

1 IN THE CIRCUIT COURT, SEVENTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 FLAGLER COUNTY, FLORIDA

4 CASE NO.: 2013-00325-CFFA

5 STATE OF FLORIDA

6 versus

JURY TRIAL

7 DARRELL EUGENE MCDONOUGH,

8 Defendant.

ORIGINAL

9 _____/
10
11 TRANSCRIPT OF PROCEEDINGS

12 VOLUME II - PAGES 138 THROUGH 280
13

14 DATE TAKEN: April 22, 2014

15 PLACE: Kim C. Hammond Justice Center
16 1769 East Moody Blvd., Bldg. 1
Bunnell, FL 32110

17 BEFORE: The Honorable David Walsh
18 Circuit Judge

19 This cause came on to be heard at the time and place
20 aforesaid, when and where the following proceedings were
21 stenographically reported by:

22
23 Rhonda Bounds, RPR
24 Court Reporters, Seventh Judicial Circuit
Kim C. Hammond Justice Center
25 Bunnell, FL (386) 313-4571

I N D E XVOLUME II

DARRELL MCDONOUGH

Direct Examination by Mr. Partington 146

Cross-Examination by Mr. Warren 172

Redirect Examination by Mr. Partington 180

DEFENSE RESTS 181

MOTION FOR JUDGMENT OF ACQUITTAL,
Defendant 183

JURY CHARGE CONFERENCE 183

CLOSING ARGUMENTS

By Mr. Warren 220

By Mr. Partington 231

By Mr. Warren 238

JURY CHARGE 241

I N D E X (Cont'd.)

| | | |
|----|-------------------------|-----|
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | VERDICT | 259 |
| 5 | | |
| 6 | JURY POLLED | 260 |
| 7 | | |
| 8 | CERTIFICATE OF REPORTER | 280 |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 (Proceedings continued from Volume I.)

2 (Luncheon recess was taken from 11:48 a.m. to
3 1:07 p.m., after which the following proceedings were
4 had out of the presence of the jury:)

5 P R O C E E D I N G S

6 THE BAILIFF: Court is back in session.

7 THE COURT: All right. Thank you. Please have a
8 seat everyone.

9 The State is present. The defendant is present
10 with counsel.

11 And, Mr. Bailiff, the jury is present in the
12 hallway?

13 THE BAILIFF: Yes, sir.

14 THE COURT: Are they all there, to your
15 knowledge?

16 THE BAILIFF: Yes. All present.

17 THE COURT: All right. Counsel, I would suggest
18 we just defer the jury instructions until we finish up
19 with the trial.

20 MR. WARREN: Yes, sir.

21 THE COURT: And are you ready now,
22 Mr. Partington?

23 MR. PARTINGTON: Yes, Your Honor.

24 THE COURT: Now, does the defendant intend to
25 testify?

1 MR. PARTINGTON: He does, Your Honor.

2 THE COURT: Okay. Well, let me speak to him for
3 just a moment, if I may.

4 Mr. McDonough, you're here for your case, of
5 course. Up to this point, have you had a full
6 opportunity to speak with your counsel,
7 Mr. Partington, and has he answered all of your
8 questions?

9 THE DEFENDANT: To an extent, yes, sir.

10 THE COURT: All right. Well, it's important that
11 you be comfortable with the fact that your attorney is
12 here working for you, that he's ensuring that you're
13 represented properly within the bounds of the law.

14 One of the things that, of course, I'm sure he's
15 spoken with you about is your right to testify or not
16 testify. Now, you have the absolute right to remain
17 silent if you wish to do that, meaning that if you
18 said "I do not want to testify," and you requested it,
19 I would instruct the jury that they not consider the
20 fact that you did not testify against you. They
21 have -- in fact, they can take no inference whatsoever
22 of your -- of your guilt because you choose to avail
23 yourself of your Fifth Amendment privilege not to
24 testify.

25 The good thing about not testifying is you're not

1 exposing yourself to possible cross-examination and
2 other things that might make you look bad before the
3 jury.

4 On the other hand, by testifying, if you do
5 choose to testify, you do have the benefit of giving
6 your side of the story, if that's what you wish to do.
7 But you have to recognize that it does expose you to
8 the possibility of impeachment and other things as --
9 because the State does have a chance to cross-examine
10 you.

