

STATE OF NORTH CAROLINA  
CLEVELAND COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 11-CRS-53350/51/52

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THE STATE OF NORTH CAROLINA,	)	<u>Volume 2 of 2</u>
	)	
VS.	)	<b><u>T R A N S C R I P T</u></b>
	)	
JULIO EDUARDO INFANTE GOMEZ,	)	<b>Motion to Suppress</b>
DEFENDANT.	)	
	)	Pages 132 thru 311

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Transcript of the trial proceedings taken in the General Court Of Justice, Superior Court Division, Shelby, North Carolina, at the May 13, 2013, Criminal Session, before the Honorable Nathaniel J. Poovey, Judge Presiding.

APPEARANCES

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1 (The Court was called to order at 9:30 on May 14, 2013.)

2 (The Defendant was present with his counsel; the State's  
3 attorney was present.)

4 **The Court:** Good morning. I apologize for  
5 being a little bit late.

6 I think Sergeant Fitch was on the stand. Were  
7 we in the middle of hearing your direct?

8 **Ms. Kirby-Turner:** No, I'm not done with my  
9 direct.

10 **The Court:** Say again.

11 **Ms. Kirby-Turner:** I'm sorry. Did you ask me  
12 if I was done with my direct?

13 **The Court:** I said weren't you in the middle  
14 of your direct?

15 **Ms. Kirby-Turner:** Yes.

16 **The Court:** You may ask your next question.

17 (The witness retook the stand.)

18 **CONTINUE DIRECT EXAMINATION BY MS. KIRBY-TURNER:**

19 **Q.** Sergeant Fitch, you are sergeant over which  
20 departments again presently?

21 **A.** Presently I'm over just the narcotics unit, the  
22 plain clothes.

23 **Q.** Did you handle a request that was brought up by  
24 Mr. Coleman yesterday in court for certain records from  
25 the sheriff's department?



1 \* \* \*

2 **Ms. Kirby-Turner:** I'm sorry. May I approach  
3 the witness?

4 **The Court:** Yes. You don't need to ask  
5 permission to approach a witness.

6 \* \* \*

7 **Q.** Sergeant Fitch, I'm going to show you what has  
8 previously been marked as Defendant's Exhibit 4, and I'll  
9 ask if you can, tell us that is?

10 **A.** Yes. This was the letter that Major Gold gave  
11 to me to comply.

12 **Q.** What does that letter say?

13 **A.** It says please provide copies of all citations  
14 and/or written warning citations issued by Deputy Fitch,  
15 C-121; Deputy C. Cook, C-122; and Deputy J. Seagle, C-  
16 124 to where the initial observation of the person cited  
17 were made on Interstate Highway 85 regardless of the  
18 physical location where the citation or warning citation  
19 were actually issued from January 1, 2009, through July  
20 30, 2011.

21 **Q.** Is that the letter that Major Gold gave you?

22 **A.** Yes.

23 **Q.** Is that the letter that he told you to comply  
24 with?

25 **A.** Yes, ma'am.

1 Q. Did you do that?

2 A. Yes, ma'am, I did.

3 Q. How did you do that?

4 A. I called all the guys in. Deputy Cook was off,  
5 so we was able to get in his vehicle and get what  
6 citations we could find. I called Jody Seagle to the  
7 office and Deputy Fitch to the office. We made copies of  
8 all those citations.

9 Q. What did you do with them?

10 A. At that point in time I put them all in a  
11 folders, separated them by officers, and I took them up  
12 to the administrative office of the sheriff's office and  
13 they were going to forward them on.

14 Q. I'm going to show you what is marked as  
15 Defendant's Exhibit 5 and I'll ask if you recognize that?

16 A. I do.

17 Q. What is that?

18 A. This is the letter that I wrote and put in with  
19 the citations.

20 Q. Please read it slowly.

21 A. This letter is in response for public records  
22 from the Cleveland County Sheriff's Office concerning  
23 warning citations. It has been a common practice for  
24 completed warning ticket booklets to be disposed of via  
25 recycling or other means of disposal. The Cleveland

1 County Sheriff's Office following the policy and  
2 procedure manual does not require deputies to maintain  
3 warning citations due to storage capacity. So therefore  
4 we do not have all the information requested. Records  
5 are requested for Deputies Dwight Fitch, Chris Cook, and  
6 Jody Seagle from 2009 to current. Deputy Cook and Seagle  
7 have only been a part of the ICE team since December of  
8 2010.

9 Q. When you asked Deputy Seagle and Deputy Fitch  
10 -- Deputy Dwight Fitch to come in and bring you records,  
11 did both of them do that?

12 A. Yes, ma'am.

13 Q. So Dwight Fitch did bring you things; is that  
14 correct?

15 A. Yes, ma'am.

16 Q. Did you make copies of everything that they  
17 brought you?

18 A. Yes, ma'am, I did.

19 Q. I believe your letter states warning citations;  
20 did you also copy criminal citations?

21 A. Yes, ma'am, I believe so.

22 Q. You testified that you put them in folders; is  
23 that correct?

24 A. Yes, ma'am.

25 Q. And that you put everything together; is that

1 right?

2       **A.** Yes, ma'am.

3       **Q.** Then you delivered it to the control room?

4       **A.** The control room and then I also delivered a  
5 copy to the DA's office.

6       **Q.** Since it's -- Defendant's Exhibit 5 was with  
7 all of those records?

8       **A.** Yes, ma'am. That letter accompanied all the  
9 citations.

10       **Q.** Did you bring me a copy?

11       **A.** I did, yes, ma'am.

12       **Q.** Was my copy the exact same as the copy that you  
13 left for Mr. Coleman?

14       **A.** All but the letter.

15       **Q.** I'm going to show you --

16   \* \* \*

17       **Mr. Coleman:** Can I see that?

18       **Ms. Kirby-Turner:** Sure, absolutely.

19   \* \* \*

20       **Q.** I'm going to show you what has been marked as  
21 State's Voir Dire Exhibit 2 and I'll ask you if you  
22 recognize that?

23       **A.** Yes, ma'am, I do.

24       **Q.** What is it?

25       **A.** This is the citations for Deputy Dwight Fitch

1 that I made copies of that morning to put in the folder.

2 Q. Do you recognize that particular folder?

3 A. Yes, ma'am. That's my writing. I wrote his  
4 name at the top.

5 Q. Who did you give State's 2 to?

6 A. I give this one to you at the DA's office.

7 Q. To me?

8 A. Yes.

9 Q. So that's my copy?

10 A. Yes, ma'am.

11 Q. Did you place the exact same citations in the  
12 envelope with Defendant's Voir Dire 5?

13 A. Yes, ma'am, I did.

14 Q. What's in that; what's in State's 2?

15 A. There is criminal citations and some warning  
16 citations.

17 Q. So there are criminal citations and there are  
18 warning citations?

19 A. Yes, ma'am.

20 Q. That you delivered in an envelope with Voir  
21 Dire -- Defendant's Voir Dire Exhibit 5 to Mr. Coleman?

22 A. I didn't deliver it to Mr. Coleman. I gave it  
23 our administrative office, yes, ma'am, but the citations  
24 were with the letter.

25 Q. I'm going to ask you some more questions about

1 that in a minute. We'll identify the other ones as well.  
2 Now I'm going to show you what has been marked as State's  
3 Exhibit Voir Dire 3?

4 **A.** Okay.

5 **Q.** What is State's 3?

6 **A.** This is citations that I got from Chris Cook on  
7 that morning that he was off, but I was able to get in  
8 his vehicle and get copies of citations.

9 **Q.** So those came from his vehicle?

10 **A.** Yes, ma'am.

11 **Q.** After that did he give you more?

12 **A.** Yes, ma'am, he did, and those were turned over  
13 as well.

14 **Q.** I'm going to show you what I have marked as  
15 State's Voir Dire 5. That's out of order. I apologize  
16 for that. I will ask if you recognize State's 5?

17 **A.** Yes, ma'am, I do.

18 **Q.** What is that?

19 **A.** Those are the warning citations that Deputy  
20 Cook gave to me at a later date, and the reason those  
21 wasn't gotten here was because he was off. I didn't have  
22 access or didn't find these when I was trying to get all  
23 this together that day to turn them in in a timely  
24 manner.

25 **Q.** What is the top sheet of State's Voir Dire 5 if

1 you can tell us?

2       **A.** It is -- It appears to be maybe an email from  
3 Brenda Bolton to Calvin Coleman.

4       **Q.** What does the body say; do you want to read it?

5       **A.** It says attached are a few more tickets that  
6 were turned in from Chris Cook. I was told to give these  
7 to you, that you had already been given all the others  
8 from the Cleveland County Sheriff's Department regarding  
9 tickets for an order or something. If you have any  
10 questions, please feel free to call. Thanks, Brenda.

11       **Q.** Behind that cover sheet are those the citations  
12 -- I mean, the warning tickets that you mentioned?

13       **A.** Yes, ma'am.

14       **Q.** In State's 3, what's contained in State's 3  
15 exactly?

16       **A.** They all appear to be the criminal citations.  
17 All I was able to find was his actual citation book from  
18 the clerk's office, so I made copies of all the criminal  
19 citations in his book, yes?

20       **A.** Behind the email that you testified to, the  
21 rest of State's 5 are what?

22       **A.** They're all warning citations. He brought me  
23 the warning citations at a later date.

24       **Q.** Finally, State's 4; can you tell us what  
25 State's Voir Dire 4 is?



1           **Mr. Coleman:**     Yes.

2           **The Court:**     I mean, he's not going to do  
3 anything, as I understand what you're getting ready to  
4 do, is take us through what I can simply read for myself  
5 if I chose to.

6           **Ms. Kirby-Turner:**   Yes. If the Court would  
7 rather me just simply admit these as Exhibits --

8           **The Court:**     I'd be glad to admit exhibits if  
9 you all would stipulate as to what the racial makeup of  
10 them is.

11          **Ms. Kirby-Turner:**   My racial breakdown is  
12 actually different from what Mr. Coleman put in the  
13 record yesterday.

14          **The Court:**     They are what they are.

15          **Ms. Kirby-Turner:**   Right.

16          **The Court:**     As I understand it, this witness  
17 has no more knowledge about those tickets and what race  
18 the individuals are than anybody else looking at those  
19 tickets and determining what race they say they are.

20          **Ms. Kirby-Turner:**   They say. That's true, and  
21 the Court can certainly read that. So I would move --

22          **The Court:**     I don't need witnesses just to  
23 simply read me something. I can read myself.

24          **Ms. Kirby-Turner:**   My concern was just that  
25 yesterday there was something testified to and put into

1 the record, and I just -- But if the Court can read for  
2 himself, which he certainly can, I will certainly put  
3 these in.

4 **The Court:** Okay.

5 **Ms. Kirby-Turner:** The State would move to  
6 introduce Voir Dire 2, Voir Dire 3, Voir Dire 4, and Voir  
7 Dire 5.

8 **The Court:** Do you have any objection to any  
9 of that?

10 **Mr. Coleman:** Yes.

11 **The Court:** What's the grounds for your  
12 objection?

13 **Mr. Coleman:** Your Honor, I think what we were  
14 dealing with and I think what Mr. Fitch misunderstood is  
15 that I requested citations and/or tickets written on  
16 Interstate 85.

17 If you will look at the ones that you say you  
18 gave me from Fitch, tell me how many of them were written  
19 on Highway 85? Not one. So I don't see as being  
20 relevant.

21 We're talking about the task force, that drug  
22 interdiction task force on 85, Your Honor. The fact that  
23 they wrote tickets in Grover, North Carolina, or Kings  
24 Mountain at some time, we've got those. That wasn't our  
25 point. We specifically -- And I didn't bring them. We

1 specifically asked in every subpoena and in our letter  
2 for tickets written on 85 by this team.

3           **The Court:**       The objection on that ground is  
4 overruled. I will admit them. They certainly would be  
5 -- Perhaps their weight would go down a little bit based  
6 upon them not being on 85, but as to your argument that  
7 there's some kind of racial profiling going on by this  
8 team or by these officers, this is certainly relevant as  
9 to whether or not there was such a racially motivated  
10 reason for stopping vehicles.

11           So I understand your argument about it just  
12 being 85, but that goes to the weight of it, not to its  
13 admissibility.

14           Have you looked at these and do you know what  
15 the racial breakdown is without --

16           **Mr. Coleman:**    I have no idea, Your Honor,  
17 because our focus was -- I don't think they're doing drug  
18 interdiction on city streets. I think they set up on  
19 Highway 85, and that's where we're arguing that the  
20 profiling takes place.

21           **The Court:**       Some of these, I'm just looking  
22 at the first few warning tickets here from State's  
23 Exhibit 5, and they are on I-85.

24           **Mr. Coleman:**    Which is State's Exhibit 5?

25           **The Court:**       State's Exhibit 5 was introduced

1 as the warning tickets turned over later by Deputy Cook,  
2 top sheet email from Brenda Bolton to you.

3 **Mr. Coleman:** If they were on 85, they are  
4 relevant particularly if they're Hispanic people as  
5 probably I think they are.

6 **The Court:** The first one's name is Luis E.  
7 Ruiz Gomez. The second one's name is Jesus Galvan Solis.  
8 The third one is Jaime R. Reyes. All these are on I-85.  
9 The next one is Kevin Krueger. That doesn't sound very  
10 Hispanic. The race of them is simply marked as M. Is  
11 that Mexican?

12 **Ms. Kirby-Turner:** No. That's male. There  
13 should be an H.

14 **The Court:** It says -- You may be getting  
15 the race and the sex mixed up, but under sex it says H  
16 and under race it says M.

17 **Ms. Kirby-Turner:** I think that's --

18 **Mr. Coleman:** It's Hispanic male.

19 **The Court:** The next one shows M and they  
20 got the race right, H. Then the next one is - sex, it  
21 says W, but the guy's name's Kevin. Race, it says M.

22 The next one says sex H, race M. I guess  
23 that's Hispanic male. That's Santos Delmar Alvarez.  
24 Fredy Montoya, sex H, race M. I guess that's Hispanic  
25 male again. David F. Franco is another H, M, then Sunny

1 Vazhayinal.

2 Have you seen these?

3 **Mr. Coleman:** Briefly this morning, Your  
4 Honor.

5 **Ms. Kirby-Turner:** He also saw them when they  
6 were turned over in the packet to him.

7 **Mr. Coleman:** And many --

8 **The Court:** That's what the disconnect is  
9 that these seem to be given to you. Now you're saying  
10 you didn't get them?

11 **Mr. Coleman:** Your Honor, for instance, which  
12 ones are you looking at; which officer?

13 **The Court:** I was just looking at those  
14 turned in from Deputy Chris Cook that were not turned in  
15 in the original --

16 **Mr. Coleman:** Yes. I think those are included  
17 in my tally.

18 **The Court:** Okay. Do you have the one  
19 that's actually the one ticket in this case?

20 **Mr. Coleman:** That's --

21 **The Court:** Elvis Pena.

22 **Mr. Coleman:** No, I don't.

23 **The Court:** Well, it's --

24 **Mr. Coleman:** Well, maybe I do, Your Honor.

25 Let me check. It was on 85, and I tried to include it in

1 my packet. Your Honor, for the record I have Ruiz-Gomez;  
2 Ruiz, Luis; and I have Solis, Jesus. I have Jaime Reyes,  
3 Kevin Krueger, Alvarez Santos, Freddy Montoya, Sunny  
4 Vazhayinal, David Franco.

5 **The Court:** You've got all the ones then in  
6 State's Exhibit 5?

7 **Mr. Coleman:** Yes.

8 **The Court:** I'm looking at State's Exhibit 3  
9 now which is the original ones that they got from Chris  
10 Cook. There's, looks like, several criminal summons in  
11 here, no warning tickets. Have you seen those?

12 **Mr. Coleman:** Your Honor, I looked at them  
13 briefly before she handed them to the officer, but again,  
14 if I got them and they were not along Highway 85 which is  
15 what I requested, I did not include them in my totals. I  
16 was looking at this task force.

17 **Ms. Kirby-Turner:** To be fair, these were all  
18 of the tickets issued while they were on the task force.  
19 Wherever they were written, they were on the task force  
20 when these were written. This is not from 1997.

21 This is while they were on the task force, and  
22 yesterday it was implied that, and I believe the Court  
23 addressed it, that no one complied with the subpoena and  
24 that is one of the major reasons that we're going through  
25 this exercise.

1           **The Court:**       The reason that I thought that  
2 there was no compliance with the subpoena is because  
3 that's what the witness testified to. He said that he  
4 didn't comply with it on the stand under oath.

5           The idea that he didn't comply with it shocked  
6 me, that it was just, you know, he didn't -- It's like it  
7 didn't even register. That's what he said. I can only  
8 take him at his word. He said no, I didn't comply with  
9 it. No, I didn't give any. I don't know how to get  
10 that. I mean, it was --

11           **Ms. Kirby-Turner:**   And it was --

12           **The Court:**       He obviously was wrong.

13           **Ms. Kirby-Turner:**   Yes.

14           **The Court:**       Unless he did comply with it and  
15 forgot or I don't know what but --

16           **Ms. Kirby-Turner:**   I would like --

17           **The Court:**       That's the reason I was making  
18 that implication is because that's what he said.

19           **Ms. Kirby-Turner:**   And I actually have a  
20 witness coming from the sheriff's department to testify  
21 that he was never subpoenaed. So that will be another  
22 witness that I call, and I would also -- I might need to  
23 clarify that he was being asked about the SBI computer  
24 form which is not -- which was never requested, not in a  
25 letter, not in a subpoena, not anything.

1           So I think he was testifying when he said well,  
2 I don't know where they go. We hit transmit and I'm not  
3 sure where it goes. He was talking about the SBI blind  
4 form.

5           I'm going to ask Sergeant Fitch about that, the  
6 SBI blind form that goes in that was never requested from  
7 the sheriff's department or subpoenaed.

8           So don't -- One of the reasons I'm going to  
9 these witnesses is because I don't want the Court to  
10 think that Deputy Fitch lied under oath. He was being  
11 asked about an SBI form that was never subpoenaed, and he  
12 doesn't know where that goes or what happens to it  
13 because he's not supposed to. It is an anonymous static  
14 gathering system that the SBI runs and maintains  
15 regarding racial profiling. So I just want the Court to  
16 be clear about that.

17           I also want the Court to be clear that any  
18 request, not that there was a subpoena that was served on  
19 this officer, but any request that was given to the  
20 sheriff's department was complied with because I don't  
21 think that was clear yesterday, and I want to make sure  
22 that that is clear.

23           **The Court:**       Okay.

24           **Mr. Coleman:**   Your Honor, if I may, again I  
25 don't think there was a discrepancy. I went out of my

1 way to specifically ask in my letter to the sheriff's  
2 department for tickets where the initial observation were  
3 the person cited was on Interstate Highway 85. That's  
4 what I put in all the subpoenas.

5 I'm not interested in these officers when  
6 they're driving through the city of Shelby and see a  
7 traffic violation and write a ticket. That is not what I  
8 was looking for. I was looking for their team that sits  
9 up there on a daily basis, wanted to know about their  
10 stops on 85 which is the situs of this particular  
11 situation that we're in.

12 **The Court:** I'll let you all present  
13 whatever evidence you'd like to and make whatever  
14 arguments you'd like to based on that evidence, and if  
15 you think something needs clearing up, then you're  
16 certainly welcome to do that. You're doing a fine job of  
17 clearing some things up.

18 **Ms. Kirby-Turner:** Thank you.

19 \* \* \*

20 **Q.** Sergeant Fitch --

21 **A.** Yes, ma'am.

22 **Q.** -- back to actually the topic I just brought up  
23 on the record, the SBI forms. Are you familiar with what  
24 I'm talking about?

25 **A.** I'm somewhat familiar, yes, ma'am.

1           **Q.**    Can you tell us about that system?

2           **A.**    Yes.  The system was designed some years back.  
3  It was a reporting system for -- What it done was to  
4  support agencies.  I think some years back the highway  
5  patrol, when there was a racial profiling charge brought  
6  against them, the SBI investigated.

7                    What came out of that was this SBI form that  
8  you fill out on any vehicle stop.  It's basically -- It's  
9  age, race.  It doesn't give the name of the person that  
10 was stopped and why you stopped them and whether you  
11 searched or not.

12                   At onset, this form was filled out by hand.  As  
13 technology got more and more advanced and we got the in-  
14 car computers, this form is filled out in the car on the  
15 computers.  These guys hit transmit.  None of us really  
16 understand the system enough to understand where that  
17 goes.

18                   We feel like it goes straight to Raleigh  
19 because that was what it was designed to do because when  
20 it was being handwritten, we had to have a secretary here  
21 who set down in front of a computer every day and entered  
22 these into a database that was linked to Raleigh.

23                   So we feel like this goes to Raleigh --  
24 straight to Raleigh now it cuts out a secretary having to  
25 set and enter these.

1           So these guys fill them out on their computer  
2 once the vehicle stop is complete and hit transmit and it  
3 goes to Raleigh to the best of my knowledge.

4           **Q.**    It's not something that you maintain here?

5           **A.**    No, ma'am.

6           **Q.**    I believe yesterday I had you read from the  
7 transcript from State versus Arrassaenz; do you recall  
8 that?

9           **A.**    Yes, ma'am.

10          **Q.**    We discussed the twenty-nine stops that led to  
11 seizures; is that right?

12          **A.**    Yes, ma'am.

13          **Q.**    Since 2009 -- I'm sorry, not 2009. Since 2007  
14 all the way up through 2012, you were still part of the  
15 ICE team?

16          **A.**    Yes, ma'am.

17          **Q.**    Were you still patrolling during that time?

18          **A.**    Yes, ma'am.

19          **Q.**    Were you stopping only Hispanics on I-85?

20          **A.**    Absolutely not.

21          **Q.**    Were there other significant seizures -- Define  
22 -- When you say significant, what do you mean?

23          **A.**    What I feel like it's a significant seizure on  
24 Interstate 85 would be one kilo of cocaine or better,  
25 \$30,000 or better, a lot of stolen property, those type

1 of things are significant. We don't consider a smoke bag  
2 or unless that smoke bag has a real small quantity of  
3 marijuana as a significant seizure.

4 **Q.** Since 2007, which is when the Arrassaenz case  
5 was tried, have there been significant seizures on I-85  
6 or anywhere?

7 **A.** Yes, ma'am.

8 **Q.** Were any of those seizures involving  
9 Caucasians?

10 **A.** Yes, ma'am.

11 **Q.** Were any of them involving African-Americans?

12 **A.** No, ma'am.

13 **Q.** Were any of them involving Asians?

14 **A.** No, ma'am.

15 **Q.** Were any of them involving Hispanics?

16 **A.** I'm not a hundred percent sure on that. I  
17 think there probably is. It's a small amount, maybe one,  
18 two.

19 **Q.** This case involves Hispanics; is that right?

20 **A.** Yes, yes.

21 **Q.** I understand that you're not on patrol with the  
22 ICE team anymore, but you were for eight years; is that  
23 right?

24 **A.** Yes, ma'am.

25 **Q.** When you would patrol I-85, what kind of

1 reactions or what reasons would you choose to stop  
2 someone who was violating the traffic laws?

3       **A.**     Basically look for -- Basically the way we were  
4 trained and what we done, we looked for people who was  
5 nervous to our presence.

6               I'll use the example of people who raise  
7 children. When you -- It's just like walking into a room  
8 and your children look at you and you know they've done  
9 something. It's up to you to figure out what they've  
10 done.

11               That is the approach we use when vehicles come  
12 by there. We do not hide in the bushes. We do not try  
13 to not to be seen. It's just in reverse. We try to be  
14 seen. We want them to know that law enforcement's there  
15 because there are people who's involved in criminal  
16 activity. They have what we call a fear induced reaction  
17 which is not normal to the rest of the motoring public  
18 traveling up and down the road.

19               **Ms. Kirby-Turner:**    No further questions at  
20 this time.

21               **The Court:**            Cross-examination.

22               **Mr. Coleman:**        Yes, sir.

23 **CROSS-EXAMINATION BY MR. COLEMAN:**

24               **Q.**     Mr. Fitch, the State's Exhibit 2 which were the  
25 tickets that you turned over pursuant to our request

1 regarding Dwight Fitch --

2 **A.** Yes, sir.

3 **Q.** -- have you had a chance to look at those?

4 **A.** I did not look at those.

5 **Q.** If I can show them to you again. If you will -

6 - Do you recall that my request asked for tickets and/or

7 citations that were written on Interstate Highway 85; do

8 you recall that?

