tests. There's no evidence of any field sobriety tests before the jury.

You know, as Trooper Lynch testified and I think the deputies testified too, unsteady on the feet, slurring words, smell like alcohol, but, again, in and of itself, that's not indicia of having driven a car or any type of vehicle after you have consumed alcohol.

Your Honor, I just -- I'm just not sure there's any combination of direct and substantial circumstantial evidence over and beyond my client's admission of driving this vehicle that would support this going to the jury, because otherwise it's going to be speculation that my client was driving this vehicle after having consumed any alcoholic beverages.

And, again, I think that's part of what the corpus delecti rule is to cut out, is speculation and guessing about what happened. I think I --

hopefully, I've covered this issue, but, again, I don't think the State has put up sufficient direct or substantial circumstantial evidence to get them over the hump.

THE COURT: Okay. Thank you. Solicitor, anything you'd like to place on the record?

MR. BLACK: Yes, sir. I think this primarily comes down to a -- to a fact -- factual issue that the jury is going to be left to deliberate with. Obviously, there was some stuff that had been suppressed that Your Honor ruled on prior to us getting this case, but I think the evidence -- she -- she admitted multiple times that she'd made a mistake. She told Deputy Scott that she -- she had been operating the vehicle. That was testified to and passed on to Trooper Lynch. She admitted multiple times on the video, whether it be in the car and also on the breath site video, that she made a mistake.

She did say in the breath site video I believe around minute 21 if you're viewing it in BLC, not the time stamp at the top, she did drink beer and she had been taking her medication. And I think the fact that a third party makes the call in at 16:18 or 16:16, 16:18, whatever it was, and then dispatch

is notifying the deputies and the highway patrol just shortly thereafter, I think the jury -- I think they can make the assumption that, you know, somebody just didn't pick somebody up or whatever -- whatever the case may be and then wait a couple of hours and then call dispatch. That it could be done, you know, relatively -- it would be done relatively quickly.

Judge, there was also ample -- there was a discussion on the video about Ms. McMahan saying that she had Trooper Lynch's hair on her. Trooper Lynch says, "No. Those are weeds, ma'am," then she starts talking about how she doesn't have any weed. He wasn't referring to marijuana. He was referring to the brush that was all over her body. And I think that -- with her -- the way her car was positioned in the vid -- in the video, down the embankment, she obviously had to climb out to get up -- get out of the vehicle. She would've gotten some debris and some weeds on her, and it was still evidenced by Trooper Lynch in the data master room.

So I think considering everything, considering her statements, how quick the -- quick response time of law enforcement, I think that there is sufficient evidence to go forward, and we ask to submit this

case to the jury.

THE COURT: Okay. Viewing the evidence in the light most favorable to the State, the Court's concerned with the -- if there is the existence of any evidence, not with the weight. And I find that there is sufficient evidence to send this case to the jury. The defense motion for a directed verdict is respectfully denied.

Mr. Henderson, if you'd take a moment to explain to your client what I need to do next concerning instructing her about testifying or not testifying.

MR. HENDERSON: Your Honor, we've discussed that, and I'd like for you to probably go ahead.

THE COURT: I have to.

MR. HENDERSON: Right.

THE COURT: And then if you make a decision, then you can -- she can let me know. If you haven't quite made the decision yet, you can let me know after we break for lunch.

MR. HENDERSON: Okay.

THE COURT: Ms. McMahan, I need for you to stand, please, ma'am, and I need to have you sworn in.

THE CLERK: Raise your right hand.

THE DEFENDANT: (Complying.)

THE CLERK: The evidence you're about the Court will be the truth, the whole truth, and nothing but the truth?

THE DEFENDANT: Yes.

THE COURT: All right. Ms. McMahan, I'm going to explain to you certain of your rights. If you do not understand anything that I say, please let me know that. If you want me to explain anything in more detail, then let me know that as well. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. We've now reached the stage of the trial where you may present your defense. You have the right to proclaim the protections given to you by the Fifth Amendment to the Constitution of the United States. And this amendment states in part "no person shall be compelled in any criminal case to be a witness against himself." This means that you cannot be required to testify in this case. You have the right to testify on your own behalf, however, no one can make you testify. This is a personal right and no one can waive this right except you, ma'am.

If you decide to testify, you'll be subject to

the same rules that govern other witnesses and you may be examined and cross-examined on any relevant issue in this case.

In addition, if you have any convictions involving dishonesty or false statement for crimes punishable by imprisonment for more than one year and this Court determines that the probative value of admitting this evidence outweighs the prejudicial effect, the Solicitor would be able to introduce your record to attack your credibility.

If you decide to testify, this decision on your part must be freely, voluntarily, and intelligently made with knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify.

If you decide not to testify, this decision also must be freely, voluntarily, and intelligently made by you. And if you decide not to testify, I will specifically instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever and that there's to be absolutely no prejudice to you because you did not testify.

It's left entirely up to you whether or not you testify. Certainly -- and I'm sure you already have

talked with your attorney, any family members, friends, anyone else, but the final decision is left entirely up to you.

Have you understood what I've explained to you, ma'am?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you have any questions about what I've explained to you?

THE DEFENDANT: No, sir.

THE COURT: Okay. Are you in a position now to tell me whether or not you'll testify?

THE DEFENDANT: No, sir.

THE COURT: You need to talk to Mr. Henderson more?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. We're going to take a break for lunch. And then after we come back from lunch, then you can let mow know. Okay?

THE DEFENDANT: Okay. Thank you.

THE COURT: Okay. Thank you.

All right. Let's bring the -- bring the jury out, and we'll go ahead and take a break after we excuse them.

THE BAILIFF: (Complying.)

(At 12:53 p.m., jury entered the courtroom.)

THE COURT: Let the record reflect the jury is back in.

Madam forelady and ladies and gentlemen of the jury, we're going to break for lunch at this time. If you'll be back here at 2:15. Hopefully, that will give you enough time to get you a bite to eat. I'll remind you once again not to have any discussions about this case among yourselves or anybody that you come in contact with over the lunch break. Certainly, no research into this case, and we'll see you back at 2:15. Have a good lunch.

(At 12:53 p.m., jury excused for lunch recess.)

THE COURT: Okay. We'll be in recess until 2:15. We've got a draft charge, and Grayson's going to e-mail that to you in just a minute to give you something to look at.

MR. HENDERSON: Sounds good. Thank you.

THE COURT: Okay. Thank you.

(From 12:54 to 2:32 p.m., lunch recess.)

THE COURT: Okay. We are back on the record in the *State v. Sherry McMahan*.

Ms. McMahan, if you'd please stand.

THE DEFENDANT: (Complying.)

THE COURT: And have you now made a decision whether or not you will testify?

THE DEFENDANT: I'm not going to.

THE COURT: Okay. And that decision not to testify, has that been freely, voluntarily, and intelligently made by you?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, ma'am. You can have a seat.

THE DEFENDANT: (Complying.)

THE COURT: Okay. Anything else on the record? When the jury comes out, I'll -- Mr. Henderson, you can rest your case, and we'll go straight into closing. Anything -- anything else, or are we ready to go?

MR. HENDERSON: I think we're ready to go, Your Honor.

MR. BLACK: Yes, sir. We're ready. We did have that charge conference, and I think we both agreed the intent part of the charge that was originally provided to us, not necessarily applicable based on a case a couple years ago that talked about mens rea not being an element of the DUI crime.

THE COURT: And that has been taken out. And then the one typo that Mr. Henderson caught, we took care of that too. So y'all -- otherwise you're good

with the charge?

MR. HENDERSON: Yes, sir, Your Honor.

MR. BLACK: Yes, sir.

THE COURT: Very good. Thank you. All right. Let's -- let's bring the -- bring the jury out.

THE BAILIFF: (Complying.)

(At 2:33 p.m., jury entered the courtroom.)

THE COURT: Let the record reflect the jury is back in. Mr. Henderson.

MR. HENDERSON: Your Honor, the defense rests.

THE COURT: Okay. Very good. Madam forelady, ladies and gentlemen of the jury, the evidentiary record in this case is now closed. What we have now to do is that the lawyers will make their closing arguments to you. The State will go first and then the defense last. And then after that is done, I will charge you the law that applies to this case. And then after that, I will instruct you to begin your deliberations.

This is the last chance that the lawyers have to advocate for their respective sides, so I'm going to ask that you give the lawyers your undivided attention.

Solicitor Black, are you ready, sir?

MR. BLACK: Yes, sir. Thank you, Your Honor.

May it please the Court.

Good afternoon. Thank you for your attention thus far in this matter and thankfully we've been able to be somewhat brief and review all the evidence and the testimony about this case and get you out of here by the end of the day.

As you heard, folks, this event happened on September the 28th of last year on Old Abbeville Highway, kind of between here and Greenwood off of -- near -- kind of near Stevenson Road.

You heard testimony from the deputy. You heard testimony from the trooper. And in criminal cases, like the judge explained to you guys initially, the State has the burden to prove the case beyond a reasonable doubt. And what that means and what the judge is going further tell you, I know you've heard preliminary instructions, is we have to prove the elements of the crime.

You've already heard for a DUI case, we have to prove that an individual was driving the vehicle in the particular county that they're charged and that their ability to operate that motor vehicle was materially and appreciably impaired by drugs, alcohol, or a combination of the two. That's what we have to prove, and we have to prove it beyond a

reasonable doubt.

And at the outset I said, when you think about what beyond a reasonable doubt is, think about being firmly convinced of something. And in criminal cases, we don't have to prove the case beyond all possible conceivable doubt or beyond a shadow of a doubt because there are few things in this world that we absolutely know for certain. And the law doesn't require us to prove the case beyond all certainty. It just requires us to prove it beyond a reasonable doubt. Being firmly convinced after you see the evidence, after you hear the testimony of the witnesses, are you firmly convinced the defendant in this case was driving under the influence?

And what did we hear? The first witness that we called was Deputy Seth Scott. Deputy Scott, as you could probably tell, he had bags under his eyes. He worked all night last night and he didn't get an opportunity to go to sleep, but he was the first person that responded to this particular wreck on that day. You saw it was about 4:30 in the afternoon when officers first got there. The day was sunny. It was a clear day. Hadn't been raining. Really wasn't a cloud in the sky. All the

officers actually had sunglasses on. You could tell that from the video.

And Old Abbeville Highway is a relatively busy road. I mean, it's not 72 either definitely, but it's well-traveled. For those that live here in the county know that that's a very well-traveled road.

So what did Deputy Scott testify to? And a lot of it of his testimony was probably pretty boring. He's talking about different times. And y'all may not remember all the exact times that he was referring to, but I asked several times and I wrote them all down. If y'all remember, he said that the initial came -- the initial call to his dispatch was at 16:18:49. And that's 4:18:49, 4:00 p.m. in the afternoon, 4:18:49.

Dispatch relayed that call to him about a minute and a half later, and it came in at 16:20, which was 4:20 p.m. He was -- I'm assuming he was in the area because he arrived at the scene at 4:25 p.m., and that was his testimony. So five minutes it took him from receiving the call to getting to the scene.

He left the scene to head to an address, [redacted] Stevenson Road, just kind of right around the corner about two minutes later. He left at 4:27, and that

was his testimony. And he has to -- as you remember, he has to give these times to dispatch for his sake so everybody knows where he at -- where he is and what he's doing. He arrived at 4:33. He arrived at that residence, [redacted] Stevenson Road.

He got this information from dispatch as you heard. The tag -- he ran the tag. Saw it came back to this address. Also received this information from dispatch. Showed up. So by the time he arrived on scene to the time that he got to the house was about eight minutes, 4:25 to 4:33. About eight minutes.

You heard his testimony that he made contact with the defendant. Knocked on the door in the carport. She came to the door. You heard his testimony that there wasn't anyone else in the house that he could see. He didn't go inside the house, but he did kind of peer around the corner while she was getting her belongings to come with them.

His testimony was that she smelled of alcohol. Noticed that she was slurring her words. Made mention of the fact that she had drank alcohol. She admitted that. She got into a wreck up the road and she'd been taking prescription medications. Just this brief conversation.

Based on that, she got in the car with him. They left and headed back up the road just around the corner to Old Abbeville Highway where her vehicle -- where her vehicle was. They got back on the scene at 4:44 p.m. So by the time he arrived on the scene, which was 4:25, to the time that they arrived back on scene with the defendant was 19 minutes. Nineteen minutes. And as you heard this -- this communication with dispatch, and as you also heard Old Abbeville Highway is a very -- relatively busy road. Not 72, but people travel that road.

At 4:51, that's when Trooper Lynch shows up. And at this point, the deputies, they said, all right, we typically on these types of cases, we just turn them over to highway patrol because that's their -- that's their niche. That's their specialty.

So at this point everything was turned over to Trooper Lynch. You heard Trooper Lynch testify that he made contact with the -- with Ms. McMahan, the defendant. Conducted a brief investigation. You heard his testimony. You also saw the video, as well. You heard that she was slurring her words, and that's evident on the videos. You heard that it

was a clear day. You could see him wearing his sunglasses. You saw all of that. And you also heard him say that he -- you know, he smelled alcohol coming from her breath. That was also testimony from Trooper Lynch.

After his brief investigation, ultimately he placed the defendant under arrest and charged her with driving under the influence. And that happened just after 5:00 p.m. At that point they got in the car. They rode back to the -- to the detention center where she was taken to a data master room. She was offered a breath test, and she ultimately blew a .18.

Now, Trooper Lynch read her her Miranda rights, which is standard in any criminal case after arrest. Typically, officers read Miranda. And Ms. McMahan, the defendant, agreed to speak to Trooper Lynch and they talked about everything that was going on. And you heard the -- the entire car ride from the scene to the jail and then also the conversation that took place in the data master room.

And what were -- what -- what was the conversation?

(Playing video.)

MR. BLACK: She talks about how she had been

taking her medication. You heard her talking about how'd she'd been taking some depression medication. Unfortunately, you heard that she had had -- her mother had passed away recently. She was going through a lot. She'd been taking prescription medication. And based on the conversation with Trooper Lynch, she'd been doing it as doctors had prescribed, but as we also know from talking to Trooper Lynch that she shouldn't be mixing that with anything, but we know that she was taking medication.

(Playing video.)

MR. BLACK: As you heard at the very outset of that clip, she said, "I made a mistake." What was she doing? She was hungry. She was going to get something to eat, but she says, "I made a mistake." Why is she saying she made a mistake? Because she got behind the wheel while she was intoxicated and drove her motor vehicle in the roadways. You just can't do that.

(Playing video.)

MR. BLACK: She messed up today. Again, she admits that she made a mistake. She knew what she had done and she told the trooper, "Yes. I messed up. I made a mistake." Again, she's admitting

she's drinking. She's admitting to driving and doing something that she should -- that she should not have been doing.

(Playing video.)

MR. BLACK: Here she's already admitting again that she had drank. Told Deputy Scott that. Told Trooper Lynch that. Again, making an admission of what she had done.

(Playing video.)

MR. BLACK: Again, with Trooper Lynch in the data master room, she admits to drinking beer. She admits to driving. Knows that she shouldn't have been doing it. Tells Trooper Lynch. And, obviously, you can all empathize with somebody that recently lost their family member, but you can't get on the roadways and drink and drive. You just can't do it.

And you heard throughout this that she continually slurred her words. You -- when she was talking with Trooper Lynch, she goes, "Your hair's on me."

Trooper Lynch says, "I don't have a lot of hair, ma'am. That's just weed."

I'm not going to go back and play that clip. If you want to watch it, you can certainly request

that.

And she says "Oh, I don't have any weed."

He wasn't referring to marijuana. He was referring to the weeds from the brush where she crawled out of the car and had -- still had all that stuff on her, and she thought it was Trooper Lynch's hair. Y'all remember that clip. She had debris and weed all over her from where her car was down in the ravine.

Folks, I don't -- I don't want to belabor the point anymore, but she ultimately blew into the test -- into the machine. It was a .18. You're going to hear that the inference level is .08. You've already heard a little bit of testimony about that. That at .08, you can infer that a person is under the influence such that their ability to operate a motor vehicle is materially and appreciably impaired. Double .08 is .16. She's even higher that. She's a .18.

Folks, this case is very clear. I think it's very clear. Mr. -- Mr. Henderson, I'm sure, is going to talk to you about how the State hasn't proven the fact that she was driving the vehicle, that Trooper Lynch didn't see her driving the vehicle, Deputy Scott didn't see her driving the

vehicle, and that's -- that's true. They did not see her driving the vehicle.

But when the call came out at 6:18:49 [sic] and was relayed to Deputy Scott at 16:20, he got to her house five minutes later, 4:25. He brought her back to the scene at 4:44. He gets to her house within five minutes of that first call coming out.

She had the green weed all over her. It's in the video. Trooper Lynch makes a note of that. And she's at .18. And it's her car. It's registered to her, her address.

Folks, find Ms. McMahan guilty. She was driving under the influence that day, and she shouldn't have been operating that motor vehicle. Thank you.

THE COURT: Thank you, Solicitor. Mr. Henderson, are you ready for closing arguments?

MR. HENDERSON: Yes, sir. If it pleases the Court. I'm going to move some notes up here and share the table with the Solicitor. And I'm going to ask the Solicitor too, since it's his video system, to put Trooper Lynch's video back at this 40 seconds into the video.

THE COURT: Okay.

MR. HENDERSON: I don't want to be responsible

for tearing up their equipment.

(Brief recess.)

MR. HENDERSON: Ladies and gentlemen, I thank you for your attention and your hard work today and this afternoon. I just want to run over a few things with you. I'm not going to be that long with you. I just want you to think about several things as we bring your attention I hope.

We keep hearing about all these numbers. We keep hearing 4:18. We keep hearing 4:20. We hear 4:25. We hear all these numbers. And, again, there's been testimony over here about this CAD report and what a CAD report is. It's kind of a Government document that's created when people call in to 911.

So they said they got a call to report a car in the ditch at 4:18. Fine. Where is that person that called? I haven't heard any testimony. We don't know what he or she saw. Ladies and gentlemen, I live in Greenwood. I'm up and down 72 a good bit. You see cars all the time in the median, on the side of the road. If I go down the road, I'm deciding I want to call 911 and said, hey, there's a car broke down in the median, that doesn't mean the car broke down in the median a minute ago, an hour ago, a day

ago. Who knows? All we know here is that somebody had called in to report that there's a car off the road. I'm assuming there's been a -- been a wreck. We don't know when that wreck occurred.

Look at that, ladies and gentlemen. The car is actually kind of somewhat below the road level. If people are zipping up and down, who knows when the people are going to call 911. A lot of people riding by probably wouldn't call 911. You know, they figure that the car's down there and it blends in with the foliage a little bit there too. A lot of people probably coming by never see the car. I'm assuming somebody saw it and called in to report it, but just because they called at 4:18 p.m. doesn't mean a wreck happened at 4:18 p.m.

Don't you think that if the Government had investigated it and found out that somebody saw this wreck, they would've brought that person in here? Absolutely. And that's what you pay law enforcement to do, to go out here and investigate wrecks and bring in witnesses to the courtroom.