11 Only you can make this decision with the
12 assistance of your counsel and the advice of your
13 counsel.

14 Is it -- then do I take it that you do wish to
15 testify?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. And you're doing that with the
18 advice of your attorney and you're -- you're
19 comfortable with that?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. All right. Then that's what
22 we'll do.

23 Now, Mr. Partington, do you expect any other
24 testimony at this point?

25 MR. PARTINGTON: No, Your Honor.

1 THE COURT: Okay. So what we'll do is take up
2 your case. After that, if the State has any
3 rebuttal --

4 Would you anticipate any rebuttal at this time?

5 MR. WARREN: Your Honor, I don't anticipate any
6 rebuttal.

7 I have -- Your Honor, I have Deputy Barbagallo
8 on -- kind of -- he's on patrol right now. He's on
9 duty. So he's probably about ten minutes away if I
10 would need him. But I really don't anticipate --

11 THE COURT: So you -- but you -- at this point
12 unlikely. But he is available if you need him?

13 MR. WARREN: Yes, sir.

14 THE COURT: Okay. Then I would expect counsel
15 will probably finish up the testimony around 2:00 or
16 so, maybe 2:30. Give us time to go through some jury
17 instructions, and then go into arguments sometime
18 around 3:00 o'clock, is what I'm looking at right now.

19 MR. WARREN: Yes, sir.

20 THE COURT: Okay. And if there's nothing
21 further, if we're ready, I'll bring in the jury now,
22 gentlemen.

23 MR. PARTINGTON: Yes, sir.

24 THE COURT: All right. Please bring in the jury,
25 Mr. Bailiff.

1 THE BAILIFF: Yes, sir.

2 THE COURT: And let them be seated directly in
3 there the jury box.

4 (The jury entered the courtroom, after which the
5 following proceedings were had:)

6 THE COURT: Okay. Folks, please come in and
7 resume your seats.

8 All right. Thank you.

9 The jury is now seated.

10 All right. Members of the jury, anything happen
11 over the lunch hour that anyone needs to report to me?
12 Do not. Okay.

13 And we're ready to continue with the case now.

14 Members of the jury, this morning the State
15 rested its case, so it's now the turn of the defendant
16 to present evidence if the defendant wishes to do so.

17 Mr. Partington, would you like to call any
18 witnesses?

19 MR. PARTINGTON: Your Honor, the Defense would
20 call Darrell McDonough.

21 THE COURT: All right. Mr. McDonough, would you
22 please step up here. Raise your right hand to be
23 sworn.

24 THE CLERK: Do you swear or affirm the testimony
25 you're about to give is the truth, the whole truth,

1 and nothing but the truth, so help you God?

2 THE DEFENDANT: I do.

3 THE COURT: All right. Have a seat up here,
4 Mr. McDonough.

5 Okay. Just scoot a little bit closer,
6 Mr. McDonough. There you go.

7 Okay. You may proceed, Mr. Partington.

8 MR. PARTINGTON: Thank you, Your Honor.

9 DARRELL MCDONOUGH

10 having been first duly sworn, was examined
11 and testified upon his oath as follows:

12 DIRECT EXAMINATION

13 BY MR. PARTINGTON:

14 Q Good afternoon, Darrell.

15 You can -- you can remain seated.

16 A Oh. I thought you said get up.

17 THE COURT: No, you can have a seat. That's
18 good.

19 BY MR. PARTINGTON:

20 Q Sorry if I didn't speak clearly. I just said
21 good afternoon.

22 A Good afternoon.

23 Q If you would, state your full name for the
24 record.

25 A Darrell E. McDonough.

1 Q All right. And --

2 THE COURT: Just pull a little closer. There you
3 go.

4 A Darrell McDonough.

5 THE COURT: And what you can do is this,
6 Mr. McDonough, is you just scoot your chair a little
7 closer. You don't have to lean forward quite so much
8 because I think --

9 THE DEFENDANT: Can you hear me now?

10 THE COURT: You can sit back just a little bit.
11 Right about there.

12 THE DEFENDANT: A lot better? Can you guys hear
13 me?

14 THE COURT: There you go. That's good.

15 Okay. Go ahead, Mr. Partington.

16 BY MR. PARTINGTON:

17 Q Darrell, I want to take you back to the evening
18 of April 17th, 2013. Do you remember that evening?

19 A Very clearly.

20 Q Can you just tell me in your own words what
21 happened that evening?

22 A Starting where?

23 Q Starting when -- I guess you were headed
24 southbound on US-1?

25 A Yes, sir. I was driving southbound on US-1

1 coming home one night, working on my truck that afternoon.
2 I come to the stop sign. As I was stopping, Mr. Barbagallo
3 came out of that parking lot that was at the parts store
4 with his lights and sirens on.