9 **A.** I do.

10 **Q.** How many of those were written on Interstate

11 Highway 85?

12 **A.** Four.

13 **Q.** May I see those, please?

14 **A.** Yes, sir.

15 **Q.** What was the race of the people that were

16 written?

17 **A.** I didn't look. Hispanic.

18 **Q.** Well, I certainly didn't mean to leave them

19 out, and I will certainly adopt those as the ones written

20 by Dwight Fitch on 85. It's all Hispanic.

21 I want to ask you -- I'm going to hand you what

22 we've had marked as Defendant's Exhibit 2 and ask you if

23 you recognize that as a transcript of your testimony from

24 the 2007 Arrassaenz case?

25 **A.** What it appears to be, yes, sir.

1           **Q.**    If you will, go to page 89? Let me know when  
2 you're there.

3           **A.**    I'm there.

4           **Q.**    I believe on page 89, lines 1 through 20. Mr.  
5 Teddy inquired of you about writing warning tickets and  
6 then telling Mr. Arrassaenz he was free to go; is that  
7 correct?

8           **A.**    That's correct.

9           **Q.**    But then at line 17 you admitted that you  
10 weren't finished with him and he was not free to go and  
11 that he -- because you were doing a drug investigation;  
12 is that true?

13          **A.**    That is correct.

14          **Q.**    When you, as well as the Mr. Fitch that  
15 testified, you all tell them they're free to go, they are  
16 not necessarily free to go; are they?

17          **A.**    I think the State law says it doesn't matter  
18 what he thinks. It's what I think.

19          **Q.**    That's what I'm asking you. You testified in  
20 that trial that although you told him he was free to go,  
21 he was not free to go. That was your testimony?

22          **A.**    Not in my mind, yes, sir.

23          **Q.**    Well, your words or your mind he was not free  
24 to go. So in that case he's in custody; is that correct?

25          **A.**    No, sir.

1           **Q.**    If you're not free to go, aren't you in  
2 custody?

3           **A.**    No, sir.

4           **Q.**    If you will, look at page 122, if you will,  
5 start at line 8.  It's there where Mr. Teddy asked you do  
6 you use a search form -- consent to search form in your  
7 stops?

8           **A.**    Yes.

9           **Q.**    At line 18 I believe that you answered him  
10 because video and audio are as good or better than any  
11 signed consent form?

12          **A.**    Yes, sir.

13          **Q.**    You understand, of course, that the sheriff  
14 department's policy calls for that video or audio not to  
15 be shut off at any time during that kind of stop; is that  
16 correct?

17          **A.**    Yes, sir.

18          **Q.**    So if it's turned off, that's a violation of  
19 the policy itself; isn't it?

20          **A.**    Like we testified before, me and my captain had  
21 a conversation prior to that, and it was okay for us to  
22 be doing what we were doing.

23          **Q.**    Your captain told you you could violate the  
24 written policy of the sheriff's department?

25          **A.**    A policy is a guide.

1           **Q.**    The policy is a guide, so you don't have to go  
2 by that?

3           **A.**    You can be given permission.

4           **Q.**    When you're given permission, what did that --  
5 tell us what did that have to do with, I believe, you and  
6 your captain discussed Mexican drug cartels and defense  
7 attorneys; tell us about that?

8           **A.**    Yes. I guess the best way for me to explain  
9 that would be the best it's like writing a book report in  
10 school. You can watch the movie or you can read the  
11 book. If you watch the movie, you're going to fail the  
12 book report because watching a movie's too easy.

13                    If we don't educate them on the video stop  
14 itself, we go one step further. If they want to learn  
15 how we're doing, everything is in a written report. If  
16 they want to read the written report, that's all well and  
17 fine because it's all in the written report, but we do  
18 not want to educate them as to what we're seeing and what  
19 leads us to the compartments because they're using it to  
20 defeat us.

21           **Q.**    What I would ask, Sergeant Fitch, is when  
22 you're deciding not to follow the sheriff's department  
23 policy and you're deciding to shut off audio portions of  
24 the I-COP machine, then do you think those are -- that  
25 evidence that defense attorneys might need or that a

1 Court might want to view?

2 **A.** It was decided that unless I was talking to  
3 your client, there wasn't really any evidence being  
4 gathered, and verbal evidence or any audio evidence  
5 unless I was talking to the suspect.

6 **Q.** The decision as to what is or is not evidence  
7 was made by whom; you or your captain?

8 **A.** We only turned them off once we started  
9 searching.

10 **Q.** No. I was asking you, you were saying that the  
11 only time there's evidence is when you're talking to my  
12 client. My question was who made the decision as to what  
13 is or what is not evidence?

14 **A.** We talked about it and come to an agreement, me  
15 and the captain.

16 **Q.** You and captain decided that it's okay to skirt  
17 the policy against turning these things off, and you and  
18 the captain decided what is or is not evidence; is that  
19 correct?

20 **A.** I guess you could say that.

21 **Mr. Coleman:** I don't have any further  
22 questions.

23 **The Court:** Redirect.

24 **Ms. Kirby-Turner:** Just a couple of questions  
25 that I neglected to ask you before.

1 **REDIRECT EXAMINATION BY MS. KIRBY-TURNER:**

2           **Q.**    Sergeant Fitch, do you have a policy that you  
3 and the ICE team or anyone in the sheriff's department  
4 writes warning citations or criminal citations every time  
5 they make stop?

6           **A.**    No, ma'am.

7           **Q.**    You personally, are there times where you've  
8 stopped a vehicle and not written a warning or criminal  
9 citations?

10          **A.**    Many a times.

11          **Q.**    How did you personally -- or how did you  
12 personally, you don't make any stops anymore, but how did  
13 you personally decide whether you would write a warning  
14 citation or a criminal citation when you made stop?

15          **A.**    If we were going to take the vehicle stop one  
16 step further. What I mean by that if we felt like  
17 criminal activity -- more criminal activity was afoot,  
18 then we would go and start and write that warning  
19 citation to start paperwork for the courts to show  
20 exactly that that helps document time, where we were at,  
21 and that was how we done that in case anything was found  
22 in that vehicle.

23          **Q.**    Did you hear Sergeant -- I'm sorry, Deputy  
24 Fitch testify yesterday about the battery in the --

25          **A.**    I did.

1 Q. -- the external mike.

2 A. Yes, ma'am.

3 Q. I believe you testified that he had reported to  
4 you that they were having trouble with the batteries  
5 running out; is that true?

6 A. Yes, ma'am.

7 Q. Did you fix that problem?

8 A. Yes, ma'am. We were in the middle of a budget.  
9 The way that the county's always done, after May 15<sup>th</sup>, you  
10 know, because of budget restraints and getting the --  
11 finalizing the old budget and getting ready for the new  
12 budget between May 15<sup>th</sup> and the first of July, we're not  
13 able to order any equipment. So he came to me. We had  
14 to wait until we could order those batteries to fix those  
15 mikes.

16 Q. Sergeant Fitch, I'm going to show you what I'm  
17 marking as State's Voir Dire 6, and I'll ask you if you  
18 can, tell us what this is?

19 A. Yes, ma'am. This is a receipt. I went back to  
20 the sheriff's secretary and asked for a copy of the  
21 receipt where we had purchased the mike batteries.

22 Q. Is that what State's Voir Dire 6 is?

23 A. Yes, ma'am. This is the form she gave me, yes,  
24 ma'am.

25 Q. What did you order -- or what did the sheriff's

1 department order?

2           **A.** It appears there were fourteen batteries. I'm  
3 assuming the quantity means twelve of one type and two of  
4 another type.

5           **Q.** Do you know what those batteries that are  
6 listed on that page go to?

7           **A.** I'm not a hundred percent sure on all of these  
8 numbers as far as what the different numbers mean, but  
9 that was the form she gave me about the batteries that we  
10 had ordered.

11           **Q.** What does the second page say?

12           **A.** Basically gives an amount and transaction date  
13 and the total amount.

14           **Q.** What does that say?

15           **A.** Batteries.

16           **Q.** What's the amount paid?

17           **A.** \$189.86.

18           **Q.** What's the date on that?

19           **A.** Transaction date was August 25<sup>th</sup>.

20           **Q.** Did you receive any batteries for those  
21 external mikes?

22           **A.** Yes, ma'am, we did.

23           **Ms. Kirby-Turner:** No further questions.

24 **RE-CROSS-EXAMINATION BY MR. COLEMAN:**

25           **Q.** Mr. Fitch, those batteries were ordered after

1 the fact. This arrest of Mr. Gomez took place on  
2 7/11/11; weren't those batteries ordered sometime after  
3 that?

4 **A.** Yes, sir.

5 **Q.** Were you in the courtroom yesterday when  
6 Officer Dwight Fitch testified that, and we could hear,  
7 that his audio device was actually working at the time of  
8 this arrest?

9 **A.** Yes.

10 **Q.** That he took it off his belt, And when asked  
11 was it working, did you take it off because it wasn't  
12 working? That his response was there was nothing wrong  
13 with it; did you know that?

14 **A.** I heard him say he took it off and put it in  
15 the charging cradle.

16 **Q.** Did you notice that I asked him what was the  
17 problem with it, was it working or not working; did you  
18 hear that portion?

19 **A.** I did.

20 **Q.** He did not indicate that he took it off because  
21 it was not working. It appeared that he took it off in  
22 line with the policy that you're talking about that you  
23 can turn it off because the only thing relevant is what  
24 you guys decide is evidence?

25 **A.** I took it that he was taking it off to make

1 sure it was charged in case he needed it again because he  
2 was having trouble with his mike. When you place the mic  
3 in the charging cradle in the I-COP system, it  
4 automatically turns off. It will not charge and stay on  
5 at the same time.

6 **Q.** Would you consider it some kind -- somewhat of  
7 a pattern that you turned yours off deliberately during  
8 Arrassaenz and the reason for that is because, I believe,  
9 it was something to do with Mexican drug cartels and  
10 defense attorneys; is that right?

11 **A.** That is correct on my stop, yes.

12 **Q.** Then Mr. Fitch turned his off and put it in the  
13 cradle; is that the way you train them -- Strike that.  
14 Does he have the same authority as you had to determine  
15 what evidence would be listened to and what evidence  
16 would not be listened to?

17 **A.** No, sir.

18 **Q.** So he should have left it on all the time?

19 **A.** He was trying to make sure it was charged to  
20 preserve it in case he needed to re-approach your client  
21 is the way I took it from the testimony.

22 **Q.** As far as the information that he wanted to  
23 keep away from defense attorneys, can you explain that to  
24 the Court?

25 **A.** That is how we actually get to the

1 compartments. The tool marks that we find when we start  
2 seeing these compartments. If we educate what we're  
3 looking for, what leads us to compartments, the next time  
4 they'll make sure they don't leave those tool marks.  
5 They'll put new screws.

6 They'll do whatever they've got to do to cover  
7 up how we got to that compartment. It's a game. We're  
8 trying to stay ahead.

9 Q. You were thinking -- Your line of thinking is  
10 that some unscrupulous defense attorneys may share that  
11 with some cartels or something?

12 A. We were at a customs training that it was some  
13 informants that had been caught and exactly told that to  
14 the customs agents, yes, sir.

15 Q. In light of that, when Mr. Fitch testified,  
16 Dwight Fitch, yesterday, he told us all about the stress  
17 marks and everything about the car. So that information  
18 comes out anyhow; doesn't it?

19 A. It does.

20 Q. It comes out according to you and the Court and  
21 myself, we're allowed to hear it. It comes out through  
22 your interpretation; right?

23 A. We write what we see. We're not liars.

24 Q. You write what you see; you're not liars?

25 A. Yes, sir.

1           **Q.**    Wouldn't it be better to let us look at it  
2 firsthand or listen to it firsthand?

3           **A.**    What would be the difference if we just  
4 searched and never said anything?

5           **Q.**    What would be the difference if what?

6           **A.**    We just searched and never said anything,  
7 there'd still be the audio.

8           **Q.**    Well, that would be fine, but that's not what  
9 happens. I guess what I'm trying to get at here, Mr.  
10 Fitch, is we have to accept what you interpret or what  
11 you say was happening when we actually could have been  
12 listening to it, and the reason for so doing is because  
13 you're trying to hide secrets from defense attorneys and  
14 drug cartels; is that correct?

15          **A.**    That is correct in the past. Not in this -- We  
16 changed our policy after that. We talked about it and we  
17 don't turn them off.

18          **Q.**    So now the policy is to go along with what the  
19 policy has always been, to keep them running all the  
20 time?

21          **A.**    Yes, sir.

22                   **Mr. Coleman:**    No further questions.

23                   **Ms. Kirby-Turner:**    No further questions.

24                   **The Court:**        You may step down.

25 (The witness was excused.)

1 Call your next witness.

2 **Ms. Kirby-Turner:** The State calls Jody  
3 Seagle.

4 **JODY SEAGLE, FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS**  
5 **ON DIRECT EXAMINATION BY MS. KIRBY-TURNER:**

6 **Q.** Please state your name for the Court?

7 **A.** Jody Seagle.

8 **Q.** How are you employed?

9 **A.** Cleveland County Sheriff's Office.

10 **Q.** In what capacity?

11 **A.** Canine handler, patrol division.

12 **Q.** How long have you been a canine handler?

13 **A.** I've been a canine handler for a year and a  
14 half.

15 **Q.** What did you do before you were a canine  
16 handler?

17 **A.** Prior to being a canine handler, I was assigned  
18 to the Interstate Criminal Enforcement team and prior to  
19 that I was assigned to the patrol division of the  
20 sheriff's office.

21 **Q.** How long were you on the Interstate Criminal  
22 Enforcement team?

23 **A.** Just almost a year.

24 **Q.** How long were you a patrol deputy before you  
25 went to the Interstate Criminal Enforcement team?

1           **A.**    I was a patrol deputy for four years and also  
2 two prior years with the patrol division, Shelby Police.

3           **Q.**    Were you working on the Interstate Criminal  
4 Enforcement team in July of 2011?

5           **A.**    Yes, ma'am.

6           **Q.**    On July 11<sup>th</sup> were you called out to assist  
7 Deputy Fitch with a stop?

8           **A.**    Yes, ma'am.

9           **Q.**    About what time of day?

10          **A.**    It was in the morning hours around 8:30, and  
11 actually he had just called me and inform me that he was  
12 stopping a vehicle which we always did to let each other  
13 know for our safety where we was at and that he was  
14 stopping a vehicle. I just automatically went to his  
15 location.

16          **Q.**    Where was that?

17          **A.**    It was 85 northbound near the seven mile  
18 marker.

19          **Q.**    What did you see when you got there?

20          **A.**    Deputy Fitch was out of his vehicle. I noticed  
21 that he had a blue SUV type crossover vehicle stopped.  
22 He was out of his vehicle speaking with the driver.

23                   As I pulled up, he was actually finishing his  
24 conversation and walked back to my SUV to where I stayed  
25 inside of my SUV during the entire period of this traffic

1 stop.

2 Q. After Deputy Fitch came out and talked to you,  
3 what did he do?

4 A. He returned to his vehicle to start running  
5 driver's information, registration, and issue a warning  
6 citation.

7 Q. What did you do?

8 A. I stayed in my vehicle the entire time. I had  
9 positioned it to where I could see the vehicle that he  
10 had stopped, and I stayed there the entire length of his  
11 stop until he issued the warning citation and had got  
12 consent to search the vehicle before I exited my car.

13 Prior to that while I stayed in my car, the  
14 second vehicle, the primary objective is observe the  
15 occupants inside of the vehicle for the primary officer's  
16 safety. I did that and observed the driver stayed in  
17 front of Deputy Fitch's car.

18 Couldn't really see the female front passenger  
19 but did notice a lot of movement out of the rear seat  
20 passenger, couldn't seem to stay in one spot in his seat.  
21 He continually went back and forth inside the vehicle  
22 which is visible on his camera.

23 Q. Did you call Chris Cook?

24 A. Yes, ma'am.

25 Q. At what point did you call him?

1           **A.**     Around the same time Deputy Fitch was leaving  
2 my vehicle to go back to his.

3           **Q.**     So you went ahead and called him at that time?

4           **A.**     Yes, ma'am, just to advise him of the stop and  
5 of where we was at because at that time he had left the  
6 interstate for a brief time. I was just letting him know  
7 that we had a vehicle stopped.

8           **Q.**     Did you ask him to come out at that point?

9           **A.**     Yes, ma'am.

10          **Q.**     You did ask for him to come out?

11          **A.**     Yes.

12          **Q.**     At what point did you get out of your vehicle?

13          **A.**     Once Deputy Fitch had told me that he had  
14 consent to search the vehicle which he had stopped.

15          **Q.**     What did you do then?

16          **A.**     I exited my vehicle and walked to the vehicle  
17 that he had stopped and began to search it.

18          **Q.**     Where were the occupants of the vehicle?

19          **A.**     They were off to the roadway for their safety  
20 back towards his vehicle off the side of the road to the  
21 -- just in case there was an accident that there would be  
22 no injuries as far as them getting hit by the vehicles.

23          **Q.**     Where did you search in the vehicle?

24          **A.**     I started at the front passenger seat area.  
25 That's where I began the search.

1           **Q.**    What, if anything, did you notice or note in  
2 the vehicle?

3           **A.**    When I first entered the vehicle, I noticed  
4 numerous air fresheners hanging throughout the car, not  
5 just the one that you normally see hanging around the  
6 rear view mirror.  These were Black Ice brand air  
7 fresheners that give a very strong, distinct odor.

8                    They was hanging from the rear view mirror as  
9 well on each of the shirt hangars back through the rear  
10 of the vehicle and also two hanging in the cargo area of  
11 the vehicle.

12           **Q.**    Is that five total?

13           **A.**    Five or six total ones.

14           **Q.**    Did you notice anything else?

15           **A.**    Yes, ma'am.  I noticed empty Five Hour Energy  
16 drink bottles, empty water bottles, empty potato chip  
17 bags.  I noticed a single key in the ignition of the  
18 vehicle.

19           **Q.**    Why did you notice that?

20           **A.**    Just --

21           **Q.**    Why did that stick out to you?

22           **A.**    Because that tells me that the car may not  
23 belong to who's driving it because most people keeps  
24 their car keys with their house keys.

25           **Q.**    I'm sorry.  I interrupted you.  What else did

1 you notice?

2       **A.** Like I said, I was in the front area of the  
3 vehicle. I noticed the non-factory painted screws  
4 holding the center console together, and I did see in the  
5 front there was also stress marks on the plastic areas in  
6 the front of the vehicle.

7       **Q.** How long would you say you searched before  
8 Deputy Cook arrived?

9       **A.** Less than five minutes.

10       **Q.** When he arrived, what did he do?

11       **A.** He began to help Deputy Fitch and I search the  
12 vehicle, and several minutes after, that he returned to  
13 his vehicle to retrieve his canine to conduct an open air  
14 sniff.

15       **Q.** Are you familiar with Canine Heky?

16       **A.** Yes, ma'am.

17       **Q.** Is that your dog now?

18       **A.** No.

19       **Q.** Is he still working?

20       **A.** Yes, ma'am.

21       **Q.** Are you familiar with Heky's indicators?

22       **A.** Yes, ma'am.

23       **Q.** Were you familiar at the time with how he  
24 indicated?

25       **A.** Yes, ma'am.

1 Q. By at the time, I mean on July 11, 2011?

2 A. Yes, ma'am.

3 Q. Did you watch Chris work Heky around the car?

4 A. I did.

5 Q. Did you see any of the indicators that Chris  
6 testified to yesterday?

7 A. Yes, ma'am, I did.

8 Q. Do you stop a lot of Hispanic people?

9 A. I stop a lot of different people.

10 Q. Do you stop Hispanic people?

11 A. Yes, ma'am, I do.

12 Q. Do you stop them because they're Hispanic?

13 A. Absolutely not.

14 Q. Why do you stop people?

15 A. For criminal activity.

16 Q. Do you just randomly choose people?

17 A. No, ma'am.

18 Q. Why do you stop?

19 A. I stop them for array of reasons, to name a  
20 few; speeding, left of center, fail to maintain lane  
21 control, seatbelt. The list goes on and on. It's any  
22 type of infraction or criminal activity that I see.

23 Q. I believe you heard Mr. Coleman ask yesterday  
24 if lots of people speed on I-85?

25 A. Yes, ma'am.

1           **Q.**    So how do you choose the ones that you stop?

2           **A.**    You choose the ones that you stop by -- As far  
3 as the speeding aspect?

4           **Q.**    No.  I understand that you're stopping people  
5 because they're speeding, but do you stop all people who  
6 are speeding?

7           **A.**    No, ma'am.

8           **Q.**    How do you choose the ones that you stop?

9           **A.**    The ones that are speeding and, which is what I  
10 initially stop for, the reaction of the vehicle and the  
11 ones that give a reaction to my marked patrol car's  
12 presence as it passes me.

13          **Q.**    Describe that reaction?

14          **A.**    It could be anything from elbows locked out,  
15 turning looking away from me, looking at the floorboard.  
16 I've had them let their seat down as they go by me to try  
17 to hide behind the doorpost.  I've had them reach to the  
18 rear of the vehicle causing them to run off the road as  
19 they pass by my marked patrol car, any array of things.

20          **Q.**    Is it just Hispanic people that do that?

21          **A.**    No, ma'am.

22          **Q.**    Do you write warning citations to everybody you  
23 stop or criminal citations to everybody you stop?

24          **A.**    I do not.  Most of my stops are cleared  
25 normally with a verbal warning.

1           **Q.**    How do you choose the people that you write  
2 tickets to?

3           **A.**    These persons may have not had a license, may  
4 be just right there for identity, maybe to see further  
5 criminal activity if I see further criminal activity to  
6 take a stop further, and also that goes for verbal  
7 warnings too. I don't just write warning tickets to  
8 people to cars that I search.

9           **Q.**    So some part of your search you do write verbal  
10 tickets? I'm sorry. You don't write a verbal warning.  
11 So some cars that you search you also give verbal  
12 warnings to those?

13          **A.**    Yes, ma'am, and that's because initially the  
14 warning citation is not kept here. So it's really a  
15 record that it's not really for anything other than  
16 writing their information down.

17                    It's no different than giving them a verbal  
18 warning because I do have audio and video inside of my  
19 vehicle and I am required to fill out the SBI forms for  
20 racial profiling by State law and which I fill out for  
21 every vehicle that I stop. There's no more information  
22 on the SBI form than what's written on the written  
23 warning ticket that we have.

24          **Q.**    Do you have any idea what percentage of stops  
25 you have made or specifically during those -- about a

1 year? Is that how long ago --

2 **A.** About a year.

3 **Q.** -- the percentage of stops during that year  
4 where you stopped them and wrote a written warning or  
5 issued a criminal citation?

6 **A.** The percentage?

7 **Q.** Can you estimate that?

8 **A.** No, ma'am. I can't even estimate the number of  
9 cars that I stopped. I would say in excess of a hundred  
10 easily.

11 **Q.** You made in excess of a hundred stops?

12 **A.** Yes, ma'am.

13 **Ms. Kirby-Turner:** No further questions.

14 **Mr. Coleman:** Just a couple of questions.

15 **CROSS-EXAMINATION BY MR. COLEMAN:**

16 **Q.** Mr. Seagle?

17 **A.** Yes, sir.

18 **Q.** Are you still a part of that team?

19 **A.** I am not.

20 **Q.** What was the name of that team officially?

21 **A.** The ICE team?

22 **Q.** Yes.

23 **A.** It stands for Interstate Criminal Enforcement.

24 **Q.** Interstate Criminal Enforcement.

25 **A.** Yes.

1 Q. What does interstate mean in that?

2 A. Interstate would refer to --

3 Q. I-85?

4 A. In Cleveland County, yes, sir.

5 Q. It's not the Shelby enforcement team?

6 A. No, sir.

7 Q. It's not the Grover enforcement team?

8 A. No, sir.

9 Q. That's Defendant's Exhibit 5?

10 A. Yes, sir.

11 Q. If you will, look at the last two sentences.

12 It's a request. Did I request items from the Interstate  
13 Enforcement team out there where they do their work on I-  
14 85?

15 A. I'm sorry.

16 Q. What was requested of -- That's the one from  
17 the sheriff, but at the bottom of that, the sheriff  
18 indicates that two of you had only been a member of the  
19 ICE team for a certain amount of time; is that right?