I haven't seen anybody come in here to give us that time. That's the time that matters. What time did this wreck occur? What time did Ms. McMahan leave her home that day and get back to her home

that day? I haven't heard any evidence about any of that. No what did Ms. McMahan -- what time did she have something to drink that day. Haven't heard any evidence about that either. You know, just haven't heard any of that. I want y'all to keep that in mind. Just because you got some times here, that's your reasonable doubts.

Again, Ms. McMahan has no obligation to prove or disprove anything. The Government's got to come in here and prove all the facts beyond all and any reasonable doubt. They've got to tie all of this together, ladies and gentlemen. I just -- I haven't seen it done yet.

Let's go back over a little bit of the testimony. And you hear a lot of -- well, you heard and you've seen the videos. You hear Ms. McMahan saying, "I drove the vehicle." You hear her say, "I drank earlier in the day," or I drank earlier before the police got to her house, but you never once heard her say, "I drank and then drove." I want y'all to think through that. Think about that. I never heard her say that at all, and that's what the Government's trying to punish her for, drinking then driving. They can't prove drinking and driving v. driving then drinking. They don't have a clue what

happened. All we know is that somebody called in that there's a wreck. And then the next thing you know, deputies are taking Ms. McMahan from her house. Where do people drink at typically, their house.

Let's go back over a little bit of the testimony. Deputy Scott, you heard him testify that he got the tag number, but I also thought I heard him say that he didn't walk down to the car. And I may have misunderstood that, but I'm just -- and if y'all heard something different, use your memory, not mine. But, again, ladies and gentlemen, you've got to walk down to that car and get the tag number. You heard Trooper Lynch say that. I mean, that's common sense you walk down there.

And guess what? If you're walking down to this car, I mean, we all do it walking to our car. What are we going to do? We're going to touch the hood when we walk by. You know, Deputy Scott couldn't remember if he did, but I guarantee you that if he touched that hood and it was blazing hot, oh, he'd remember that. What does that mean? Blazing hot means it's a fresh wreck. He didn't say anything about seeing any smoke coming out of the car. Didn't say anything about any leaking fluids. I

didn't hear anything about that.

I mean, there's no evidence here that this is any type of a recent wreck. I mean, all we've got is evidence of a wreck that happened at some time. The Government hasn't put up any evidence of when it occurred. So we know that Deputy Scott had to go behind the car, and then I guarantee you he probably touched the hood. That's just our -- that's our instinct. We all do it walking to our car.

And let's talk about -- a little bit about what Deputy Scott also didn't know. He couldn't remember whether or not when he first talked to my client at her house whether or not she had a drink in her hand. Was she drinking? I don't know. I can't remember. And you heard him say he doesn't know when the wreck occurred.

You heard Deputy Scott say he doesn't know when my client drank any alcohol that day. Doesn't have a clue. And he doesn't know how long my client had been at home. I mean, these -- these are the issues, ladies and gentlemen. This is your reasonable doubt.

And you heard Deputy Scott saying, "Oh, I'm not going to do an investigation. I'm going to turn it over to the highway patrol." Guess what? I mean,

he's in the catbird seat. He's the first one there. He's the first person to have contact with my client at her home. He needs to find out all this stuff. Ladies and gentlemen, this is what you pay your local law enforcement to do. It's what you pay the deputies to do. I mean, they know there's been a wreck. Happened some time. We've run the tag number. This car comes back to this address, so we're going to go up there and find out about it, things like Ms. McMahan may have been in a distress condition. Need to do some investigation to find out what was behind this, not just say, "Hey, we're going to through you in the cage and let me take you down to the highway patrol."

And then you heard Trooper Lynch here. Obviously, he didn't go anywhere near the car. You've seen his video. He never went to the car. He even admitted he didn't go near the car. He doesn't know whether or not it's hot, whether or not there's smoking, any of this stuff.

You know, funny we see his video right here. Again, we watch like the first 40 seconds of the video. Now, we see the car down in the -- in the ditch down there facing the road. And next thing we know, we're seeing Ms. McMahan being arrested and

Mirandized, you know, and he called this an investigation.

MR. BLACK: Judge I'm just going to have to object to this. This was a -- we -- this was ruled on pretrial.

THE COURT: I agree.

MR. BLACK: This is unfair to the State.

THE COURT: I agree. Move to something else, please.

MR. HENDERSON: Okay. And, you know, Trooper Lynch, he doesn't have any knowledge of when this wreck happened. You know, he gets -- he gets reports over his radio just like all law enforcement does. You heard him say it, "I got dispatched to a wreck and I arrived there," but he doesn't know when the wreck happened. You know, he doesn't know -- he doesn't have a clue when my client drank any alcohol that day. He doesn't know when my client took any medication that day. He just doesn't know. And he doesn't know how long my client had been at home.

And again, he can't set forth -- I mean, the Government's playing all these video clips, but you still didn't hear any evidence about my client saying, hey, I drank and then drove. It's not in the record, folks. The State's trying to bundle up

a whole group of independent bad facts and say, hey, must've been drinking and driving because you had a wreck. Folks, we don't convict people on speculation in this country. Just don't do it.

You know, we just had our Independence Day holiday actually a week ago tomorrow. And, I mean, people fought for our right to come in here and be presumed not guilty of offenses, just like Ms. McMahan did.

And I tell you what burns me up. You heard on the data master video -- if not, y'all can watch it again in the room -- that she asked for a lawyer. You always have an absolute right to a lawyer. You heard Trooper Lynch even read what the Miranda rights are. You have a right to an attorney. He actually testified to that. And guess what? When my client asked for one, what's he do? He gives her the snub. Ladies and gentlemen, within a week of Independence Day, that's un-American, highly un-American. We expect more of our law enforcement than that.

And then you also heard Trooper Lynch tell my client that, hey, based upon this data master result, you know, that, hey, your license is going to be suspended for a month. Okay. She's already

been punished. For whatever happened that day, she's already been punished. Trooper Lynch said her license was going to be suspended for a month. And, again, they can't even show what happened out there, and they took her license for a month.

And, again, going back to this CAD detail -- CAD report. CAD doesn't say when stuff happens. You know, all the CAD does is that when somebody calls in to report something. That's all it is. Is it a valuable tool? Absolutely it is. But, again, it doesn't tell you when -- when an event occurred. Somebody's got to call in about it, you know, say I saw it. You know, other than just somebody -- somebody calling in and saying, I'm riding down the road, I assume, and see a car in the ditch. What does that mean? Absolutely nothing.

Ladies and gentlemen, in the State's opening, they were harping on using your good common sense. Yeah, absolutely. I hope you brought your common sense with today and use it because the Government cannot prove beyond all and any reasonable doubt that Ms. McMahan drank and then drove. Based on the deputy's investigation, it's just as plausible that she drove and then drank, which isn't illegal at all.

I mean, the Government's trying to take two totally plausible scenarios and say, ladies and gentlemen, you've got to pick the one that's going to put Ms. McMahan in jail. No. That's not what the law says. Your obligation as a jury, you pick beyond -- you pick the scenario that's most in favor of Ms. McMahan. She's entitled to the benefit of all and any reasonable doubt.

That's our Constitution again, ladies and gentlemen. That's what last Thursday was about, our Declaration of Independence, you know, our freedom to sit in here and have 12 people, you know, use their common sense and hold the Government's feet to the fire. Again, you don't hold anything against Ms. McMahan. She's got nothing to prove. She's got nothing to disprove. Use your common sense, ladies and gentlemen.

You heard Ms. McHahan say she's having a rough time. Her mother had passed. You know, just because mama's passed, doesn't mean I was drinking and driving or she was drinking and driving. Just because I have anxiety doesn't mean I was drinking and driving. Again, the Government wants to take all these desperate facts, throw them into one big stew and say, hey, she must be drinking and driving.

It's not how it works, folks.

His Honor is going to go into what the law is. I'm not going to bore you with the law. He understands it a whole lot better than I do. So I will let His Honor talk to you about what the law is. But as you being the judge of the facts, I'm just asking you to use your good common sense about what the Government has proved, and I will submit to you, ain't a whole lot.

You know, when you go back there, I would encourage you to do the right thing and I think you know what the right thing is. Thank you, ladies and gentlemen.

THE COURT: All right. Thank you, Mr. Henderson.

Ladies and gentlemen of the jury, I now will charge you the law that is applicable to this case and you must consider the charge as a whole and not focus on some portions to the exclusion of others.

The indictment charges the defendant with driving under the influence. I remind you, the fact that the defendant was arrested, charged, and indicted in this case is not evidence in this case and cannot be considered by you as evidence of guilt in this case, nor does it create any presumption or

inference of guilt. This document is simply the formal written instrument which contains the charge made against the defendant. It is a formal document by which this case is brought into this court.

The defendant has pled not guilty to this indictment and that plea of not guilty puts the burden on the State to prove the defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself or herself innocent. I charge you that if it's an important rule of law that the defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which the indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence does not end when you begin your deliberations, but it accompanies the defendant throughout the trial, unless you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. This presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant, which remains with the defendant unless

it has been stripped from the defendant by evidence satisfying you of the defendant's guilt beyond a reasonable doubt.

Now, this presumption of innocence is not mere legal theory. It's not just a legal phrase. It is a substantial right to which every defendant is entitled, unless you the jury are satisfied from the evidence of the defendant's guilt beyond a reasonable doubt.

Now, concerning reasonable doubt, some of you possibly may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true. Such as by the greater weight of the preponderance of the evidence.

In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Now, there are very few things in this world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt.

If based on your consideration of the evidence you are firmly convinced that the defendant is

guilty of the crime charged, you must find the defendant guilty.

If on the other hand you think there's a real possibility that the defendant is not guilty, you must give the defendant the benefit of the doubt and find her not guilty.

Now, I remind you, madam forelady and ladies and gentlemen of the jury, that -- that during this trial you and I have certain duties to perform. As the trial judge, it's my responsibility to preside over the trial of this case and also have the duty to rule on the admissibility of evidence offered during this trial. You are to consider only the competent evidence before you.

If there was any testimony ordered stricken from the record in this case during this trial -- I don't recall that, but if there was, you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand, any exhibits which have been made part of the record in this case, and any stipulations of counsel.

I have the additional duty to charge you the law that applies to this case. As the presiding judge, I am the sole judge of the law of this case.

And it is your duty as jurors to accept and apply the law as I now state it to you.

If you already have any idea as to what the law is or what the law ought to be and it does not agree with what I now tell you the law is, you must abandon this idea because you are sworn to accept the law and apply the law exactly as I state it to you.

In every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in the case. A trial judge cannot intimate, state, comment on, or make any statement to a trial jury about the facts of the case.

Since you the jury are the sole of the facts of this case, you are not to infer from what I have said during the progress of this trial in ruling upon the admissibility of evidence or otherwise or anything that I say now during the course of this instruction to you that I have any opinion about the facts of this case. The law does not allow me to have an opinion about the facts in this case. This is a matter solely for you the jury to determine. As jurors, it is your duty to determine the fact, value, and weight of the evidence presented during this trial.

Now, ladies and gentlemen of the jury, there are two types of evidence which are generally presented during the trial, that being direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Crimes may be proven by circumstantial evidence. The law makes no distention between the weight or value be given by either direct or circumstantial evidence.

However, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State, once again, has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Necessarily, ladies and gentlemen, you must

determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of this truth.

In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety.

You may consider whether any witness has exhibited to you any interest, bias, or prejudice, or other motive in this case. You may also consider the appearance and manner of the witness while on the witness stand.

I instruct you and emphasize the fact that the defendant did not testify is not a factor to be considered by you in any way in your deliberations and in your consideration on the question of the guilt or innocence of the defendant. It must not be considered by you in any manner whatsoever. The

defendant has the Constitutional right to remain silent and the assertion of that right must not be considered by you in your deliberations. I repeat, under your oath, you are to draw no conclusion whatsoever from the fact that the defendant in this case did not testify.

The fact that this defendant did not testify should not even be discussed in the jury room. The burden of proof, as I've stated to you, is on the State. The defendant is not required to prove her innocence. The burden of proof remains on the State to prove guilt beyond a reasonable doubt.

Now, let me explain to you the charge of driving under the influence. The State must prove beyond a reasonable doubt the defendant was driving a motor vehicle in this State while under the influence of alcohol and/or drugs or other substances to the extent that the defendant's faculties to drive were material and appreciably impaired.

Driving a motor vehicle means that the vehicle was in motion. This may be proven by direct or circumstantial evidence. A movement of the vehicle might occur without any affirmative act by a driver or, in fact, by any person. If a vehicle is moved

by some power beyond the control of the defendant or by action, this would not be driving.

The State must prove beyond a reasonable doubt a defendant was sufficiently under the influence or impaired, her ability to drive with reasonable care and due regard for others and herself, or as a reasonably prudent person would drive. It is not necessary to show that the defendant was in a helpless condition, passed out, or even intoxicated.

On the other hand, the fact that the defendant at some time prior to this incident drank an alcoholic beverage or took a drug does not prove that the defendant was driving under the influence.

Now, there has been a test result into evidence, the amount of alcohol in the defendant's blood at the time of the alleged violation as shown by chemical analysis of the defendant's breath or other bodily fluids may be considered by you in deciding whether the defendant was under the influence.

If the alcohol concentration was at the time five one hundreds of one percent, .05 or less, it is conclusively presumed that the person was not under the influence of alcohol. If the alcohol concentration was at the time in excess of five one

hundreds of one percent, .05, but less than eight one hundreds of one percent, .08, this fact does not give rise to any inference that the person was or was not under the influence of alcohol. This fact may be considered with other evidence in determining the guilt or innocence of the person. If the alcohol concentration was at the time eight one hundreds of one percent, .08, or more, it may be inferred that the person was under the influence of alcohol.

Now, madam forelady and ladies and gentlemen of the jury, there are two possible verdicts in this case, guilty and not guilty. There's no significance in the order in which I state these possible verdicts, simply that one must be stated before the other.

Madam forelady and ladies and gentlemen of the jury, your verdict must be unanimous as to this charge. And when the jury has reached a verdict, I'm going to come down and show the verdict form that you will complete and sign and then let the bailiff know that a verdict has been reached.

Additionally, if at any time when you're communicating with the Court after you begin your deliberations, do not give the Court at any time a

breakdown of your vote before a unanimous verdict is reached.

And I know I've read a lot to you. And what I'm going to do is, I'm going to allow you to take this jury charge back in the jury room for whatever use that you wish to make of it. I'm going to come down and show you the verdict form. It's very simple to complete.

MR. BLACK: Your Honor, before you do that, I might have a matter that we might need to address.

THE COURT: Okay. All right.

(Sidebar discussion.)

THE COURT: Madam forelady and ladies and gentlemen of the jury, the lawyers -- these good lawyers that I have in this case just brought out a mistake that is in the verdict form. So what I want you to do, it's going to take a few minutes to printout a new verdict form. All 14 of you go back to the jury room. Do not begin your deliberations. Don't begin any discussions about the case, and then we'll bring you back out in just a few minutes. Okay. Thank you.

(At 3:22 p.m., jury left the courtroom.)

(From 3:22 to 3:34 p.m., recess.)

THE COURT: Okay. State have any exceptions or

objections to the Court's charge?

MR. BLACK: No, sir.

THE COURT: And the defense?

MR. HENDERSON: No, sir.

THE COURT: Okay. All right. Very good. Now we can bring them out.

THE BAILIFF: Okay.

(At 3:35 p.m., jury entering the courtroom.)

THE COURT: Let the record reflect the jury is back in.

Madam forelady, this is the verdict form. And this has the name of the case and the indictment number. And the first question you have to ask is to find the defendant either guilty or not guilty, and you'll place your initials on the appropriate line. Remember your verdict must be unanimous throughout.

If you find the defendant guilty, then the next question you need to go to in make a finding of the defendant's blood alcohol content, you would put your -- only if -- naturally, only if you find her guilty. If you find her not guilty, you don't put your initials there. Put your initials on the one appropriate line there. Sign it. It's already been dated. Okay.

All right. So what I'm going to give to you, madam forelady, is the verdict form I just showed you, the copy of the Court's charge, the exhibits that's been entered into evidence in this case. I'm going to hand these to you now. I'm going to direct that the 12 of you go back to jury room, begin your deliberations, and let us know when you have reached a verdict. Okay. And the two alternates stay here, please.

(At 3:36 p.m., jury left the courtroom.)

(From 3:36 to 4:00 p.m., deliberations.)

THE BAILIFF: Judge, they've got a verdict.

THE COURT: They've got a verdict. Okay. Let's -- let's bring the jury out.

(At 4:01 p.m., jury entered the courtroom.)

THE COURT: Let the record reflect the jury is back in.

Madam forelady, without telling me what the verdict is, have you reached a unanimous verdict in this case?

MADAM FORELADY: Yes, sir.

THE COURT: All right. Would you hand the verdict form to the bailiff, please?

MADAM FORELADY: (Complying.)

THE COURT: Okay. Madam clerk, would you

publish the verdict, please?

THE CLERK: The State of South Carolina, County of Abbeville, *State of South Carolina v. Sherry McMahan*, Indictment 2019-GS-01-27, as to the charge of driving under the influence, we the jury find the defendant guilty. We the jury find the defendant's blood alcohol content to be 16 or greater. Jennifer Harper, Forelady.

Madam forelady, ladies and gentlemen of the jury, is this your verdict so say you all? Please signify by raising your right hand.

THE JURORS: (Indicating.)

THE COURT: Let the record reflect that all 12 hands were up in the air.

Mr. Henderson, do you want individual polling of the jury?

MR. HENDERSON: Yes, please.

THE COURT: Okay. Madam clerk.

THE CLERK: Victor Burno, is this your verdict?

THE JUROR: Yes.

THE CLERK: Ricky Sampson, is this your verdict?

THE JUROR: Yes.

THE CLERK: Johnna Evans, is this your verdict?

THE JUROR: Yes.

THE CLERK: Phillip Calhoun, is this your verdict?

THE JUROR: Yes.

THE CLERK: Wendy Capps, is this your verdict?

THE JUROR: Yes.

THE CLERK: Katherine Brown, is this your verdict?

THE JUROR: Yes.

THE CLERK: Kelli Bright, is this your verdict?

THE JUROR: Yes.

THE CLERK: Jennifer Harper, is this your verdict?

THE JUROR: Yeah.

THE CLERK: James Hagood, is this your verdict?

THE JUROR: Yes.

THE CLERK: Joshua Wayne Page, is this your verdict?

THE JUROR: Yes.

THE CLERK: Candace Leigh, is this your verdict?

THE JUROR: Yes.

THE CLERK: Joyce Price, is this your verdict?

PROSPECTIVE JUROR: Yes.

THE CLERK: Judge, the jurors have answered all in the affirmative.

THE COURT: Okay. All right. Thank you, madam clerk.

Ladies and gentlemen, I want to thank you for your jury service. The verdict that you have reached in this case does not matter to me. What I -- what matters to me is that the jury performed its duties conscientiously, professionally, and I think you have -- you've done that. This was a very short case. Most of the cases that we try in this court are not this short, but in any event, I do appreciate your service. We have no further jury business for this week, so you do not need to come back.