5 As I was stopping, he pulls right up behind me.
6 Turned off his siren. Walked up to my truck, touched my
7 truck as so much as I could feel the truck moving from it.
8 I watched him go back to his car.

9 I know he says he didn't get out of his car, but
10 he did. He actually touched the part where I had -- he
11 said my light was out. It was not out. I had a flashlight
12 in place turned in towards the light so that it would
13 illuminate like the other light, because I had a fuse out.
14 That day I figured out a fuse was out. And I had to get a
15 fuse.

16 It would -- what happened -- all the blinkers and
17 everything worked fine. My stoplights were all working.
18 But when I put it in drive that light would go out, the
19 driver's side light would go out. And it was one fuse that
20 I replaced -- fixed it.

21 What I had in place for the light going out was
22 one of those strip lights. They're very bright. But I had
23 it pointed in to the lens so that it would glow just like
24 the other one. So by statutes -- Florida Statutes --

25 MR. WARREN: Objection, Your Honor.

1 A -- 316.7 --

2 MR. WARREN: Objection.

3 THE COURT: Listen. Hey.

4 THE DEFENDANT: Yes, sir?

5 THE COURT: When someone makes an objection, you
6 stop talking.

7 THE DEFENDANT: Oh, I didn't know that. Excuse
8 me.

9 THE COURT: Yeah. That's the rule. Until I can
10 rule on the objection. Okay?

11 THE DEFENDANT: Okay.

12 THE COURT: I'm going to sustain the objection.
13 The jury will kindly disregard the last comment of the
14 witness.

15 You may proceed.

16 MR. PARTINGTON: Thank, Your Honor.

17 Darrell --

18 THE COURT: I suggest we do it question by
19 question.

20 MR. PARTINGTON: Yes, sir.

21 BY MR. PARTINGTON:

22 Q So you're -- the first time you were aware that
23 someone's behind, you're stopped on Woodland Boulevard at
24 the stoplight -- or stop sign?

25 A It's a stop sign. There is no light there.

1 Q Okay. And so you're sitting in your vehicle;
2 correct?

3 A That's correct.

4 Q All right. And did a deputy come speak to you at
5 your window?

6 A No, he did not. But he was within 20 feet
7 yelling. Because he wasn't far, like from me to you.

8 Q Okay. And did you have your license and
9 registration available?

10 A Yes, sir, I did. When I stopped I knew he wanted
11 to speak with me, presumably. I thought he was going to
12 come all the way up to the window, which he didn't. But at
13 the point -- when I saw him exit his vehicle and walk
14 towards my car, I had my license out of my -- my wallet for
15 him, and I had my hand resting on the window.

16 Q Okay. The window was open?

17 A Yes, it was. Both windows were open, anyway.

18 Q But he never spoke to you at that point?

19 A No, sir.

20 Q Okay.

21 A In fact, he knew I want -- I wanted to know what
22 he -- what he wanted and what to do, because I had my hand
23 in the air out the -- out the door like that (indicating).

24 Q Okay. And did -- what happened next?

25 A He got on his PA to make an announcement. It

1 was -- it kept cutting out. Like when he spoke in it, it
2 would cut out.

3 So he was standing -- he got back out of his car
4 and stood there between his car and the door. And it was
5 just like really getting -- his head started glowing red.
6 He starts beating his thing on top of the roof of his car
7 because he couldn't get it to work right.

8 And I thought -- you know, he's within -- this
9 close. I could, you know, put my head and let him tell me
10 this way what -- but it seemed like he -- he checked out my
11 light and thought it was good enough, and did like that
12 (indicating) to go ahead. Because after he made his
13 announcement, he -- it was still "unaudible." I didn't go
14 anywhere.

15 Q So you never heard what he was trying to tell
16 you --

17 A No, sir.

18 Q -- on the PA?

19 A I did -- but -- but I did see his hands do like
20 this (indicating). When he went like this (indicating) --
21 just like that. And I'm -- I'm right there, so it looked
22 like I'm supposed to go.

23 I proceeded over the bridge. I pulled out slow
24 just to make sure that he was -- that I was doing the right
25 thing.