20 A. Yes, sir. I was only on the ICE team for --

21 Q. So he specifically referred to the ICE team; am  
22 I right?

23 A. Yes, sir.

24 Q. This is the letter he was responding to,  
25 Defendant's Exhibit 4; what did I ask for?

1           **A.**    Do you want me to read it aloud?

2           **Q.**    Just read it to yourself and then tell me.

3           **A.**    Citations that were made on Interstate I-85.

4           **Q.**    Right.  That's because that's where you guys  
5 work.  That's why it's called the Interstate; isn't it?

6           **A.**    Yes, sir.  Our primary goal is, I think  
7 Sergeant Fitch said it, ICE and COP.

8                        We wasn't on the interstate every single day  
9 that we worked, five days a week.  It may be three days.  
10 It may be five.  Next week it may be one.  Our primary  
11 goal as a function was to neighborhood patrol and  
12 interstate highway patrol.

13           **Q.**    The requests related to when you were out there  
14 on the interstate.  I want to show you what's been marked  
15 as Defendant's Exhibit 6.  Now pursuant to my request,  
16 that is what was turned over to me.  I didn't make them  
17 up.  I didn't go to the sheriff's department and get  
18 them.  That's what was turned over to me.  I'm going ask  
19 you to look at those and tell me if you can, recognize  
20 what Defendant's 6 is?

21           **A.**    Yes, sir.

22           **Q.**    What are those?

23           **A.**    Those are my warning citations.

24           **Q.**    On Highway Interstate 85?

25           **A.**    If you've separated them all out, I'm not going

1 to look at them. I'm not --

2 Q. Okay. We'll do them. If you will look at them  
3 and tell me the name and race on the first one?

4 A. Rasheed Duncombe, black male.

5 Q. All right. Go ahead. Next one.

6 A. I can't pronounce that name. I apologize.

7 Q. Is it a Hispanic male?

8 A. Yes, sir.

9 Q. The next one?

10 A. David Castro.

11 Q. Hispanic male?

12 A. Yes, sir.

13 Q. Next one?

14 A. I can't pronounce that name. It's Hispanic  
15 male.

16 Q. All right.

17 A. Nicholas Claytor.

18 Q. What race?

19 A. Black male. Want me to keep going?

20 Q. Yes.

21 A. Miguel Caballero, Hispanic male. Jose -- I  
22 can't pronounce the last name.

23 Q. Hispanic male?

24 A. Yes, sir.

25 Q. I can't -- Cecilio is the last name, Hispanic

1 male. Benitez, Hispanic male. Berumen, Rueben Berumen,  
2 Hispanic male; Jaime Galicia, Hispanic male; Jessica  
3 Pope, that's a white female; Chantel, can't pronounce  
4 their last name, black female; Nealie Lawrence, black  
5 male; Hispanic male;

6 Q. Wait a minute; what's the name?

7 A. I can't pronounce it. The name after --

8 Q. But it was an Hispanic male?

9 A. Yes, sir. Hispanic male; I can't pronounce  
10 that, I apologize, Hispanic male; Sanchez, Hispanic male;  
11 and Vargas, Hispanic male.

12 Q. Describe to me, if you would, you say you saw  
13 some bolts that were, I don't know, drew your attention  
14 to them in the car. Describe to me where they were?

15 A. Yes, sir. The ones that I initially saw, the  
16 center console between the front driver's seat and the  
17 front passenger's seat, that's where I initially noticed  
18 the screws, I believe it was. I believe it was bolts.  
19 They're held together by screws.

20 Q. Were you here when Dwight Fitch testified  
21 yesterday?

22 A. Yes, sir, I was.

23 Q. Do you recall that he testified once he decided  
24 to ask those questions about pistolas and money and drugs  
25 that he started and decided to search?

1           **A.**    I'm sorry. Ask me one more time.

2           **Q.**    When he asked those buzz questions; do you have  
3 any drugs; do you have any pistolas, do you have any  
4 money over \$10,000; he testified that he had already  
5 decided to search?

6           **A.**    I don't believe he testified he had already  
7 decided to search. He testified that in his mind that  
8 they was not free to leave and that if they had denied  
9 consent to search, if the canine had not indicated, then  
10 they would have been free to go.

11          **Q.**    That's a different question, but you answered  
12 the second part. The second part I asked him if he was  
13 free to go and he said no, they were not free to go.  
14 Although I told them they were free to go; do you recall  
15 that?

16          **A.**    Yes, sir.

17          **Q.**    If the people are not free to go, are they in  
18 custody?

19          **A.**    No, sir.

20          **Q.**    So when you're not free to go, you're not in -  
21 What is in custody then, Sergeant Seagle?

22          **A.**    It's if you're handcuffed and you're being  
23 taken to jail.

24          **Q.**    You think handcuffed and being taken to jail  
25 means --



1           **A.**   Why do you need consent --

2           **Q.**   Yes.

3           **A.**   -- of the person?

4           **Q.**   Yes.  If a determination has been made that  
5 they are not free

6           **A.**   We don't always ask for consent.  There's times  
7 that we just run the canine.  We don't always ask for  
8 consent first.

9           **Q.**   In this case you will agree, I think, based on  
10 Mr. Fitch's testimony, Dwight Fitch, and the video that  
11 we watched that he asked those questions before the  
12 canine searched the vehicle; is that correct?

13          **A.**   Yes.

14          **Q.**   He said when he asked those questions, he  
15 decided to search?

16          **A.**   Yes, sir.

17          **Q.**   So he didn't have to do with the canine.  He  
18 had made up his mind that he was going to search?

19          **A.**   Based upon the actions by your client and the  
20 -- what he had stopped the vehicle for at the beginning  
21 and the indicators that he had picked up upon among those  
22 things, that's why when we say the person is not free to  
23 leave in our mind.  We don't just come up with that off  
24 the top of our head.  We have a criminal basis that  
25 builds up to that point.

1           **Q.**    When you say the person's not free to leave?

2    Well, the person's not free --

3           **A.**    If he was free to leave, we would allow him to  
4    go on down the road and not waste our time or their time.

5           **Q.**    Right, but you're not going to allow them to  
6    leave? As in the indicators that you're talking about  
7    is, I believe, their air fresheners and energy drinks,  
8    one key on the key ring?

9           **A.**    Yes, sir.

10          **Q.**    That kind of thing?

11          **A.**    Yes, sir.

12          **Q.**    And in your mind that means that there's  
13    criminal activity afoot?

14          **A.**    All of those together with my training and  
15    experience, I would say so, yes.

16                **Mr. Coleman:**    I don't have any further  
17    questions.

18                **Ms. Kirby-Turner:**    No further questions.

19                **The Court:**        You may step down.

20    (The witness was excused.)

21                    Let's take a morning break. It's 11:00  
22    o'clock. Do you have any other witnesses?

23                **Ms. Kirby-Turner:**    Just a couple, Your Honor.

24                **The Court:**        Deputy, put us in recess for  
25    about fifteen minutes.

1 **RECESS**

2 (The Defendant was present with his counsel; the State's  
3 attorney was present.)

4 The Court: If you all are ready to proceed,  
5 so am I.

6 **Ms. Kirby-Turner:** Yes, Your Honor.

7 **The Court:** You may call your next witness.

8 **Ms. Kirby-Turner:** Your Honor, the State calls  
9 Ruth Deviney.

10 **RUTH DEVINEY, FIRST BEING DULY SWORN, TESTIFIED AS**

11 **FOLLOWS ON DIRECT EXAMINATION BY MS. KIRBY-TURNER:**

12 **Q.** Please state your name for the Court?

13 **A.** Ruth Deviney.

14 **Q.** How are you employed?

15 **A.** Clerk's office.

16 **Q.** What is your position in the clerk's office?

17 **A.** Assistant clerk, supervisor over the criminal  
18 department.

19 **Q.** Supervisor over the criminal department?

20 **A.** Yes.

21 **Q.** How long have you been with the clerk's office?

22 **A.** Twenty-one years.

23 **Q.** How long have you been on the criminal side?

24 **A.** The whole time.

25 **Q.** The whole time? Have you ever maintained in

1 the clerk's office copies of warning tickets?

2 **A.** No, ma'am.

3 **Q.** What do you maintain in the criminal side of  
4 the clerk's office?

5 **A.** Just the tickets that they turn in that we put  
6 in shucks that we set up.

7 **Q.** So actual criminal citations?

8 **A.** Yes, ma'am.

9 **Q.** Have you ever maintained warning tickets?

10 **A.** No, ma'am.

11 **Q.** Do you know how Mr. Coleman would have obtained  
12 warning tickets from the clerk's office?

13 **A.** I do not.

14 **Ms. Kirby-Turner:** I don't have any further  
15 questions.

16 **Mr. Coleman:** I have just a couple.

17 **CROSS-EXAMINATION BY MR. COLEMAN:**

18 **Q.** Ruth, I'll ask you -- You probably aren't aware  
19 that we were requesting both citations and warning  
20 tickets from Interstate 85; were you aware of that?

21 **A.** Just the citations. We went through the books.

22 **Q.** I believe it was Mr. Brantney from my office  
23 that came to your office and went through all of the  
24 citation booklets that the two of you could find for  
25 tickets written on Interstate Highway 85?

1           **A.**    Yes, sir.

2           **Q.**    So that related to citations, not just warning  
3 tickets?

4           **A.**    It was citations, not warning tickets.

5           **Q.**    You probably weren't here, but my request to  
6 the sheriff department was for both, and what we got from  
7 them was warning tickets. So we had to come to your  
8 office to get the citations; is that correct?

9           **A.**    That's correct.

10          **Q.**    Thank you.

11          **REDIRECT EXAMINATION BY MS. KIRBY-TURNER:**

12          **Q.**    Do you know that no one from the sheriff's  
13 department provided citations; do you know that?

14          **A.**    We don't receive warning tickets.

15          **Q.**    You don't see warning tickets?

16          **A.**    No, not at all. It's just citations.

17          **Ms. Kirby-Turner:**    I don't have any further  
18 questions.

19          **Mr. Coleman:**        I don't have any further  
20 questions.

21          **The Court:**            You may step down.

22          (The witness was excused.)

23                                    Call your next witness.

24          **Ms. Kirby-Turner:**    I'm going to recall  
25 Sergeant Fitch.



1           **A.**    Yes, sir.

2           **Q.**    All of them were in the file; were they not?

3 Both?

4           **A.**    Did I see it, yes.

5           **Q.**    Those were the ones that we presented that were  
6 predominantly Hispanic; is that correct?

7           **A.**    We went through them, and whatever we come up  
8 with, yes, sir.

9           **Q.**    Do you recall most of them being Hispanics?

10          **A.**    Yes.

11          **Q.**    Whether they were citations or whether they  
12 were warnings, were they Hispanic people that these  
13 tickets were made; the great majority of them?

14          **A.**    Majority of them, yes, sir.

15          **Q.**    Thank you.

16                **Ms. Kirby-Turner:**    No further questions.

17 (The witness was excused.)

18                **The Court:**        Call your next witness.

19                **Ms. Kirby-Turner:**    That would be the evidence  
20 for the State.

21                **The Court:**        Do you wish to be heard? Do you  
22 wish to present evidence?

23                **Mr. Coleman:**        Yes, we would like to recall two  
24 of the officers.

25                **The Court:**        Okay.

1           **Mr. Coleman:**   I'll start with Mr. Dwight  
2 Fitch.

3           **The Court:**       Sir, come on back up to the  
4 witness box. You're still under oath.  
5 (The witness retook the stand.)

6           **Mr. Coleman:**   I'll need to look at, I believe  
7 it's, Defendant's 3, the citations that were presented  
8 for Mr. Fitch.

9           **The Court:**       Two through five is the only  
10 ones you had, and those are right here.

11          **Ms. Kirby-Turner:**   That I introduced.

12          **The Court:**       Right.

13 **DWIGHT FITCH, PREVIOUSLY BEING DULY SWORN, TESTIFIED AS**  
14 **FOLLOWS ON DIRECT EXAMINATION BY MR. COLEMAN:**

15          **Q.**   Mr. Fitch?

16          **A.**   Yes, sir.

17          **Q.**   Those citations provided out of your office,  
18 how many of them are there? How many of them?

19   \* \* \*

20          **The Court:**       Which exhibit is he looking at?

21          **Mr. Coleman:**   That's number--

22          **The Court:**       Two, the one for you, four for  
23 you; right?

24          **Mr. Coleman:**   Yes, sir.

25   \* \* \*

1           **A.**   Six.

2           **Q.**   How many of them were Hispanic people; do you  
3 recall?

4           **A.**   Two.

5           **Q.**   Two of them were Hispanic people?

6           **A.**   That's what I'm counting here out of six. Let  
7 me recount them if that's not right. Three. I have one  
8 marked here as o, as other.

9           **Q.**   How many of those were arrested where drugs  
10 were found? So you pulled out the ones belonging to  
11 Peguero Elvis Pena?

12          **A.**   Yes. He was involved in this.

13          **Q.**   I can't make that out. Looks like Adolfo or  
14 something of that nature?

15          **A.**   Looks like Nicholas May, 136 Zebbie Drive,  
16 Casar, North Carolina.

17          **Q.**   Was that written on Interstate 85?

18          **A.**   This was at 136 Zebbie Drive, Casar, North  
19 Carolina, for -- It appears to be, what I can make out,  
20 marijuana.

21          **Q.**   I'm going to show you this one. This is Sammy  
22 David Gold and was that written on County Line Road in  
23 Shelby?

24          **A.**   Yes, East Dixon Boulevard.

25          **Q.**   This one is Zelda Woods; was that written in

1 Boiling Springs, North Carolina?

2 **A.** Yes, it was.

3 **Q.** This one is a Mr. Perez; was that written in  
4 Grover, North Carolina?

5 **A.** I-85 near Grover.

6 **Q.** I-85 near Grover, North Carolina?

7 **A.** Yes.

8 **Q.** That is a Mr. Perez?

9 **A.** Yes.

10 **Q.** This one which was written on I-85, that's a  
11 Mr. Zalva Garcia?

12 **A.** Yes.

13 **Q.** And Mr. Elvis Pena were the three out of your  
14 six that were written on Highway State -- Highway  
15 Interstate 85; right?

16 **A.** Perez, Zalva Garcia, and Pena.

17 **Q.** So looks like the three that you stopped on 85  
18 were Hispanic people; were they not?

19 **A.** Yes.

20 **Mr. Coleman:** I don't have any further  
21 questions. Now Your Honor, I --

22 **The Court:** That's the Court's Exhibit.

23 **Mr. Coleman:** This has been introduced?

24 **The Court:** Yes.

25 **Mr. Coleman:** All right.

1                   **The Court:**       Let me just make sure that I  
2 understand.  These are -- State's Exhibit 2 contains what  
3 appears to be two warning tickets and four citations.  I  
4 don't know that there's been any concrete evidence other  
5 than maybe a letter as to -- for what period of time this  
6 covers, and are these all of the citations and/or are  
7 these -- I think that there's evidence that these perhaps  
8 are not all of the warning tickets.

9                   But Mr. Coleman, the evidence was as I heard it  
10 that they got what they could but not necessarily all of  
11 them.  As to the citations, did they get all of them, and  
12 if they did get all of them, from what period of time  
13 until what cutoff period of time do these include?

14                   **Mr. Coleman:**   Those are the State's exhibits,  
15 Your Honor, but I can answer from my perspective.  From  
16 my perspective --

17                   **The Court:**       I'm asking both of you.  I don't  
18 know that that's -- or I may even be asking the witness  
19 for clarification because I'm not sure that it's been  
20 established what State's Exhibit 2 actually contains.  Do  
21 you know?  Yes or no.  That's fine.  If you don't know,  
22 it's all right to say I don't know.  Does anyone else  
23 know?

24                   **Ms. Kirby-Turner:**   Well, Sergeant Fitch says  
25 that he gathered everything that was in their possession.

1 That's all the warning tickets that they have.

2 **The Court:** I understand that's all the  
3 warning tickets that they have. I understood that and  
4 that perhaps there are others, but we don't know whether  
5 there are others or not.

6 **Ms. Kirby-Turner:** Right.

7 **The Court:** With respect to the citations,  
8 that seems to be something that could be traced. Those  
9 are maintained, and if they are, they should be  
10 maintained and there's been evidence that they're turned  
11 into the clerk's office.

12 **Ms. Kirby-Turner:** Yes.

13 **The Court:** I know that from personal  
14 experience in spite of the testimony, but assuming that,  
15 then do we have all of those and do we have -- and if we  
16 have all of them, then for what period are we talking  
17 about; from what start date do the tickets begin to what  
18 end date do the tickets stop?

19 **Mr. Coleman:** Your Honor, I can look at my own  
20 exhibits to determine that, but I was very specific,  
21 January 1, 2009, through July 30, 2011. I didn't want to  
22 be over burdensome and narrowed it to --

23 **Ms. Kirby-Turner:** Sergeant Fitch said he --  
24 whatever is written in that letter is what he complied  
25 with.

1           **The Court:**       So from the totality of the  
2 period between January 1, 2010 --

3           **Mr. Coleman:**     January 1, 2009.

4           **The Court:**       2009, through July --

5           **Mr. Coleman:**     30, 2011.

6           **The Court:**       So we're talking about a two and  
7 a half year period?

8           **Mr. Coleman:**     Seems like.

9           **The Court:**       Two a half year period, you  
10 wrote four citations?

11          **Ms. Kirby-Turner:**   Yes, sir. I mean, that's  
12 what's in the folder, and this --

13          **The Court:**       Does that sound right to you?

14          **A.**       Yes. That sounds about right for a uniform  
15 citations that I had written.

16          **The Court:**       If that's what it is, that's  
17 what it is.

18          **Ms. Kirby-Turner:**   I didn't go, and I don't  
19 want to tell the Court that I went to the Clerk's office  
20 and I looked because I did no such thing because this was  
21 peripheral to me.

22                I never received a discovery request for any of  
23 this because I believe it's outside of discovery because  
24 I don't -- because this is the defendant's burden.

25                I think he's trying to establish an equal

1 protection clause violation and the case law is clear  
2 that it's his burden. So I think that he did the right  
3 thing and made the request of the right people, and I  
4 think that when he says Mr. Brantley went through -- I  
5 don't know what Mr. Brantley did, but it sounds like he  
6 sat down in the clerk's office and went through and  
7 looked for citations. So I think that the inquiry's been  
8 made.

9 **The Court:** There's a way to search the  
10 State computer for an officer.

11 **Ms. Kirby-Turner:** I don't know if that was  
12 done or not.

13 **The Court:** I don't either.

14 **Mr. Coleman:** At this point he's testified.  
15 That's all the tickets that he wrote over that two and a  
16 half year period.

17 **The Court:** I thought he said he didn't  
18 know. His answer was he didn't know, and I asked him  
19 then well, did you -- does that sound about right; four  
20 tickets for two and a half years, and he said as far a  
21 uniform citations -- What did you say?

22 **A.** Yes.

23 **Mr. Coleman:** Those are all my questions.

24 **The Court:** Do you have any re -- Do you  
25 have any cross-examination?

1                   **Ms. Kirby-Turner:**    I guess I can -- Yes, sir.

2   **CROSS-EXAMINATION BY MS. KIRBY-TURNER:**

3           **Q.**    Deputy Fitch, I'll try not to be too hard on  
4 you on my cross-examination of you. I'll ask you an  
5 open-ended question. Why -- Strike that. You testified  
6 yesterday that there are all kinds of people up and down  
7 I-85; is that right?

8           **A.**    Yes.

9           **Q.**    You know they're speeding; is that right?

10          **A.**    Yes.

11          **Q.**    There's a lot of people that drive up and down  
12 that road; are there?

13          **A.**    Yes.

14          **Q.**    And a lot of them are speeding; is that right?

15          **A.**    Yes.

16          **Q.**    Do you stop every single speeder?

17          **A.**    No.

18          **Q.**    Why not?

19          **A.**    I don't always see an indication of nervousness  
20 to my presence that I would need to stop the car.

21          **Q.**    Do you stop every Hispanic speeder?

22          **A.**    No.

23          **Q.**    Why would you stop a vehicle that was speeding  
24 as opposed to another vehicle that was speeding; what  
25 makes you choose one car over another?

1           **A.**    Some of the indicators that in my previous  
2 testimony that I pointed out, what we call fear induced  
3 reaction to our presence.

4           **Q.**    Do you stop Hispanic people simply because  
5 they're Hispanic?

6           **A.**    Absolutely not.

7           **Q.**    You've written four citations?

8           **A.**    That would be -- That would sound about right.  
9 I've not written many uniform citations.

10          **Q.**    For various traffic offenses, I'm not sure what  
11 they're for, but they were all for -- were they all for  
12 traffic violations?

13          **A.**    One was for misdemeanor possession of marijuana  
14 I think. It was kind of not clear on the copy that I  
15 saw.

16          **Q.**    Did you stop -- The Hispanic people you stopped  
17 on I-85, did you stop them simply because they were  
18 Hispanic?

19          **A.**    No.

20          **Q.**    Were there other Hispanic people that you have  
21 observed committing traffic violations in the years that  
22 you've been on the ICE team that you didn't stop?

23          **A.**    Yes.

24          **Q.**    Have you ever stopped Caucasian people on I-85  
25 for traffic violations?

1           **A.**    Yes.

2           **Q.**    Have you ever stopped African-American people  
3 on I-85 for traffic violations?

4           **A.**    Yes.

5           **Q.**    How did you pick those white people and those  
6 African-American people out of all the other white people  
7 and all the other African-American people that were  
8 committing traffic violations?

9           **A.**    They were committing traffic violations and  
10 they had further indicators.

11           **Ms. Kirby-Turner:**    I don't have any further  
12 questions.

13           **The Court:**        I have a few.

14 **QUESTIONS BY THE COURT:**

15           **Q.**    As for the reasons why you stopped Mr. Pena,  
16 can you remind me again what those reasons were?

17           **A.**    What my indicators were why I picked him?

18           **Q.**    Why you stopped Mr. Pena.  If you could, just  
19 maybe list them for me?  The indicators, I heard that.  
20 There were several indicators.  Just list all the  
21 indicators that you relied upon based upon your training  
22 and experience to pull over Mr. Pena's vehicle?

23           **A.**    When I first saw him, the reduction of the  
24 speed and the tip of the front of the car.

25           **Q.**    Is that how you knew there was a reduction in

1 the speed because you saw the tip of the car?

2 **A.** Yes. It nose-dived just a little. As they  
3 passed, the driver looked away from me and the passenger  
4 looked in my direction.

5 As the car passed, I saw the brake lights were  
6 on on the car.

7 After they passed my location and I got out on  
8 the road, I noticed that they had immediately changed  
9 lanes from the fast lane to the slow lane.

10 When I caught up to the car just past the two  
11 mile or the exit two, I pulled up beside the car and I  
12 rode beside the car from just past the two mile marker to  
13 almost the five mile marker, side by side, looking at the  
14 driver.

15 I never saw the passenger -- the rear seat  
16 passenger in the car at this time. I just inadvertently  
17 overlooked him or he was lying down, but I didn't see  
18 him.

19 The driver looked straight ahead the entire  
20 time from the two to almost the five.

21 He had a tight grip on the steering wheel at  
22 the ten and two position.

23 **Q.** Anything else?

24 **A.** That's basically it and the stop was based on  
25 the speed that I paced the vehicle at. I estimated just

1 an average of seventy-five, but he did actually speed up  
2 to seventy-nine miles an hour in front of me right before  
3 the stop.

4 **Q.** Anything else?

5 **A.** That's it.

6 **The Court:** That's all the questions I have.

7 **Ms. Kirby-Turner:** I don't have any further  
8 questions.

9 **The Court:** You may step down.

10 (The witness was excused.)

11 Any further evidence?

12 **Mr. Coleman:** Yes, sir.

13 **The Court:** Any further evidence for the  
14 defendant?

15 **Mr. Coleman:** At this time call Deputy Chris  
16 Cook.

17 **CHRIS COOK, PREVIOUSLY BEING DULY SWORN, TESTIFIED AS**

18 **FOLLOWS ON DIRECT EXAMINATION BY MR. COLEMAN:**

19 **Q.** Mr. Cook, I'm going to hand you what's  
20 previously been marked as Defendant's Exhibit 7. I think  
21 you already identified them as the tickets turned over to  
22 me by your office?

23 **A.** Yes, sir.