The checks for your jury service will be mailed to you. Don't make big plans for those checks because unfortunately the State law does not provide for what I consider to be adequate compensation for the jury. They'll be mailed to you.

The Clerk has excuses if you need one for work or otherwise. And I hope that some time down the road, you'll be summoned back again, either in the criminal court or civil court, and have another opportunity to sit on a jury.

I like to shake the hands of my jury, so I'm going to come down there as you exit the jury box.

Madam forelady, you need to sign the back of the indictments, so if you'll just hang around for just a minute. And y'all are free to go.

(At 4:06 p.m., jury was excused from further service.)

THE COURT: Whenever you get the sectioning sheet -- you've already got it completed?

MR. BLACK: I got it.

MR. HENDERSON: Yeah, I think that's fine, Your Honor.

THE COURT: Let me see the lawyers over here for just a second.

(Sidebar discussion.)

(From 4:09 to 4:19, recess.)

THE COURT: Okay. We're on the record in the sentencing phase of the *State v. Sherry Ashley McMahan*, and I've had an in chambers conference with the lawyers giving them indication of where I'm going to more likely go on sentencing.

Solicitor, anything you want to put on the record as it relates to sentencing?

MR. BLACK: No, sir, Your Honor. You heard the case. You heard the facts. She does have a prior DUI, which was from September the 20th of 2011, and that's the only thing she has on her record.

THE COURT: Okay. All right. Mr. Henderson.

MR. HENDERSON: And, Your Honor, very briefly just to protect my record. I think my record is well preserved that I believe this should be treated as a first. I know His Honor disagrees. I'm going to make sure that I raise that issue again, and also that I believe that her right -- asking for the right to counsel, that the case that you're relying on, I believe, is not applicable to this situation, but I understand His Honor's ruling, but I'd ask that you take that into consideration. And, again, don't have a lot to say about sentencing, Your Honor. You read -- you ran by that you would suggest weekend time.

THE COURT: Right.

MR. HENDERSON: My client said that if she's going to do that, would prefer to start next Friday. So July, what's that, the 19th, and I guess run through July the 21st. And just keep doing that every week until she satisfies the 90 days.

THE COURT: Right. Okay. Very good. And, again, your point is well taken concerning the lawyer issue. And, again, as I stated during the -- during the case, I recognize that's not exactly on point, but it is the closest thing that we could

find in South Carolina as it relates to breathalyzer proceedings and the lawyer.

Everybody be at ease for just a moment.

(Brief recess.)

THE COURT: Okay. Ms. McMahan, as I told the lawyers in the -- in the hallway, I think this case or the sentence in this case justifies a mand -- the mandatory minimum. It is the minimum. And I realize that it involves some time in jail, plus some financial responsibility, but this is the least amount I can do under the statute. I can't -- I don't have any discretion to go anything less than what I'm going to do.

All right. The sentence of the Court is, you'd be committed to the State Department of Corrections for a period of one year and pay a fine of $3500, provided upon the service of 90 days and payment of $1100 fine, plus cost and assessments.

I'll suspend the balance, give you credit for one day that you've already been incarcerated, and the 90 day sentence to be served on weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m. beginning July 19th, 2019. Ma'am, the fine and costs will be paid at the rate of $100 per month by the 10th of each month beginning August 10th of 2019.

MR. HENDERSON: Your Honor, one of the deputies said that they prefer -- the jail prefers that inmates are there by 5:00 p.m.

THE COURT: 5:00?

MR. HENDERSON: Or no later than 5:00.

THE COURT: Well, let's -- let's go to 5:00. Okay. Good luck to you, ma'am.

MR. HENDERSON: Thank you, Your Honor.

THE DEFENDANT: Thank you.

MR. BLACK: Thank you, Your Honor.

(At 4:25 p.m., the proceedings concluded.)

- - -

# CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

I, the undersigned, Lisa Scott, Circuit Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Abbeville County, South Carolina, on the 10th day of July, 2019.

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

January 13, 2020

/s/Lisa Scott

*Lisa Scott*
*Circuit Court Reporter*

| | |
|---|---|
| THE STATE OF SOUTH CAROLINA<br>COUNTY OF ABBEVILLE | IN THE COURT OF GENERAL SESSIONS<br>FOR THE EIGHTH JUDICIAL CIRCUIT |
| THE STATE OF SOUTH CAROLINA,<br>-vs-<br>SHERRY MCMAHAN,<br>DEFENDANT. | INDICTMENT:<br>19GS01-0027<br>**PRE-TRIAL RULINGS** |

Using the numbering scheme contained in the email from Mr. Henderson on July 8, 2019, the pre-trial rulings of the Court are as follows:

1. The Court respectfully denies the Defense Motion to Remand. Based on State v. Robinson, 380 S.C. 201, 669 S.E.2d 588 (2008) and State v. Talley, 371 S.C. 535, 640 S.E.2d 878 (2007), use of Defendant's prior conviction for enhancement is proper given that Defendant was not actually imprisoned as a result of that conviction.

2. This matter has been resolved.

3. This Motion is respectfully denied. The fact that deputies were shown on the Incident site video was sufficient to put the Defense on notice of the involvement of Dep. Jonathan Pratt and Dep. Seth Scott in this case. Additionally, the CAD Report, although only done so recently, has been produced. Accordingly, there has been no showing of unfair prejudice as to any alleged Rule 5 or Brady violation by the State.

4. The Court finds Defendant was in custody for Miranda purposes when she was placed in the caged backseat of Deputy Scott's patrol car. See State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997).[1] To determine whether a person is in custody for Miranda purposes, a court, considering the totality of the circumstances, must initially inquire whether a

[1] Overturned on other grounds by State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018).



COURT'S EXHIBIT NO. 4 IDENTIFICATION/EVIDENCE DKT.# DATE: 7/10/19
PENGAD 800-631-6989

reasonable person in the Defendant's position would have understood himself or herself to be in custody. Id at 127-28, 489 S.E.2d at 621. This initial determination is based upon an objective review of the circumstances, not the subjective views of the officers or Defendant. Id at 128, 489 S.E.d2d at 621.

Similar to the Easler defendant, Defendant was placed in a caged backside of patrol car and taken to the incident scene. Here, however, the officers had a suspicion that Defendant was under the influence prior to their arrival at the incident scene based upon statements made by Defendant at her house. This stands in contrast to Easler where the officers had not been to the indecent scene at the time that they picked up defendant and did not "form any opinion about [the defendant's] intoxication" until they arrived at the incident scene.

Additionally, while an officer is not required to give Miranda warnings prior to administering field sobriety tests during routine traffic stops or noncustodial interrogations, this case is different. Here, the traffic stop was not routine, and Defendant was in custody at the time that officers administered field sobriety tests. Additionally, Defendant was not Mirandized prior to the administration of the field sobriety tests. Accordingly, the field sobriety tests, and their results, are not admissible. However, the deputies will be allowed to testify as to what Defendant said while at her house, and the Trooper can testify both as to what Defendant said after Miranda warnings were given and as to his observations.

5. Since, in accordance with above, the HGN test does not come in, this point is moot.[2]

6. This Motion is ~~respectfully denied~~ granted.

[2] For future reference, however, only the head of a defendant, and not his eyes, need be captured on video alongside an officers administration of an HGN test. See State v. Gordan, 14 S.C. 94, 777 S.E.2d 376 (2015). See also State v. Lorusso, 2017 WL 4616845.

7. A criminal defendant is not entitled to counsel during the administration of a breathalyzer test. State v. Degnan, 305 S.C. 369, 371, 409 S.E.2d 346, 346 (1991).

8. The Court will allow mention of Defendant taking prescription medication made before she gets into the Deputy's car and after Miranda warnings have been given. The DUI statute specifically mentions alcohol and/or drugs. The jury if free to give it whatever weight it wants to this testimony and both sides can certainly argue no tests to determine levels, etc.

Donald B. Hocker
Circuit Court Judge

Date: 7-9-19
Abbeville, South Carolina.

#3

Form 438
Rev. 3/09

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY

# UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME: Stuart | MIDDLE NAME: Ashley | LAST NAME: McMillan

STREET AND NO.: [redacted] | CITY: Iva | STATE: SC | ZIP CODE: 29655

STATE LICENSED: SC | DRIVER'S LICENSE NO.: [redacted] | CDL: ☐ YES ☐ NO | DRI. LIC. CLASS: [redacted]

VEH. LIC. NO.: [redacted] | STATE: SC | MAKE OF VEH: Ford | YEAR: 01 | COMM. VEH. | AUTO | 16 PSGR. VEH. | COMB. | HAZ. MT. | MOPED | MTRCYCL. | OTHER

## YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT: Traffic Court | STREET AND NO.: 21 McCalla Falls Rd

DATE: 9-20-11 | OF | TRIAL | TIME OF TRIAL: 1500 | CITY: Anderson | STATE: SC | ZIP CODE: 29626

VIOLATION - COURT APPEARANCE REQUIRED: YES NO: DUI | VIOLATION SECTION NO.: 56-5-2930

OWNER OF VEHICLE: McMillan | DATE OF ARREST: 3-26-11

ADDRESS OF OWNER: Iva | DATE OF VIOLATION: 3-26-11

BAIL DEPOSITED: $500 | NAME OF ARRESTING OFFICER: T.B. McConnell | RANK: TFC

DESCRIPTION OF ACCUSED

RACE: W | SEX: M | DATE OF BIRTH: [redacted] | HT.: 6'0" | HAIR: Brn | WT.: 180 | EYES: Blu

COUNTY: Anderson | NUMBER: 04

BADGE: 102 | TROOP: 2

DATE BAIL REC'D. | BY

DAY: S 1 | M 2 | T 3 | W 4 | T 5 | F 6 | S 7

CASE BEFORE: MAGISTRATE ☒ | MUN. COURT ☐ | CIRCUIT COURT ☐ | FAMILY COURT ☐ | FEDERAL COURT ☐

TIME OF VIOLATION MILITARY TIME: 1408 | WEATHER: C

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE.

I 1 | U 2 | P 3 | S 4 | O 5 | HWY. NO.: 76

DEFENDANT: DID NOT APPEAR ☐ | APPEARED ☒

DISPOSITION: NOLLE PROSSED ☐ | FORFEITED BOND ☐ | GUILTY ☒ | PLED: NOLO CONTENDERE ☐

MILES: 5.7 | N 1 | E 2 | S 3 | W 4

CITY: Iva | CODE: 47

TRIAL BY: TRIAL JUDGE ☐ | JURY ☐

VERDICT OF TRIAL IF ANY: GUILTY ☐ | NOT GUILTY ☐ | DATE OF TRIAL IF ANY: 20

Lat: 34° 14' 57"

Long: 82° 32' 4"

| JAIL | SUSPEND | FINE | AMT. COLLECTED | AMT. SUSPENDED |
|---|---|---|---|---|
| | | 997 | STR | |

OFFENSE CODE: 99 | B.A. LEVEL: R

COMMITTED TO: | Vehicle Searched: No | Arrest as Result of Collision: Yes

CERTIFIED CORRECT: T.B. McConnell | DATE: 9/20/11

F 155664

997

TRIAL COURT'S COPY

SID# 1986329

DOCKET NO.

PENGAD 800-631-6989

DEFENDANT'S EXHIBIT 4 249

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

VS

McMahon, Sherry
Defendant

Reference Ticket/Warrant Number(s) F155664

Charge(s) DUI

I Sherry McMahon appear in my own proper person and declare that I understand the charges against me. I understand my scheduled court date is 9-20-11. I further state that I desire to waive my right to appear in court for my trial. I wish to enter a plea of GUILTY to the above listed charges. I understand that I am giving up my right to a trial by jury, my right to hire an attorney, my right to present evidence on my behalf. I will accept the decision of the judge in this matter. I am making this decision freely and voluntarily. I have not been threatened or forced to do this. I am not under the influence of any drugs, medication, or alcohol today.

Sherry McMahon — 9-20-11
Defendant — Date

[signature] — 9-20-11
Witness — Date

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

F1556664
WARRANT/TICKET #

VS

MAGISTRATE COURT

Sherry McMahan
DEFENDANT
[redacted] 1st Ave
ADDRESS
Iva, SC 29655

INDIGENT PAYMENT PLAN
17-25-350 SC CODE OF LAWS

| TELEPHONE # | RACE | SEX | BIRTH DAY | SOCIAL SECURITY # |
|---|---|---|---|---|
| 378-7110 | W | F | [redacted]-64 | [redacted] |

CHARGE DUI

COURT DATE 9-2011 FINE AMOUNT $ 997.00 OR 30 DAYS IN JAIL

THE DEFENDANT NAMED ABOVE HAS BEEN TRIED OR PLEADED GUILTY TO ABOVE LISTED CHARGE(S) AND DECLARES TO BE INDIGENT AT THIS TIME AND ASKS THE COURT TO SCHEDULE TIME PAYMENTS OF THE IMPOSED FINE IN LIEU OF JAIL TIME.

**IT IS HEREBY ORDERED:**

THE DEFENDANT SHALL PAY OR CAUSED TO BE PAID THE FINE IMPOSED IN THE AMOUNT OF $ 997.00 PLUS THREE PERCENT (3%) COLLECTION FEE, TOTAL FINE BEING $ 1026.91
1- In 30 days PAYMENTS ~~OF~~ $ in 30 day WEEKLY / MONTHLY UNTIL FINE & COSTS PAID IN FULL
2- FINE TO BE PAID IN FULL ON until Paid in full (DATE) ~~Oct~~ 10-21-11
OR A BENCH WARRANT SHALL BE ISSUED FOR THE ARREST OF THE DEFENDANT FOR FAILING TO COMPLY WITH PAYMENT PLAN SCHEDULE PURSUANT SC CODE OF LAWS 17-25-350.

**I HAVE READ, UNDERSTAND AND AGREE WITH THE TERMS OF THE SCHEDULED PAYMENT PLAN OUTLINED IN THIS AGREEMENT.**

DEFENDANT Sherry McMahan DATE 9-2011 JUDGE [signature]

| PAYMENT DATE | RECEIPT # | CREDIT | BALANCE |
|---|---|---|---|
| 10-12-11 | 326710 | 997.00 | 0 |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF GENERAL SESSIONS |
| COUNTY OF GREENWOOD | ) | EIGHTH JUDICIAL CIRCUIT |
| STATE OF SOUTH CAROLINA | ) | |
| v. | ) | **REMAND ORDER** |
| MICHAEL CARLOS PEACE, | ) | Indictment No. 2012-GS-24-1840 (DUI 2nd) |
| Defendant. | ) | |

FILED GENERAL SESSIONS
8th JUDICIAL CIRCUIT
GREENWOOD, SC
2014 DEC -9 PM 4:07

| | |
|---|---|
| **TRIAL JUDGE:** | **HON. J. DERHAM COLE** |
| **COURT REPORTER:** | **NOT APPLICABLE** |
| **STATE'S ATTORNEY:** | **ASST. SOLICITOR MICAH BLACK** |
| **DEFENDANT'S ATTORNEY:** | **CARSON M. HENDERSON for BILLY J. GARRETT, JR.** |
| **DATE OF HEARING:** | **MONDAY, DECEMBER 8, 2014** |

This matter was on the jury trial roster for the week of Monday, December 8, 2014, in Greenwood General Sessions Court. The attorneys listed above met with the Court to discuss the matter in chambers.

The Defendant pled guilty to DUI 1st in Cayce Municipal Court on August 3, 2006, without an attorney. The only documents in the Cayce Municipal Court's file are a Disposition Sheet indicating that the Defendant pled guilty and agreed to a payment plan; a handwritten letter from the Defendant dated July 5, 2006, indicating that he "would like to waive my right to a jury trial"; Uniform Traffic Ticket No. 95264DL; and six (6) payment receipts.

The Cayce Municipal Court's file does not indicate that the Defendant was informed that he had the right to an attorney, that an attorney would be appointed for the Defendant if he could not afford an attorney, that self-representation can be dangerous, that there may be defenses to the charge, and that there may be collateral consequences of a guilty plea (such as increased

penalties for subsequent offenses). If the Defendant had failed to pay his fine, the Cayce Municipal Court could have issued a bench warrant for the Defendant's arrest and sentenced him to a period of incarceration in the Lexington County jail.

In Shelton v. Alabama, 535 U.S. 654 (2002), the United States Supreme Court held that a defendant convicted of a misdemeanor may not be incarcerated, or face the risk of incarceration, unless he had "the guiding hand of counsel" or knowingly and intelligently waived his right to counsel. In the Cayce Municipal Court, the Defendant did not have an attorney, but there is no evidence that the Defendant knowingly and intelligently waived his right to counsel. Furthermore, there is no evidence in the Cayce Municipal Court's file that the Defendant received and knowingly and intelligently waived his rights pursuant to Faretta v. California, 422 U.S. 806 (1975).

**IT IS THEREFORE ORDERED** that this matter shall be and is hereby remanded to the Greenwood Magistrate's Court for disposition, by trial or plea, as a DUI 1st offense.

**IT IS FURTHER ORDERED** that if the Defendant is convicted of or pleads guilty to DUI 1st offense in Greenwood Magistrate's Court, he shall be sentenced in accordance with the penalties for DUI 1st offense convictions.

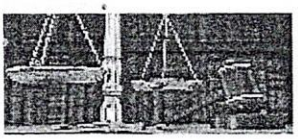
**IT IS FURTHER ORDERED** that the Greenwood Magistrate's Court shall dispose of the matter within one hundred eighty (180) days of remand as provided in Code Section 22-3-545.

IT IS SO ORDERED.

HON. J. DERHAM COLE
Presiding Circuit Court Judge
Eighth Judicial Circuit

Greenwood, South Carolina

December 9, 2014



Carson Henderson <carson@carsonhendersonlawfirm.com>

# RE: [External] Re: enhancements based on prior uncounseled convictions

1 message

**Hackett, Susan** <shackett@sccid.sc.gov> Tue, Oct 16, 2018 at 3:30 PM
Reply-To: scacdl@scbar.org
To: "scacdl@scbar.org" <scacdl@scbar.org>

Ben,

I raised an enhancement issue in a PCR in the IAC context. I was unsuccessful, however. (Perhaps, that's because it was not preserved!) Here's a quick snippet from the petition I filed, which included a cite to Chance:

"The Sixth and Fourteenth Amendments to the United States Constitution prohibit a prior uncounseled conviction that results in a sentence of imprisonment to be used to enhance punishment of a subsequent conviction." State v. Spratt, 383 S.C. 212, 213, 678 S.E.2d 266, 267 (Ct. App. 2009)(citing State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 336 (Ct. App. 1998)); see also Nichols v. United States, 511 U.S. 738, 746-747 (1994); State v. Chance, 304 S.C. 406, 407-408, 405 S.E.2d 375, 376 (1991); State v. Sosbee, 371 S.C. 104, 110-111, 637 S.E.2d 571, 574 (2001). If the un-counseled prior did not result in a prison term, then it can be used to enhance. Talley v. State, 371 S.C. 535, 545, 640 S.E.2d 878, 883 (2007). On the other hand, if the defendant knowingly, voluntarily, and intelligently waived his right to counsel, then the prior uncounseled conviction may be used for sentence enhancement. Spratt, 383 S.C. at 213-214, 678 S.E.2d at 267. In Alabama v. Shelton, 535 U.S. 654, 658 (2002), the United States Supreme Court held the constitutional right to counsel extends to defendants who receive a suspended sentence that may result in the actual deprivation of a person's liberty. In Talley, 371 S.C. at 544, 640 S.E.2d at 882, the South Carolina Court of Appeals held the rule of Shelton applies retroactively on post-conviction relief.