1 When I got to the top of the bridge where the
2 bend -- you know, that's a dangerous bridge, by the way.
3 I've seen people pull over --

4 MR. WARREN: Objection, Your Honor.

5 THE COURT: Sustain the objection.

6 MR. PARTINGTON: Darrell --

7 THE COURT: Just listen to the question. Okay?
8 Just answer the question.

9 THE DEFENDANT: Okay.

10 BY MR. PARTINGTON:

11 Q If you'll slow down a little bit. Let me ask the
12 questions and then answer.

13 When -- based on -- you couldn't hear what he was
14 telling you or trying to tell you?

15 A Right.

16 Q Based on the hand motions that he made, what did
17 you think?

18 A I thought that if he didn't come tell me -- that
19 he was just using his hand motions -- that I was free to
20 go. I figured if it was something more important that he
21 would have been able to shout it or come to my window.

22 Q All right.

23 A And that's --

24 Q And he had -- he had been out of his vehicle,
25 looked at your vehicle.

1 A Correct.

2 Q And then through his hand signals, you thought
3 you were free to go?

4 A That's right.

5 Q Okay. So you turned on to go westbound on State
6 Road 100.

7 A Over the bridge.

8 Q Okay. And that's an overpass?

9 A That's correct.

10 Q All right. And what happened next?

11 A Well, as soon as I got to a point on the bridge
12 where I could see that there were no cars coming in the
13 opposite direction -- because I don't want to veer lanes
14 while I'm looking -- I checked my mirror -- rearview mirror
15 and immediately saw Barbagallo's car coming at me at a very
16 high rate of speed. So I tapped my brakes to slow down,
17 going on the other side -- it was coming down the other
18 side of the bridge now.

19 I knew that he was still accelerating. Okay. I
20 tried to brake faster. But I knew that he was speeding up.
21 He probably thought that I was going to go for it, you
22 know, whatever, because there was a reason he was coming
23 after me that I didn't know about.

24 He -- I -- I stopped as soon as I could get that
25 truck slow enough so that I could merge into the shoulder

1 to pull over.

2 Q Okay. You didn't -- you didn't --

3 A I -- I was never stuck.

4 Q -- want to stop on the bridge?

5 A Well, I couldn't anyway. I was going -- I was
6 going the speed limit.

7 Q Okay.

8 A So by the time he's coming up behind me, I
9 started braking. But I knew -- when I knew I was getting
10 pulled over, I started braking immediately. And so by the
11 time the truck stopped, it was not as far as the officer
12 indicated. He pushed his finger further down than it --
13 than I was actually. Not as far -- I was about halfway.

14 Can I point? Can I use the --

15 THE COURT: Just wait a minute. Let your
16 attorney ask you a question.

17 THE DEFENDANT: I would just like to show the
18 jury where I was.

19 THE COURT: Just -- just let the attorney ask you
20 a question.

21 THE DEFENDANT: Okay.

22 THE COURT: All right?

23 BY MR. PARTINGTON:

24 Q If you would, can you show us where you stopped
25 the truck?

1 THE COURT: Let's do this, Mr. Partington. Could
2 you please step over --

3 MR. PARTINGTON: Sure.

4 THE COURT: -- to the diagram? I'll let you do
5 it that way.

6 MR. PARTINGTON: Yes, sir.

7 BY MR. PARTINGTON:

8 Q On this diagram -- you're coming over the
9 overpass.

10 A That's right.

11 Q And where did you stop the vehicle?

12 A Well, keep moving your pen. Keep going. Keep
13 going. Keep going. Right about there.

14 Q Okay.

15 A That's about right. Right where the bridge kind
16 of touches down to the -- to the road, to the -- like right
17 past where the bridge connects with the ground.

18 Q Okay.

19 A Where his pen is, just about.

20 Q All right. And did you use your blinker --

21 A Yes, I did.

22 Q -- at that time?

23 A Yes, I did.

24 Q All right. And at some point did you think
25 Deputy Barbagallo was going to pass you?

1 A When I was right on top of the bridge, when he
2 was coming and accelerating towards me, he did go into the
3 other lane, but only because he was moving too fast. He
4 had to go into the other lane. About ran somebody else off
5 the road. Okay. I witnessed this.