24 **Q.** I want you to compare it with Defendant's --  
25 But at any rate, I'd like -- This is Defendant's Exhibit

1 7A. What it is is it's a compilation of the tickets  
2 you've written with the person's name, the date the  
3 ticket was written, their race, what state they were from  
4 by tag, and the reason you cited them; would you look at  
5 it to see if that's accurate?

6 **A.** These are not in order with --

7 **Q.** Yes, yes. Take your time.

8 **A.** Yes, sir.

9 **Q.** Defendant's 7A is just a listing of those  
10 tickets that you wrote and it's drawn out where they were  
11 from by tag, the date it was written, and the reason it  
12 was written?

13 **A.** Yes, sir.

14 **Q.** And the race of the person?

15 **A.** Yes, sir.

16 **Mr. Coleman:** I don't have any further  
17 questions.

18 **The Court:** Recross -- Cross-examination.

19 **CROSS-EXAMINATION BY MS. KIRBY-TURNER:**

20 **Q.** Was that graph, I'll call it, which is  
21 Defendant's --

22 \* \* \*

23 **Ms. Kirby-Turner:** I'm sorry. You're calling  
24 it Defendant's what?

25 **Mr. Coleman:** It's Defendant's -- The graph?

1           **Ms. Kirby-Turner:**    The graph.

2           **Mr. Coleman:**       7A

3           **Ms. Kirby-Turner:**    7 -

4           **Mr. Coleman:**       7A

5           **Ms. Kirby-Turner:**    7A?

6           **Mr. Coleman:**       Yes.

7                                   \* \* \*

8           **Q.**    Was Defendant's 7A only the eight citations --  
9           or the eight warning tickets that you gave to Sergeant  
10          Fitch?

11          **A.**    Yes.   That was what we brought up yesterday.

12          **Ms. Kirby-Turner:**    I don't have any further  
13          questions.

14          **The Court:**        You may step down.

15          (The witness was excused.)

16          Call your next witness.

17          **Mr. Coleman:**        Call Jody Seagle.

18          **The Court:**        Sir, you are still under oath.

19          (The witness retook the stand.)

20          **JODY SEAGLE, PREVIOUSLY BEING DULY SWORN, TESTIFIED AS**

21          **FOLLOWS ON DIRECT EXAMINATION BY MR. COLEMAN:**

22          **Q.**    Mr. Seagle, I believe that you have already  
23          identified Defendant's 6 as tickets that you wrote?

24          **A.**    Yes, sir, warning tickets that I --

25          **Q.**    Warning tickets, yes.   If you would, would you

1 compare it with this. I have prepared a chart showing  
2 the number of people stopped, their race, the state tag,  
3 and why they were stopped, and see if that's accurate?  
4 That is Defendant's 6A that I'm asking you to compare to  
5 what you've already identified as Defendant's 6.

6 **A.** Mr. Coleman, these are in no particular order.  
7 If you copied them from my warning tickets, I'll take  
8 your word and say they're right. I don't want to take an  
9 hour of the Court's time for me going through all of  
10 these.

11 **Q.** Well, I think we can accomplish it together.  
12 I'll read the tickets. You see if they're on there?

13 **A.** Okay.

14 **Q.** Duncombe Rasheed - Rasheed Duncombe; is he on  
15 there?

16 **A.** Yes, sir.

17 **Q.** Orduna Peocopio?

18 **A.** Yes, sir.

19 **Q.** David Castro?

20 **A.** Yes, sir.

21 **Q.** Joaquin De La Cruz?

22 **A.** Yes, sir.

23 **Q.** Nicholas Claytor?

24 **A.** Yes, sir.

25 **Q.** Miguel Caballerd?

1           **A.**    Yes, sir.

2           **Q.**    Jose Peralte?

3           **A.**    Yes, sir.

4           **Q.**    Gaspar Cecilio?

5           **A.**    Yes, sir.

6           **Q.**    Freddy Benitez?

7           **A.**    Yes, sir.

8           **Q.**    Ruben Bermen?

9           **A.**    Yes, sir.

10          **Q.**    Jaime Galicia?

11          **A.**    Yes, sir.

12          **Q.**    Jessica L. Pope?

13          **A.**    Yes, sir.

14          **Q.**    Chantel Pincham?

15          **A.**    Yes, sir.

16          **Q.**    Nealie Lawrence?

17          **A.**    Yes, sir.

18          **Q.**    Sigitas Misevicius?

19          **A.**    Yes, sir.

20          **Q.**    Jeronimo-Galeano Caemen?

21          **A.**    Yes, sir.

22          **Q.**    Pedro Sabus-Burrera?

23          **A.**    Yes, sir.

24          **Q.**    Anguelo Espinal-Cazaro?

25          **A.**    Yes, sir.

1           **Q.**    Jose L. Sanchez?

2           **A.**    Yes, sir.

3           **Q.**    There's one more, and that would be Francisco  
4 Sandoval-Vargas?

5           **A.**    Yes, sir.

6           **Q.**    So you agree that Defendant's 6A is nothing  
7 more than a compilation of the tickets that were turned  
8 over to me written by you?

9           **A.**    That's accurate.

10          **Q.**    All right. Thank you.

11          **Mr. Coleman:**    Your Honor, at this time I call  
12 --

13          **The Court:**       Do you have any further  
14 questions of this witness?

15          **Mr. Coleman:**    No, sir.

16          **The Court:**       Do you have some questions for  
17 this witness?

18          **Ms. Kirby-Turner:**    No, sir.

19          **The Court:**       You may step down.

20          (The witness was excused.)

21                        Now you may call your next witness.

22          **Mr. Coleman:**    At this time I'm going to call  
23 Mr. Julio Infante.

24          **The Court:**       Julio Infante.

25          **Mr. Coleman:**    Gomez, yes, sir.

1           **The Court:**       Where's he at?

2           **Mr. Coleman:**    Here.

3           **The Court:**       Okay. Tell him to come on up.

4   **JULIO GOMEZ, FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS**  
5   **ON DIRECT EXAMINATION BY MR. COLEMAN:**

6                               \* \* \*

7           **The Court:**       You all might want to give the  
8   interpreter a little time to translate the question to  
9   the witness and then allow time for her then to translate  
10   the answer to us; okay?

11                    Ask your next question.

12                               \* \* \*

13           **Q.**    Mr. Gomez, were you traveling on Interstate 85  
14   on July 11, 2011?

15                               \* \* \*

16           **The Court:**       Could you, first of all, ask him  
17   to state his name for the record?

18                               \* \* \*

19           **Q.**    Would you please state your name?

20           **A.**    Julio Gomez.

21           **Q.**    Mr. Gomez, were you traveling on Interstate 85  
22   on July 11, 2011?

23           **A.**    Yes.

24           **Q.**    Were you traveling with Cololeiny Dela-Cruz and  
25   Elvis Pena?

1           **A.**    Yes.

2           **Q.**    Were you coming from Georgia?

3           **A.**    Yes.

4           **Q.**    You were headed to New York?

5           **A.**    Yes.

6           **Q.**    Where had you been in Georgia?

7           **A.**    I know I was in Atlanta, Georgia.  I don't know  
8 exactly where it was.

9           **Q.**    Why did you go into Georgia?

10          **A.**    I was there with some cousins of mine.

11          **Q.**    Were you stopped on Highway Interstate 85 by  
12 Officer Fitch?

13          **A.**    Yes.

14          **Q.**    While you were there with Officer Fitch, were  
15 you in the back passenger seat?

16          **A.**    Yes.

17          **Q.**    Did you give Cololeiny Dela-Cruz permission --  
18 Strike that.  Did you tell Cololeiny Dela-Cruz that you  
19 agreed to allow Sergeant Fitch to search your car?

20          **A.**    No.

21                   **Mr. Coleman:**    I don't have any further  
22 questions.

23                   **The Court:**        Cross-examination.

24 **CROSS-EXAMINATION BY MS. KIRBY-TURNER:**

25          **Q.**    Mr. Gomez, how long have you lived in America?

1           **A.**   Somewhere around from 2002, 2003.

2           **Q.**   'Til now?

3           **A.**   Yes.

4           **Q.**   Have you lived here constantly for about the  
5 period of time?

6           **A.**   In the United States, yes.

7           **Q.**   You don't speak any English at all?

8           **A.**   Not really. I can understand a little bit. I  
9 can speak a little bit but really not a lot.

10          **Q.**   Do you remember this officer?

11          **A.**   Yes.

12          **Q.**   Do you remember him coming up to your window  
13 and asking you for a registration card?

14          **A.**   Yes. I do remember.

15          **Q.**   Did you understand what he was asking for?

16          **A.**   The registration, I've been asked for that many  
17 times.

18          **Q.**   You were able to get that for him; is that  
19 right?

20          **A.**   Yes.

21          **Q.**   Did you understand any of the questions he  
22 asked you after that?

23          **A.**   No.

24          **Q.**   You weren't able to understand not one word?

25          **A.**   No, because when I'm surrounded with people

1 that speak English, I don't really pay attention.

2 Q. Are you saying that you were surrounded by  
3 people that speak English that day?

4 A. Both of them that were there, both of them  
5 speak English.

6 Q. Who is Randy Cololeiny Dela-Cruz to you? What  
7 is your relationship?

8 A. We were friends. We would go out once in a  
9 while.

10 Q. Does she have your child?

11 A. Yes.

12 Q. So she's the mother of your child?

13 A. Yes, but we never really had a relationship.

14 Q. When she volunteered to translate, did you  
15 understand what was happening?

16 A. I could not understand the question because it  
17 was in English. I couldn't understand the question.

18 Q. Did she not translate the question?

19 A. She translated the questions.

20 Q. What were the questions that you understood you  
21 were being asked?

22 A. The question that she asked was one, if they  
23 could, check the car. One, the officer asked where I was  
24 from, and where my --

25 \* \* \*

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**Translator:** Your Honor, may I clarify just for clarification for him?

**The Court:** Yes.

\* \* \*

**A.** He asked me where my parents were from. That's the question he asked.

**Q.** But you did understand Ms. Dela-Cruz to ask if they could check the car?

**A.** She said the question.

**Q.** Did you say no?

**A.** I said no.

**Ms. Kirby-Turner:** No further questions.

**The Court:** Redirect.

**Mr. Coleman:** Yes.

**REDIRECT EXAMINATION BY MR. COLEMAN:**

**Q.** The officer asked you where you were from?

**A.** Yes.

**Q.** You told him New York?

**A.** Yes.

**Q.** Then he asked you where you were really from or where your parents were from?

**A.** Yes.

**Mr. Coleman:** Thank you. I don't have any questions.

**The Court:** Recross?

1           **Ms. Kirby-Turner:**    No.

2           **The Court:**        You may step down.

3           (The witness was excused.)

4           You may call your next witness.

5           **Mr. Coleman:**    Your Honor, we don't have any  
6 further witnesses at this time. I would move to  
7 introduce Defendant's Exhibits -- I'm going to try to get  
8 them in order here if I can.

9           **The Court:**        I can go through the ones I have  
10 as identified for the record if you want me to.

11          **Mr. Coleman:**    Yes, sir. I want to make sure I  
12 have them all, but yes, I would like for you to do the --

13          **The Court:**        I have as Defendant's Exhibit 1  
14 the sheriff's department policy regarding audio  
15 recordings.

16          **Mr. Coleman:**    All right. I'm trying to find  
17 that.

18          **The Court:**        Do you wish to introduce it?

19          **Mr. Coleman:**    Yes, sir.

20          **The Court:**        Do you have any objection?

21          **Ms. Kirby-Turner:**   No, Your Honor.

22          **The Court:**        Defendant's Exhibit 1 is  
23 received.

24                I have as Defendant's Exhibit 2 a certified  
25 copy of the transcript of the Arrassaenz trial.

1           **Mr. Coleman:**    Yes, sir.  That's number two.

2           **The Court:**        Defense Exhibit 2 is received.

3                            Defendant's Exhibit 3 is subpoena for Federal  
4 court 11-09-73011.

5           **Mr. Coleman:**    That's number three?

6           **The Court:**        Yes, sir.

7           **Mr. Coleman:**    Yes, sir.

8           **Ms. Kirby-Turner:**  I would object to that,  
9 Your Honor.

10           **The Court:**        Overruled.  Defendant's 3 is  
11 received.

12                            Exhibit 4 I have as the letter to the Cleveland  
13 County Sheriff's Office request for public records.

14           **Mr. Coleman:**    That is correct, Your Honor.

15           **The Court:**        Defendant's 4 is received.

16                            Five I have is the response from supervisor  
17 regarding request for public records.

18           **Mr. Coleman:**    Yes, sir.

19           **The Court:**        Defendant's 5 is received.

20                            Defendant's 6 is warning citations from Jody Seagle.

21           **Mr. Coleman:**    That is correct.

22           **The Court:**        Defendant's Exhibit 7 I have as

23 --

24           **Mr. Coleman:**    Your Honor, I have a six A, I  
25 believe.

1           **The Court:**       Right. That was identified  
2 later on. I'm getting to that one. Defendant's Exhibit  
3 7 was the citations written by Cook on I-85.

4           **Mr. Coleman:**    Yes, sir.

5           **The Court:**       Nine of them. Do you request  
6 that one to be introduced?

7           **Mr. Coleman:**    Yes, sir.

8           **The Court:**       Defendant's Exhibit 7 is  
9 received.

10                   Then I have Defendant's Exhibit 6A and 7A which  
11 is, apparently, like a list of compilation of some of the  
12 particular information contained within their respective  
13 numerical exhibits, 6A being the compilation of the  
14 information contained within Defense Exhibit 6 and 7A  
15 being the compilation of the information contained in  
16 Defendant's Exhibit 7.

17           **Mr. Coleman:**    Yes, sir.

18           **The Court:**       Do you request both those be  
19 admitted?

20           **Mr. Coleman:**    Yes, sir, I do.

21           **The Court:**       All right. Defendant's Exhibit  
22 6A and 7A are received.

23           **Mr. Coleman:**    I have one more that I'd like to  
24 mark and introduce as Defendant's Exhibit 8.

25           **The Court:**       What is it?

1           **Mr. Coleman:**   Your Honor, that's a breakdown  
2 or compilation of the stop from the time it started at  
3 8:38:50.

4           **The Court:**       Have you seen that?

5           **Ms. Kirby-Turner:**   No.

6           **Mr. Coleman:**   I think you did while we were  
7 trying to find the time up there. You looked at it and  
8 told the judge what time the vehicle -- or the drug  
9 search ended.

10          **Ms. Kirby-Turner:**   I'm going to object to  
11 this. The video is in evidence, and the Court can look  
12 at the video.

13          **The Court:**       Well, it may help me. I can go  
14 through it and make sure his times are all right.

15          **Mr. Coleman:**   I did that while we were looking  
16 at it, but I'd love the Court to go through it and see  
17 that the times are okay.

18          **The Court:**       Can you get the video set back  
19 up?

20          **Ms. Kirby-Turner:**   I can.

21          **The Court:**       Okay. Let's do that, and I will  
22 preliminarily and conditionally admit Defendant's Exhibit  
23 8, but if they don't match up, then that conditional  
24 admission would be then rejected.

25          **Mr. Coleman:**   Yes, sir.

1           **Ms. Kirby-Turner:** I don't know if this is  
2 what Mr. Coleman thinks is important in the video.

3           **The Court:** I'll let you make a list of the  
4 things you think are important or the events that you  
5 have seen them. It's basically just time stamps with  
6 what happened during that time stamp; right?

7           **Mr. Coleman:** Correct.

8           **The Court:** From State's Exhibit 1?

9           **Ms. Kirby-Turner:** Yes.

10          **The Court:** Can I see a copy of State's  
11 Exhibit 8 -- I mean, Defendant's Exhibit 8?

12          **Ms. Kirby-Turner:** It's in my hand.

13          **Mr. Coleman:** Yes, sir. I've got an extra  
14 copy.

15          **The Court:** Well, let me have the original.

16          **Mr. Coleman:** Okay.

17          **The Court:** Then if it is what you say it  
18 is, then --

19 (The video was played.)

20          **The Court:** I've looked at the date that the  
21 time stamps that he's got on here so far, and they do  
22 appear to be maybe not exact second but very close to  
23 when the events started. So if you're now okay with it,  
24 that this is when the stuff happened, then I don't know  
25 that I need to watch the rest of it.

1           **Ms. Kirby-Turner:**    I don't want you to  
2 necessarily.

3           **The Court:**            Do you withdraw your objection  
4 to its admission then that you see that it's accurate.

5           **Ms. Kirby-Turner:**    I would stipulate that it's  
6 accurate and I think my objection is to the relevance, I  
7 suppose, of the defense counsel drawing up a summary of  
8 the video and placing it into the evidence. My  
9 objection's not to the accuracy of it.

10          **The Court:**            Okay. Defendant's Exhibit 8 is  
11 admitted. I'll afford what weight to it that needs to be  
12 afforded.

13          **Ms. Kirby-Turner:**    Yes, sir.

14          **The Court:**            Any further evidence for the  
15 defense?

16          **Mr. Coleman:**        No, sir.

17          **The Court:**            Any rebuttal evidence for the  
18 State?

19          **Ms. Kirby-Turner:**    No, Your Honor.

20          **The Court:**            Are you all ready to argue?  
21 It's close to lunch.

22          **Mr. Coleman:**        I would prefer to go to lunch.

23          **The Court:**            Do you have some case law?

24          **Ms. Kirby-Turner:**    Lots of case law.

25          **The Court:**            Do you have some case law?

1           **Mr. Coleman:**    Yes, sir.

2           **The Court:**       Can y'all at least give me the  
3 case law in case I have time at lunch I can deal with  
4 that?

5           **Mr. Coleman:**    Yes, sir.

6           **The Court:**       Let's be recessed until 2:00 pm.

7 **RECESS**

8 (The Defendant was present with his counsel; the State's  
9 attorney was present.)

10          **The Court:**       Would you all like to argue?

11          **Mr. Coleman:**    Yes.

12          **The Court:**       All right. I'll hear from you  
13 first if you want to. Do you want to waive the opening?  
14 Since he presented evidence, I guess you have the last.

15          **Ms. Kirby-Turner:** I just have just a  
16 procedural question for the Court before we do get  
17 started.

18          **The Court:**       Okay.

19          **Ms. Kirby-Turner:** As I see it, there are  
20 really two separate issues here, and one is the Fourth  
21 Amendment motion to suppress based on the Fourth  
22 Amendment where the State bears the burden of proof by a  
23 preponderance of the evidence is my understanding.  
24 That's a motion to suppress.

25                 It also seems to me based on what we've heard

1 so far and based on the defendant's motion which cites an  
2 equal protection violation, I believe, under the due  
3 process clause that would really be a motion to dismiss.  
4 I think dismissal is the desired remedy in the Court  
5 sanctioned remedies based on the case law I've read.

6 **The Court:** It doesn't specifically ask for  
7 that in his motion I don't think, but I see where you're  
8 coming from.

9 **Ms. Kirby-Turner:** I'm assuming that the  
10 Court's going to treat it that way.

11 **The Court:** Do you want to be heard on that?

12 **Mr. Coleman:** Your Honor, I think that a  
13 number of Constitutional amendments are at play here, and  
14 some of them came up during the course of this year, and  
15 I think certainly the fourth and the fourteenth which we  
16 already knew and the fifth, due process, but I think the  
17 Sixth Amendment also has been -- come into the case based  
18 on the testimony here.

19 So we will argue every Constitutional violation  
20 that we perceive, even those that were disclosed during  
21 the course of this hearing.

22 **The Court:** In any event, I don't know  
23 whether it matters which one -- or whether you argue them  
24 separately or argue them together. You're welcome to  
25 argue them both or either.

1           **Ms. Kirby-Turner:**   My question is, if that is,  
2 in fact, a racial discrimination claim under the equal  
3 protection, then it's the defendant's burden of proof.

4           I'm going to just -- If it's okay with the  
5 Court, I don't know what order that means we go in at  
6 this point. If Mr. Coleman's going to argue first, I'll  
7 argue last, that's fine. I just wanted to make sure that  
8 we didn't need to do two separate arguments and one of us  
9 go first.

10          **The Court:**       I don't think it's necessary  
11 that you need to do two separate arguments. He says he's  
12 going to argue everything. I'm not sure that the end  
13 result is going to be much different either way. If I  
14 suppress the evidence, are you going to go forward with  
15 the trial?

16          **Ms. Kirby-Turner:**   No.

17          **The Court:**       I didn't think so. So, I mean,  
18 it's the same result regardless of which avenue going  
19 forward. I'll let you argue that, you know, that with  
20 respect to his claims of violation of the equal  
21 protection although it's his burden, he hasn't met it.  
22 I'll let you argue that with respect to the Fourth  
23 Amendment issues, it's your burden, and you have.

24          **Ms. Kirby-Turner:**   Yes, sir.

25          **The Court:**       So either way --

1           **Ms. Kirby-Turner:**    But I'll just go second; is  
2 that what the Court --

3           **The Court:**            You have -- He presented  
4 evidence, and I just thought that you had the right to  
5 open the closing arguments and the closing.

6           **Ms. Kirby-Turner:**    No, Your Honor.

7           **The Court:**            I'll let you waive the opening.

8           **Ms. Kirby-Turner:**    I'll waive opening.

9           **Mr. Coleman:**        Your Honor, I'll be brief, and I  
10 want to start with just reading a brief paragraph from  
11 the State versus Menendez, North Carolina Court of  
12 Appeals, 12011 of 2011.

13          **The Court:**            Do I have that one?

14          **Mr. Coleman:**        No, sir. I'm just setting the  
15 stage with something the Court said in this case.

16                 The equal protection clause on the Fourteenth  
17 Amendment of our Federal Constitution prohibits selective  
18 enforcement of the law based on considerations such as  
19 race. They're citing Rand versus the United States.

20                 Our State Constitution Article 1, Section 19  
21 also mandates equal protection under the law for all  
22 persons and citing Richardson versus The Department of  
23 Correction. They go on to say accordingly our Supreme  
24 Court has expressly affirmed that discriminatory  
25 application of the law will not be tolerated by the

1 courts in the state, and they're citing State v. Ivy  
2 which the Court does have.

3 Your Honor, this originally began as a stop of  
4 Mr. Gomez out on Interstate 85, and our argument is that  
5 we think first, there was no reason to stop him other  
6 than him being a Latino person.

7 I think the evidence offered by the State  
8 through the officer that stopped him was that he was  
9 looking for Mr. Gomez's, or whoever was driving, fear --  
10 I think it's fear reaction or something of that nature.

11 What that means according to the evidence is  
12 that one person in the car looked at him and another  
13 person looked away from him. So if that car was  
14 speeding, and he admitted that all cars are speeding now.  
15 If that car was speeding, all you got to do is, like in  
16 most instances I've been stopped -- I don't know if the  
17 Court has, but it's common knowledge that a cop pulls in  
18 behind you and he turns on the light and he pulls you  
19 over.

20 I suggest that the reason he decided to catch  
21 up with the car, pull up alongside him and look inside  
22 the car was to determine whether or not the occupants  
23 were Latino people. That's exactly what he did.

24 One of the things that I requested, Your Honor  
25 -- It seems there's been some confusion about that. I

1 asked through subpoena, I asked through the North  
2 Carolina public records law for tickets written by these  
3 officers on Interstate 85. It's called the Interstate 85  
4 team. That's what the I in ICE is. That's where they  
5 work.

6 I asked for those over a period of time of two  
7 years. I did not ask the sheriff's department to send  
8 me, in some instances, tickets written by these officers  
9 where eighty or ninety percent of them were written to  
10 Latin people. I didn't ask for that. That's what they  
11 provided to me. I didn't ask either for tickets of any  
12 particular race, nor did I ask for just warning  
13 citations. I asked specifically -- In my letter to them  
14 I asked for citations and/or warning tickets issued to  
15 people on Interstate 85.

16 What they provided me was, to say the very  
17 least a little shocking to me that practically every  
18 citation they provided me was a Latino person that they  
19 had pulled over for whatever their reasons.

20 I suggest to the Court that that in and of  
21 itself is literally impossible to do, to be along a busy  
22 interstate like I-85, where I would believe thousands of  
23 people travel every day, for someone to ask a law  
24 enforcement agency give me tickets written to people out  
25 there, anybody, and they give you the ones that relate to

1 Latino people.

2           Some of them we didn't have that the State  
3 brought into court today and I'm glad the State did. The  
4 three that he stopped out there and arrested, and I'm  
5 talking about Officer Fitch, they were also Latino  
6 persons.