-Susan

Susan Barber Hackett

Office of Appellate Defense

1330 Lady Street, Suite 401

Columbia, S.C. 29201

803-734-1330

**From:** scacdl-request@scbar.org <scacdl-request@scbar.org> **On Behalf Of** petediamaduros@aol.com
**Sent:** Tuesday, October 16, 2018 2:47 PM

NOT AN enhancement case



NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 00–1214

ALABAMA, PETITIONER *v.* LEREED SHELTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

[May 20, 2002]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the Sixth Amendment right of an indigent defendant charged with a misdemeanor punishable by imprisonment, fine, or both, to the assistance of court-appointed counsel. Two prior decisions control the Court's judgment. First, in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), this Court held that defense counsel must be appointed in any criminal prosecution, "whether classified as petty, misdemeanor, or felony," *id.*, at 37, "that actually leads to imprisonment even for a brief period," *id.*, at 33. Later, in *Scott* v. *Illinois*, 440 U. S. 367, 373–374 (1979), the Court drew the line at "actual imprisonment," holding that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment.

Defendant-respondent LeReed Shelton, convicted of third-degree assault, was sentenced to a jail term of 30 days, which the trial court immediately suspended, placing Shelton on probation for two years. The question presented is whether the Sixth Amendment right to appointed counsel, as delineated in *Argersinger* and *Scott*, applies to a defendant in Shelton's situation. We hold that a suspended sentence that may "end up in the actual

deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution for the crime charged. *Argersinger*, 407 U. S., at 40 (internal quotation marks omitted).

I

After representing himself at a bench trial in the District Court of Etowah County, Alabama, Shelton was convicted of third-degree assault, a class A misdemeanor carrying a maximum punishment of one year imprisonment and a $2000 fine, Ala. Code §§13A–6–22, 13A–5–7(a)(1), 13A–5–12(a)(1) (1994). He invoked his right to a new trial before a jury in Circuit Court, Ala. Code §12–12–71 (1995), where he again appeared without a lawyer and was again convicted. The court repeatedly warned Shelton about the problems self-representation entailed, see App. 9, but at no time offered him assistance of counsel at state expense.

The Circuit Court sentenced Shelton to serve 30 days in the county prison. As authorized by Alabama law, however, Ala. Code §15–22–50 (1995), the court suspended that sentence and placed Shelton on two years' unsupervised probation, conditioned on his payment of court costs, a $500 fine, reparations of $25, and restitution in the amount of $516.69.

Shelton appealed his conviction and sentence on Sixth Amendment grounds, and the Alabama Court of Criminal Appeals affirmed.[1] That court initially held that an indi-

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[1] Shelton also appealed on a number of state-law grounds. The Court of Criminal Appeals rejected all but one of those challenges, concluding that most had been procedurally defaulted in the trial court. See App. 14–25. On one such challenge, the court remanded for further proceedings, *id.*, at 23, but affirmed after the trial court ruled against Shelton on remand, *id.*, at 29.

gent defendant who receives a suspended prison sentence has a constitutional right to state-appointed counsel and remanded for a determination whether Shelton had "made a knowing, intelligent, and voluntary waiver of his right." App. 7. When the case returned from remand, however, the appeals court reversed course: A suspended sentence, the court concluded, does not trigger the Sixth Amendment right to appointed counsel unless there is "evidence in the record that the [defendant] has actually been deprived of liberty." *Id.*, at 13. Because Shelton remained on probation, the court held that he had not been denied any Sixth Amendment right at trial. *Id.*, at 14.

The Supreme Court of Alabama reversed the Court of Criminal Appeals in relevant part. Referring to this Court's decisions in *Argersinger* and *Scott*, the Alabama Supreme Court reasoned that a defendant may not be "sentenced to a term of imprisonment" absent provision of counsel. App. 37. In the Alabama high court's view, a suspended sentence constitutes a "term of imprisonment" within the meaning of *Argersinger* and *Scott* even though incarceration is not immediate or inevitable. And because the State is constitutionally barred from activating the conditional sentence, the Alabama court concluded, "'the threat itself is hollow and should be considered a nullity.'" *Ibid.* (quoting *United States* v. *Reilley*, 948 F. 2d 648, 654 (CA10 1991)). Accordingly, the court affirmed Shelton's conviction and the monetary portion of his punishment, but invalidated "that aspect of his sentence imposing 30 days of suspended jail time." App. 40. By reversing Shelton's suspended sentence, the State informs us, the court also vacated the two-year term of probation. See Brief for Petitioner 6.[2]

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[2]Justice Maddox dissented, stating that Shelton was not constitutionally entitled to counsel because he "received only a suspended

Courts have divided on the Sixth Amendment question presented in this case. Some have agreed with the decision below that appointment of counsel is a constitutional prerequisite to imposition of a conditional or suspended prison sentence. See, *e.g.*, *Reilley*, 948 F. 2d, at 654; *United* States v. *Foster*, 904 F. 2d 20, 21 (CA9 1990); *United States* v. *White*, 529 F. 2d 1390, 1394 (CA8 1976). Others have rejected that proposition. See, *e.g.*, *Cottle* v. *Wainwright*, 477 F. 2d 269, 274 (CA5), vacated on other grounds, 414 U. S. 895 (1973); *Griswold* v. *Commonwealth*, 252 Va. 113, 116–117, 472 S. E. 2d 789, 791 (1996); *State* v. *Hansen*, 273 Mont. 321, 325, 903 P. 2d 194, 197 (1995). We granted certiorari to resolve the conflict. 532 U. S. 1018 (2001).

## II

Three positions are before us in this case. In line with the decision of the Supreme Court of Alabama, Shelton argues that an indigent defendant may not receive a suspended sentence unless he is offered or waives the assistance of state-appointed counsel. Brief for Respondent 5–27.[3] Alabama now concedes that the Sixth Amendment bars *activation* of a suspended sentence for an uncounseled conviction, but maintains that the Consti-

---

sentence and was not incarcerated." App. 41. Judge Maddox also construed the trial record as establishing Shelton's waiver of any right to appointed counsel he might have enjoyed. *Ibid.*

[3] Shelton also urges this Court to overrule *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), and *Scott* v. *Illinois*, 440 U. S. 367 (1979), to the extent those cases do not guarantee a right to counsel "in all cases where imprisonment is an authorized penalty." Brief for Respondent 27–31. We do not entertain this contention, for Shelton first raised it in his brief on the merits. "We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate." *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999).

tution does not prohibit *imposition* of such a sentence as a method of effectuating probationary punishment. Reply Brief 4–13. To assure full airing of the question presented, we invited an *amicus curiae* ("*amicus*") to argue in support of a third position, one Alabama has abandoned: Failure to appoint counsel to an indigent defendant "does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked." 534 U. S. 987 (2001).[4]

A

In *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963), we held that the Sixth Amendment's guarantee of the right to state-appointed counsel, firmly established in federal-court proceedings in *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), applies to state criminal prosecutions through the Fourteenth Amendment. We clarified the scope of that right in *Argersinger*, holding that an indigent defendant must be offered counsel in any misdemeanor case "that actually leads to imprisonment." 407 U. S., at 33. Seven Terms later, *Scott* confirmed *Argersinger*'s "delimit[ation]," 440 U. S., at 373. Although the governing statute in *Scott* authorized a jail sentence of up to one year, see *id.*, at 368, we held that the defendant had no right to state-appointed counsel because the sole sentence actually imposed on him was a $50 fine, *id.*, at 373. "Even were the matter *res nova*," we stated, "the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel" in nonfelony cases. *Ibid.*

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[4] Charles Fried, a member of the Bar of this Court, accepted our invitation and has well fulfilled his assigned responsibility.

Subsequent decisions have reiterated the *Argersinger-Scott* "actual imprisonment" standard. See, *e.g.*, *Glover* v. *United States,* 531 U. S. 198, 203 (2001) ("any amount of actual jail time has Sixth Amendment significance"); *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 113 (1996); *Nichols* v. *United States,* 511 U. S. 738, 746 (1994) (constitutional line is "between criminal proceedings that resulted in imprisonment, and those that did not"); *id.*, at 750 (SOUTER, J., concurring in judgment) ("The Court in *Scott*, relying on *Argersinger*[,] drew a bright line between imprisonment and lesser criminal penalties."); *Lassiter* v. *Department of Social Servs. of Durham Cty.,* 452 U. S. 18, 26 (1981). It is thus the controlling rule that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . .unless he was represented by counsel at his trial." *Argersinger*, 407 U. S., at 37.

B

Applying the "actual imprisonment" rule to the case before us, we take up first the question we asked *amicus* to address: Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant's violation of the terms of probation? We conclude that it does not. A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point "result[s] in imprisonment," *Nichols*, 511 U. S., at 746; it "end[s] up in the actual deprivation of a person's liberty," *Argersinger*, 407 U. S., at 40. This is precisely what the Sixth Amendment, as interpreted in *Argersinger* and *Scott*, does not allow.

*Amicus* resists this reasoning primarily on two grounds. First, he attempts to align this case with our decisions in *Nichols* and *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973).

See Brief for *Amicus Curiae* by Invitation of the Court 11–18 (hereinafter Fried Brief). We conclude that Shelton's case is not properly bracketed with those dispositions.

*Nichols* presented the question whether the Sixth Amendment barred consideration of a defendant's prior uncounseled misdemeanor conviction in determining his sentence for a subsequent felony offense. 511 U. S., at 740. Nichols pleaded guilty to federal felony drug charges. Several years earlier, unrepresented by counsel, he was fined but not incarcerated for the state misdemeanor of driving under the influence (DUI). Including the DUI conviction in the federal Sentencing Guidelines calculation allowed the trial court to impose a sentence for the felony drug conviction "25 months longer than if the misdemeanor conviction had not been considered." *Id.*, at 741. We upheld this result, concluding that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.*, at 749. In *Gagnon*, the question was whether the defendant, who was placed on probation pursuant to a suspended sentence for armed robbery, had a due process right to representation by appointed counsel at a probation revocation hearing. 411 U. S., at 783. We held that counsel was not invariably required in parole or probation revocation proceedings; we directed, instead, a "case-by-case approach" turning on the character of the issues involved. *Id.*, at 788–791.

Considered together, *amicus* contends, *Nichols* and *Gagnon* establish this principle: Sequential proceedings must be analyzed separately for Sixth Amendment purposes, Fried Brief 11–18, and only those proceedings "result[ing] in *immediate* actual imprisonment" trigger the right to state-appointed counsel, *id.*, at 13 (emphasis added). Thus, the defendant in *Nichols* had no right to appointed counsel in the DUI proceeding because he was

not immediately imprisoned at the conclusion of that proceeding. The uncounseled DUI, valid when imposed, did not later become invalid because it was used to enhance the length of imprisonment that followed a separate and subsequent felony proceeding. Just so here, *amicus* contends: Shelton had no right to appointed counsel in the Circuit Court because he was not incarcerated immediately after trial; his conviction and suspended sentence were thus valid and could serve as proper predicates for actual imprisonment at a later hearing to revoke his probation. See Fried Brief 14, 23–24.

*Gagnon* and *Nichols* do not stand for the broad proposition *amicus* would extract from them. The dispositive factor in those cases was not whether incarceration occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony offense for which he was imprisoned. See *Nichols*, 511 U. S., at 743, n. 9 (absent waiver, right to appointed counsel in felony cases is absolute). Unlike this case, in which revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel, the sentences imposed in *Nichols* and *Gagnon* were for felony convictions—a federal drug conviction in *Nichols*, and a state armed robbery conviction in *Gagnon*—for which the right to counsel is unquestioned. See *Nichols*, 511 U. S., at 747 (relevant sentencing provisions punished only "the last offense committed by the defendant," and did not constitute or "change the penalty imposed for the earlier" uncounseled misdemeanor); *Gagnon*, 411 U. S, at 789 (distinguishing "the right of an accused to counsel in a criminal prosecution" from "the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime").

Thus, neither *Nichols* nor *Gagnon* altered or diminished

*Argersinger*'s command that "no person may be imprisoned *for any offense* . . . unless he was represented by counsel at his trial," 407 U. S., at 37 (emphasis added). Far from supporting *amicus*' position, *Gagnon* and *Nichols* simply highlight that the Sixth Amendment inquiry trains on the stage of the proceedings corresponding to Shelton's Circuit Court trial, where his guilt was adjudicated, eligibity for imprisonment established, and prison sentence determined.

*Nichols* is further distinguishable for the related reason that the Court there applied a "less exacting" standard "consistent with the traditional understanding of the sentencing process." 511 U. S., at 747. Once guilt has been established, we noted in *Nichols*, sentencing courts may take into account not only "a defendant's prior convictions, but . . . also [his] past criminal behavior, even if no conviction resulted from that behavior." *Ibid.* Thus, in accord with due process, Nichols "could have been sentenced more severely based simply on *evidence* of the underlying conduct that gave rise" to his previous conviction, *id.*, at 748 (emphasis added), even if he had never been charged with that conduct, *Williams* v. *New York,* 337 U. S. 241 (1949), and even if he had been acquitted of the misdemeanor with the aid of appointed counsel, *United States* v. *Watts,* 519 U. S. 148, 157 (1997) *(per curiam).* That relaxed standard has no application in this case, where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to "the guiding hand of counsel," *Argersinger*, 407 U. S., at 40 (internal quotation marks omitted).

*Amicus* also contends that "practical considerations clearly weigh against" the extension of the Sixth Amendment appointed-counsel right to a defendant in Shelton's situation. Fried Brief 23. He cites figures suggesting that although conditional sentences are commonly imposed,

they are rarely activated. *Id.*, at 20–22; Tr. of Oral Arg. 20–21 (speculating that "hundreds of thousands" of uncounseled defendants receive suspended sentences, but only "thousands" of that large number are incarcerated upon violating the terms of their probation). Based on these estimations, *amicus* argues that a rule requiring appointed counsel in every case involving a suspended sentence would unduly hamper the States' attempts to impose effective probationary punishment. A more "workable solution," he contends, would permit imposition of a suspended sentence on an uncounseled defendant and require appointment of counsel, if at all, only at the probation revocation stage, when incarceration is imminent. Fried Brief 18, 23–24.

*Amicus* observes that probation is "now a critical tool of law enforcement in low level cases." *Id.*, at 22. Even so, it does not follow that preservation of that tool warrants the reduction of the Sixth Amendment's domain that would result from the regime *amicus* hypothesizes. *Amicus* does not describe the contours of the hearing that, he suggests, might precede revocation of a term of probation imposed on an uncounseled defendant. See *id.*, at 24 (raising, but not endeavoring to answer, several potential questions about the nature of the revocation hearing *amicus* contemplates). In Alabama, however, the character of the probation revocation hearing currently afforded is not in doubt. The proceeding is an "informal" one, *Buckelew* v. *State*, 48 Ala. App. 418, 421, 265 So. 2d 202, 205 (Ala. Crim. App. 1972), at which the defendant has no right to counsel, and the court no obligation to observe customary rules of evidence, *Martin v. State*, 46 Ala. App. 310, 311, 241 So. 2d 339, 340 (Ala. Crim. App. 1970).

More significant, the sole issue at the hearing—apart from determinations about the necessity of confinement, see Ala. Code §15–22–54(d)(4) (1975)—is whether the defendant breached the terms of probation. See *Martin*,

46 Ala. App., at 312, 241 So. 2d, at 341 ("All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." (internal quotation marks omitted)). The validity or reliability of the underlying conviction is beyond attack. See *Buckelew*, 48 Ala. App., at 421, 265 So. 2d, at 205 ("a probation hearing cannot entertain a collateral attack on a judgment of another circuit").

We think it plain that a hearing so timed and structured cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration. Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to "the crucible of meaningful adversarial testing," *United States* v. *Cronic,* 466 U. S. 648, 656 (1984). The Sixth Amendment does not countenance this result.

In a variation on *amicus'* position, the dissent would limit review in this case to the question whether the *imposition* of Shelton's suspended sentence required appointment of counsel, answering that question "plainly no" because such a step "does not deprive a defendant of his personal liberty." *Post*, at 3. Only if the sentence is later activated, the dissent contends, need the Court "ask whether the procedural safeguards attending the imposition of [Shelton's] sentence comply with the Constitution." *Id.*, at 3.

Severing the analysis in this manner makes little sense. One cannot assess the constitutionality of imposing a suspended sentence while simultaneously walling off the

procedures that will precede its activation. The dissent imagines a set of safeguards Alabama might provide at the probation revocation stage sufficient to cure its failure to appoint counsel prior to sentencing, including, perhaps, "complete retrial of the misdemeanor violation with assistance of counsel," *id.*, at 4. But there is no cause for speculation about Alabama's procedures; they are established by Alabama statute and decisional law, see *supra*, at 10–11, and they bear no resemblance to those the dissent invents in its effort to sanction the prospect of Shelton's imprisonment on an uncounseled conviction.[5] Assessing the issue before us in light of actual circumstances, we do not comprehend how the procedures Alabama in fact provides at the probation revocation hearing could bring Shelton's sentence within constitutional bounds.[6]

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[5] In any event, the dissent is simply incorrect that our decision today effectively "deprive[s] the State of th[e] option" of placing an uncounseled defendant on probation, with incarceration conditioned on a guilty verdict following a trial *de novo*. *Post*, at 4. That option is the functional equivalent of pretrial probation, as to which we entertain no constitutional doubt. See *infra*, at 15–16, and n. 12.

Regarding the dissent's suggestion that other "means of retesting (with assistance of counsel) the validity of the original conviction" might suffice, *post*, at 5, n. 3, we doubt that providing counsel after the critical guilt adjudication stage "[would] be of much help to a defendant," for "the die is usually cast when judgment is entered on an uncounseled trial record." *Argersinger*, 407 U. S., at 41 (Burger, C. J., concurring in result). "A large number of misdemeanor convictions take place in police or justice courts which are not courts of record. Without a drastic change in the procedures of these courts, there would be no way" for the defendant to demonstrate error in the original proceeding or reconstruct evidence lost in the intervening period. *Nichols*, 511 U. S., at 748. But we need not here decide whether or what procedural safeguards "short of complete retrial" at the probation revocation stage could satisfy the Sixth Amendment, *post*, at 5; the minimal procedures Alabama *does* provide are plainly insufficient.

[6] Charging that we have "miraculously divined how the Alabama

Nor do we agree with *amicus* or the dissent that our holding will "substantially limit the states' ability" to impose probation, Fried Brief 22, or encumber them with a "large, new burden," *post*, at 6–7. Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution. See *Nichols*, 511 U. S., at 748–749, n. 12. All but 16 States, for example, would provide counsel to a defendant in Shelton's circumstances, either because he received a substantial fine[7] or because state law authorized incarceration for the charged offense[8] or provided for a maxi-

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justices would resolve a constitutional question," *post*, at 2, the dissent forgets that this case is here on writ of certiorari to the Alabama Supreme Court. That court ruled in the decision under review that Shelton's sentence violates the Sixth Amendment. The Alabama Supreme Court has thus *already* spoken on the issue we now address, and in doing so expressed not the slightest hint that revocation-stage procedures—real or imaginary—would affect the constitutional calculus.