6 Q You say he had to. Why?

7 A Because he was going way too fast. And I was
8 slowing down as he was speeding up.

9 Q So if he hadn't, he would have collided with you?

10 A I would say so, yeah. In fact, I was pulled
11 to -- as far right as I could be on that bridge, because it
12 is a narrow spot, without, you know, getting too close. I
13 didn't want to scrape my truck up.

14 But I got over as far as I could as I was slowing
15 down. (Utters sound.) You know what I mean? When you're
16 hitting the brakes in the truck. I'm fully loaded. I had
17 tools, pressure washer. It was a very heavy truck at the
18 time.

19 Q And at what point did you hear the siren?

20 A I heard the siren about -- well, right when I
21 looked up to see Barbagallo coming up in my rearview
22 mirror.

23 Q Okay. And --

24 A (Utters sound). After he --

25 Q Well --

1 A First heard the siren, it sounded kind of like it
2 was going the other way. About another five seconds, it
3 was coming up my way.

4 Q Okay.

5 A So it was, like, oh, you know, he's coming after
6 me, you know.

7 Q At that point you realize that --

8 A Yes.

9 Q When he started to go around you, you were
10 slowing down?

11 A Yes, for sure. I was braking.

12 Q Do you think he was going to keep on going? Or
13 what was going through your mind?

14 A As -- at a very small point -- a second, yes, I
15 did think maybe he was trying to go around me for a second.

16 Q Okay.

17 A But as soon as he got back behind me, he
18 accelerated back up, and I knew for sure that I was getting
19 pulled over.

20 Q Okay. And then you indicated where ultimately
21 you pulled over.

22 A That's right. And I pulled over willingly. I
23 did. I was never stuck.

24 Q Can you describe where the truck was parked on
25 the side of the road, how far from the edge of the road.

1 A My front wheels were on pretty much the harder
2 part, you know, where the road starts turning into grass.
3 Anyway, the truck was on hard surface.

4 When I stopped the truck, I wanted to make sure
5 that I wasn't stuck so that when I -- when they were done
6 with me I could just pull out and drive away.

7 Okay. So my main concern was to get the back of
8 the truck to a spot on the ground that was hard enough but
9 soft enough if they were going to pull me out -- or throw
10 me on the ground it wouldn't have broken my collarbone.

11 The -- another issue was concrete --

12 Q We're not there yet.

13 A Okay. Sorry.

14 Q Just give me a second.

15 So you pulled over. And at that point it's just,
16 at the time, Corporal Barbagallo who's behind you; correct?

17 A What do you mean?

18 Q Were there any other officers there when you
19 pulled over?

20 A Yeah. Barbagallo, as he was running up, says,
21 "Put your hands up," so that's immediately what I did. And
22 Officer Mortimer was right behind him.

23 Q Okay. So almost at the same time --

24 A Yeah. Almost --

25 Q -- Officer Mortimer was right there?

1 A Yeah.

2 Q All right. And what happened at that point?

3 A At that point they said, "Get your hands up."

4 And I said, "Okay. Okay. Here are my hands."

5 Said, "Get out of the car." Actually, he started
6 going for the handle. Okay. He didn't ask me to get out
7 of the car. He started pulling on the handle. And I was,
8 like, Okay. Wait a minute. I said, "First of all, if
9 you're going to pull me out of the truck," I said, "be
10 careful with my collarbone. I have an injury."

11 It's a very bad injury. I brought pictures.
12 It's something you kind of always have in your mind and
13 you're always conscious about when you do anything.

14 Q And what is the -- or is or was the injury to the
15 collarbone?

16 A I have a skateboard injury that I had about
17 three -- three years prior to that incident that -- it
18 shattered my collarbone. I never got it operated on. It's
19 just one of those things. So it looks okay now.

20 Q You told the officer you were --

21 A I told him --

22 (Simultaneous speaking.)

23 Q -- (indiscernible.)

24 A -- to be careful with me. And I said I'll do --
25 I said, first off -- I said, I can't get out. The truck is

1 not in gear. Okay.

2 Because they told me to get my hands up, folks.
3 I -- I didn't want to do any sudden movements because I was
4 fearing for my life. Okay. He said, you know, "Get your
5 hands up." Blah, blah, blah. I said, "Okay. But, hey, I
6 got -- I got to get this truck in park. And I've got to --
7 you know, please be careful with my shoulder bone because
8 it's injured. I don't want to re-injure my collarbone."
9 It took me about a year and a half to get over that.