7           When I asked each of them to explain to me how  
8 it is that you've written all these tickets for Latino  
9 persons, they had no reasonable explanation. I suggest  
10 that that has to be nothing less than racial profiling.

11           They understood from the 2007 Arrassaenz case,  
12 Sergeant Rodney Fitch testified, that they had to start  
13 keeping information because of racial profiling or some  
14 problem with racial profiling. So they understood that.

15           In spite of that, the information they provided  
16 me leads to no other conclusion other than racial  
17 profiling. You couldn't do it if you closed your eyes  
18 and put a net out. You could not stop a majority of  
19 Latino people on an interstate highway.

20           So I suggest that is certainly indicative of a  
21 profiling. Your Honor, I think that's a violation of the  
22 Fourteenth Amendment. That's a violation of the North  
23 Carolina Constitution. That's a violation of 15A-974 to  
24 subject people by race or any other category to search  
25 out and to search them.

1           Secondly, Your Honor, I want to talk about the  
2 Fourth Amendment. We know that the Fourth Amendment is a  
3 prohibition against unreasonable searches and seizures.  
4 That's -- One of the cases that I read, and I can't think  
5 of it off the top of my head, it says that is not a  
6 second class right. That is one that Americans hold near  
7 and dear, and it is.

8           In this particular case, when the car is pulled  
9 over, this officer has told us that when he asked those  
10 questions, do you have large sums of money, do you have  
11 pistols, do you have any drugs in the car that he's  
12 already made up his mind to search.

13           I mean, that's what he said. I've already made  
14 up my mind to search. At the time he made up his mind to  
15 search all he has was the car had air fresheners; the car  
16 had, he thought, no luggage; the driver was nervous; he  
17 was -- his hands trembled; he didn't look at me; that  
18 kind of thing. That was his reasonable suspicion for  
19 wanting to search and not only wanting to, making a  
20 determination that he was going search.

21           He goes through this litany of questions with  
22 every member of the car -- Where you coming from. Where  
23 you going. -- without getting to the business of writing  
24 the warning ticket that he claimed he pulled them over  
25 for.

1 I think the Court saw the tape, and if the  
2 Court -- the video. He spent the majority of his time  
3 questioning them about their travel itinerary, and he  
4 made a -- I guess he made a determination that based on  
5 them coming from Atlanta they were going to New York and  
6 them being Latino that there's got to be drugs in the  
7 car. I think that's what he's basing his determination  
8 to search on.

9 One of the things he did was he gave Mr. Pena  
10 his driver's license back and told him he's free to go.  
11 As the Court knows, in Giovanni those are buzz words, but  
12 he also said he was not free to go. Maybe there was a  
13 category in between that I'm aware of, Judge, but if a  
14 police officer says the person is not free to go, then to  
15 me that's custody any way you look at.

16 That being the case that invokes the Sixth  
17 Amendment. If you tell him he's not free to go or --  
18 Yes, you told him he was free to go, but he's not really  
19 free to go because from the video he told Mr. Pena, hold  
20 up, you just wait when Mr. Pena started for the car.

21 So he clearly was not free to go and these  
22 people were being detained against their will. I think  
23 before talking to any of them, he probably should have  
24 advised them that they had a right not to talk to him  
25 because they were not free to go. I think that certainly

1 invokes the Sixth Amendment.

2           Also, Your Honor, I think the fifth and the  
3 Fourteenth Amendment are Constitutional violations that  
4 came out during the course of this hearing. They cannot  
5 -- And when I say they, I mean police officers. They  
6 cannot determine for this Court what evidence is relevant  
7 and what evidence is not relevant. They cannot determine  
8 that we turn it off and we'll tell you or put in our  
9 reports what it says although we're operating in  
10 violation of the sheriff's department policy that said  
11 that I-COP shall not be turned off.

12           They had conversations among themselves that we  
13 don't want this getting back to defense attorneys or  
14 Mexican cartels, and we'll write down what we want the  
15 Court or the defendants to know. That is clearly a  
16 violation, in my mind, of not providing Brady material  
17 that could have been provided, and in this case, Your  
18 Honor, I know there was some talk of Mr. Fitch, and I  
19 mean, Officer Dwight Fitch that he needed batteries or --  
20 that I-COP was working fine.

21           We were looking at it until he, for whatever  
22 his reasons and he said it was not because it stopped,  
23 'til he decided to take it off his belt and put it in the  
24 charger.

25           The reason I brought in the things regarding

1 Officer Rodney Fitch from 2007 is because they're so  
2 similar. He turned off the I-COP in that case and was  
3 questioned about it. What he said, if the Court  
4 remembers, I asked him about it when he had the  
5 transcript as well, we'll document what we want you to  
6 know. We'll just do it in our reports because we have  
7 been given permission to violate the sheriff's department  
8 policy.

9 I think that any evidence is relevant during  
10 the course of a stop, a search, and a seizure like this.  
11 So I think Fifth Amendment and Fourteenth Amendment, due  
12 process, has been violated particularly with respect to  
13 spoliation of evidence. And in this case I think that's  
14 exactly what happened.

15 There's no reason for Officer Fitch in this  
16 case to have everything be a recording until he gets to  
17 the point where he doesn't want us to know what's going  
18 on and takes this thing off and puts it in the cradle.

19 They come in later with battery orders for the  
20 whole department. It looked like I think it was, months  
21 later after the fact. So I hope the Court will not be  
22 swayed by that.

23 Your Honor, also another right that I think was  
24 violated, and this is back to the Fourth Amendment  
25 consent. You got things here, the officer says that

1 Dela-Cruz consented or said that Mr. Gomez consented. He  
2 admits that he didn't get consent from Mr. Gomez. He got  
3 it from a passenger. That's Ms. Dela-Cruz.

4 Mr. Gomez denies telling him he could search  
5 the car but let's for the sake of argument assume that  
6 consent was given.

7 To the normal person -- and that's what the  
8 courts look at, what's reasonable. For the normal person  
9 consent to search certainly does not mean going under the  
10 hood of the vehicle, looking through the motor, going  
11 under the bottom of the vehicle, removing floorboards or  
12 any -- That certainly exceeds the scope of any consent  
13 that was given.

14 And in this case no consent was given. We argue  
15 that no consent was given but if consent had been given,  
16 if the police stopped anyone in this courtroom today and  
17 say can I search, I would assume that as reasonable  
18 people we take that to mean he wants to look around in  
19 our car, not to lift our hood and go in our motors and  
20 start tearing up floorboards and getting special tools  
21 that he's got to take apart things with. That was not  
22 consent. That was just a search that the police officers  
23 wanted to conduct.

24 Your Honor, I want point out too that but for  
25 the main things different and a couple of -- just a

1 couple of things, the case of United States versus  
2 DiGiovanni, Fourth Circuit case, it's this case all over  
3 again. It's exactly what it is. The trooper in that  
4 case stopped DiGiovanni on a Maryland highway. He asked  
5 him to exit his car to issue him a warning ticket and to  
6 determine, of course, if any criminal activity was afoot.

7 He saw two shirts hanging in the rear, a  
8 hygiene bag on the back seat, and that the interior of  
9 the car was clean and that there was no luggage, and  
10 this, to him, suggested drug activity. What doesn't?

11 If this kind of thing, if no luggage or a clean  
12 car full of air fresheners, if that means criminal  
13 activity is afoot, then literally you can stop  
14 practically every car on the highway and search it.  
15 These are not signals that there's any criminal activity  
16 was afoot.

17 This trooper requested DiGiovanni about drug  
18 trafficking activity because he had formed an opinion and  
19 a reasonable suspicion that criminal activity was  
20 occurring. He asked about drugs in the car. That sounds  
21 familiar. Marijuana in the car, that sounds familiar.  
22 Cocaine, money, and meth, all that sounds familiar.

23 He then asked permission to search the car.  
24 DiGiovanni in this case gave him consent. He returned  
25 DiGiovanni's license and gave him a warning ticket and

1 told him he was free to go, but he immediately started  
2 questioning him about drugs in the car. DiGiovanni -  
3 This officer least got a consent form signed. DiGiovanni  
4 signed it. During the search, this trooper found over  
5 34,000 pills of Oxycodone. After being Mirandized,  
6 DiGiovanni confessed to the crime.

7 In District Court the Court concluded that the  
8 stop could not last longer than the purpose for which it  
9 was made, i.e. to issue a warning tickets. That's one of  
10 the things that is wrong with this case.

11 Issue the warning ticket and let the people go  
12 but not in this case. We're not going to let them go  
13 because I formed an opinion that there's criminal  
14 activity. So therefore you're not free to go. That is  
15 based solely on the fact you didn't look at me when you  
16 passed.

17 Guess what, you passed a law enforcement  
18 officer and you were speeding and you put on your brakes.  
19 Now that's a dead giveaway for some kind of criminal  
20 activity.

21 Then when I got up alongside you or near, the  
22 woman on my side looked at me. The man didn't. The  
23 driver didn't. Guess what else too, he had both hands on  
24 the steering wheel. My God, there must be some kind of  
25 criminal activity afoot.

1           Back to DiGiovanni, the Court concluded that  
2 rather than checking his license, the trooper diverted to  
3 a drug investigation not supported by reasonable  
4 suspicion.

5           The Court addressed whether the consent to  
6 search was voluntary and stated -- the Court concluded  
7 that even though the trooper used, in the words of the  
8 Court, the buzz words you're free to go, the encounter  
9 was not consensual, not at all.

10           Your Honor, next I want to talk about State v.  
11 Ivy, and I gave the Court that case solely for the  
12 concept that our courts have indicated they will not  
13 tolerate anybody proceeding on what's known as driving  
14 while black, and I will assume the Court is talking about  
15 Latinos or anyone else and that our courts have said it's  
16 a violation of the Fourteenth Amendment.

17           Your Honor, one of the telltale signs or one of  
18 the cases that I've handed to the Court was State v.  
19 Miles where the defendant was unconstitutionally detained  
20 therefore the search of the car is unconstitutional.  
21 That's what our courts have said.

22           If the defendant is unconstitutionally detained  
23 regardless of any perceived consent, the search is  
24 invalid because the consent is not valid. Also in the  
25 case of Miles, wouldn't you know it, the defendant was

1 nervous. His heart was beating so fast the cop could see  
2 it through his shirt. Well, he's being stopped by a  
3 bunch of patrolmen. I'm sure that his heart was beating  
4 that fast.

5 Judge, in State v. Jackson, a North Carolina  
6 Court of Appeals case heard in Rutherford County, Judge  
7 Downs was the judge in that case on a motion to suppress  
8 two things came out of that case.

9 First of all, the Court indicated that  
10 certainly passengers have the right to have standing to  
11 contest a stop and seizure. The drugs in this case that  
12 were found were suppressed because the detention was  
13 beyond the scope of the original traffic stop. Again the  
14 consent given to search was not constitutional because of  
15 the prolonged detention beyond a reasonable time to  
16 effectuate the purposes for the stop.

17 In State v. Branch which I handed to the Court,  
18 defendant was detained too long. There was not  
19 reasonable suspicion to justify such detention.

20 Now the Court recently came out with a case,  
21 Your Honor, the Sellers case. I don't think that comes  
22 into play here. The Sellers case is -- and I did not  
23 hand that up to the Court. I'm sorry. I have -- don't  
24 have that case with me.

25 In the Sellers case, the Court concluded that

1 stopping somebody for four minutes while you're waiting  
2 for a drug sniff dog or whatever you're doing is de  
3 minimis, and I absolutely agree. Who's going to argue  
4 about four minutes. So that case has no bearing on what  
5 we're doing here.

6           These people were alongside that highway for an  
7 extended period of time waiting for sniff dogs, for --  
8 just not able to leave. I know how difficult it is.  
9 Nobody wants people to violate the law to not be punished  
10 for violating the law, but there are some things that are  
11 more important. I think the Constitution is more  
12 important.

13           I won't belabor the point, but I will say that  
14 the sheriff's department provided me what I asked for  
15 except they didn't provide any information about any  
16 other race of people other than Latino people that they  
17 had stopped out there on 85.

18           They provided other documents this morning.  
19 The district attorney and others came in saying see, we  
20 stopped other people. That's fine, but I'm talking about  
21 ICE team. I am not saying there's racial profiling by  
22 the sheriff's department, by the ICE team, yes. It's ICE  
23 because it's interstate. That's where they work. Those  
24 are the ones that I want, and those are the ones that I  
25 presented in the exhibits that were accepted into

1 evidence.

2           They were stops made along Interstate 85 and  
3 predominately all of them just happened to be Latino  
4 people. How you could come to the conclusion or -- Well,  
5 they said they didn't keep any warning tickets first of  
6 all, but then they gave these to me. I can go down there  
7 and pick them up. That's what they gave to me.

8           All of them almost, all of them -- If you  
9 separate the ones out that are not Latino, you probably  
10 got five out of all the ones you got and three of those  
11 are black.

12           So I think racial profiling is clear. I think  
13 it's clear that from the moment that Officer Dwight Fitch  
14 testified that I had already made up my mind to search  
15 when I asked those questions. It is so familiar. It is  
16 the same thing that Rodney Fitch told David Teddy in a  
17 trial of the Arrassaenz case back in 2007, almost exact  
18 same words that when I asked those questions, I have  
19 decided to search.

20           You have to look at the point where he was  
21 asking those questions, right after the stop. So he's  
22 already decided to search. I think the Court asked him  
23 what is it based on; hand on steering wheel, one person  
24 looking at me, one person not looking at me, and that  
25 kind of thing. That cannot be the standard for reasonable

1 suspicion.

2 I know it's a lower standard than probable  
3 cause, but even so, reasonable suspicion has to mean  
4 something.

5 At the point -- Not looking at the whole case  
6 where the drugs were found and all that, we got to look  
7 at the point where this officer testified I had decided  
8 to stop and they were not free to go. We have to look at  
9 a point where he told the driver you hold up and wouldn't  
10 let him go.

11 So all intents and purposes the people in the  
12 car and Mr. Pena was outside of the car, were in custody.  
13 That's why I think that the Sixth Amendment, right to  
14 counsel, was invoked there. I think Miranda would be  
15 invoked there, and they deserved to be Mirandized because  
16 if you made up your mind to search the car and they're  
17 not free to go. To start asking them about drugs and  
18 guns and money and that kind of thing, that's certainly  
19 questioning, and they're in custody.

20 So I would ask the Court to conclude as  
21 difficult and unpalatable as it might be that there is  
22 not just a violation in this case there are  
23 Constitutional violations that I've talked about but  
24 there's a pattern.

25 Dwight Fitch is supervised by the gentleman

1 Rodney Fitch and his answers to everything that I looked  
2 at in the transcript, that is Defendant's 2, were  
3 basically the same as this Fitch's. So there's been a  
4 pattern of this for a while, and I think the thing that  
5 is repugnant to say the least is when Rodney Fitch  
6 testified, well, yes, we turned it off. We'll write what  
7 we want you to know, what we want to give the defense  
8 attorneys.

9 I think that's a clear violation of due  
10 process. You can't have a fair trial if we can't have  
11 all the evidence if it's up to the cops to determine what  
12 evidence is and what evidence is not. That's going too  
13 far.

14 Now we've heard him testify to show you they  
15 were wrong, to show you that they were absolutely wrong  
16 he testified oh, we don't do that anymore. You can't  
17 turn those things. We follow the policy now.

18 Well, the policy should have been followed all  
19 along. If he says that we follow the policy now, why did  
20 Mr. Dwight Fitch decide to take his audio device off of  
21 his belt and turn it off? It did not turn off by itself.  
22 He said he was not having trouble with it at that  
23 particular moment because we were listening. Can't claim  
24 trouble with it, we're all listening until he took it off  
25 his belt and put it in the cradle.

1           But his supervisor testifies we don't do that  
2 anymore. So that's what I believe raises the issue of  
3 due process.

4           Finally, Your Honor, under North Carolina law  
5 the exclusionary rule, evidence should be suppressed if  
6 its exclusion is required by the Constitution of the  
7 United State or the Constitution of North Carolina or the  
8 evidence is obtained as a result of a substantial  
9 violation of the criminal procedure acts, and I think in  
10 both cases that's clear here.

11           What I don't want to hear as an argument is  
12 that well, we don't have all the tickets they wrote.  
13 That's fine. That's fine. Okay, so they didn't keep all  
14 the tickets they wrote. That's fine but they kept a lot  
15 of them and they gave them to me and they're all Hispanic  
16 people.

17           I don't want to hear the argument that the only  
18 ones we kept were the ones that were drug busts. No,  
19 they did not because I had Mr. Cook up there for instance  
20 -- Mr. Fitch rather, and I said all right, these are the  
21 six we got today from you. Were any of them involved  
22 with drugs? Guess what, out of that six three of them.  
23 Guess what; again they were Latino people.

24           So no, they did not just keep the ones that  
25 were involved in drugs. They kept others too and they

1 provided them to us and I presented them to the Court.

2 I think the time that they held Mr. Gomez  
3 beside that road there was much too long to write a  
4 ticket.

5 I understand that the law is if you want to  
6 pull somebody over and if you have reasonable suspicion  
7 that they're violating the law and you pull them over,  
8 that while you're -- to give them a warning ticket for  
9 speeding or any other infraction, you can ask them all  
10 kinds of questions. You've been to the moon, been  
11 convicted of anything. Do you have dope? That's  
12 perfectly normal and legal. I wouldn't say normal. I'll  
13 say it's legal. But what you can't do is you can't  
14 abandon the purpose for which you pulled them over.  
15 You'd better be writing that ticket. The courts have  
16 said this over and over and over again. North Carolina  
17 is one of the worst places for this.

18 There is a report that came out recently that  
19 was broken by the Fayetteville Observer that blacks and  
20 Latinos in this state are ten times more likely to be  
21 stopped and ticketed and searched than white people  
22 although they make up a much smaller percentage of the  
23 population.

24 The general assembly and the DOJ are out to try  
25 to do something about that, but the one place that it can

1 be stopped is in this place where we are to be fair to  
2 everybody.

3           So I just think at this point there's no excuse  
4 because there's a pattern of this with the ICE team.  
5 There's a pattern. Mr. Fitch, 2007, pull over Latino  
6 people, turns off the microphone at a point where he  
7 wants it turned off and tells us that I'll write down  
8 what we think the Court or the defense attorneys ought to  
9 know.

10           Again it happened in 2011, same thing. In 2007  
11 Mr. Fitch, that's Rodney Fitch, from his transcript  
12 testified that when I asked those questions, you got any  
13 money or drugs or this or that, I have already decided to  
14 search and the people are not free to go.

15           We heard it again from Dwight Fitch. This is a  
16 pattern and repetition that the courts should do all they  
17 can to prevent and one of the things the Court has to  
18 balance is, I believe, what is the interest protected.  
19 That interest, in my mind, is Fourth, Fifth, Sixth, and  
20 Fourteenth Amendment.

21           What is it that the Court hopes to accomplish?  
22 That's to prevent them from doing it again. Behavior is  
23 not going to -- It hasn't changed from back then.  
24 Behavior is not going to change unless something is done  
25 about it and it is much better for a person who may be

1 guilty of something to not be found guilty of something  
2 rather than to abdicate the Constitution.

3           That's all that we have in the country that  
4 holds us together. There is nothing else, absolutely  
5 nothing in this country that holds us together. It is  
6 the one thing that poor people, black people, Latino  
7 people, all of us believe in. You believe you've got to  
8 shout when you're talking about the Constitution, and if  
9 it's not right, it's not right. What they did out there  
10 is not right and they are going to continue to do it.

11           So I ask the Court certainly to suppress this  
12 evidence and not to be swayed by any argument that well,  
13 they might have wrote hundreds and hundreds of tickets.  
14 They might have. Well, why did you give Mr. Coleman --  
15 You said you don't keep them. Why did you give Mr.  
16 Coleman all these tickets that you wrote to Latino  
17 people?

18           As far as the little discrepancy that I think  
19 the State attempted to create it by saying I didn't  
20 present all the tickets. No, the ones that were not  
21 written on 85 that were written in Grover and Kings  
22 Mountain and downtown Shelby, no, I didn't present those.  
23 I presented the ICE tickets that were written on the  
24 interstate which is what I asked for.

25           Thank you.

1           **The Court:**       Thank you.

2           **Ms. Kirby-Turner:**   Your Honor, I will begin  
3 with the Fourth Amendment. Again it is my belief and I  
4 believe the law states that it is our burden by a  
5 preponderance of the evidence to prove to this Court that  
6 the officer's actions including the stop of the vehicle  
7 and the search of the vehicle comport with the  
8 requirement of the Fourth Amendment of the Constitution  
9 of the United States, North Carolina, and certainly I  
10 believe that we have done that. I'll begin, and I will  
11 try to break down this argument into some kind of  
12 reasonable manner.

13                       The first point I would like to address to the  
14 Court is the reasonable suspicion stop of the vehicle.  
15 Reasonable suspicion to stop the vehicle, Your Honor, is  
16 simply speeding.

17                       Deputy Fitch paced the vehicle at between  
18 seventy-nine and seventy-five miles per hour in a sixty-  
19 five miles per hour zone. North Carolina is an absolute  
20 speed state. If you're going sixty-six in a six-five  
21 mile per hour zone, the officer has the right to pull you  
22 over. It's a violation of the North Carolina General  
23 Statutes 20-141 and North Carolina General Statute 20-183  
24 outlines the power of law enforcement to stop and issue  
25 either a criminal citation or a warning for a violation

1 of Chapter 20.

2 Now, of course, this was a pre-textual stop in  
3 that Deputy Fitch felt that there was some kind of  
4 criminal activity afoot, and that is why he paced them  
5 and that is why he ended up pulling them over.

6 As long as it is not racial discrimination,  
7 United States versus Rend which is followed by State  
8 versus McClendon which I know this Court's read probably  
9 a many a time, 350 N.C. 630. And all these cases that  
10 I'm citing I have handed up.

11 Additionally, the State versus Menendez which  
12 Mr. Coleman read from, the Court has it because I handed  
13 it up as well. That's the unpublished opinion, and I am  
14 going to cite from it. I handed it up even though it is  
15 unpublished because there just simply wasn't anything  
16 else literally in North Carolina on racially motivated  
17 stops, but the Court does have that as well.

18 State versus McClendon, of course, adopts the  
19 holding in Rend. The officer's subjected motive for the  
20 stop as long as it is not in a violation of due process  
21 and equal protection of the laws is immaterial.

22 So yes, Deputy Fitch did, in fact, stop this  
23 vehicle because he felt that there was criminal activity  
24 that was afoot. Did it rise to the level of reasonable  
25 suspicion? Doesn't matter because he had reasonable

1 suspicion to stop for a violation of Chapter 20, that  
2 being the speed.

3           Once he had that vehicle stopped for that  
4 violation of Chapter 20, he did at that point in time  
5 start an investigation which he's entitled to do. Mr.  
6 Coleman stated well, maybe there's something in between  
7 custody and not being in custody, and there is.

8           It's my understanding of the law that you have  
9 three levels of police interaction with individuals.

10           First, you might have voluntary contact.  
11 Fourth Amendment's not involved. Don't have to have any  
12 justification for voluntary contact.

13           Second under the Fourth Amendment, you have it  
14 in -- in what's called an investigatory seizure where you  
15 are holding that person for a limited investigative  
16 purpose. For those kinds of stops and seizures, you must  
17 have reasonable suspicion that criminal activity is  
18 afoot.

19           The highest level of interaction or the most  
20 restrictive I guess would be a better way putting it, is  
21 custody which is arrest, formal arrest or its functional  
22 equivalent.

23           At that point in time if you wish, you, as a  
24 law enforcement officer, wish to interrogate someone, you  
25 need to read them their Miranda warnings. So yes, there

1 are three different levels of police interaction with  
2 individuals. Once he had that vehicle stopped, it was an  
3 investigatory stop.

4           The reason for the stop was, of course, the  
5 speeding. The law in North Carolina, the law in other  
6 jurisdictions is you can ask certain limited questions  
7 outside of the scope of that stop. State versus Wilson  
8 which is 155 N.C. App. 89, a 2002 North Carolina Court of  
9 Appeals case, the defendants were stopped for a Chapter  
10 20 violation, a traffic violation.

11           This was a trooper. He asked about the  
12 vehicle; who is was registered to, did it belong to the  
13 person driving it, did it belong to anyone in car; and he  
14 asked about their travel plans; where were you going,  
15 where are you coming from, how long have you been there.