[7]See N. J. Stat. Ann. §2A:158A–5.2 (1985); *State* v. *Hermanns*, 278 N. J. Super. 19, 29, 650 A. 2d 360, 366 (1994); N. C. Gen. Stat. §7A–451(a)(1) (1999); Vt. Stat. Ann., Tit. 13, §5201 (1998).

[8]See *Alexander* v. *Anchorage*, 490 P. 2d 910, 913 (Alaska 1971) (interpreting Alaska Const., Art. I, §11, to provide counsel when punishment may involve incarceration); *Tracy* v. *Municipal Court for Glendale Judicial Dist.*, 22 Cal. 3d 760, 766, 587 P. 2d 227, 230 (1978) (Cal. Penal Code Ann. §686 (West 1985) affords counsel to misdemeanor defendants); Del. Code Ann., Tit. 29, §4602 (1997); D. C. Code Ann. §11–2602 (2001); Haw. Rev. Stat. §802–1 (1999); Ill. Comp. Stat., ch. 725, §113–3 (1992); *Brunson* v. *State*, 182 Ind. App. 146, 149, 394 N. E. 2d 229, 231 (1979) (right to counsel in misdemeanor proceedings guaranteed by Ind. Const., Art. I, §13); Ky. Rev. Stat. Ann. §§31.100(4)(b), 31.110(1) (1999); La. Const., Art. I, §13; Mass. Rule Crim. Proc. 8 (2001); Minn. Rule Crim. Proc. 5.02(1) (2001); Neb. Rev. Stat. §29–3902 (1995); N. Y. Crim. Proc. Law §170.10(3)(c) (1993); Okla. Stat., Tit. 22, §1355.6.A (Supp. 2002); Ore. Rev. Stat. Ann. §135.050(4) (Supp. 1998); Tenn. Sup. Ct. Rule 13(d)(1) (2001); Tex. Crim. Proc. Code Ann. §26.04(b)(3) (Supp. 2002); Va. Code Ann. §§19.2–159, 19.2–160 (2000); Wash. Super. Ct. Crim. Rule 3.1(a) (2002); W. Va. Code §50–4–3

mum prison term of one year.[9] See Ala. Code §§13A–6–22, 13A–5–7(a)(1), 13A–5–12(a)(1) (1994). There is thus scant reason to believe that a rule conditioning imposition of a suspended sentence on provision of appointed counsel would affect existing practice in the large majority of the States.[10] And given the current commitment of most

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(2000); Wis. Stat. §967.06 (1998); Wyo. Stat. Ann. §7–6–102 (2001).

[9]See Idaho Code §§19–851(d)(2), §19–852(a)(1) (1997); Iowa Rule Crim. Proc. 26 (2002); *Wright* v. *Denato*, 178 N. W. 2d 339, 341–342 (Iowa 1970); Md. Ann. Code, Art. 27A, §§2(h)(2), 4(b)(2) (1997 and Supp. 2000); Nev. Rev. Stat. §§178.397, 193.120 (2001); N. H. Rev. Stat. Ann. §§604–A:2(I), 625:9(IV)(a)(1) (Supp. 2001); N. M. Stat. Ann. §§31–16–2(D), §31–16–3(A) (2000); Ohio Rules Crim. Proc. 2(C), 44(A) (2002); Pa. Rule Crim. Proc. 122(A) (2002); 18 Pa. Cons. Stat. §106(c)(2) (1998); S. D. Codified Laws §§23A–40–6, 23–40–6.1, 22–6–2(1) (1998); see also Conn. Gen. Stat. §51–296(a) (Supp. 2001) (imposition of a "suspended sentence of incarceration with a period of probation" necessitates appointment of counsel).

[10]That ten States in this majority do not provide counsel to every defendant who receives a suspended sentence hardly supports the dissent's dire predictions about the practical consequences of today's decision, see *post*, at 5–8, and n. 4. The circumstances in which those States currently allow prosecution of misdemeanors without appointed counsel are quite narrow. In Pennsylvania, for example, all defendants charged with misdemeanors enjoy a right to counsel regardless of the sentence imposed, Pa. Rule Crim. Proc. 122(B) (2002); only those charged with "summary offenses" (violations not technically considered crimes and punishable by no more than 90 days' imprisonment, 18 Pa. Cons. Stat. §106(c)(2) (1998)) may receive a suspended sentence uncounseled. Pa. Rule Crim. Proc. 122(A) (2002); *Commonwealth* v. *Thomas*, 510 Pa. 106, 111, n. 7, 507 A. 2d 57, 59, n. 7 (1986). (Typical "summary offenses" in Pennsylvania include the failure to return a library book within 30 days, 18 Pa. Cons. Stat. §6708 (1998), and fishing on a Sunday, 30 Pa. Cons. Stat. §2104 (1998)). Gaps in the misdemeanor defendant's right to appointed counsel in other States that extend protection beyond the Sixth Amendment are similarly slight. See, *e.g.*, S. D. Codified Laws §§23A–40–6.1, 22–6–2(2) (1998) (defendant charged with misdemeanor enjoys absolute right to appointed counsel unless offense punishable by no more than 30 days' imprisonment); Tex. Crim. Proc. Code Ann. §26.04(b)(3) (Supp. 2002)

jurisdictions to affording court-appointed counsel to indigent misdemeanants while simultaneously preserving the option of probationary punishment, we do not share *amicus*' concern that other States may lack the capacity and resources to do the same.

Moreover, even if *amicus* is correct that "some courts and jurisdictions at least [can]not bear" the costs of the rule we confirm today, Fried Brief 23, those States need not abandon probation or equivalent measures as viable forms of punishment. Although they may not attach probation to an imposed and suspended prison sentence, States unable or unwilling routinely to provide appointed counsel to misdemeanants in Shelton's situation are not without recourse to another option capable of yielding a similar result.

That option is pretrial probation, employed in some form by at least 23 States. See App. to Reply Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 1a–2a (collecting state statutes). Under such an arrangement, the prosecutor and defendant agree to the defendant's participation in a pretrial rehabilitation program,[11] which includes conditions typical of post-trial

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(counsel must be appointed to all misdemeanor defendants except those tried before a judge who knows sentence will not include imprisonment).

More typical of the situation that results in a suspended sentence, we think, is a case like Shelton's—a prosecution before a jury for third-degree assault, arising out of a fistfight that followed a minor traffic accident, see App. 15, n. 2. Far from "quite irrelevant," *post*, at 6, that 34 States already provide an attorney in this situation strongly suggests that the added requirement of providing counsel routinely in suspended sentence cases will not prove unduly onerous.

[11] Because this device is conditioned on the defendant's consent, it does not raise the question whether imposition of probation alone so restrains a defendant's liberty as to require provision of appointed counsel. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 8; cf. Brief for Respondent 13–16.

probation. The adjudication of guilt and imposition of sentence for the underlying offense then occur only if and when the defendant breaches those conditions. *Ibid.*; see, *e.g.*, Conn. Gen. Stat. §54–56e (2001); Pa. Rules Crim. Proc. 310–320, 316 (2002) ("The conditions of the [pretrial rehabilitation] program may be such as may be imposed with respect to probation after conviction of a crime."); N. Y. Crim. Proc. Law §170.55(3) (McKinney Supp. 2001) (pretrial "adjournment in contemplation of dismissal" may require defendant "to observe certain specified conditions of conduct").[12]

Like the regime urged by *amicus*, this system reserves the appointed-counsel requirement for the "small percentage" of cases in which incarceration proves necessary, Fried Brief 21, thus allowing a State to "supervise a course of rehabilitation" without providing a lawyer every time it wishes to pursue such a course, *Gagnon*, 411 U. S., at 784. Unlike *amicus*' position, however, pretrial probation also respects the constitutional imperative that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial," *Argersinger*, 407 U. S., at 37.

C

Alabama concedes that activation of a suspended sentence results in the imprisonment of an uncounseled defendant "for a term that relates to the original offense" and therefore "crosses the line of 'actual imprisonment'"

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[12]There is thus only one significant difference between pretrial probation and the "sensible option" urged by the dissent, *i.e.*, "complete retrial of the misdemeanor violation with assistance of counsel" upon a defendant's violation of probation terms, *post*, at 4. Pretrial probation is substantially less expensive: It permits incarceration after a single trial, whereas the dissent's regime requires two—one (without counsel) to place the defendant on probation, and a second (with counsel) to trigger imprisonment.

established in *Argersinger* and *Scott*. Reply Brief to *Amicus Curiae* Professor Charles Fried 8. Shelton cannot be imprisoned, Alabama thus acknowledges, "unless the State has afforded him the right to assistance of appointed counsel in his defense," *Scott*, 440 U. S., at 374; see Reply Brief 9. Alabama maintains, however, that there is no constitutional barrier to *imposition* of a suspended sentence that can never be enforced; the State therefore urges reversal of the Alabama Supreme Court's judgment insofar as it vacated the term of probation Shelton was ordered to serve.

In effect, Alabama invites us to regard two years' probation for Shelton as a separate and independent sentence, which "the State would have the same power to enforce [as] a judgment of a mere fine." Tr. of Oral Arg. 6. *Scott*, Alabama emphasizes, squarely held that a fine-only sentence does not trigger a right to court-appointed counsel, *ibid.*; similarly, Alabama maintains, probation uncoupled from a prison sentence should trigger no immediate right to appointed counsel. Seen as a freestanding sentence, Alabama further asserts, probation could be enforced, as a criminal fine or restitution order could, in a contempt proceeding. See Reply Brief 11–12; Reply Brief to *Amicus Curiae* Professor Charles Fried 10–13; Tr. of Oral Arg. 7.

Alabama describes the contempt proceeding it envisions as one in which Shelton would receive "the full panoply of due process," including the assistance of counsel. Reply Brief 12. Any sanction imposed would be for "post-conviction wrongdoing," not for the offense of conviction. Reply Brief to *Amicus Curiae* Professor Charles Fried 11. "The maximum penalty faced would be a $100 fine and five days' imprisonment," Reply Brief 12 (citing Ala. Code §12–11–30(5)(1995)), not the 30 days ordered and suspended by the Alabama Circuit Court, see *supra*, at 2.

There is not so much as a hint, however, in the decision of the Supreme Court of Alabama, that Shelton's proba-

tion term is separable from the prison term to which it was tethered. Absent any prior presentation of the position the State now takes,[13] we resist passing on it in the first instance. Our resistance to acting as a court of first view instead of one of review is heightened by the Alabama Attorney General's acknowledgment at oral argument that he did not know of any State that imposes, postconviction, on a par with a fine, a term of probation unattached to a suspended sentence. Tr. of Oral Arg. 8. The novelty of the State's current position is further marked by the unqualified statement in Alabama's opening brief that, "[b]y reversing Shelton's suspended sentence, the [Supreme Court of Alabama] correspondingly vacated the two-year probationary term." Brief for Petitioner 6.

In short, Alabama has developed its position late in this litigation and before the wrong forum. It is for the Alabama Supreme Court to consider before this Court does whether the suspended sentence alone is invalid, leaving Shelton's probation term freestanding and independently effective. See *Hortonville Joint School Dist. No. 1* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State."). We confine our review to the ruling the Alabama Supreme Court made in the case as presented to it: "[A] defendant who receives a suspended or probated sentence *to imprisonment* has a

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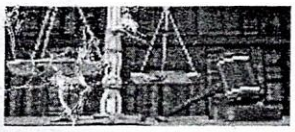
[13] Not until its Reply Brief did the State convey that, as it comprehends *Argersinger* and *Scott*, "there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation." Reply Brief 9. Before the Supreme Court of Alabama, the State's position coincided with the position now argued by *amicus*. See State's Brief and Argument on Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals, p. 31, and State's Brief and Argument in Support of its Application for Rehearing, in No. 1990031 (Ala. Sup. Ct.), p. 32.

constitutional right to counsel." App. 40 (emphasis added); see Brief for Petitioner 6. We find no infirmity in that holding.

* * *

Satisfied that Shelton is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined, we affirm the judgment of the Supreme Court of Alabama.

*It is so ordered.*

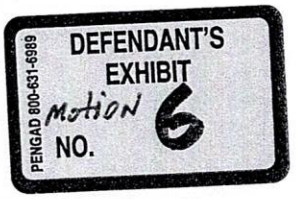


Carson Henderson <carson@carsonhendersonlawfirm.com>

# STATE v. SHERRY ASHLEY MCMAHAN

1 message

**Carson Henderson** <carson@carsonhendersonlawfirm.com> Mon, Jul 8, 2019 at 5:16 PM
To: "Hocker, Donald B." <dhockerj@sccourts.org>, "Hocker, Donald B. Law Clerk (Alfred L. Bixler)" <dhockerlc@sccourts.org>, Micah Black <mblack@greenwoodsc.gov>, "Yates Brown (8th Circuit Solicitor's Office)" <ybrown@greenwoodsc.gov>




Judge Hocker,

The following issues need to be addressed on behalf of the Defendant:

1. Motion to remand which we discussed in chambers;

2. Motion to quash the open container indictment which we discussed on the record;

3. Rule 5/Brady violations. The first mention of Dep. Jonathan Pratt and Dep. Seth Scott was when I received the State's witness list this afternoon in the courtroom. They aren't mentioned in any written discovery. No videos or reports or radio transmissions have been produced from these witnesses. I specifically asked for such information in my discovery motions. I also asked for training records for all officers involved in the investigation. Trooper Prince's in-car video hasn't been produced. The State hasn't indicated what time that each officer involved in this matter came into contact with the Defendant.

4. When Trooper Lynch's in-car video begins, my client is in the backseat of a deputy's vehicle. She's in custody (suspect's freedom of movement has been restricted in any significant way) if she's in the backseat of the deputy's vehicle. The State hasn't produced evidence indicating how my client came to be in the custody of the deputy, other than "she was taken home by a passerbyer." See Berkemer v. McCarty, 468 U.S. 420; State v. Easler, 489 S.E.2d 617 (S.C.). When Trooper Lynch arrives, he begins interrogating my client (asks her what happened, how much have you had to drink). My client doesn't receive Miranda warnings prior to Trooper Lynch's questioning. Client performed field sobriety tests without being mirandized. See Pennsylvania v. Muniz, 496 U.S. 582; State v. Clute, 480 S.E.2d 85 (S.C. Ct. App.).

5. Client's eyes can't be seen during the HGN test. See State v. Gordon, S.C. 2015.

6. 19:15 into Trooper Lynch's video: dispatch says my client has a prior DUI conviction.

7. Breath test video observation start time begins at 17:33:04. At 5:40:28, client says she won't take breath test "until I talk to my lawyer." My client had been mirandized at this point. Trooper Lynch doesn't give my client an opportunity to contact a lawyer. Client provides a sample at 17:57:45. There was ample time for my client to be allowed to contact a lawyer without interfering with or delaying the test. Trooper Lynch says my client was arrested at 17:01. Considering that Trooper Lynch had 2 hours to get a breath sample, there was sufficient time to allow my client to contact a lawyer.

8. All mention of my client taking prescription medication should be redacted. Trooper Lynch didn't ask my client for a urine test.

I don't think that I've omitted anything.

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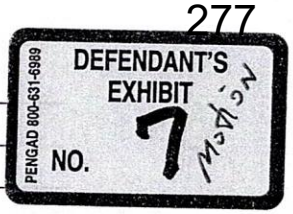
*Carson M. Henderson*
*The Henderson Law Firm, P.C.*

*864-649-0384 (office)*

276

109-B Oak Avenue
Greenwood S.C. 29646

www.carsonhendersonlawfirm.com




State vs. _____

Ticket/Warrant Number(s) _____

Offense(s) Charged _____

Penalty: _____

## FARETTA WARNINGS

You have been charged with the criminal offense(s) listed above. Before you can plead guilty or not guilty to this charge(s) or proceed to trial, you must be informed that you have the right to an attorney. If you cannot afford an attorney (and meet certain income guidelines established by the Court), an attorney will be appointed to represent you, if you so choose. If you do not meet the eligibility guidelines to have an attorney appointed to represent you, you still have the right to an attorney to represent you on the charge(s) listed above, however the attorney must be retained at your own expense.

You do have the constitutional right to represent yourself and proceed without an attorney; however, I must inform you of the following:

DEFENDANT NOT INFORMED OF THESE RIGHTS

- Self-representation can be dangerous and you have the right to have the assistance of a lawyer at all stages of the proceedings, and if you cannot afford a lawyer, a lawyer can be appointed to represent you.
- Criminal defense is a highly specialized and technical area of the law.
- There may be certain factual, legal, or other defenses to the charge(s) you are facing and if you choose to proceed without the services of a licensed attorney, you may not be aware of certain defenses.
- There may be issues related to the conduct of trial or a guilty plea that could arise in the future that you may not be aware of and it would be your attorney's responsibility to be aware of those issues and how to properly address them before the Court, and, if necessary, preserve the issues for appellate review.
- There may be collateral consequences of a conviction or plea that you are not aware of, including, but not limited to, you could face increased penalties for subsequent offenses, suspension of your driver's license, the restriction of the right to possess firearms and/or ammunition, or your immigration status may be affected.
- If you exercise your right to proceed without the services of an attorney, you are responsible for complying with all applicable rules of court, including rules of evidence, procedural rules, and proper behavior before the Judge and/or Jury.
- You understand that if you waive screening for a court-appointed attorney, that you are responsible for hiring a private attorney if you want one.

I state that I have fully and completely read this document regarding self-representation and I have had any and all of my questions answered to my complete satisfaction. At this time, I **DO/DO NOT** (circle one) wish to be screened for a court-appointed attorney and I wish to proceed with my trial at this time.

_____ _____

Signature of Defendant Date Signature of Judge Date

422 U.S. 806 (1975)

# FARETTA
v.
# CALIFORNIA.

No. 73-5772.

**Supreme Court of United States.**

Argued November 19, 1974.
Decided June 30, 1975.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

*Jerome B. Falk, Jr.*, by appointment of the Court, 417 U. S. 906, argued the cause for petitioner. With him on the briefs was *Roger S. Hanson.*

*Howard J. Schwab,* Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *S. Clark Moore,* Assistant Attorney General, and *Russell Iungerich* and *Donald J. Oeser,* Deputy Attorneys General.[*]

807 *807 MR. JUSTICE STEWART delivered the opinion of the Court.

The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment. This clear constitutional rule has emerged from a series of cases decided here over the last 50 years.[1] The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.