10 They didn't -- they acted like they were looking
11 through me, like they didn't even hear me when I said that.
12 And it's -- it was very scary.

13 Q And did you get to put the truck in park?

14 A No. I was told -- right after I said, you know,
15 "Please be careful with my collarbone, I don't want to get
16 it re-injured," I was told by Mr. Mortimer, the big guy
17 that was just up here, to shut my g-d mouth or I was going
18 to get shot -- shot in the head. And --

19 Q What did you do at that point?

20 A I froze. I said, you know, "Don't shoot me in
21 the face. Please."

22 Q What happened next?

23 A I gave them -- I said, "Here's my hands." And I
24 didn't do any -- any sudden moves, because I -- like I
25 said, I was afraid. I gave them my hands like this

1 (indicating). I said, "Here's my hands. I'm not doing
2 anything like you don't want me to do." I was completely
3 compliant.

4 Now, they were struggling with the door. I said,
5 "Do you want me to unlock the door for you?" They said
6 "Yes." I said, "Okay."

7 So they freed one of my hands. I unlocked the
8 door for them. They opened the door and started pulling on
9 me. Okay. I said, "Okay."

10 But I would have gotten up fine, but the seat
11 belt was on. I forgot about the seat belt. So --

12 Q Was the truck in park at this point or --

13 A No, sir, it wasn't.

14 Q Okay.

15 A But I wasn't thinking about that. I'm sorry.

16 Q So they're pulling you out, but the seat belt is
17 on.

18 A Correct.

19 Q What happens next?

20 A Now, they pull me out of the truck and -- they
21 didn't pull me out. I got out. And I was standing there
22 between the door and the truck. And I actually -- they
23 were kind of like standing around like this, kind of a --
24 like they didn't -- almost like they didn't know what to
25 do. You know? And I was, like, okay. Now what? You

1 know.

2 So I walked around to the side of the truck with
3 my hands up against the truck, because I didn't -- you
4 know, I don't want to, like, do anything they're going to
5 think that they're going to have to shoot me about, you
6 know. So I'm -- I got my hands against the truck. The
7 truck starts rolling. Okay. I thought, oh, my god, you
8 know, the truck's out of gear.

9 Q What did you say at that point?

10 A I said, "The truck. The truck. The truck."

11 Q And what happened next?

12 A Then an officer jumped in it. I believe -- I was
13 told --

14 MR. WARREN: Objection to hearsay.

15 BY MR. PARTINGTON:

16 Q Do you know who the officer was?

17 A I want to say Claire is his last name, but I'm
18 not sure. I don't know. I don't know who that officer
19 was. But I want to thank him. You know, he did --

20 Q So what happened? The officer jumped in the
21 truck?

22 A Yes.

23 Q And --

24 A Stopped the truck.

25 Q Okay.

1 A Okay. So I wasn't stuck. I was -- it was all --
2 everything I did was willingly. Okay.

3 Q Now, you say the truck wasn't stuck. Because it
4 was starting to roll away?

5 A That's correct.

6 Q Okay.

7 A But I wasn't stuck anyway, you know. I made sure
8 of that.

9 Q When you pulled it over?

10 A When I pulled over --

11 Q Okay.

12 A -- I made sure I wasn't stuck first.

13 Q All right. So the truck has rolled a little bit
14 away from you. You're still standing there with your hands
15 up?

16 A Yes. And that they --

17 Q What happens at that point?

18 A They didn't like that. They thought -- maybe
19 they thought I did that on purpose or whatever -- whatever.

20 They took me by my shoulders -- by my shoulders
21 straight out like this. I was kicked in both knees
22 simultaneously on each side by whoever was standing there,
23 on each side to -- you know, they were pulling down on my
24 arms too. And I would have gone down, but I, you know --
25 there's a process involved, but they weren't going with the

1 process. They were pulling down on my arms. They kicked
2 my knees. I went down very hard. Officer Mortimer, the
3 big -- the big, heavy one, jumps on top of me and was
4 putting his hands all through my pockets. And then they
5 checked, you know, my butt, my anus through my shorts to,
6 you know --

7 Q When you say "they," who are you talking about?

8 A Mortimer.

9 Q Okay.

10 A Specifically. He was the only one that jumped on
11 top of me. He was the one that put the cuffs on. And he's
12 the one that -- I don't know. He was putting his hands
13 through my pocket, and he did the anal search too.