16           He checked their license and their registration  
17 and the Court held the questions and the actions; the  
18 questions about the travel plans, the questions about who  
19 the car belonged to; the questions and the actions by the  
20 officer were reasonably related to the officer's  
21 underlying justification of issuing a warning ticket for  
22 a Chapter 20 violation.

23           So there is nothing wrong with Deputy Fitch  
24 going up to the window and saying can I see your license,  
25 getting a -- I didn't even cite a case on this because in

1 my opinion is black letter law for any reason a driver or  
2 an occupant could be ordered out of the car and a driver  
3 and occupant be able to stay in their car.

4 So he asked the driver to step out of the car  
5 and asked him about his travel plans. What did he say?  
6 My recollection is he stated we went to, and I had --  
7 Deputy Fitch said I didn't really understand what he was  
8 saying. It sounded to me like it was Suwanee.

9 Now I do know that that is a place in Georgia.  
10 Suwanee is a place in Georgia, and it sort of sounds like  
11 that on the video if that's what he's trying to say.

12 He's having a hard time saying it but it sounds  
13 like Suwanee and that is what Deputy Fitch believed him  
14 to be saying. He wasn't saying Atlanta. It wasn't  
15 Atlanta. That's clear. Atlanta and Suwanee don't sound  
16 anything alike.

17 He asked him how long they had been down there  
18 and he said four days. So he goes back to the car. He  
19 asks for the registration after he says, you know, who is  
20 this car registered to. He says it's not registered to  
21 me. It's my friend's car. He says it's his car. It's  
22 his mother's car, I think, was the conversation.

23 Goes back over, asks for the registration which  
24 he's entitled to do. The defendant is the back seat  
25 passenger. He asks him is this your mother's car. He

1 says yes. Now apparently at some point we have a  
2 language barrier that springs up in the midst of this but  
3 when he says is this your mother's car; can I have the  
4 registration, he says yes and gets the registration.

5 So there's no question there that he understood  
6 what was going on. He, the defendant, understood what  
7 was going on at that point. Later on, there again seems  
8 to be a language barrier where the front seat passenger,  
9 who is the mother of his child, begins to interpret for  
10 him but initially no language barrier.

11 He knows just to reach forward, start getting  
12 the registration out of the car. While that's happening,  
13 Deputy Fitch says to the front seat passenger female  
14 where have y'all been? Atlanta. How long have y'all  
15 been there? Two days. What were you doing? Visiting  
16 family.

17 There you have a clear discrepancy in the  
18 amount of time they were there and the place where they  
19 were. That's a discrepancy.

20 You also have, according to Deputy Fitch, a  
21 strong overwhelming odor of air freshener coming from  
22 inside the car. He said when I approached the passenger  
23 window the first thing I noticed was an odor of air  
24 freshener hit me.

25 A single key in the ignition, Five Hour Energy

1 drinks cans in the console, the rear passenger's moving  
2 around a lot, this is all -- When he asked for the  
3 license, he says his hand and arm were shaking to the  
4 point that I watched the license shaking in his hand.

5 Yes, of course, when you're pulled over -- when  
6 I'm pulled over by officers, and I'm a little embarrassed  
7 to admit, I guess, that I've been pulled over for  
8 speeding, I have. I've done it. I've been written  
9 tickets before, I'm nervous, and I know the officers that  
10 pull me over. Nervousness is normal.

11 Extreme nervousness to the point that your body  
12 is shaking, that your arm is shaking, your hand is  
13 shaking, and the license is shaking in your hand, is not  
14 normal.

15 A trip from New York to Suwanee, Georgia, or  
16 Atlanta, Georgia, for two days is not normal. A single  
17 key in the car is odd. I think we all -- Think about our  
18 key chains right now and what's on them. It's not just a  
19 single key I guarantee it in anyone's car in this room.

20 That is not normal to these officers. The Five  
21 Hour Energy cans is not normal. It signifies a quick  
22 trip. I guess it does fit in with two-day turnaround  
23 from New York to Atlanta and back again for two days. So  
24 I guess that would go along with that but it indicates a  
25 quick trip.

1           At this point we're building reasonable  
2 suspicion to extend this stop. That's within the --  
3 That's his job. He's a law enforcement officer. He's  
4 supposed to be investigating. He already has a hunch  
5 that there's something not right here and when he stops  
6 this car and he starts talking to these folks and  
7 noticing and observing, things start adding up with him  
8 that this isn't right based on his training and  
9 experience.

10           It's not just one thing. It's the totality of  
11 circumstances and I don't have to tell the Court that.  
12 The Court knows when you're talking about reasonable  
13 suspicion when you're talking about probable cause you're  
14 talking about the totality of the circumstances in light  
15 of that officer's training and experience.

16           Here you have all of those indicators combined  
17 from the beginning where you saw -- or he saw the nose  
18 dive of the car slamming on its brakes when it came into  
19 his view coupled with the driver's reaction and we may  
20 all be taught that we should keep our hands at the ten  
21 and two and look at the road while we're driving, but you  
22 can't tell me that it is normal for someone when an  
23 officer or anyone pulls up beside them and rides beside  
24 them for almost three miles that they keep their hands  
25 locked on the ten and two position and gripping that

1 steering wheel so tight that he could actually see the  
2 change in color in his knuckles, that his knuckles were  
3 lighter than the rest of his hand which signifies how  
4 tight he was gripping on that steering wheel and he  
5 stared straight ahead.

6 He didn't look down at the odometer or the  
7 speedometer, didn't look at the passenger beside him and  
8 said I wonder why he's riding beside us and didn't look  
9 over. That's avoiding. That's avoiding contact. It's  
10 strange.

11 Then you couple that with the fact that you've  
12 got a strange conflicting story from the driver and the  
13 passenger, you have the overwhelming odor of air  
14 fresheners, you have the single key in the ignition, you  
15 have the Five Hour Energy drinks, you have the extreme  
16 nervousness of the driver. It is all of that coupled  
17 together that give you reasonable suspicion to extend  
18 that traffic stop and why would he want to extend that  
19 traffic stop? Not to search the car.

20 You don't search for reasonable suspicion. You  
21 have to have probable cause to search a vehicle. You  
22 have to have probable cause to search a vehicle. You  
23 don't search a vehicle based on reasonable suspicion and  
24 my recollection of his testimony is I was going to ask  
25 for consent.

1           If I didn't get consent, I was going to call  
2 for the dog. The dog indication is what gives you  
3 probable cause but I'll get to that in a moment.

4           A couple of other cases that I handed up as far  
5 as the reasonable suspicion to extend the traffic stop,  
6 Your Honor, were State versus Hernandez. Well, State  
7 versus Wilson is going back to that one. State versus  
8 Wilson states that a reasonable suspicion is, again,  
9 based on the totality of the circumstances and the facts  
10 that the Court hears are to be viewed through the eyes of  
11 a reasonable and cautious officer guided by his training  
12 and experience. These are phrases I know the Court has  
13 heard time and again.

14           State versus Hernandez, 170 North Carolina  
15 Court of Appeals 299, which is a 2005 Court of Appeals  
16 case, reasonable suspicion to extend the traffic stop  
17 existed in that case when the defendant exhibited extreme  
18 nervousness, conflicting statements about his travel  
19 plan, and the strong odor of air fresheners.

20           We're not just making this stuff up like we  
21 feel this is just going to be indicative of criminal  
22 activity. These are things the Court has held are  
23 indicative of criminal activity.

24           State versus Euceda-Valle, E-U-C-E-D-A V-A-L-L-  
25 E, 182 N.C. App. 268, reasonable suspicion existed when

1 the defendant was extremely nervous, refused to make eye  
2 contact, the vehicle was not registered to the occupants,  
3 there were numerous cans of Red Bull in the car, single  
4 key in the ignition, strong odor of air freshener, and  
5 some confusion about the travel plans.

6           These are cases where reasonable suspicion to  
7 extend the stop usually to get a drug dog to come and do  
8 an exterior sniff of the vehicle existed.

9           It's the State's contention that reasonable  
10 suspicion to extend the traffic stop to get the dog there  
11 existed.

12           In the alternative, should the Court not  
13 believe that, the State contends that this seizure which  
14 was a seizure based on traffic stop, certainly,  
15 absolutely this was a seizure, was converted to a  
16 consensual encounter once the stop, the traffic portion  
17 of the stop ended.

18           When Deputy Fitch writes out the warning  
19 ticket, calls in, checks the license and registration,  
20 they're fine, he goes up to the driver Mr. Pena and says  
21 -- I think first, actually, he walks up to the passenger  
22 side window and hands the registration back to the  
23 defendant, says he can go, registration is given back,  
24 walks back to Mr. Pena and says I need you to slow down.  
25 Here's a warning ticket. Here's your license back.

1 You're free to go.

2           They both turn and walk away. The Court can  
3 see from the video that Mr. Pena turns around and says  
4 have a nice day. You hear Mr. Fitch say you too. Hey,  
5 do you mind if I talk to you a minute? Can I ask you  
6 another question and he consents. At that point it  
7 becomes a consensual encounter.

8           The warning ticket's been issued, license and  
9 registration have been given back and it converts from a  
10 seizure from the traffic stop to a consensual encounter.

11           Consensual encounters, of course, need to be  
12 examined by the Court to ensure they are, in fact,  
13 consensual.

14           He was told he was free to go. In that  
15 officer's mind, he wasn't free to go, absolutely not, but  
16 it is not a subjective standard. It is an objective  
17 standard. It is what a reasonable innocent person in the  
18 defendant's position would have felt. Would he have felt  
19 free to leave?

20           It is an objective standard based on the  
21 circumstances not within his mind which is subjective but  
22 the objective standard.

23           So what are some of the facts this Court  
24 should look at; how many officers were present, and I  
25 think that's why it's important that Deputy Seagle stayed

1 in his car. He didn't get out. He didn't interact.

2 This was a one on one interaction between the  
3 driver and Deputy Fitch. No weapons were displayed and I  
4 asked him did you display your weapon other than it being  
5 on your belt? Did you touch him? No, I didn't. Did you  
6 use an aggressive tone of voice? No, I didn't, and the  
7 Court can see that for itself. So those are the kinds of  
8 factors that go into whether or not this was a consensual  
9 encounter.

10 State versus Kincaid is a case exactly about  
11 converting a traffic stop, a seizure into a consensual  
12 encounter. It's 147 N.C. App. 94. The officer -- The  
13 case is clear. The officer must return all documentation  
14 for the detention to end which we have in this case.

15 Again, would a reasonable innocent person under  
16 the circumstances believe he was free to leave or  
17 disregard the request for information? A seizure does  
18 not occur simply because an officer approaches an  
19 individual and asks a few questions.

20 The test is whether under the totality of the  
21 circumstances a reasonable innocent person would feel  
22 that he was not free, not free to decline the officer's  
23 request or otherwise end the encounter.

24 The Court can see the encounter. Deputy Fitch  
25 is not authoritative. He asks questions. He doesn't

1 give commands. He turns it into a consensual encounter,  
2 and of course, he had already given back all the  
3 documentation at that point; given the ticket, given the  
4 registration, given the license when he asked can I ask  
5 you another question.

6           At this point we enter into the consent portion  
7 of the program. Of course, the Court needs to determine  
8 whether or not consent was voluntary and there is some  
9 question about whether or not it is the owner of the  
10 vehicle that should be giving consent which the owner  
11 wasn't there.

12           If the owner of the vehicle is registered to  
13 the defendant's mother, she wasn't there. I don't think  
14 we have any evidence of that. So it's registered to the  
15 defendant's mother. So she's not there but there is a  
16 question of whether or not the defendant is the owner.

17           Certainly you can ask the driver who's in  
18 control of the vehicle, I think the case law would  
19 demonstrate, for consent to search.

20           So to be sure, Deputy Fitch asked both of them.  
21 He says to the driver do you mind if I search the  
22 vehicle. Well, it's not my car. Well, I understand  
23 that, but you're in control of the vehicle. I'll ask him  
24 too, but do you mind. Well, if it's okay with him, it's  
25 okay me.

1           We don't hear at that point from the driver who  
2 seems to speak pretty good English, but he doesn't speak  
3 English. He doesn't -- You'll have ask him but he  
4 doesn't speak English which I thought was interesting  
5 because we had this language barrier.

6           I think that we would have heard some more  
7 about it before Deputy Fitch goes up and asks for  
8 consent. So he goes up and he asks him do you have any  
9 drugs in the car, do you have any weapons in the car, do  
10 you have any large sums of money in the car, and I might  
11 be paraphrasing, but that's the gist of it.

12           When he starts asking these questions, the  
13 passenger says well, he -- I'll translate for him which  
14 there seemed to be no problem at that time with her  
15 translating. I tried to make that clear to the Court.  
16 This is not just some random person who's deliberately  
17 trying -- or would have a reason to skew or misrepresent  
18 the questions that the officer is asking while she's  
19 translating.

20           This is the mother of his child and he says  
21 they're just kind of friends and they went out a few  
22 times but she's the mother of his child and she was in  
23 this car with him.

24           So he says can I search your car and he says no  
25 on the stand here today but here's no indication from her

1 that he says no. In fact, according to Deputy Fitch, and  
2 you don't hear it on video, according to Deputy Fitch,  
3 she says yes and he indicates that he nods his head yes.

4 On the roadside there's no indication that  
5 there was no consent to search. He says well, do you --  
6 will y'all step out of the vehicle for me? There's no  
7 protest. There's no -- Why exactly would you step out of  
8 the car if I told you you couldn't search. He told you  
9 no, you couldn't search. There was nothing to indicate  
10 that consent was not given. Everybody hops out of the  
11 car, no problems.

12 Mr. Coleman seems to indicate that the search  
13 exceeded the scope of the consent that the hood was  
14 opened and the engine was gone through and things were  
15 taken apart.

16 I would contend that that's not what the  
17 evidence shows. The evidence shows that they went  
18 through the car, and they noticed all of the bolts, the  
19 new bolts, the stress marks, things of that nature, but  
20 they didn't even crawl up under the car to see the  
21 compartment until after the dog indicated. So I would  
22 contend that the scope of the search was -- consent  
23 search was not exceeded.

24 As far as volunteering, State versus Felton,  
25 which I handed up as well I hope, 33 N.C. 619. It is a

1 case about if the Court has any questions about  
2 interpretation, about an interpreter asking questions and  
3 interpreting back to the law enforcement officer. State  
4 versus Felton states that officers can testify about  
5 translated statements as long as the translator was an  
6 agent of the defendant because there would be no reason  
7 for the agent of the defendant to misinterpret.

8           That is why I asked him about her being the  
9 mother of his child and things of that nature. I think  
10 clearly she was the agent of the defendant, and there  
11 would be no reason for her to misinterpret -- for no  
12 apparent reason for her to misinterpret.

13           As far as voluntariness of consent, Schneckloth  
14 versus Bustamonte, which is a United State Supreme Court  
15 case. I don't think I printed it because it's, I'm sure,  
16 well known to the Court, 1973 United States Supreme Court  
17 case, totality of the circumstances whether or not  
18 consent was voluntary.

19           Your Honor, moving on to probable cause, I  
20 would contend had consent to search but even without  
21 consent to search, you have the dog sniff.

22           The dog in State versus Branch is 177 N.C. App.  
23 104, 2006 case which I handed up which clearly talks  
24 about free air sniffs by a law enforcement canine who are  
25 trained to detect narcotics, not a search.

1           In that case the defendant was held for a  
2 legitimate law enforcement purpose. While that defendant  
3 was being held, the dog was run around the car and  
4 alerted on the exterior of the car.

5           Branch holds the Fourth Amendment does not give  
6 rise to legitimate expectation of privacy in possessing  
7 contraband or illegal drugs in a well-trained dog that  
8 alerts solely to the presence of contraband during a walk  
9 around a car at a routine traffic stop does not rise to  
10 the level of a constitutionally compromisable  
11 infringement.

12           So certainly once they had the dog indication  
13 at that time probable cause existed. It didn't matter if  
14 they took the engine block apart. It didn't matter if  
15 they took the wheels off. It didn't matter if they cut  
16 the headliner out. They could have searched in the  
17 vehicle anywhere that narcotics could have been held.

18           What they did rather than tear the entire car  
19 apart was look in the area where the dog kept indicating,  
20 and they found -- Once Deputy Fitch crawled up under the  
21 car, he found an aftermarket compartment.

22           They simply took some bolts out, opened it up,  
23 opened up the back cargo area floorboard that had been  
24 bolted down, and saw a big hole cut in the bottom of the  
25 car where three kilos of cocaine were.

1           So clearly that search based on probable cause  
2 or consent was allowable under the Fourth Amendment.

3           Moving on to the racial profiling argument  
4 under the Fourteenth Amendment and equal protection  
5 clauses, first, Your Honor, the burden, I believe as the  
6 law states, is on the defendant.

7           The evidence that was -- So it's his burden.  
8 It's his job to present evidence and most of his evidence  
9 came out -- Well, not most -- Well, most of his evidence  
10 came out during the cross-examination of the State's  
11 witnesses which we were putting on our case in chief for  
12 the Fourth Amendment.

13           So what you have here is some warning tickets  
14 and some citations that three officers wrote. Three  
15 officers, now we're talking about Deputy Fitch, but I  
16 think Mr. Coleman's trying to show a pattern of  
17 discrimination.

18           I will contend that the stops by Deputy Cook  
19 and Deputy Seagle are irrelevant. I contend that the  
20 Arrassaenz transcript is irrelevant for numerous reasons.

21           One, the most important reason being that was  
22 in a random vehicle stop. Arrassaenz, as I'm sure the  
23 Court has gathered based on the testimony from Sergeant  
24 Fitch, was a stop that US Customs asked him to effect.

25           So this was not a vehicle stop based on a

1 traffic violation alone. This was what some people refer  
2 to as a whisper stop where they asked Sergeant Fitch to  
3 get up out of the bed at four in the morning and go stop  
4 this specific vehicle.

5 He testified before he got the stop, he didn't  
6 have any idea what the race of those people were. He  
7 just knew that he was looking for this particular vehicle  
8 and customs asked him to stop it.

9 So it turned out Mr. Arrassaenz was Hispanic,  
10 but that stop -- the reason for that stop was a request  
11 from United States Customs. It's not related to this  
12 case besides of the fact that there were drugs in the car  
13 and Mr. Arrassaenz was Hispanic and he was on I-85.

14 I have never looked at this before. So this  
15 was a learning process for me. So I hope I'm stating the  
16 law correctly, and of course the Court, I'm sure, will  
17 correct me if I'm wrong but it's my understanding that in  
18 order for the defendant to establish a violation of the  
19 due process clause because of racial discrimination for  
20 vehicle stops or for any other purpose.

21 This line of cases started with selective  
22 prosecution essentially. In U.S. v. Armstrong is 1996 US  
23 Supreme Court case, 517 U.S. 456. In that -- That, I  
24 think -- That case did address specifically selective  
25 prosecution but in my reading of this case it's my

1 understanding that it's the same two-prong test for  
2 selective prosecution or racially motivated traffic stops  
3 or tickets or arrests. So it's the same two-prong test.  
4 In that case the Court did outline the two-prong test.

5 In order to prove a violation, the defendant  
6 must show a discriminatory effect and how in that case  
7 there was a prosecutorial policy that was applied and  
8 that the prosecutions were motivated by discriminatory  
9 purpose. I did not get into a lot of the facts of the  
10 case, but I believe that is the case -- a case that  
11 outlines crack -- that talks about crack cocaine  
12 prosecutions and the Federal government or the district  
13 attorney's office for crack cocaine and how it's a  
14 disproportioned amount of African-Americans were in jail  
15 for crack cocaine versus other ethnicities for that same  
16 drug.

17 So I think that was the basis for it which is  
18 really not relevant to this case but just to give the  
19 Court a little background.

20 U.S. v. Armstrong says it's a two-prong  
21 standard. You must show a discriminatory effect and you  
22 must show that the prosecution was motivated by a  
23 discriminatory purpose.

24 The Court states it is a rigorous standard and  
25 it should be. It should be a rigorous standard because

1 you're alleging an extremely improper purpose for  
2 prosecuting someone and putting them in jail. So in that  
3 case the Court said it -- They were seeking discovery,  
4 they being the defendants, in that case -- or the  
5 plaintiffs were seeking discovery of multiple records  
6 from multiple prisons and indictments and things of that  
7 nature.

8           So the Court held that just to obtain the  
9 discovery that the defendant must make a showing just to  
10 get discovery. The defendant must make a showing that  
11 similarly situated defendants of other races could have  
12 been prosecuted but where not.

13           That same test and that same reasoning, I hate  
14 to say trickles down but moves down the line to stop that  
15 defendants were alleging for racial motive.

16           U.S. v. Nesa-Roche is the best I can come with,  
17 and I'll spell that for the court reporter, US versus N-  
18 E-S-A-R-O-C-H-E. This is a district court case from  
19 Kansas.

20           I'm not going to tell the Court that's  
21 authority the Court has to follow, but the reason that  
22 I'm citing it is it lays out -- it was a stop. It was a  
23 racially motivated stop case, traffic stop case, and it  
24 lays out, I think, very clearly the reasoning of the  
25 Court and how the test is to be applied. So that's why

1 I'm citing that case.

2 This was a Hispanic male that was pulled over  
3 on the interstate. The officer stated that he pulled --  
4 Officer's sitting on the interstate watching traffic.  
5 The officer initially pulled the vehicle because he  
6 passed a maintenance worker too close and he stated that  
7 he was going to cite him for reckless driving.

8 In that the case the claimant, who's the  
9 defendant, cited a study, an highway study, that was done  
10 by the University of Kansas or -- I believe, which stated  
11 that on that specific highway the Kansas Highway Patrol  
12 stopped six point eight percent of Hispanics and that  
13 officer stopped thirty-three point six nine percent  
14 Hispanics.

15 So there is a huge disparity between what all  
16 the other officers were doing that worked for the Kansas  
17 Highway Patrol versus what that specific officer was  
18 doing. So there was a study. There was evidence. There  
19 was actual statistical evidence in that case that there  
20 was a discriminatory effect, and the Court found that  
21 based on those studied there was a discriminatory effect,  
22 that this officer was pulling over a disproportionate  
23 amount of Hispanics compared to what everyone else was  
24 doing.

25 We don't even have that here. We don't have

1 comparative. We don't have a study. We don't have any  
2 evidence. We have nothing except the fact that these  
3 officers were pulling over some Hispanic folks, and yes,  
4 the warning tickets are for primarily Hispanic people.

5 I asked Chris Cook -- Actually I didn't even  
6 ask him. I think it was Mr. Coleman's question. Why are  
7 you pulling over so many Hispanic people? Because  
8 they're nervous. Well, why -- They're showing the  
9 indicators of fear, and I think we've called it so many  
10 different things, but these indications of fear.

11 Fear induced reactions, I think, is what we've  
12 been calling them. A lot of times we pull them over and  
13 they're afraid because they don't have an operator's  
14 licenses and we send them on their way.

15 So he admits yes, we're pulling over a lot of  
16 Hispanic people. A lot of Hispanic people have these  
17 fear induced reactions to us and a lot of times they  
18 don't have an operator's license. A lot of times there  
19 are explanations.

20 So we don't have that statistical evidence,  
21 Your Honor, I would contend that would show for certain a  
22 discriminatory effect. It's not my burden. These are  
23 things that the defendant could have brought to the  
24 Court.

25 All he did was subpoena whatever warning

1 tickets the sheriff's office could give him and whatever  
2 citations he could get from the sheriff's office and from  
3 the clerk's office. That's all we get.

4 If this was a grand scheme for the sheriff's  
5 department ICE team was only pulling over Hispanic people  
6 for whatever reason, what purpose they would have in just  
7 pulling over Hispanic people, I don't know.

8 I guess the theory is they just don't like  
9 Hispanic people. I'm not really sure. We don't know,  
10 but if that was their grand scheme and they colluded  
11 together and they all decided that they were going to  
12 engage in this little plan to only pull over Hispanic  
13 people, they surely would have decided that they were  
14 going to pull over a few white people and a few black  
15 people and a few Asian people and start writing them  
16 warning tickets too.

17 They were honest and gave the tickets that they  
18 had -- the warning tickets that they had and it doesn't  
19 look good. It doesn't, but they didn't try to hide that  
20 fact. They gave what they had and they testified to why  
21 they pulled over people and they were honest about it and  
22 I would like the Court to consider that as well.

23 Mr. Coleman bears the burden. He's the  
24 claimant here and he brought the Court some warning  
25 citations which these officers were able to explain why

1 they pull over Hispanic people.