## I

Anthony Faretta was charged with grand theft in an information filed in the Superior Court of Los Angeles County, Cal. At the arraignment, the Superior Court Judge assigned to preside at the trial appointed the public defender to represent Faretta. Well before the date of trial, however, Faretta requested that he be permitted to represent himself. Questioning by the judge revealed that Faretta had once represented himself in a criminal prosecution, that he had a high school education, and that he did not want to be represented by the public defender because he believed that that office was "very loaded
808 down with . . . a heavy case load." The judge *808 responded that he believed Faretta was "making a mistake" and emphasized that in further proceedings Faretta would receive no special favors.[2] Nevertheless, after establishing that Faretta wanted to represent himself and did not want a lawyer, the judge, in a "preliminary ruling," accepted Faretta's waiver of the assistance of counsel. The judge indicated, however, that he might reverse this ruling if it later appeared that Faretta was unable adequately to represent himself.

Several weeks thereafter, but still prior to trial, the judge *sua sponte* held a hearing to inquire into Faretta's ability to conduct his own defense, and questioned him specifically about both the hearsay rule and the state law governing the challenge of
809 potential jurors.[3] After consideration *809 of Faretta's answers, and observation of his demeanor, the judge ruled that
810 Faretta had not made an intelligent and knowing waiver of his right to the assistance *810 of counsel, and also ruled that Faretta had no constitutional right to conduct his own defense.[4] The judge, accordingly, reversed his earlier ruling permitting self-representation and again appointed the public defender to represent Faretta. Faretta's subsequent request for leave to act as cocounsel was rejected, as were his efforts to make certain motions on his own behalf.[5] Throughout
811 *811 the subsequent trial, the judge required that Faretta's defense be conducted only through the appointed lawyer from the public defender's office. At the conclusion of the trial, the jury found Faretta guilty as charged, and the judge sentenced him to prison.

The California Court of Appeal, relying upon a then-recent California Supreme Court decision that had expressly decided
812 the issue,[6] affirmed the trial judge's ruling that Faretta had no federal or state constitutional right *812 to represent himself.[7] Accordingly, the appellate court affirmed Faretta's conviction. A petition for rehearing was denied without opinion, and the California Supreme Court denied review.[8] We granted certiorari. 415 U. S. 975.

## II

In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington
813 one day before the Sixth Amendment *813 was proposed, provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel. . . ." The right is currently codified in 28 U. S. C. § 1654.

With few exceptions, each of the several States also accords a defendant the right to represent himself in any criminal case.
814 [9] The Constitutions of 36 States explicitly confer that right.[10] Moreover, many state courts have *814 expressed the view that the right is also supported by the Constitution of the United States.[11]

This Court has more than once indicated the same view. In *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279, the Court recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a "correlative right to dispense with a lawyer's help." The defendant in that case, indicted for federal mail fraud violations, insisted on conducting his own defense without benefit of counsel. He also requested a bench trial and signed a waiver of his right to trial by jury. The prosecution consented to the waiver of a jury, and the waiver was accepted by the court. The defendant was convicted, but the Court of Appeals reversed the conviction on the ground that a person accused of a felony could not competently waive his right to trial by jury except upon the advice of a lawyer. This Court reversed and reinstated the conviction, holding that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel." *Id.*, at 275.

815 The *Adams* case does not, of course, necessarily resolve the issue before us. It held only that "the Constitution *815 does not force a lawyer upon a defendant." *Id.*, at 279.[12] Whether the Constitution forbids a State from forcing a lawyer upon a defendant is a different question. But the Court in *Adams* did recognize, albeit in dictum, an affirmative right of self-representation:

> "The right to assistance of counsel and the *correlative right to dispense with a lawyer's help* are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . .
>
> ". . . What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
>
> ". . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution." *Id.*, at 279-280 (emphasis added).

816 In other settings as well, the Court has indicated that *816 a defendant has a constitutionally protected right to represent himself in a criminal trial. For example, in *Snyder* v. *Massachusetts*, 291 U. S. 97, the Court held that the Confrontation Clause of the Sixth Amendment gives the accused a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence. This right to "presence" was based upon the premise that the "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, *for it will be in his power,* if present, to give advice or suggestion or *even to supersede his lawyers altogether and conduct the trial himself.*" *Id.*, at 106 (emphasis added). And in *Price* v. *Johnston*, 334 U. S. 266, the Court, in holding that a convicted person had no absolute right to argue his own appeal, said this holding was in "sharp contrast" to his "recognized privilege of conducting his own defense at the trial." *Id.*, at 285.

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The United States Courts of Appeals have repeatedly held that the right of self-representation is protected by the Bill of Rights. In *United States v. Plattner*, 330 F. 2d 271, the Court of Appeals for the Second Circuit emphasized that the Sixth Amendment grants the accused the rights of confrontation, of compulsory process for witnesses in his favor, and of assistance of counsel as minimum procedural requirements in federal criminal prosecutions. The right to the assistance of counsel, the court concluded, was intended to supplement the other rights of the defendant, and not to impair "the absolute and primary right to conduct one's own defense *in propria persona*." *Id.*, at 274. The court found support for its decision in the language of the 1789 federal statute; in the statutes and rules governing criminal procedure, see 28 U. S. C. § 1654,
817 and Fed. Rule Crim. Proc. 44; in the many state constitutions that expressly guarantee self-representation; *817 and in this Court's recognition of the right in *Adams* and *Price*. On these grounds, the Court of Appeals held that implicit in the Fifth Amendment's guarantee of due process of law, and implicit also in the Sixth Amendment's guarantee of a right to the assistance of counsel, is "the right of the accused personally to manage and conduct his own defense in a criminal case." 330 F. 2d, at 274. See also *United States ex rel. Maldonado v. Denno*, 348 F. 2d 12, 15 (CA2); *MacKenna v. Ellis*, 263 F. 2d 35, 41 (CA5); *United States v. Sternman*, 415 F. 2d 1165, 1169-1170 (CA6); *Lowe v. United States*, 418 F. 2d 100, 103 (CA7); *United States v. Warner*, 428 F. 2d 730, 733 (CA8); *Haslam v. United States*, 431 F. 2d 362, 365 (CA9); compare *United States v. Dougherty*, 154 U. S. App. D. C. 76, 86, 473 F. 2d 1113, 1123 (intimating right is constitutional but finding it unnecessary to reach issue) with *Brown v. United States*, 105 U. S. App. D. C. 77, 79-80, 264 F. 2d 363, 365-366 (plurality opinion stating right is no more than statutory in nature).

This Court's past recognition of the right of self-representation, the federal-court authority holding the right to be of constitutional dimension, and the state constitutions pointing to the right's fundamental nature form a consensus not easily ignored. "[T]he mere fact that a path is a beaten one," Mr. Justice Jackson once observed, "is a persuasive reason for following it."[13] We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.

818 *818 **III**

This consensus is soundly premised: The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged.

## A

The Sixth Amendment includes a compact statement of the rights necessary to a full defense:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Because these rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States.[14] The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice— through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. See *California v. Green*, 399 U. S. 149, 176 (Harlan, J., concurring).

819 *819 The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.[15]
820 The right to defend *820 is given directly to the accused; for it is he who suffers the consequences if the defense fails.

The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools

guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master;[16] and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. Cf. *Henry v. Mississippi*, 379 U. S. 443, 451; *Brookhart v. Janis*, 384 U. S. 1, 7-8; *Fay v. Noia*, 372 U. S. 391, 439. This allocation can only be justified, however, by the defendant's consent, at the
821 *821 outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

## B

The Sixth Amendment, when naturally read, thus implies a right of self-representation. This reading is reinforced by the Amendment's roots in English legal history.

In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights.[17] The Star Chamber not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless
822 it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was *822 considered to have confessed.[18] Stephen commented on this procedure: "There is something specially repugnant to
823 justice in using rules of practice in such a manner as *823 to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defense." 1 J. Stephen, A History of the Criminal Law of England 341-342 (1883). The Star Chamber was swept away in 1641 by the revolutionary fervor of the Long Parliament. The notion of obligatory counsel disappeared with it.

By the common law of that time, it was not representation by counsel but self-representation that was the practice in prosecutions for serious crime. At one time, every litigant was required to "appear before the court in his own person and conduct his own cause in his own words."[19] While a right to counsel developed early in civil cases and in cases of misdemeanor, a prohibition against the assistance of counsel continued for centuries in prosecutions for felony or treason.[20] Thus, in the 16th and 17th centuries the accused felon or traitor stood alone, with neither counsel nor the benefit of other rights—to notice, confrontation, and compulsory process—that we now associate with a genuinely fair adversary
824 proceeding. The trial was merely a "long argument between the prisoner and the *824 counsel for the Crown."[21] As harsh as this now seems, at least "the prisoner was allowed to make what statements he liked. . . . Obviously this public oral trial presented many more opportunities to a prisoner than the secret enquiry based on written depositions, which, on the continent, had taken the place of a trial. . . ."[22]

With the Treason Act of 1695, there began a long and important era of reform in English criminal procedure. The 1695 statute granted to the accused traitor the rights to a copy of the indictment, to have his witnesses testify under oath, and "to make . . . full Defense, by Counsel learned in the Law."[23] It also provided for court appointment of counsel, *but only if the*
825 *accused so desired*.[24] *825 Thus, as new rights developed, the accused retained his established right "to make what statements he liked."[25] The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. The ban on counsel in felony cases, which had been substantially eroded in the courts,[26] was finally eliminated by statute in 1836.[27] In more recent years, Parliament has provided for court appointment of counsel in serious criminal cases, but only at the accused's request.[28] At no point in this process of reform
826 in England was counsel ever forced upon the *826 defendant. The common-law rule, succinctly stated in *R. v. Woodward*, [1944] K. B. 118, 119, [1944] 1 All E. R. 159, 160, has evidently always been that "no person charged with a criminal offence can have counsel forced upon him against his will."[29] See 3 Halsbury's Laws of England ¶ 1141, pp. 624-625 (4th ed. 1973); *R. v. Maybury*, 11 L. T. R. (n. s.) 566 (Q. B. 1865).

282

C

In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England.

The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions."[30] This prejudice gained strength in the Colonies where "distrust
827 *827 of lawyers became an institution."[31] Several Colonies prohibited pleading for hire in the 17th century.[32] The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class."[33] The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class."[34] In the heat of these sentiments the Constitution was forged.

This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. Colonial judges soon departed from ancient English practice and allowed accused felons the aid of counsel for their defense.[35] At the same
828 time, however, the basic right of *828 self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.[36]

The right of self-representation was guaranteed in many colonial charters and declarations of rights. These early documents establish that the "right to counsel" meant to the colonists a right to choose between pleading through a lawyer and
829 representing oneself.[37] After the *829 Declaration of Independence, the right of self-representation, along with other rights basic to the making of a defense, entered the new state constitutions in wholesale fashion.[38] The right to counsel was
830 clearly thought to *830 supplement the primary right of the accused to defend himself,[39] utilizing his personal rights to notice, confrontation, and compulsory process. And when the Colonies or newly independent States provided by statute rather than by constitution for court appointment of counsel in criminal cases, they also meticulously preserved the right of the accused to defend himself personally.[40]

831 *831 The recognition of the right of self-representation was not limited to the state lawmakers. As we have noted, § 35 of the Judiciary Act of 1789, signed one day before the Sixth Amendment was proposed, guaranteed in the federal courts the right of all parties to "plead and manage their own causes personally or by the assistance of . . . counsel." 1 Stat. 92. See 28 U. S. C. § 1654. At the time James Madison drafted the Sixth Amendment, some state constitutions guaranteed an accused the right to be heard "by himself" and by counsel; others provided that an accused was to be "allowed" counsel.[41]
832 The various state proposals for the Bill of Rights had similar variations in terminology.[42] *832 In each case, however, the counsel provision was embedded in a package of defense rights granted personally to the accused. There is no indication that the differences in phrasing about "counsel" reflected any differences of principle about self-representation. No State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable. If anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none.

In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an "assistance" for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.

## IV

There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. See *Powell* v. *Alabama*, 287 U. S. 45; *Johnson* v. *Zerbst*, 304 U. S. 458; *Gideon* v. *Wainwright*, 372 U. S. 335; *Argersinger* v. *Hamlin*, 407 U. S. 25. For it is surely true that the basic thesis of

833 those decisions is that the help of a lawyer is essential to assure *833 the defendant a fair trial.[43] And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.

But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders,[44] yet the notion of compulsory counsel was utterly foreign to them. And whatever else
834 may be said of those who wrote the Bill of Rights, surely there can be no *834 doubt that they understood the inestimable worth of free choice.[45]

It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." *Illinois v. Allen*, 397 U. S. 337, 350-351 (BRENNAN, J., concurring).[46]

835 *835 **V**

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Johnson v. Zerbst*, 304 U. S., at 464-465. Cf. *Von Moltke v. Gillies*, 332 U. S. 708, 723-724 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U. S., at 279.

Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not
836 to accept *836 the assistance of counsel, and that Faretta would be required to follow all the "ground rules" of trial procedure.[47] We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on *voir dire*.[48] For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense. Accordingly, the judgment before us is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

This case, like *Herring* v. *New York, post,* p. 853, announced today, is another example of the judicial tendency to constitutionalize what is thought "good." That effort fails on its own terms here, because there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own
837 defense to criminal charges.[1] Moreover, there is no constitutional basis for *837 the Court's holding, and it can only add to the problems of an already malfunctioning criminal justice system. I therefore dissent.

**I**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Robert Osbey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-001038

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**ON WRIT OF CERTIORARI**

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Appeal from Spartanburg County
J. Derham Cole, Plea Court Judge
Edward W. Miller, Post-Conviction Relief Judge

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Opinion No. 27866
Submitted November 15, 2018 – Filed March 6, 2019

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**REVERSED**

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Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, and Assistant Attorney General Jordan Adraine Cox, both of Columbia, for Respondent.

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**JUSTICE FEW:** Robert Osbey pled guilty to criminal charges without counsel. He later applied for post-conviction relief (PCR) on the ground he did not waive his right to counsel. We reverse the denial of his PCR claim because the record does not reflect a valid waiver of Osbey's right to counsel. In particular, the plea court

did not ensure Osbey was aware of the dangers of self-representation. We remand to the court of general sessions for a new trial.

## I. Facts and Procedural History

The State charged Osbey with two counts of trafficking in cocaine base and one count of possession with intent to distribute cocaine base. The charges stem from two incidents in which Osbey allegedly sold crack cocaine to a confidential informant. Osbey pled guilty almost a year after his arrest, without counsel. The plea court informed him of his right to counsel, and noted Osbey had previously been informed by a court official on three separate occasions that if he wanted to have a public defender appointed he would have to contact the public defender's office and submit an application. The plea court then asked, "Did you knowingly and intelligently make the decision not to have a lawyer assist you?" Osbey responded, "No, sir. I was trying to get one." Osbey explained he went to the public defender's office the week before but was told it was too late.

The plea court ruled,

> I find . . . that you have knowingly waived your right to counsel by your conduct, having known and been advised that you could have an appointed lawyer but you needed to contact the public defender's office so that they could accept your application. And in a year's time . . . you failed to do that. So, you have waived your right to counsel.

Osbey pled guilty to his charges, and the plea court sentenced him to eight years in prison, followed by three years of probation. Osbey did not appeal.

Osbey filed a PCR application on the ground he "did not knowingly and voluntarily waive his right to counsel." At the PCR hearing, Osbey's PCR counsel stated, "This was a pro se plea . . . , but there was nothing on the record that Mr. Osbey was warned about the dangers of self-representation . . . . There is no evidence he had sufficient understanding for his actions to amount to a knowing and voluntary waiver of counsel." The PCR court found "the plea judge was correct in finding [Osbey] knowingly and voluntarily waived his right to counsel." We granted Osbey's petition for a writ of certiorari.

## II. Analysis

A defendant in a criminal case "has the right to the assistance of counsel." *State v. Justus*, 392 S.C. 416, 419, 709 S.E.2d 668, 670 (2011) (citing U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 340-41, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799, 802-03 (1963)). The defendant may waive his right to counsel, but he must do so knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1975). For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581-82). A defendant may waive counsel "by an affirmative, verbal request," or a defendant's actions may constitute a "waiver by conduct." *State v. Roberson*, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009).

The plea court found Osbey waived his right to counsel "by [his] conduct" because Osbey did not seek counsel after being told three separate times he needed to contact the public defender's office.[1] By definition, "A waiver is a voluntary and intentional

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[1] We understand the plea court's frustration with Osbey's dilatory conduct in failing to obtain counsel. In numerous cases, we have recognized a defendant may be found to have waived his right to counsel when it is clear to the court the defendant knew his unreasonable delays could result in a waiver. In *State v. Jacobs*, 271 S.C. 126, 245 S.E.2d 606 (1978), for example, we stated the trial court "had done all it could do to urge [the defendant] to" retain counsel, but the defendant refused. 271 S.C. at 127, 245 S.E.2d at 607. After examining the defendant's actions, we "conclude[d] that, by his conduct, appellant waived his right to counsel." 271 S.C. at 127-28, 245 S.E.2d at 607-08 (citing *United States v. Arlen*, 252 F.2d 491, 494 (2d Cir. 1958)). Relying on *Arlen*, we found the defendant knew the consequences of his actions—that if he did not obtain counsel in a timely manner he would lose his right to counsel—and we found he chose to forego counsel. 271 S.C. at 128, 245 S.E.2d at 608 (for clarification of our finding, *see Arlen*, 252 F.2d at 494 (holding "where a defendant . . . has been advised by the court that he must retain counsel by a certain reasonable time . . . the court may treat his failure to provide for his own defense as a waiver of his right to counsel")); *see also United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995) (discussing "waiver by conduct," and stating, "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel."); *Com. v. Means*, 907 N.E.2d 646, 658

abandonment or relinquishment of a known right." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (citing *Eason v. Eason,* 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009)), *opinion clarified on other grounds*, 386 S.C. 274, 688 S.E.2d 120 (2009). "Waiver requires a party to have known of a right and known that right was being abandoned." 385 S.C. at 496-97, 685 S.E.2d at 607. Any waiver, therefore, including a waiver of counsel "by conduct," must be knowing and intelligent. For a waiver to be "knowing and intelligent," the defendant "should be made aware of the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581-82; *Prince*, 301 S.C. at 423-24, 392 S.E.2d at 463. The *Faretta* and *Prince* requirement applies to any waiver, whether the waiver is alleged to be by "affirmative, verbal request" or "by conduct." *See Goldberg*, 67 F.3d at 1100, 1101 (requiring *Faretta* warnings for a valid waiver by conduct); *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) ("The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct." (citing *Goldberg*, 67 F.3d at 1100)).

In *Gardner v. State*, 351 S.C. 407, 570 S.E.2d 184 (2002), this Court held the *Faretta* and *Prince* requirement of warning the defendant of the dangers of self-representation applies to waiver by conduct. The PCR court found the petitioner's conduct amounted to a waiver of his right to counsel. 351 S.C. at 410, 570 S.E.2d at 185. We explained the petitioner knew he might lose his right to counsel if he failed to obtain counsel prior to his guilty plea. 351 S.C. at 410-11, 570 S.E.2d at 185-86. We reversed, however, finding, "Petitioner was not adequately apprised of the dangers of self-representation." 351 S.C. at 412, 570 S.E.2d at 186.