2           Even if the Court finds that this is  
3 statistical evidence, which I would ask it not to, but  
4 even if the Court finds that this is statistical  
5 evidence, there's a second prong.

6           That second prong is you have to show, and by  
7 you I mean the claimant, has to show that Deputy Fitch  
8 was motivated in this stop by discriminatory purpose.

9           There's not one shred of evidence that Deputy  
10 Fitch did on this occasion or ever has pulled over anyone  
11 because they were Hispanics.

12           The Court asked him what drew your attention to  
13 this car what made you suspicious and he sat there and he  
14 told the Court all of the things that made him suspicious  
15 of this car and made him decide to pull this car over and  
16 not one of them was that he was Hispanic.

17           By he, I mean not even the defendant, I mean,  
18 Mr. Pena. There's not one that thing that he testified  
19 to and not one thing on that video that shows he had a  
20 bad purpose. That shows that there was anything other  
21 than objective factors that made him pull that vehicle  
22 over and made him continue to investigate. Nothing.

23           The defendant testifies. He had plenty of  
24 opportunity to say well, he said I know that all people  
25 -- all Latinos are carrying drugs. I know y'all either

1 have drugs or money because you're coming from the  
2 border. That man never said anything -- Deputy Fitch  
3 never said one thing about that. He never addressed the  
4 fact these people were Hispanic except I think he might  
5 have written on the warning ticket or he might have  
6 written other. I can't remember.

7           The Court can go back and look but that might  
8 be the warning ticket where he didn't even write  
9 Hispanic. He wrote other because he wasn't sure of the  
10 race. That's a burden that the claimant has to meet.

11           I would ask the Court to read U.S. versus Nesa-  
12 Roche because the Court in that case, and it is a  
13 district court opinion, but the Court in that case stated  
14 that took notice of the manner in which the officer,  
15 because I'm sure they had a video just like we all do  
16 now, the Court took notice of how the defendant was  
17 treated, the things that the officer said to the  
18 defendant, and stated that there was not one shred of  
19 evidence that this officer pulled this man over for a  
20 racial reason.

21           The Court stated a defendant must prove that  
22 the government's enforcement of traffic laws against him  
23 was invidious or in bad faith and was based on  
24 impermissible consideration such as the desire to prevent  
25 the exercise of constitutional rights. You don't have it

1 here. He's not met his burden. I would contend he  
2 hasn't met his burden on the first prong but if the Court  
3 takes the warning citations and traffic tickets as  
4 statistical evidence that there's a pattern and that  
5 there's a discriminatory effect, I would ask the Court to  
6 look at the second prong because I think the claimant  
7 fails miserably on the second prong in particular.

8 We would ask the Court to deny the motion to  
9 suppress.

10 **The Court:** I haven't had a chance to read  
11 through all of these cases yet. I started on them and I  
12 read several of them over lunch and I looked at some of  
13 the other parts of the evidence that I haven't had a  
14 chance to look at during the hearing.

15 I want to have plenty of time to read these  
16 cases before I make a decision. I'll be glad -- It's  
17 about 3:20 right now. I also may need to do a little  
18 research on my own. I'll be glad to try to -- I'll start  
19 on that now and work on it the rest of the day and come  
20 back tomorrow morning at 9:30.

21 **Ms. Kirby-Turner:** At 9:30, Your Honor?

22 **The Court:** At 9:30. Or I can try to --  
23 It's possible that I could be finished, you know, say an  
24 hour from now and we could come back around 4:30 and I  
25 could give you my decision.

1           **Ms. Kirby-Turner:**    I don't want to rush the  
2 Court.  I want the Court -- I know the Court -- this  
3 Court likes to do his own research and so I would not  
4 want to rush that.

5           We can be prepared in the morning to go forward  
6 with this case if that's the decision of the Court and if  
7 not, we can be prepared for the next case if the Court  
8 chooses to suppress.  We'll just do it that way if you  
9 want that much time.  So I don't want to rush any  
10 decision.

11           **The Court:**           Thank you.

12           **Mr. Coleman:**    I would agree.  This is -- These  
13 constitutional issues are too important.  I think the  
14 Court should take its time and do its own search and take  
15 the time to read the documents we submitted.

16           **The Court:**       Well, it'll probably take me at  
17 least an hour to read through all this stuff and it might  
18 take longer than that.  And whatever order I entered,  
19 I'll probably dictate findings of fact and will probably  
20 take a substantial amount of time as well.

21           So why don't we go ahead and stop for the day  
22 and we'll come back at 9:30.  I'll have you all a  
23 decision then.

24           I'm going to come in at 9:30 and be ready to  
25 go.  That will give us the morning to deal with this and

1 whatever else you all have.

2 **Ms. Kirby-Turner:** Yes, sir.

3 **The Court:** Deputy, put us in recess until  
4 9:30.

5 (The court recessed at 3:20 pm, May 14, 2013.)

6 (The Court was called to order at 9:30 on May 15, 2013.)

7 (The Defendant was present with his counsel; the State's  
8 attorney was present.)

9 **The Court:** Are we ready?

10 **Ms. Kirby-Turner:** Yes, sir.

11 **The Court:** Do you want to approach?

12 (Counsel approached the bench and conferred with the  
13 Court.)

14 **The Court:** The motion to suppress is  
15 allowed and what I'm going to do is dictate an order with  
16 detailed findings of fact including the law and an order  
17 based on that and I'm going to reserve the right to make  
18 changes to that.

19 Probably what I'm going to do is have the court  
20 reporter prepare a transcript of the testimony that may  
21 be necessary for appellate purposes in any event, but I  
22 would like to see it.

23 I write as fast as I can when folks are  
24 testifying but I can't take every word down but the court  
25 reporter can.

1           So I'm going to reserve the right to perhaps  
2 make some changes to the findings to perhaps add  
3 additional findings and to perhaps take some of the  
4 findings that I make in court out of the order because as  
5 I dictate things in open court, they don't always come  
6 out on paper in a grammatically correct way and they  
7 don't always come out as I intend them to.

8           So is there any objection to that from either  
9 the State or the defendant operating under that  
10 procedure?

11           **Ms. Kirby-Turner:**    No, Your Honor.

12           **Mr. Coleman:**       Not from the defendant.

13           **The Court:**        Let me also ask is there any  
14 objection from either the State or the defendant that I  
15 sign this order out of county, out of session, out of  
16 term?

17           **Ms. Kirby-Turner:**    No, Your Honor.

18           **Mr. Coleman:**       Not from the defendant.

19           **The Court:**        Okay. Because that will  
20 certainly allow the court reporter to prepare the  
21 transcript, send it to me, and then for me to review it.

22           I'm going to ask that the originally prepared  
23 order that I'm about to dictate in writing, and if you  
24 can, forward that to me in a Word Perfect document would  
25 be best so that I can go in and make changes and so

1 forth.

2 All right. For a caption, entitle it Order  
3 Allowing Motion to Suppress Filed April 24, 2012.

4 This order is entered upon a hearing conducted  
5 on the defendant's motion to suppress filed April 24,  
6 2012, in the above captioned case.

7 A hearing was held upon the defendant's motion  
8 in open court in the absence of any jury. The defendant  
9 was present at all times with his counsel, Mr. Calvin  
10 Coleman.

11 The State was represented by Ms. Sally Kirby-  
12 Turner. I guess I could put your name in there too, Mr.  
13 Bozin.

14 **Mr. Bozin:** Yes, sir.

15 **The Court:** From the evidence presented, the  
16 Court finds as fact the following by at least a  
17 preponderance of the evidence:

18 1. And if you could, just make these  
19 paragraphs -- divide them up. I may just say next  
20 paragraph, but if a paragraph gets really long, it  
21 probably should be divided into two paragraphs.

22 In ruling upon this motion to dismiss, the  
23 Court has had the opportunity to observe the manner and  
24 demeanor of each witness and to determine the credibility  
25 of each witness.

1           The Court has seen the body language of each  
2 witness as they testified.

3           The Court has observed the pauses and  
4 hesitations, if any, of when the witnesses have answered  
5 questions.

6           The Court has heard the inflections and the  
7 tones of the voices of the witnesses as they testified.

8           The Court has seen the look on the face of the  
9 witnesses and seen the expressions as they answered  
10 questions.

11           The Court has observed many other factors used  
12 in determining the credibility of witnesses which a bare  
13 black and white record cannot afford.

14           The testimony considered in ruling upon this  
15 motion includes the testimony of Investigator Dwight  
16 Fitch, Officer Chris Cook, Sergeant Rodney Fitch, Officer  
17 Jody Seagle all with the Cleveland County Sheriff's  
18 Office, and Ms. Ruth Deviney with the Cleveland County  
19 Clerk's Office and the defendant.

20           The Court has also considered the documentary  
21 exhibits that have been offered and received by both the  
22 State and the defendant.

23           On or about July 11, 2011, Deputy Dwight Fitch  
24 with the Cleveland County Sheriff's Office was working as  
25 part of the ICE team with the Cleveland County Sheriff's

1 Office which is a acronym for Interstate Criminal  
2 Enforcement team.

3 The purpose of this ICE team with the Cleveland  
4 County Sheriff's Office is to monitor and control  
5 Interstate 85 as it runs through Cleveland County from  
6 the number one mile marker to the number eight mile  
7 marker.

8 This highway interdiction team works  
9 exclusively on Interstate 85. The purpose of this team  
10 is to enforce any criminal law.

11 On July 11, 2011, Deputy Fitch was in a marked  
12 Chevrolet Tahoe with Cleveland County Sheriff's Office  
13 stickers in the median of I-85 in the early morning  
14 around mile marker one monitoring northbound traffic on  
15 I-85. He was wearing a BDU type uniform which was gray  
16 in color and had badges sewn and another badge on his  
17 belt.

18 Deputy Fitch was watching for any criminal  
19 activity and particularly was watching for what he called  
20 "fear induced reaction" looking for changes in speed or  
21 vehicle travel or reckless driving, and the like.

22 As Deputy Fitch was monitoring traffic, he saw  
23 the vehicle in which the defendant was a passenger  
24 approaching from approximately a half mile away.

25 Deputy Fitch saw this vehicle slow as it

1 approached but as he testified, this was not abnormal and  
2 in fact the majority of vehicles as they approached his  
3 vehicle slowed down.

4 As the vehicle approached, Deputy Fitch saw the  
5 vehicle passing other cars and as the vehicle drove by,  
6 he saw -- he testified that he saw the driver look away  
7 and female passenger look at him.

8 Deputy Fitch left the median and began  
9 following this car which he identified as a Chrysler and  
10 later was identified as a Chrysler Pacifica, blue in  
11 color.

12 Deputy Fitch testified that most vehicles on I-  
13 85 are speeding and that what drew his attention to this  
14 vehicle were its speed and its reaction as it passed.

15 Deputy Fitch was not certified to operate a  
16 radar though his vehicle did contain a radar.

17 After catching up to this vehicle, Deputy Fitch  
18 pulled up along beside the vehicle and rode beside the  
19 vehicle at a speed of approximately seventy-one miles per  
20 hour.

21 At this time he was looking into the vehicle  
22 and saw the driver who was looking straight ahead and had  
23 his hands on the steering wheel at the ten, two position.

24 Deputy Fitch testified that he saw the driver's  
25 knuckles had turned a different color. The Court finds

1 this to be unbelievable evidence based upon factors, some  
2 of which will be outlined later in this order.

3 Deputy Fitch continued following this vehicle  
4 along beside him for approximately three miles on the  
5 interstate.

6 The vehicle passed slower traffic on the right-  
7 hand side. Deputy Fitch was pacing the defendant's  
8 vehicle with his own which had not been calibrated.

9 At one point Deputy Fitch testified that he  
10 didn't know whether the defendant was speeding or not  
11 because his vehicle had not been calibrated. He later  
12 testified that he could tell that he was speeding.

13 At about the time the vehicle was to exit  
14 Cleveland County close to the seven mile marker Deputy  
15 Fitch activated his blue lights.

16 He testified that he stopped this vehicle  
17 because of its speed and that his plan was to write the  
18 driver a warning ticket. Notwithstanding his testimony,  
19 the State in the case has conceded that Deputy Fitch  
20 pulled this vehicle over on a pretextual basis.

21 The Court finds that Deputy Fitch stated the  
22 purpose for pulling over the vehicle was a pretext of the  
23 real purpose that he pulled the vehicle over.

24 Approximately thirty seconds prior to  
25 activating his blue lights, the I-COP camera within

1 Deputy Fitch's vehicle turns on and the Court has viewed  
2 State's Exhibit 1 constituted a DVD of the in-car video  
3 camera in Deputy Fitch's car.

4 The Chrysler Pacifica immediately pulled to the  
5 shoulder of the road and once the car was stopped, Deputy  
6 Fitch notified another officer, Deputy Jody Seagle who  
7 was also on the interdiction team of the stop and Deputy  
8 Seagle advised that he would be en route to provide  
9 backup.

10 Deputy Fitch had not noticed the backseat  
11 passenger, the defendant in this case, prior to stopping  
12 the vehicle.

13 Deputy Fitch exited his vehicle and walked up  
14 to the passenger side of the vehicle in which the  
15 defendant was a backseat passenger and began speaking to  
16 the driver.

17 Deputy Fitch testified that he did not see any  
18 luggage in the car and that when he approached the car,  
19 he smelled an odor of air fresheners. He spoke to the  
20 driver and told him why he stopped him. He asked to see  
21 the driver's license of the driver.

22 Deputy Fitch saw a single key in the vehicle's  
23 ignition and saw several energy drinks in the console and  
24 he noticed that the driver's hands were shaking when he  
25 produced his driver's license.

1 Deputy Fitch asked the driver, later identified  
2 as the co-defendant in this case, Mr. Elvis Pena, to exit  
3 the vehicle and walk back to the front of the deputy's  
4 vehicle.

5 Once at the front of Deputy Fitch's vehicle,  
6 Deputy Fitch began speaking to the defendant about his  
7 speed and asked him various questions including where he  
8 was from, where he was coming from, how long he'd been  
9 there, and the purpose for his visit. He asked if the  
10 vehicle was his and asked if they were all going back to  
11 New York.

12 Deputy Fitch then approached the vehicle again  
13 to ask for the registration papers which were provided to  
14 him.

15 Once he obtained the registration, Deputy Fitch  
16 walked back to Deputy Seagle's vehicle which had by then  
17 arrived and told Deputy Seagle what he had.

18 According to the I-COP camera video, the  
19 defendant's vehicle was pulled over at approximately 8:38  
20 a.m. At 8:40 a.m. the driver was out of the vehicle. At  
21 8:43 a.m. the deputy begins talking to Officer Seagle,  
22 and at 8:44 a.m. Deputy Fitch is heard to say that he's  
23 going to start the paperwork.

24 At 8:53 a.m. Deputy Fitch ran the driver's  
25 license of the driver of the vehicle and at 8:54 a.m.

1 Deputy Fitch ran the tag of the vehicle.

2 Deputy Seagle contacted Deputy Cook who was the  
3 canine handler to respond to the scene once Deputy Fitch  
4 had talked to him. At approximately 9:00 a.m. Deputy  
5 Cook arrived on the scene to assist with his canine.

6 Deputy Fitch determined that the driver's  
7 license of the driver was valid and that the vehicle's  
8 registration were all in proper order and legal.

9 At approximately 8:57 a.m. Deputy Fitch is seen  
10 on the DVD video handing the driver the warning ticket.  
11 They are seen to shake hands and the driver tells Deputy  
12 Fitch to have a nice day.

13 Deputy Fitch responds "you too." In the same  
14 breath he begins asking the driver of the vehicle various  
15 questions including do you have any drugs in the car, do  
16 you have any cocaine, any marijuana, any weapons, large  
17 sums of money over \$10,000 to which the driver responds  
18 no to all.

19 He then asks the driver whether he can search  
20 the car and the driver responds that it's not his vehicle  
21 that he would need to ask the backseat occupant.

22 Deputy Fitch then advises the driver, Mr. Pena,  
23 to stay where he is and then he re-approaches the vehicle  
24 and engages in a conversation with the backseat  
25 passenger, the defendant in this case.

1 Deputy Fitch approaches the vehicle and begins  
2 interrogating the defendant and apparently the front-seat  
3 passenger translates for the defendant.

4 He asked the defendant whether there are any  
5 large sums of money over \$10,000. Defendant responds no.  
6 He asks whether or not there are drugs in the car, any  
7 guns in the car. The defendant responds no.

8 There is confusion as to whether the defendant  
9 granted permission to search the vehicle. The defendant  
10 testified that he did not grant permission but the deputy  
11 testified that the defendant did give permission.

12 The Court finds that any consent obtained was  
13 involuntary and was not supported by reasonable suspicion  
14 as set forth in this order and that any consent given by  
15 the defendant to search the vehicle or anyone else that  
16 consent is invalid by other factors which will thereafter  
17 be set forth.

18 Deputy Fitch directs the occupants of the  
19 vehicle to step out of the vehicle and motions for them  
20 and directs them to where they would be stationed while  
21 the search occurs.

22 Deputy Fitch then turns around and walks back  
23 to his vehicle and at 8:59 a.m. replaces the microphone  
24 which records on the DVD into his charger which silences  
25 it and thereafter on the video no audio is heard.

1 Deputy Fitch intentionally turned his audio  
2 off.

3 Deputy Fitch observes luggage in the car, three  
4 small bags, one with some baseball cleats and one bag of  
5 a makeup kit and one bag with some male clothes.

6 Once Deputy Fitch begins to search the vehicle,  
7 Officer Seagle also approaches and begins searching the  
8 vehicle.

9 The search of the defendant's vehicle in this  
10 case is extensive including searching under the hood, the  
11 back of the hatch, inside the luggage bags, within the  
12 vehicle, inside of the console, dash, under the seats.  
13 At some point Deputy Fitch removes grommets and looks  
14 behind the carpeted area of the vehicle under the seat.

15 Deputy Cook deployed Canine Heky onto the  
16 vehicle and according to that testimony, the Canine Heky  
17 alerted behind the back seat in the cargo area near the  
18 floorboard.

19 At one point during the search the officers  
20 went underneath the vehicle and began looking around the  
21 spare tire area. They noticed an area that looked like  
22 it was an aftermarket overspray, slight color change than  
23 the rest of the undercarriage of the vehicle and that  
24 this appeared to be the area located underneath the back  
25 seat.

1 Deputy Fitch got a tool kit and unscrewed bolts  
2 and lifted up the seat and the hatch and saw an area cut  
3 out of the floorboard that looked to be a non-factory  
4 alteration of the vehicle.

5 Inside they found three packages in this  
6 concealed compartment which appeared to them, based on  
7 their training and experience, to be a controlled  
8 substance and they thereafter placed the occupants under  
9 arrest.

10 The search of this vehicle began at  
11 approximately 8:59 a.m. and the occupants were placed  
12 under arrest at approximately 9:28 a.m.

13 It is the written policy of the Cleveland  
14 County Sheriff's Office introduced as Defendant's Exhibit  
15 1 as follows: "Policy Title, Use of Mobile Video/Audio  
16 Recording Equipment."

17 Purpose: MVR equipment has been demonstrated  
18 to be of value in the prosecution of traffic violations,  
19 criminal offenses, evaluation of employee performance,  
20 and use as a training aid. Deputies **shall** (emphasis  
21 added by the Court) adhere to the following procedures  
22 for the use of MVR equipment.

23 Procedures: A. Cleveland County Sheriff's  
24 Office had adopted the use of in car video recording  
25 systems in order to accomplish several objectives,

1 including but not limited to:

2 1. Accurate documentation of events, actions,  
3 conditions and statements made during arrests and  
4 critical incidents so as to enhance officer reports,  
5 assist in the collection of evidence, and testimony in  
6 court.

7 2. The enhancement of this agency's ability to  
8 review probable cause for arrests, arrest procedures, and  
9 for evaluation and training.

10 3. Deputies **shall** (emphasis added by the  
11 Court) adhere to the following operating procedures when  
12 using vehicles with MVR equipment:

13 1. MVR equipment installed in any vehicle is  
14 the responsibility of the deputy assigned to that vehicle  
15 and **shall** (emphasis added by the Court) be maintained and  
16 operated per the manufacturer's recommendations.

17 2. MVR equipment will be automatically  
18 activated when the emergency lighting system on the  
19 patrol vehicle is activated.

20 3. MVR activation **shall** (emphasis added by the  
21 Court) include audio recording as well as video  
22 recording. Deputies **shall** include audio recording as  
23 part of their documentation. He/she **shall** not  
24 intentionally fail to turn on or intentionally turn off  
25 audio recordings of matters being documented. Microphone

1 condition, maintenance, and plug in at transmitter are  
2 the deputy's responsibility to ensure proper recording of  
3 the audio portion.

4 4. Deputies shall not erase or alter video  
5 recordings in any manner.

6 The Cleveland County Sheriff's Office policy  
7 goes on to state many other limits and procedures for the  
8 use of MVR videos. The pertinent ones for this hearing  
9 are set forth above.

10 Sergeant Rodney Fitch, despite the written  
11 policy of the sheriff, had a policy whereby once the  
12 search of the vehicle at a traffic stop began the audio  
13 portion of the MVR was intentionally silenced. This  
14 verbal policy was in strict non-compliance and the  
15 opposite of the written policy of the sheriff's office.

16 Sergeant Fitch testified and the Court finds as  
17 credible that the reason the audio portion of the MVR was  
18 turned off was to hide evidence and prevent lawyers and  
19 perhaps those charged with drug offenses from learning  
20 the particular techniques and manner in which law  
21 enforcement officers obtain information to make arrests.

22 Sergeant Fitch admitted that such information  
23 came out in open court notwithstanding the silencing for  
24 these audio recordings.

25 Deputy Dwight Fitch, Deputy Jody Seagle, and

1 Deputy Chris Cook all work together in the Interstate  
2 Criminal Enforcement team and it is apparent to this  
3 Court that they were aware of the policy of Sergeant  
4 Rodney Fitch and his captain in shutting off these audio  
5 recordings once the search of the vehicle began.

6 Deputy Dwight Fitch testified that he was  
7 having battery problems with his audio microphone and  
8 that he placed it back in the charger in his vehicle  
9 thereby silencing it because he had been having battery  
10 problems.

11 The Court finds this to be incredible and  
12 specifically finds that it is an attempt by Deputy Dwight  
13 Fitch to deceive this Court in that it's apparent that  
14 the reason he placed the audio recording in its charger  
15 was pursuant to the policy of his sergeant.

16 It's apparent to this Court that his testimony  
17 about getting new batteries and the State's evidence  
18 regarding the purchase of batteries is a red herring and  
19 is a means by which the State is attempting to deceive  
20 this Court as to the real reason for Deputy Fitch ceasing  
21 the audio recording in this case.

22 This particular evidence, particularly the  
23 admitted withholding of evidence, the admitted secreting  
24 and spoliation and hiding of evidence by the officers  
25 involved in this case and the additional attempt by these

1 officers to cover up this action in this court in this  
2 hearing has cast a cloud of suspicion and distrust by  
3 this Court in determining the credibility of these  
4 officers' testimony and has been particularly helpful to  
5 this Court in determining the credibility of Deputy  
6 Dwight Fitch's testimony as well as the other officers'  
7 testimony.

8           The Court finds that Deputy Dwight Fitch's  
9 stated purpose in open court for replacing the audio mic  
10 into his vehicle, namely that based upon a battery reason  
11 for a budgetary concern of the sheriff's office, is a  
12 complete and total falsehood.

13           The Court finds that the real reason Deputy  
14 Fitch placed the audio mic into its charger thereby  
15 silencing the audio portion of this DVD for approximately  
16 an hour is for the purpose of hiding evidence, evidence  
17 which could have potentially been beneficially to the  
18 defendant and which could have been exculpatory.

19           The Court finds that this particular repugnant  
20 behavior by the Cleveland County Sheriff's Office is in  
21 and of itself reason to grant the defendant's motion to  
22 suppress. In this case the Court need not decide that  
23 because based upon all of the other reasons, that this  
24 certainly is required in this case.

25           The defendant's attorney Mr. Calvin Coleman on

1 September 5, 2011, sent a request for public records to  
2 the Cleveland County Sheriff's Office requesting  
3 specifically "all citations and/or warning citations  
4 issued by Deputy Dwight Fitch, Deputy C. Cook, and Deputy  
5 J. Seagle where the initial observation of the persons  
6 cited were made on Interstate Highway 85 regardless of  
7 the physical location where the citations or warning  
8 citations were actually issued from January 1, 2009,  
9 through July 30, 2011."