In this case, the plea court did not mention to Osbey the dangers of self-representation. When this happens, we look to the record to determine if it shows the factual basis for the waiver. *See, e.g.*, *Gardner*, 351 S.C. at 412, 570 S.E.2d at 186 ("In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se, with 'eyes open,' then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial."); *Prince*, 301 S.C. at 424, 392 S.E.2d at 463 (finding no valid waiver because the record "[did] not demonstrate petitioner was sufficiently aware of the dangers of self-representation"). Osbey has two prior convictions for possession with intent to distribute cocaine base. He also violated his probation in 2004 and

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(Mass. 2009) ("The key to waiver by conduct is misconduct occurring *after an express warning has been given* to the defendant about the defendant's behavior and the consequences of proceeding without counsel.").

violated parole in 2007. There is nothing else in the record to indicate Osbey was aware of the dangers of representing himself. We find this is an insufficient basis on which to find Osbey actually understood the dangers of self-representation.

The State argues, relying on *Roberson*, a defendant need not be warned of the dangers of self-representation in a waiver by conduct case, only when the defendant expressly asserts his right to self-representation. In *Roberson*, this Court held the defendant waived his right to counsel by his conduct even though he was not warned of the dangers of self-representation. 382 S.C. at 188, 675 S.E.2d at 734. We found "both *Prince* and *Faretta* inapplicable" because those cases "addressed defendants who elected self-representation." 382 S.C. at 188, 675 S.E.2d at 733. Today, we cannot reconcile our statement in *Roberson* that *Faretta* and *Prince* are inapplicable to a waiver by conduct case with the clear and unmistakable authority discussed above—including *Gardner*—that they are applicable. Perhaps the result of *Roberson* can be justified on the basis of forfeiture.[2] However, to the extent *Roberson* is in conflict with the requirement that the defendant's knowledge and understanding of the dangers of self-representation is a necessary predicate to any waiver of counsel, we overrule it.

## III. Conclusion

Osbey did not waive his right to counsel by conduct because Osbey was not warned of the dangers of self-representation. The decision of the PCR court is **REVERSED** and the case is remanded to the court of general sessions for a new trial.

**BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. JAMES, J., concurring in a separate opinion in which KITTREDGE, J., concurs.**

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[2] *See State v. Thompson*, 355 S.C. 255, 267, 584 S.E.2d 131, 137 (Ct. App. 2003) ("A defendant can forfeit his right to counsel irrespective of his knowledge of . . . the dangers of self-representation." (citing *Goldberg*, 67 F.3d at 1100)); *but see United States v. Ductan*, 800 F.3d 642, 651 (4th Cir. 2015) ("a defendant may forfeit his right to counsel . . . only in truly egregious circumstances"); *State v. Roberson*, 371 S.C. 334, 338, 638 S.E.2d 93, 95 (Ct. App. 2006) ("The record is devoid of any egregious misconduct on the part of Roberson to warrant the drastic sanction of forfeiture of the right to counsel."), *rev'd*, 382 S.C. 185, 675 S.E.2d 732.

**JUSTICE JAMES:** I concur with the reasoning of the majority, but I write separately to point out practical issues facing the circuit court when the unrepresented defendant appears for plea or trial.

The deeper problem facing the circuit court in any given case is that there is typically no clear way to verify whether *Faretta* warnings have ever been given to the unrepresented defendant. Perhaps the ideal time for giving *Faretta* warnings to the unrepresented defendant would be during either the defendant's first appearance or second appearance. However, first appearances are typically conducted with neither a judge nor a court reporter being present; therefore, even if the warnings were then given, there would be no record they were then given or by whom they were given. Second appearances are usually conducted in the presence of a circuit judge, but more often than not, a court reporter is not present. Therefore, there is typically no record of the warnings being given during a second appearance. Even if a court reporter was present during a first appearance, a second appearance, or during some other transcribed proceeding, there would be no occasion for a transcript to be requested or typed until the time for appeal or the commencement of a PCR application. That is of no help to the circuit judge before whom the defendant appears for an imminent trial or plea. If, immediately prior to trial or plea, the unrepresented defendant claims he was not given *Faretta* warnings or does not recall if he was given the warnings, it would likely not be appropriate for the trial or plea judge to receive testimony of the solicitor on the point.

In *Wroten v. State*, we observed, "While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. . . . If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986)). Consequently, the trial judge (or plea judge) has the ultimate responsibility of warning the unrepresented defendant of the dangers of self-representation immediately before the trial or plea is to begin. That paves the way for the dilatory defendant to manipulate the process for further delay, because the trial judge or the plea judge does not become involved until the tail end of the prosecution. Perhaps the most efficient way for this problem to be avoided is for the solicitor, when it becomes apparent a plea or trial is imminent, to bring the unrepresented defendant before the circuit court for the stated purpose of curing

any *Faretta* ills. Even that approach would invite further dilatory conduct by the defendant.

There are obvious practical barriers to ascertaining whether an unrepresented defendant has been warned of the dangers of self-representation. However, the law requires the defendant to be so warned, and the majority correctly concludes there is no proof Osbey was so warned. The majority also correctly concludes there is no proof of waiver by conduct. Here, we have no choice but to reward Osbey with post-conviction relief, even though he, an experienced criminal defendant, was advised he could apply for a public defender several times, beginning almost one year before he pled guilty. I reluctantly concur.

**KITTREDGE, J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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William R. Talley, Respondent,

v.

State of South Carolina, Petitioner.

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ON WRIT OF CERTIORARI

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Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

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Opinion No. 26250
Submitted September 20, 2006 - Filed January 22, 2007

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**REVERSED**

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Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Salley W. Elliott; Assistant Attorney General Christopher L. Newton, all of Columbia, for Petitioner.

Walter H. Hinton, II, of Nelson Mullins Riley & Scarborough, LLP, of Greenville; and Aisha S. Lusk, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent.

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**JUSTICE BURNETT:** This is a post-conviction relief (PCR) case. The PCR judge granted relief to William R. Talley (Respondent). We granted the State's petition for

## FACTUAL/PROCEDURAL BACKGROUND

In 1995, Respondent pled guilty to possession of drug paraphernalia in magistrate's court and paid a $200 fine. In 1996, he pled guilty to criminal domestic violence also in magistrate's court. Respondent received a $940 fine and was sentenced to thirty days' imprisonment, immediately suspended on the condition of six months' good behavior. In 2003, Respondent filed this PCR application to set aside the two misdemeanor convictions alleging his federal constitutional right to counsel had been violated because he was not represented by counsel in either conviction.

Respondent is currently serving a 97-month federal sentence for conspiracy to possess with intent to distribute and distribution of cocaine and cocaine base. He was assessed two criminal history points for the two state convictions under the United States Sentencing Guidelines. Respondent contends his federal sentence was enhanced by approximately ten months because of these criminal history points.

The State moved to summarily dismiss Respondent's PCR application for failure to file within the statute of limitations pursuant to S.C. Code Ann. § 17-27-45(A) (2003).**[1]** Respondent argued his PCR application was timely filed under S.C. Code Ann. § 17-27-45(B)**[2]** because it was filed within one year of Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002).

The PCR judge denied the motion to dismiss and held Respondent had timely filed his PCR application under § 17-27-45(B) because Shelton created a new rule that must be applied retroactively on collateral review. The PCR judge determined, under Shelton, the constitutional right to counsel applied to Respondent's convictions and Respondent had not waived the right. The PCR judge concluded Respondent's right to counsel had been violated in both convictions and vacated Respondent's convictions.

## ISSUE

Did the PCR judge err in applying Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002), retroactively on collateral review to Respondent's convictions?

## STANDARD OF REVIEW

A PCR applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them. *Id.* at 109-10, 525 S.E.2d at 517. The Court will reverse the PCR judge's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

The State argues the PCR judge erred in applying Shelton retroactively on collateral review to Respondent's convictions. We conclude the PCR judge correctly determined Shelton must be applied retroactively on collateral review, but erroneously applied Shelton to Respondent's convictions.

The State urges us to apply both Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994), to determine whether Shelton should be applied retroactively on collateral review. We disagree. In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 178, 110 S.Ct. 2323, 2330, 110 L.Ed.2d 148, 159 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions."); see also, *e.g.*, State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006) (applying Jones in determining State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), should be applied retroactively); State v. Hill, 361 S.C. 297, 604 S.E.2d 696 (2004) (applying Jones in determining State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), should be applied retroactively); Gibson v. State, 355 S.C. 429, 586 S.E.2d 119 (2003) (applying Teague to determine whether Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), should be applied retroactively on collateral review).

In general, the question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision. Teague, 489 U.S. at 300, 109 S.Ct. at 1070, 103 L.Ed.2d at 349. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 301, 109 S.Ct. at 1070, 103 L.Ed.2d at 349 (internal citations omitted) (emphasis in original).

In Shelton, the Supreme Court held the constitutional right to counsel extends to a defendant who receives a "suspended sentence that may 'end up in the actual deprivation of a person's liberty.'" 535 U.S. at 658, 122 S.Ct. at 1767, 152 L.Ed.2d at 895 (citing Argersinger v. Hamlin, 407 U.S. 25, 40, 92 S.Ct. 2006, 2014, 32 L.Ed.2d 530, 540 (1972)).**[3]** The Supreme Court explained:

> A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. The uncounseled conviction at that point "[...]

imprisonment. If, it ends up in the actual deprivation of a person's liberty."

Shelton, 535 U.S. at 662, 122 S.Ct. at 1770, 152 L.Ed.2d at 898 (citing Nichols v. United States, 511 U.S. 738, 746, 114 S.Ct. 1921, 1927, 128 L.Ed.2d 745, 754 (1994) and Argersinger, 407 U.S. at 40, 92 S.Ct. at 2014, 32 L.Ed.2d at 540).

The Supreme Court asserted that two prior decisions, Argersinger and Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), controlled its decision in Shelton. 535 U.S. at 657, 122 S.Ct. at 1767, 152 L.Ed.2d at 895. In Argersinger the Supreme Court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." 407 U.S. at 37, 92 S.Ct. at 2012, 32 L.Ed.2d at 538 (clarifying the scope of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), in which the Supreme Court held that the Sixth Amendment's guarantee of the right of an indigent defendant to appointed counsel applies to state criminal prosecutions through the Fourteenth Amendment). Then in Scott, the Supreme Court noted "the central premise of Argersinger - that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment - is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." 440 U.S. at 373, 99 S.Ct. at 1162, 59 L.Ed.2d at 389. The Supreme Court found the constitutional right to counsel does not apply when a prison term is an authorized punishment but not actually imposed. *Id.* at 369, 99 S.Ct. at 1160, 59 L.Ed.2d at 386.

Although the Supreme Court in Shelton found the Argersinger-Scott "actual imprisonment" rule controlling, "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under Teague." Butler v. McKellar, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347, 356 (1990). Precedent prior to Shelton established that a defendant was entitled to the constitutional right to counsel when the defendant received a sentence "that end[s] up in the actual deprivation of a person's liberty." Argersinger, 407 U.S. at 40, 92 S.Ct. at 2014, 32 L.Ed.2d at 540. However, the Shelton decision required counsel to be appointed when an indigent defendant received a sentence that "*may* end up in the actual deprivation of a person's liberty." Shelton, 535 U.S. at 658, 122 S.Ct. at 1767, 152 L.Ed.2d 895 (internal quotation omitted) (emphasis added). Shelton's extension of the right to counsel was a new rule under Teague because it was not dictated by precedent existing at the time of Respondent's convictions. See also Howard v. United States, 374 F.3d 1068, 1074-77 (11th Cir. 2004) (finding Shelton announced a new rule under Teague).

Generally, new procedural rules should be not applied retroactively to cases on collateral review, unless the

rule. Teague, [illegible] first exception is when the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311, 109 S.Ct. at 1075, 103 L.Ed.2d at 356 (internal quotation omitted). The second exception is when the rule "requires the observance of those procedures that...are implicit in the concept of ordered liberty." *Id.* at 311, 109 S.Ct. at 1076, 103 L.Ed.2d at 356 (internal quotations omitted). The second exception is "reserved for watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding. *Id.*

The first exception is not applicable to the present situation. The Supreme Court has repeatedly cited Gideon as illustrative of the type of new rule which falls within the second exception in Teague. See, *e.g.*, Beard v. Banks, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (recognizing the right to counsel announced in Gideon as an example of the second Teague exception); Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (same); Teague, 489 U.S. at 311-312, 109 S.Ct. at 1075-76, 103 L.Ed.2d at 357 (same). The Supreme Court also has applied each extension of the constitutional right to counsel retroactively to collateral proceedings. We conclude the new rule announced by Shelton is a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding. See Howard, 374 F.3d at 1077-80 (collecting authority which supports retroactive application of every extension of right to counsel on collateral review but noting these decisions were decided prior to Teague and concluding Shelton fell within the second Teague exception because of "the sheer importance of the right to counsel").

Because Shelton applies retroactively on collateral review, the PCR judge correctly determined S.C. Code Ann. § 17-27-45(B) is the applicable statute of limitations. Shelton was decided on May 20, 2002, and Respondent filed his PCR application on March 6, 2003. Respondent's PCR application was timely filed under § 17-27-45(B).

Although Respondent timely filed his PCR application and Shelton applies retroactively on collateral review, we conclude the rule announced in Shelton does not apply to Respondent's convictions. Respondent only paid a fine for his conviction in 1995. A fine for an uncounseled misdemeanor conviction is valid, and Respondent did not have a constitutional right to counsel for this conviction. See Scott, 440 U.S. at 373-74, 99 S.Ct. at 1162, 59 L.Ed.2d at 389. Accordingly, the PCR judge erred in vacating the 1995 conviction.

Respondent received thirty days' imprisonment, which was immediately suspended and conditioned on six months' good behavior, and was fined $940 for his 1996 conviction. In South Carolina, a magistrate cannot lawfully place a person on probation. A magistrate can, however, lawfully suspend a sentence and impose conditions. See S.C. Code Ann. [illegible]

limitations of Sections 17-25-100 and 17-27-110, after a conviction or plea for an offense within a magistrate's jurisdiction the magistrate at the time of sentence may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate. . . .Nothing in this section may be construed to give a magistrate the right to place a person on probation."). Although a magistrate has the statutory authorization to suspend sentences and impose conditional sentences, we note the enforcement of substantive conditions as part of a suspended sentence may implicate a defendant's right to counsel as required by Argersinger, Scott, and Shelton. In this case, the magistrate's condition of six months' good behavior was effectively probation, and accordingly, the probation was an illegal sentence. We vacate that portion of Respondent's sentence for his 1996 conviction.**[4]**

Therefore, Respondent lawfully received a prison sentence that was immediately suspended and a fine for his 1996 conviction. If a defendant receives only an immediately suspended sentence without probation, there is absolutely no possibility the defendant will ever be incarcerated for the underlying conviction. As such, the prison term for the underlying conviction will never be triggered, and the defendant has not received a sentence that "may 'end up in the actual deprivation of a person's liberty.'" Shelton, 535 U.S. at 658, 122 S.Ct. at 1767, 152 L.Ed.2d at 895 (citing Argersinger, 407 U.S. at 40, 92 S.Ct. at 2014, 32 L.Ed.2d at 540). Because Respondent received an immediately suspended sentence and a fine, we conclude the federal constitutional right to counsel did not apply to Respondent's conviction in 1996 and the PCR judge erroneously ruled Respondent's conviction was invalid under Shelton.

## CONCLUSION

We reverse the PCR judge's decision to vacate Respondent's convictions and uphold those convictions. We need not reach the remaining issue on appeal. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

**REVERSED.**

**TOAL, C.J., MOORE and WALLER, JJ., concur. PLEICONES, J., dissenting in a separate opinion.**

**JUSTICE PLEICONES:** I agree with the majority that Alabama v. Shelton, 535 U.S. 654 (2002) should be applied retroactively, and I agree that decision affords Respondent no relief on his 1995 conviction. I disagree, however, with the majority's conclusion that the 1996 sentence was, at least in part, illegal and would affirm the grant of post-conviction relief (PCR) to Respondent on that conviction.

The majority holds

defendant on probation." See S.C. Code Ann. § 22-3-800 (1989) ("Nothing in this section may be construed to give a magistrate the right to place a person on probation"). Here, the magistrate did not place Respondent on probation but instead suspended his sentence, conditioned on six months good behavior. Such a suspension is explicitly authorized by § 22-3-800: "[T]he magistrate at the time of sentence may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate...." A suspended sentence conditioned upon good behavior "is independent of the Probation and Parole Statutes and suspension of sentences therein provided...." Richards v. Crump, 260 S.C. 133, 194 S.E.2d 575 (1973).**[5]** I find nothing illegal about the 1996 sentence**[6]** and conclude that it was obtained in violation of the rule in Alabama v. Shelton.

I therefore concur in part and dissent in part.

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**[1]** Section 17-27-45(A) provides:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

In Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996), the Court held that all defendants convicted prior to July 1, 1995, the effective date of § 17-27-45, must be allowed until July 1, 1996, to file a PCR application.

**[2]** Section 17-27-45(B) provides:

> When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

**[3]** The defendant in Shelton was convicted of a misdemeanor; was sentenced to thirty days' imprisonment, which was immediately suspended; and was placed on unsupervised probation for two years.

**[4]** The dissent relies on dicta in Richards v. Crump, 260 S.C. 133, 194 S.E.2d 575 (1973), to allege that a suspended sentence conditioned on good behavior is independent of probation. The issue in Richards was whether a magistrate could

differentiated between consecutive and suspended sentences.

**[5]** I note that in Richards the parties conceded that a magistrate could not suspend sentences and thus it does not support the majority's holding that a magistrate lacks this authority. I note as well that the opinion makes no mention of § 43-67.1, the predecessor to § 22-3-800 then in effect.

**[6]** I n my view, if in fact the original sentence were unlawful, then the suspension would be a nullity and Respondent would be required to serve the original thirty day sentence. As such, the 1996 conviction was obtained in violation of Argesinger v. Hamlin, 407 U.S. 25 (1972), and PCR was properly granted.

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## Nichols v. United States (92-8556), 511 U.S. 738 (1994).

| Dissent [ Ginsburg ] | Opinion [ Rehnquist ] | Concurrence [ Souter ] | Syllabus | Dissent [ Blackmun ] |
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| HTML version (/supct/html/92-8556.ZD1.html) WordPerfect version (/supct/word-perfect/92-8556.ZD1) | HTML version (/supct/html/92-8556.ZO.html) WordPerfect version (/supct/word-perfect/92-8556.ZO) | HTML version (/supct/html/92-8556.ZC.html) WordPerfect version (/supct/word-perfect/92-8556.ZC) | HTML version (/supct/html/92-8556.ZS.html) WordPerfect version (/supct/word-perfect/92-8556.ZS) | HTML version (/supct/html/92-8556.ZD.html) WordPerfect version (/supct/word-perfect/92-8556.ZD) |

*NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Wash ington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.*

SUPREME COURT OF THE UNITED STATES

DECIDED BEFORE SHELTON

No. 92-8556

# KENNETH O. NICHOLS, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 6, 1994]

Chief Justice Rehnquist delivered the opinion of the Court.

In this case, we return to the issue that splintered the Court in *Baldasar* v. *Illinois*, 446 U.S. 222 (/supct-cgi/get-us-cite?446+222) (1980): Whether the Constitution prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense.

In 1990, petitioner Nichols pleaded guilty to conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 (/supct-cgi/get-usc-cite/21/846.html). Pursuant to the United States Federal Sentencing Guidelines (Sentencing Guidelines), petitioner was assessed three criminal history points for a 1983 federal felony drug conviction. An additional criminal history point was assessed for petitioner's 1983 state misdemeanor conviction for driving under the influence (DUI), for which petitioner was fined $250 but was not incarcerated. [n.1] This additional criminal historypoint increased petitioner's Criminal History Category from category II to category III. [n.2] As a result, petitioner's sentencing range under the Sentencing Guidelines increased from 168-210 months (under Criminal History Category II) to 188-235 months (under Category III). [n.3]

Petitioner objected to the inclusion of his DUI misdemeanor conviction in his criminal history score because he was not represented by counsel at that proceeding. He maintained that consideration of that uncounseled misdemeanor conviction in establishing his sentence would violate the Sixth Amendment (/supct-cgi/get-const?billofrights.html#amendmentvi) as construed in *Baldasar*, *supra*. The United States District Court for the Eastern District of Tennessee found that petitioner's misdemeanor conviction was uncounseled and that, based on the record before it, petitioner had not waived his right to counsel. [n.4] 763 F. Supp. 277 (1991). But theDistrict Court rejected petitioner's *Baldasar* argument, explaining that in the absence of a majority opinion, *Baldasar* "stands only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term." 763 F. Supp, at 279. Because petitioner's offense was already defined as a felony, the District Court ruled that *Baldasar* was inapplicable to the facts of this case; thus, petitioner's constitutional rights were not violated by using his 1983 DUI conviction to enhance his sentence. [n.5] It sentenced petitioner to the maximum term allowed by the

Sentencing Guidelines under its interpretation of *Baldasar*, a term 25 months longer than if the misdemeanor conviction had not been considered in

calculating petitioner's criminal history score.

A divided panel of the Court of Appeals for the Sixth Circuit affirmed. 979 F. 2d 402 (1992). After reviewing the fractured decision in *Baldasar* and the opinions from other Courts of Appeals that had considered the issue, the court held that *Baldasar* limits the collateral use at sentencing of a prior uncounseled misdemeanor conviction only when the effect of such consideration is to convert a misdemeanor into a felony. [n.6] The dissent, while recognizing that "numerous courts have questioned whether *[Baldasar]* expresses *any* single holding, and, accordingly, have largely limited

*Baldasar* to its facts,"nevertheless concluded that *Baldasar* proscribed the use of petitioner's prior uncounseled DUI conviction to enhance his sentence under the Sentencing Guidelines. 979 F. 2d, at 407-408 (citations omitted).

We granted certiorari 509 U. S. ___ (1993), to address this important question of Sixth Amendment (/supct-cgi/get-const?billofrights.html#amendmentvi) law, and to thereby resolve a conflict among state courts [n.7] as well as Federal Courts of Appeals. [n.8] We now affirm.

In *Scott* v. *Illinois*, 440 U.S. 367 (/supct-cgi/get-us-cite?440+367) (1979), we held that where no sentence of imprisonment was imposed, adefendant charged with a misdemeanor had no constitutional right to counsel. [n.9] Our decision in *Scott* was dictated by *Argersinger* v. *Hamlin*, 407 U.S. 25 (/supct-cgi/get-us-cite?407+25) (1972), but we stated that "[e]ven were the matter *res nova*, we believe that the central premise of *Argersinger*--that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment--is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott, supra,* at 373.

One year later, in *Baldasar* v. *Illinois*, 446 U.S. 222 (/supct-cgi/get-us-cite?446+222) (1980), a majority of the Court held that a prior uncounseled misdemeanor conviction, constitutional under *Scott*, could nevertheless *not* be collaterally used to convert a second misdemeanor conviction into a felony under the applicable Illinois sentencing enhancement statute. The *per curiam* opinion in *Baldasar* provided no rationale for the result; instead, it referred to the "reasons stated in the concurring opinions." 446 U. S., at 224. There were three different opinions supporting the result. Justice Stewart, who was joined by Justices Brennan and Stevens, stated simply that the defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense," and that "this prison sentence violated the constitutional rule of *Scott* . . . ." *Ibid.* Justice Marshall, who was also joined by JusticesBrennan and Stevens, rested his opinion on the proposition that an uncounseled misdemeanor conviction is "not sufficiently reliable" to support imprisonment under *Argersinger*, and that it "does not become more reliable merely because the accused has been validly convicted of a subsequent offense." *Id.*, at 227-228. Justice Blackmun, who provided the fifth vote, advanced the same rationale expressed in his dissent in *Scott*--that the Constitution requires appointment of counsel for an indigent defendant whenever he is charged with a "nonpetty" offense (an offense punishable by more than 6 months' imprisonment) or when the defendant is actually sentenced to imprisonment. *Id.*, at 229-230. Under this rationale, Baldasar's prior misdemeanor conviction was invalid and could not be used for enhancement purposes because the initial misdemeanor was punishable by a prison term of more than six months.

Justice Powell authored the dissent, in which the remaining three Members of the Court joined. The dissent criticized the majority's holding as one that "undermines the rationale of *Scott* and *Argersinger* and leaves no coherent rationale in its place." *Id.*, at 231. The dissent opined that the majority's result misapprehended the nature

of enhancement statutes which "do not alter or enlarge a prior sentence," ignored the significance of the constitutional validity of the first conviction under *Scott*, and created a "hybrid" conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution. *Id.*, at 232-233. Finally--and quite presciently--the dissent predicted that the Court's decision would create confusion in the lower courts. *Id.*, at 234.

In *Marks* v. *United States*, 430 U.S. 188 (/supct-cgi/get-us-cite?430+188) (1977), we stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys theassent of five Justices, `the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " *Id.*, at 193, quoting *Gregg* v. *Georgia*, 428 U.S. 153 (/supct-cgi/get-us-cite?428+153), 169, n. 15 (1976). This test is more easily stated than applied to the various opinions supporting the result in *Baldasar*. A number of Courts of Appeals have decided that there is no lowest common denominator or "narrowest grounds" that represents the Court's holding. See, *e. g.*, *United States* v. *Castro Vega*, 945 F. 2d 496, 499-500 (CA2 1991); *United States* v. *Eckford*, 910 F. 2d 216, 219, n. 8 (CA5 1990); *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 345 (CA7 1983), cert. denied, 465 U.S. 1068 (/supct-cgi/get-us-cite?465+1068) (1984). Another Court of Appeals has concluded that the holding in *Baldasar* is Justice Blackmun's rationale, *Santillanes* v. *United States Parole Comm'n*, 754 F. 2d 887, 889 (CA10 1985); yet another has concluded that the "consensus" of the *Baldasar* concurrences is roughly that expressed by Justice Marshall's concurring opinion. *United States* v. *Williams*, 891 F. 2d 212, 214 (CA9 1989). State courts have similarly divided. [n.10] The Sentencing Guidelines have also reflected uncertainty over *Baldasar*. [n.11] Wethink it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts which have considered it. This degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision. *Payne* v. *Tennessee*, 501 U. S. ___, ___ (1991) (slip op., at 18-19); *Miller* v. *California*, 413 U.S. 15 (/supct-cgi/get-us-cite?413+15), 24-25 (1973).

Five Members of the Court in *Baldasar*--the four dissenters and Justice Stewart--expressed continued adherence to *Scott* v. *Illinois*, 440 U.S. 367 (/supct-cgi/get-us-cite?440+367) (1979). There the defendant was convicted of shoplifting under a criminal statute which provided that the penalty for the offense should be a fine of not more than $500, a term of not more than one year in jail, or both. The defendant was in fact fined $50, but he contended that since imprisonment for the offense was authorized by statute, the Sixth and Fourteenth Amendment (/supct-cgi/get-const?amendmentxiv.html)s to the United States Constitution required Illinois to provide trial counsel. We rejected that contention, holding that so long as no imprisonment was actually imposed, the Sixth Amendment (/supct-cgi/get-const?billofrights.html#amendmentvi) right to counsel did not obtain. *Id.*, at 373-374. We reasoned that the Court, in a number of decisions, had already expanded the language of the Sixth Amendment (/supct-cgi/get-const?

billofrights.html#amendmentvi) well beyond its obvious meaning, and that the line should be drawn between criminal proceedings which resulted in imprisonment, and those which did not. *Id.*, at 372.

We adhere to that holding today, but agree with the dissent in *Baldasar* that a logical consequence of the holding is that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for asubsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in *Baldasar*, "[t]his Court consistently has sustained repeat offender laws as penalizing only the last offense committed by the defendant. *E. g.*, *Moore* v. *Missouri*, 159 U.S. 673 (/supct-cgi/get-us-cite?159+673), 677 (1895); *Oyler* v. *Boles*, 368 U.S. 448 (/supct-cgi/get-us-cite?368+448), 451 (1962)." 446 U. S., at 232.

Reliance on such a conviction is also consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt. As a general proposition, a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443 (/supct-cgi/get-us-cite?404+443), 446 (1972). "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence of guilt in determining what sentence to impose on a convicted defendant." *Wisconsin* v. *Mitchell*, 508 U. S. ___, ___ (1993) (slip op., at 6). One such important factor, as recognized by state recidivism statutes and the criminal history component of the Sentencing Guidelines, is a defendant's prior convictions. Sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior. We have upheld the constitutionality of considering such previous conduct in *Williams* v. *New York*, 337 U.S. 241 (/supct-cgi/get-us-cite?337+241) (1949). We have also upheld the consideration of such conduct, in connection with the offense presently charged, in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (/supct-cgi/get-us-cite?477+79) (1986). Therewe held that the state could consider, as a sentence enhancement factor, visible possession of a firearm during the felonies of which defendant was found guilty.

Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct which gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. *Id.*, at 91. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proven beyond a reasonable doubt.

Petitioner contends that, at a minimum, due process requires a misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime. No such requirement was suggested in *Scott*, and we believe with good reason. In the first place, a large

number of misdemeanor convictions take place in police or justice courts which are not courts of record. Without a drastic change in the procedures of these courts, there would be no way to memorialize any such warning. Nor is it at all clear exactly how expansive the warning would have to be; would a Georgia court have to warn the defendant about permutations and commutations of recidivist statutes in 49 other states, as well as the criminal history provision of the Sentencing Guidelines applicable in federal courts? And a warning at the completely general level--that if he is brought back into court on another criminal charge, a defendant such as Nichols will be treated more harshly--would merely tell him what he must surely already know.

Today we adhere to *Scott* v. *Illinois*, *supra*, and overrule *Baldasar*. [n.12] Accordingly we hold, consistent with the Sixth and Fourteenth Amendment (/supct-cgi/get-const?amendmentxiv.html)s of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.

The judgment of the Court of Appeals is therefore

*Affirmed.*

# Notes

1 At the time of his conviction, petitioner faced a maximum punishment of one year imprisonment and a $1,000.00 fine. Georgia law provided that a person convicted of driving under the influence of alcohol "shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than ten days nor more than one year, or by a fine of not less than $100.00nor more than $1,000.00, or by both such fine and imprisonment." Ga. Code Ann. § 40.6-391(c) (1982).

2 There are six criminal history categories under the Sentencing Guidelines. United States Sentencing Commission, Guidelines Manual ch. 5, pt. A (Nov. 1993) (Sentencing Table). A defendant's criminal history category is determined by the number of his criminal history points, which in turn is based on his prior criminal record. *Id.*, ch. 4, p. A.

3 The Sentencing Table provides a matrix of sentencing ranges. On the vertical axis of the matrix is the defendant's offense level representing the seriousness of the crime; on the horizontal axis is the defendant's criminal history category. The sentencing range is determined by identifying the intersection of the defendant's offense level and his criminal history category. *Id.*, ch. 5, pt. A (Sentencing Table).

4 Respondent contends that, even if *Baldasar* prohibits using the prior uncounseled misdemeanor conviction to enhance petitioner's sentence, the District Court applied the wrong legal standard in finding no valid waiver of the right to counsel. Based on *Johnson* v. *Zerbst*, 304 U.S. 458 (/supct-cgi/get-us-cite?304+458), 467-469 (1938) and *Parke* v. *Raley*, 506 U. S. ___, ___ (slip op., at 9), (1993), respondent argues that

petitioner failed to carry his burden to establish the absence of a validwaiver of counsel. We need not address this contention due to our resolution of the *Baldasar* issue.

[5] Petitioner's instant felony conviction was punishable under statute by not less than 10 years' imprisonment and not more than life imprisonment. See 21 U.S.C. § 841 (/supct-cgi/get-usc-cite/21/841.html)(b)(1)(B); 979 F. 2d 402, 413-414, 417-418 (CA6 1992).

[6] The court also stated that its decision was "logically compelled" by *Charles* v. *Foltz*, 741 F. 2d 834, 837 (CA6 1984), cert. denied, 469 U.S. 1193 (/supct-cgi/get-us-cite?469+1193) (1985), 979 F. 2d, at 415-416, 418 (" `[E]vidence of prior uncounselled misdemeanor convictions for which imprisonment was not imposed [] may be used for impeachment purposes' ").

[7] Compare, *Lovell* v. *State*, 283 Ark. 425, 428, 678 S. W. 2d 318, 320 (1984) (*Baldasar* bars any prior uncounseled misdemeanor conviction from enhancing a term of imprisonment following a second conviction); *State* v. *Vares*, 71 Haw. 617, 620, 801 P. 2d 555, 557 (1990) (same); *State* v. *Laurick*, 120 N. J. 1, 16, 575 A. 2d 1340, 1347 (*Baldasar* bars an enhanced penalty only when it is greater than that authorized in the absence of the prior offense or converts a misdemeanor into a felony), cert. denied, 498 U.S. 967 (/supct-cgi/get-us-cite?498+967) (1990); *Hlad* v. *State*, 565 So. 2d 762, 764-766 (Fla. App. 1990) (following the approach of Justice Blackmun, thereby limiting enhancement to situations where the prior uncounseled misdemeanor was punishable by six months' imprisonment or less), aff'd, 585 So. 2d 928, 930 (Fla. 1991); *Sheffield* v. *Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990) (*Baldasar* establishes no barrier to the collateral use of valid, uncounseled misdemeanor convictions).

[8] The Sixth Circuit expressly joined the Fifth and Second Circuits in essentially limiting *Baldasar* to its facts. See *Wilson* v. *Estelle*, 625 F. 2d 1158, 1159, and n. 1 (CA5 1980) (a prior uncounseled misdemeanor conviction cannot be used under a sentence enhancement statute to convert a subsequent misdemeanor into a felony with a prison term), cert. denied, 451 U.S. 912 (/supct-cgi/get-us-cite?451+912) (1981); *United States* v. *Castro Vega*, 945 F. 2d 496, 500 (CA2 1991) (*Baldasar* does not apply where "the court used an uncounseled misdemeanor conviction to determine the appropriate criminal history category for a crime that was already a felony"), cert. denied *sub nom. Cintron Rodriguez* v. *United States*, 507 U. S. ___ (1992). But see, *e. g.*, *United States* v. *Brady*, 928 F. 2d 844, 854 (CA9 1991) (*Baldasar* and the Sixth Amendment (/supct-cgi/get-const?billofrights.html#amendmentvi) bar any imprisonment in a subsequent case imposed because of an uncounseled conviction in which the right to counsel was not waived).

[9] In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived. *Gideon* v. *Wainwright*, 372 U.S. 335 (/supct-cgi/get-us-cite?372+335) (1963). We have held that convictions gained in violation of *Gideon* cannot be used "either to support guilt or enhance punishment for another offense," *Burgett*

v. *Texas*, 389 U.S. 109 (/supct-cgi/get-us-cite?389+109), 115 (1967), and that a subsequent sentence that was based in part on a prior invalid conviction must be set aside, *United States* v. *Tucker*, 404 U.S. 443 (/supct-cgi/get-us-cite?404+443), 447-449 (1972).

10 See n. 7, *supra*.

11 The 1989 version of the Sentencing Guidelines stated that, in determining a defendant's criminal history score, an uncounseled misdemeanor conviction should be excluded only if it "would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution." USSG § 4A1.2, Application Note 6 (Nov. 1989). Effective November 1, 1990, the Commission amended § 4A1.2 by deleting the above quoted phrase and adding the following statement as background commentary: "Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed." USSG App. C, amend. 353 (Nov. 1993). When the Commission initially published the amendment for notice and comment, it included the following explanation:%The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar* v. *Illinois*, 446 U.S. 222 (/supct-cgi/get-us-cite?446+222) (1980)." 55 Fed. Reg. 5741 (1990).

12 Of course States may decide, based on their own constitutions or public policy, that counsel should be available for all indigent defendants charged with misdemeanors. Indeed, many if not a majority of States guarantee the right to counsel whenever imprisonment is authorized by statute, rather than actually imposed. See, *e. g.*, Alaska Stat. Ann. § 18.85.100 (1991) ("serious" crime means any crime where imprisonment authorized); Ariz. Rule of Crim. Proc. 6.1(b) (indigent defendant shall be entitled to have attorney appointed in any criminal proceeding which may result in punishment by loss of liberty, or where court concludes that appointment satisfies the ends of justice); Cal. Penal Ann. Code § 15 (West 1988), Cal. Penal Code Ann. § 858 (West 1985); *Brunson* v. *State*, 182 Ind. App. 146, 394 N. E. 2d 229 (1979) (right to counsel in misdemeanor proceedings guaranteed by Ind. Const., Art. I, § 13); N. H. Rev. Stat. Ann. § 604-A:2 (1986 and Supp. 1992).

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## WITNESSES

B. M. Lynch

South Carolina Highway Patrol

## WARRANT NUMBER

20182360588875

**TRUE BILL**

Foreman of the Grand Jury

Date: 1-14-19

## VERDICT

Guilty

Jennifer Harper

Foreman 7/10/19

# THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

## COURT OF GENERAL SESSIONS

January Term, 2019

Indictment # **19GS01-0027**

## THE STATE

vs.

SHERRY ASHLEY MCMAHAN

## INDICTMENT FOR

**DRIVING UNDER THE INFLUENCE**

SC Code: § 56-05-2930(A)

CDR: 3358

I hereby waive presentment to the Grand Jury.

Defendant

Witness:

RECEIVED
JUL 15 2019
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

**INDICTMENT FOR**

**DRIVING UNDER THE INFLUENCE**
**§56-05-2930(A)**

At a Court of General Sessions, convened on the 14th day of January, 2019, the Grand Jurors of Abbeville County present upon their oath:

The defendant, Sherry Ashley McMahan, did on or about September 28, 2018, in Abbeville County, drive a motor vehicle while under the influence of alcohol and/or any other drug or a combination of drugs and/or substances which cause impairment to the extent that the defendant's faculties to drive were materially and appreciably impaired and while having an alcohol concentration of .16% or more, all in violation of Section 56-05-2930(A), Code of Laws of South Carolina (1976, as amended).

**Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.**

Micah E. Black
Assistant Solicitor

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

RECEIVED
Oct 29 2020
SC Court of Appeals

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 29th day of October, 2020.