10           Approximately three months later on December 1,  
11 2011, Sergeant Rodney Fitch with the Cleveland County  
12 Sheriff's Office responded to Mr. Coleman's request that  
13 the warning citations were commonly discarded via  
14 recycling or other means of disposal and that the  
15 sheriff's office did not have storage capacity to keep  
16 these records.

17           Sergeant Rodney Fitch relied upon the Cleveland  
18 County Sheriff's Office policy and procedure manual to  
19 advise Mr. Coleman that the records requested were  
20 generally not available but apparently did send to Mr.  
21 Coleman those records that he had for those three  
22 officers.

23           Defendant has introduced Defendant's Exhibit 7  
24 which includes nine warning tickets written by Deputy  
25 Chris Cook. These were purported and proffered to be by

1 the sheriff's office as those tickets written by Deputy  
2 Chris Cook from January 1, 2009, through July 30, 2011,  
3 on I-85.

4           Sergeant Fitch advised Mr. Coleman that  
5 Deputies Cook and Seagle had only been part of the ICE  
6 team since December 2010.

7           Of those nine warning citations written by  
8 Deputy Chris Cook six of the individuals are noted to be  
9 Hispanic, two as white, and one as black. All of these  
10 warning citations occurred on Interstate 85.

11           Deputy Jody Seagle's warning citations as  
12 delivered to or obtained by the defendant pursuant to his  
13 request were introduced as Defendant's Exhibit 6.

14           There are twenty citations included within this  
15 packet. Fourteen of those are for Hispanic individuals,  
16 four are for black individuals, one is listed as other,  
17 and one is unlisted as to the race of the individual.

18           No citations were provided to Mr. Coleman as to  
19 Deputy Dwight Fitch's citations or warning tickets, but  
20 the State introduced those as State's Exhibit 2.

21           Of Deputy Dwight Fitch's citations or warning  
22 tickets written on I-85 from the dates listed, both were  
23 for Hispanic persons. The warning citation which was  
24 issued in the case at bar makes three and the warning  
25 citation written in this case was also for Hispanic Mr.

1 Elvis Pena Rivera.

2           The stated reasons of Deputy Dwight Fitch in  
3 obtaining reasonable suspicion or probable cause to stop  
4 the defendant's vehicle in this case were the reductions  
5 in the speed of the defendant, the driver looking away  
6 and the passenger looking at him as they passed, visual  
7 observation of brake lights on the vehicle, after they  
8 passed he noticed the vehicle immediately changing lanes,  
9 and the observations Deputy Fitch made while he drove  
10 alongside the vehicle for approximately three miles in  
11 excess of seventy miles an hour with the driver looking  
12 straight ahead and his hands and the ten, two position on  
13 the steering wheel, and finally, the speed that he paced  
14 the vehicle just prior to the stop.

15           The Court finds all of those reasons enunciated  
16 by Deputy Fitch with the exception of the speed to be an  
17 invalid basis for the stop in this case and they are not  
18 objectives and do not constitute any reasonable  
19 articulable reasons for a stop in this case.

20           The Court does find that the stop in this case  
21 was proper based upon the speed that Deputy Fitch paced  
22 the vehicle.

23           The Court finds that Deputy Fitch was dilatory  
24 when he did not pursue immediately the reasons for the  
25 stop but instead gave him questions unrelated to the stop

1 and did not immediately check for the validity of Mr.  
2 Pena's driver's license or the vehicle registration.

3 Deputy Fitch testified and the Court finds as  
4 credible that even though he told the driver of the  
5 vehicle that he was free to go, that he wasn't free to go  
6 and that if he did not obtain consent to search the  
7 vehicle, then he was going to run the canine around the  
8 vehicle.

9 The Court finds that Deputy Fitch targeted the  
10 defendant in the case, at least in part, because of his  
11 race, as an Hispanic individual. This finding is  
12 supported by the defendant's evidence in this case and is  
13 supported by all of the other evidence admitted at this  
14 hearing.

15 The percentage of individuals stopped by Deputy  
16 Fitch for the approximate two-and-a-half-year period on  
17 I-85 while working on the ICE team was one hundred  
18 percent Hispanic.

19 The percentage of Hispanics stopped by Deputy  
20 Chris Cook was sixty-six point six percent compared to  
21 twenty-two point two percent for white persons and eleven  
22 point one percent for black persons.

23 The percentage of Hispanic individuals stopped  
24 by Jody Seagle was seventy percent for Hispanics, twenty  
25 percent for black persons, and this does not include the

1 unlisted race of one individual and the other race listed  
2 as other.

3           The Court finds as fact that one hundred  
4 percent, sixty-six point six percent, and seventy percent  
5 of those stopped as being of the Hispanic race far  
6 exceeds the number of individuals on the highway who are  
7 operating their vehicles in excess of sixty-five miles an  
8 hour and far exceeds the race of the individuals  
9 operating vehicles on Interstate 85.

10           The Court finds that by reason of Deputy Fitch  
11 taking into account the race of the occupants of the  
12 vehicle in the Chrysler Pacifica in this case constitutes  
13 a violation of the defendant's constitutional rights to  
14 equal protection under the law.

15           The Court finds that Deputy Fitch taking into  
16 account the race of the individuals and specifically  
17 pulling this vehicle over for the reason that the  
18 occupants were Hispanic constitutes a selective  
19 enforcement of the law and a selective prosecution of the  
20 criminal law.

21           This finding is based on other testimony in the  
22 case that most everyone who travels I-85 and that Deputy  
23 Fitch observes are exceeding the posted speed limit, that  
24 most vehicles that observe him reduce their speed.

25           The Court finds that changing lanes is not

1 illegal and does not constitute a basis upon which to  
2 stop independently or collectively with other factors.

3           The Court finds that looking straight ahead and  
4 operating the vehicle with both hands on the steering  
5 wheel at a ten, two position does not constitute a basis  
6 individually or collectively with any other factor to  
7 operate and effectuate a stop of a vehicle.

8           In short the Court finds in this case that  
9 Deputy Fitch pulled this vehicle over because the  
10 occupants were Hispanic and his testimony to the contrary  
11 is incredible to this Court and unbelievable.

12           The Court finds that subsequent to determining  
13 that Mr. Pena driver's license was valid and that the  
14 registration of the vehicle was valid, Deputy Fitch had  
15 no reasonable articulable suspicion or probable cause to  
16 delay this stop any further and that any further delay  
17 constitutes a violation of the defendant's constitutional  
18 rights.

19           Specifically the Court finds that the reasons  
20 stated by Deputy Fitch which gave rise of suspicion  
21 including a single key in the ignition, the smell of air  
22 fresheners, the energy drinks in the console, movement in  
23 the car, and no luggage is first of all, incredible and  
24 unbelievable by this Court based upon Deputy Fitch  
25 telling also that other matters and specifically even if

1 it were true, these factors, either by themselves  
2 independently or collectively, do not constitute an  
3 objective basis for any reasonable articulable suspicion  
4 that criminal activity was afoot.

5           The Court finds that energy drinks have as  
6 their common active ingredient caffeine and that another  
7 beverage has as its most active ingredient caffeine, that  
8 is coffee. And the Court finds that having a cup of  
9 coffee does not constitute a basis to pull someone over.

10           The Court also finds that having an air  
11 freshener in the car is not a basis for anyone to have  
12 reasonable suspicion of criminal activity nor luggage  
13 that was located in the car that the deputy says he did  
14 not see.

15           The Court finds that the duration of the stop  
16 in this case was not de minimus that it exceeded that  
17 time which would have been reasonable under the  
18 circumstances.

19           The driver of this vehicle is seen in the MVR  
20 video to be standing in front of Deputy Fitch's vehicle  
21 for approximately eighteen minutes. The Court observed  
22 his demeanor on the video and saw that he does not look  
23 nervous and that even if he was nervous, such nervousness  
24 would be normal.

25           Deputy Fitch also says that as a reason that he

1 suspected criminal activity was the inconsistent  
2 statements given by the driver and those in the vehicle.  
3 These statements do not constitute, either by themselves  
4 or together with any other factor, a reasonable suspicion  
5 for the officer to extend this stop.

6 Deputy Fitch testified that he did not know  
7 whether Suwanne, Georgia was within the confines of  
8 Atlanta, Georgia, and the Court finds that Smyrna,  
9 Georgia is on the outskirts of Atlanta, Georgia, and  
10 there was an obvious language barrier between Deputy  
11 Fitch and Mr. Pena and the defendant in this case.

12 The Court finds the case of State versus  
13 Jackson and the reason therein to be extremely persuasive  
14 in this case.

15 As in the case of State versus Jackson, the  
16 Court in this case finds that the consent which was  
17 purportedly obtained by the defendant to search the  
18 vehicle was tainted by the illegality of the extended  
19 detention and thus rendered any consent given by the  
20 defendant in this case ineffective to justify any search  
21 of the defendant's vehicle.

22 Based upon the totality of the circumstances,  
23 it is apparent that the driver of this vehicle, Mr. Pena,  
24 and even more so the occupants of the vehicle in this  
25 case did not feel free to leave.

1           This is based upon there being blue lights  
2 flashing, two or perhaps three Cleveland County Sheriff's  
3 Office vehicles located behind the stopped vehicle and  
4 the nature and the manner in which Deputy Fitch addressed  
5 the driver and the occupants of the vehicle.

6           The Court finds that any delay after the  
7 purpose of the stop was address was not justified and  
8 that to the extent that it was justified there was no  
9 grounds for any reasonable and articulable suspicion and  
10 that further contact with the driver and the occupants of  
11 this vehicle was not consensual thus were no grounds for  
12 a reasonable and articulable suspicion exists and where  
13 the encounter has become consensual, the driver and the  
14 occupants of this vehicle's extended seizure was not  
15 constitutional. State v. Jackson, 199 N.C. App. 236,  
16 2009.

17           The Court further finds as applicable in this  
18 case the case of State versus Parker, 183 N.C. App. 1,  
19 there the Court stated, among other things, "that in  
20 order to further detain a person after lawfully stopping  
21 him, an officer must have reasonable suspicion based on  
22 specific and articulable facts that criminal activity is  
23 afoot." Further, "without additional reasonable  
24 articulable suspicion of additional criminal activity, the  
25 officer's request for consent exceeds the scope of the

1 traffic stop, and the prolonged detention violates the  
2 Fourth Amendment."

3           The Court finds that the consent in this case  
4 is tainted and that it is invalid. This is based upon:

5           1. The violation of the defendant's rights of  
6 equal protection under the Constitution as his being  
7 racially profiled and pulled over because he was  
8 Hispanic.

9           2. The intentional withholding of evidence by  
10 the Cleveland County Sheriff's Office in this case and  
11 perhaps others.

12           And three, the prolonged detention of the  
13 vehicle without reasonable articulable suspicion of  
14 criminal activity.

15           Specifically as to those reasons of reasonable  
16 articulable suspicion stated by Deputy Dwight Fitch, the  
17 Court finds that testimony to be completely unbelievable.  
18 This unbelief is based upon Deputy Fitch bending the  
19 truth and attempting to deceive the Court in other  
20 matters and is based on the Court's viewing the MVR video  
21 in this case over three times and the Court's  
22 consideration of all the other evidence presented in this  
23 case.

24           I may add more findings once I see the order  
25 and once I see the transcript, but that's all the

1 findings right now.

2           Based upon the foregoing findings of fact, the  
3 Court concludes as a matter of law that the defendant's  
4 constitutional rights, both the Federal and the State,  
5 were violated by the traffic stop in this case.

6           Specifically the defendant's Fourth Amendment  
7 rights were violated. His rights under the equal  
8 protection clause were violated and his rights under the  
9 Fifth Amendment to the United States Constitution were  
10 violated.

11           I reserve the right to make additional  
12 conclusions of law.

13           Based upon the foregoing findings of fact and  
14 conclusions of law, it is therefore ordered that the  
15 search of the defendant's vehicle and any and all items  
16 seized as a result of that search should be and hereby  
17 are suppressed and ruled inadmissible in this case.

18           It is therefore ordered that the defendant's  
19 motion to suppress is allowed in its entirety.

20           Entered in open court this the 15th day of May,  
21 2013, and signed this the blank day of blank 2013.

22 Nathaniel J. Poovey, Superior Court Judge, presiding.

23           **Ms. Kirby-Turner:** Your Honor, at this time  
24 the State would respectfully appeal pursuant to 15A-  
25 979(c), and I believe I do need to certify to the Court

1 that as the prosecutor in this matter, I am appealing not  
2 for the purpose of delay and I need to certify, of  
3 course, the evidence is essential in this case, it being  
4 contraband with which the defendant is charged.

5 **The Court:** Do you wish to be heard on that?

6 **Mr. Coleman:** Not directly, Your Honor. I  
7 wish to be heard on another matter pertaining to this  
8 case.

9 **The Court:** What is the -- First, let me  
10 ask, do you have any objection to my certifying it for  
11 immediate appeal? Is that what you're asking me or  
12 you're certifying it?

13 **Ms. Kirby-Turner:** I think I have to --

14 **The Court:** What statute are you on?

15 **Ms. Kirby-Turner:** 15A-979(c) which states  
16 that an order by the Superior Court granting a motion to  
17 suppress prior to trial is appealable to the Appellate  
18 Division of the General Court of Justice prior to trial  
19 upon certificate by the prosecutor to the judge who  
20 granted the motion that the appeal is not taken for the  
21 purpose of delay and that the evidence is essential to  
22 the case. It doesn't state that it needs to be in  
23 writing or oral.

24 **The Court:** I'll receive your certificate  
25 and enter your notice of appeal.

1           **Ms. Kirby-Turner:**    Thank you.

2           **Mr. Coleman:**    Your Honor, my inquiry is  
3 whether the State intends to dismiss the charges or  
4 whether we're going to proceed to trial at 2:00 o'clock.  
5 I need to know one or the other.

6           **Ms. Kirby-Turner:**    It's an interlocutory  
7 appeal. It's my understanding that the charges remain  
8 pending and I think that certainly you can ask the Court  
9 to address bond. But I think the charges remain pending  
10 the appeal is my understanding.

11           **Mr. Coleman:**    That's not my understanding.  
12 I'm ready to go to trial at 2:00 o'clock and I think  
13 that's what we should do.

14           **The Court:**        I think it's an interlocutory  
15 appeal. I've just suppressed their evidence, and if  
16 they're required to go forward with that ruling, they  
17 have no evidence. He can't -- If we empanel a jury,  
18 jeopardy would attach at that point.

19                            What you're trying to do is force them to have  
20 jeopardy attached without the evidence that they would  
21 have against your client. That doesn't make sense to me.

22                            So the only rational way that could be  
23 interpreted is that the appeal would go forward. The  
24 charges would remain pending. That may change bond and  
25 that sort of thing, but I'll be glad to hear you on that.

1           **Mr. Coleman:**    Your Honor, I would ask --

2           **The Court:**        But I don't think it's  
3 appropriate to force the State to go forward once I just  
4 granted your motion. You know, consider the  
5 circumstances in this case.

6           **Mr. Coleman:**    Your Honor, I would ask the  
7 Court to certainly consider lowering the bond. This case  
8 is so old I don't even remember what the bond is now. It  
9 was \$500,000 or \$1,000,000 or something, and we  
10 subsequently had it reduced. It's a half a million  
11 dollars.

12           **The Court:**        Do you show, Madam Clerk, what  
13 the bond is?

14                    Let me just say that to the deputies in here --  
15 I'll put this on the record. The sheriff came in the  
16 back door during my presentation of the order and stood  
17 right here at my back side, and I asked him to step  
18 around and have a seat along with another deputy I asked  
19 to step around and have a seat.

20                    It appears to me that that was kind of his way  
21 -- When I asked him to do that, he kind of gave me a look  
22 like trying to intimidate me. I'm very offended by that.  
23 I don't know if I need to call the United States  
24 attorney, but I'm not going to have a sheriff come into  
25 my courtroom and stand behind me while I'm entering an

1 order and then when I ask him to move in a very polite  
2 way, he gives me a look and then go out the back door.

3 I take extreme offense to that. I know that  
4 the sheriff in this county -- I've never had a problem  
5 with him before. I've talked to him on a personal level.  
6 He seemed to be really a nice, congenial person.

7 I know that his office is in charge of the  
8 security in this courtroom and that he has the right to  
9 be in here and so forth. Obviously he's the chief  
10 bailiff. He provides security to me, but the way that  
11 transpired just then is very offensive to me because he  
12 shot me a look kind of like, you know, I'll see you  
13 later, sort of like I'll get you when the time comes.

14 The last thing I need is for the officers in  
15 the court to be shooting looks to the presiding judge  
16 like that. I don't know if I'm addressing -- I'm  
17 addressing it to the bailiffs who are in the courtroom,  
18 and I'm addressing it to you. You had maybe stepped out  
19 at the time.

20 **Ms. Kirby-Turner:** I did step out for a  
21 personal reason, and I'm sorry if that's --

22 **The Court:** That's okay. Your stepping out  
23 doesn't bother me. It doesn't bother me that he came in  
24 the courtroom, but him shooting me a glance like that is  
25 offensive.

1           **Ms. Kirby-Turner:**    What would the Court --

2           **The Court:**            It sort of makes we want to call  
3 somebody else and say hey, something's going on down  
4 here. You know, obviously I just entered a ruling that  
5 perhaps disparages his office, but I did what I think was  
6 right in this case.

7           **Ms. Kirby-Turner:**    And the State -- I don't  
8 know if the Court is concerned with the State, but I'm  
9 sorry. I don't really know what else to say to the Court  
10 on this. Whatever the Court would like me to do, I'll  
11 do.

12          **The Court:**            Perhaps you could just pass word  
13 to Sheriff Norman that I didn't appreciate the manner and  
14 the demeanor that he exhibited in this courtroom when he  
15 came in just a few minutes ago. That's all that needs to  
16 be said; okay?

17          **Ms. Kirby-Turner:**    Yes, sir.

18          **The Court:**            Thank you.

19                                    Anything else in this case?

20          **Mr. Coleman:**        Yes, sir, the matter of bond.

21          **The Court:**            Okay.

22          **Mr. Coleman:**        Your Honor, we had a -- It's --

23          **The Court:**            \$500,000 secured.

24          **Mr. Coleman:**        Yes, sir. We had a bond hearing  
25 here and we had a bond hearing in Federal Court at which

1 time we presented on behalf, and I don't have that with  
2 me now, on behalf of Mr. Gomez; all of his tax records,  
3 he works. He works at a restaurant. We offered his  
4 past. His family members came to testify as to where he  
5 lived, how long he had been living there. He is a  
6 citizen. He's originally from Dominica.

7 There's nothing else extraordinary about his  
8 case. I would ask the Court, considering the length of  
9 time he's been in jail and the length of time it may take  
10 the Court of Appeals to deal with this case to consider a  
11 non-secured bond. He is married. He has children and as  
12 I've said, is gainfully employed and lives in New York.

13 **Ms. Kirby-Turner:** We'll remain silent on the  
14 bond, Your Honor. He does have a hold from Immigration  
15 and Customs Enforcement. I don't know the status of his  
16 citizenship. I have no idea, but I do know there is a  
17 hold from Immigration and Customs Enforcement. So  
18 whatever the Court does, I believe on the bond, I don't  
19 believe he's leaving here free. So the State would just  
20 remain silent on the bond.

21 **The Court:** Do you know about any kind of  
22 Immigration and Customs Enforcement hold?

23 **Mr. Coleman:** No. I don't know any reason why  
24 there should be and I've been in touch with his lawyer at  
25 New York and he said when this case was resolved, he

1 could resolve that.

2           **The Court:**       What kind of case does he have  
3 in New York?

4           **Mr. Coleman:**    It's supposed to be, Judge, some  
5 kind of a third degree -- I think third degree assault or  
6 a robbery or something of that matter.

7           **Ms. Kirby-Turner:**   Kidnapping and robbery.  
8 Aside from the immigration hold, there's, and I wasn't  
9 going to bring that up, but there is a case in Bronx  
10 County Criminal Court which the use, threat, use of a  
11 dangerous weapon in a robbery and unlawful imprisonment  
12 first degree.

13                   I have spoken with the prosecutor up there, and  
14 besides the immigration hold, she was certainly willing  
15 to extradite. I'll see if I can get in touch with her as  
16 well, but I don't think that --

17           **The Court:**       I don't know that anybody's  
18 presented it to me. You said some things you mentioned  
19 before Judge Morgan, but what is his prior record?

20           **Ms. Kirby-Turner:**   The only thing that he has  
21 on his NCIC, which is from New York, are these pending  
22 charges. As I said, I've spoken with the prosecutor up  
23 there and he was out on bond when he was arrested here  
24 for those charges.

25           **Mr. Coleman:**    I've spoken with his lawyer

1 there and assures me that this is something that will go  
2 away and that they've got it continually on the books  
3 there because he's being held here on a charge.

4           **The Court:**       Do you know of any prior record  
5 that he has?

6           **Mr. Coleman:**    No, sir, none whatsoever.

7           **The Court:**       I'm going to modify the  
8 conditions of bond in this case as follows: the  
9 defendant's bond shall be reduced to \$100,000 secured  
10 with the following additional conditions.

11           1.    That he call in to pre-trial services in  
12 Cleveland County at least once per week, that he stay in  
13 touch with his attorney. He is to surrender any passport  
14 that he might have. He is to either remain within the  
15 State of North Carolina or remain within the State of New  
16 York, and he is to leave the confines of either New York  
17 or North Carolina only for the purpose of appearing for  
18 court. He's to violate no laws. He is to have no  
19 contact whatsoever with either of the co-defendants in  
20 this case, Randy Dela-Cruz and Elvis Pena. That first  
21 name is Randy Cololeiny Dela-Cruz; is that right?

22           **Ms. Kirby-Turner:**   Cololeiny, I think, Your  
23 Honor.

24           **The Court:**       Any other conditions that you  
25 want in there?

1           **Ms. Kirby-Turner:**    We would ask for pre-trial  
2 call in once a week. I think that would be the only  
3 thing we would ask for, Your Honor.

4           **The Court:**            Okay.

5           **Ms. Kirby-Turner:**    I'm not sure what will  
6 happen with the immigration, but it's my -- I believe he  
7 would be in their custody, I suppose, if they come and  
8 pick him up, if he does make his bond.

9           **The Court:**            I don't know exactly how they  
10 operate.

11          **Ms. Kirby-Turner:**    I wouldn't think it would  
12 affect this bond.

13          **The Court:**            We are adjourned.

14                                    \* \* \* End of Volume 2 \* \* \*  
15

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
 CLEVELAND COUNTY SUPERIOR COURT DIVISION  
 FILE NO. 11-CRS-53350/51/52

\_\_\_\_\_  
 )  
 THE STATE OF NORTH CAROLINA, )

VS. )

JULIO EDUARDO INFANTE GOMEZ, )  
 DEFENDANT. )

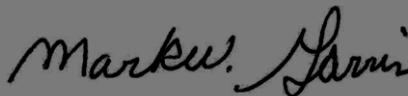
T R A N S C R I P T

C E R T I F I C A T E

I, Mark W. Garvin, Official Reporter for the State of North Carolina, do hereby certify that foregoing transcript of a hearing that was digitally recorded was prepared by this reporter; that this reporter was not present in the courtroom at the time of the hearing; and that the transcript produced is a record of what was able to be understood with certainty from the recording.

I FURTHER CERTIFY that I am not counsel for any of the parties to this action, nor in the employment of any of the parties to this action, nor am I related by blood or marriage to any of the parties, nor am I financially or otherwise interested in the outcome of this action.

This 18<sup>th</sup> day of July, 2013.



\_\_\_\_\_  
 Mark W. Garvin, CVR-CM-M  
 Official Reporter  
 27B Judicial District

CC: Clerk of Superior Court--File Copy  
 Clerk of Court of Appeals  
 (51-21-50)

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
 CLEVELAND COUNTY SUPERIOR COURT DIVISION  
 FILE NO. 11-CRS-53350/51/52

THE STATE OF NORTH CAROLINA,

VS.

JULIO EDUARDO INFANTE GOMEZ,  
 DEFENDANT.

**T R A N S C R I P T**

C E R T I F I C A T E  
 of  
 Delivery

This is to certify that the transcript in the above-entitled case was requested of Mark W. Garvin, CVR-CM, on May 15, 2013, and the transcript was electronically delivered to the parties as indicated below on the 18th day of July, 2013.

This 18th day of July, 2013.



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