14 Q Okay.

15 A And he was on top of me completely, like with
16 hands, arms off the ground.

17 Q And Deputy Barbagallo was there as well?

18 A Yes, he was.

19 Q Okay. Do you remember which side of you he was
20 on?

21 A He was on my right side.

22 Q And the other deputy was on your left?

23 A Yes, sir.

24 Q Okay. And what happened at that point? You've
25 got Officer Mortimer on top of you and --

1 A Yes.

2 Q -- you're handcuffed?

3 A They -- then they put the handcuffs on very, very
4 tightly.

5 Q Were they saying anything at this point while
6 they're tackling you to the ground?

7 A Yes. They were saying, "Stop resisting. Stop
8 resisting." I wasn't resisting one bit at all. They just
9 kept saying that. I was, like, "I'm not resisting. I'm
10 not resisting." You know, it was very frustrating.

11 Q And what happened after that?

12 A They -- Mr. Barbagallo, he says, "I'm going to
13 pick you up now. Is that all right?" I said, "Yeah.
14 Yeah."

15 He picks me up by my handcuffs, like with my
16 hands behind my back. And I'm kind of, like, (utters
17 sound). You know, he's, like, "Are you okay?" No. Yeah,
18 yeah. I'm just -- my collarbone hurts because, you know --

19 He says, "Boy, they put these things on tight."
20 You know, he's looking at the cuffs. I said, "Yeah. You
21 think? They sure did."

22 He takes them off and puts them back on for me
23 the right -- with my hands in front of me. I was, like,
24 "Thank you very much." It was nice of him.

25 Q All right. So things calmed down a little at

1 that point, would you say?

2 A They would have been calm the whole time. But,
3 yes, they were calm -- they calmed down after that.

4 Q And Deputy Barbagallo then put you in his car?

5 A Yes, he did.

6 Q And what happened after that?

7 A Nothing. I just was -- I was in pain. I was
8 sitting in the back of the car in severe pain. They drove
9 me back to the station. I didn't say anything. I was -- I
10 was afraid to say anything.

11 Q Okay. And do you remember Deputy Barbagallo
12 reading you Miranda rights?

13 A Yes, after I was cuffed and everything.

14 Q You were in the back of his car or still standing
15 up?

16 A Yes, I was -- I was cuffed --

17 Q Okay.

18 A -- in the back of his car.

19 Q All right. And did he ask you about the plant
20 material that he found in your truck?

21 A Yeah, he says, "What? Do you have pot on you
22 too, boy?" I think they thought I was younger than I am.

23 Q Okay.

24 A I'm 40 years old.

25 Q And did you have pot on you?

1 A I had very little -- like one speck. And he said
2 a couple of flakes. It was only one little flake, and it
3 was, like, here. And that was from earlier. I was chewing
4 on a stem up the road. I wasn't under the influence. But
5 I had a stem I was chewing on, just for the flavor.

6 And there was one little speck that he did not
7 put into evidence. He went like that (indicating) and it
8 was gone. It was that small (indicating). It was just --
9 you know, it was a very insignificant amount.

10 Q And what they found in the truck, do you know how
11 that got there?

12 A Yeah, I was -- I was up the road. I picked
13 somebody up, a hitchhiker, and they -- they gave me part of
14 what they had. I didn't have a container to put it in,
15 other than my lunch container from dinner I had with my
16 mother about an hour before that. So we put it -- I put it
17 in a container on one of those little -- those styrofoam
18 lid things. That -- when I was pulling over in the soft
19 part of that road -- when the back of the truck kind of
20 slid a little -- well, that's -- the tray went everywhere.
21 It just -- it fell off the sleet -- seat.

22 Q Okay. But you didn't try to throw any
23 marijuana --

24 A No.

25 Q -- out a window or --

1 A No, sir.

2 Q Do any kind of -- destroying evidence --

3 A No.

4 Q -- or anything like? Okay.

5 A No, sir. I never tried to destroy any evidence.

6 There was no evidence destroyed or thrown out of the truck,
7 for that matter.

8 Q All right. Anything else about that evening that
9 you think is important that I didn't ask?

10 A The fact that there's three officers in the
11 parking lot at one time was odd to me. All three squad
12 cars were there.

13 Q You're talking about at the Auto Zone?

14 A Yes.

15 Q That's where you first saw --

16 A That's right. Now, I saw Barbagallo pass me
17 going southbound on US-1 from 95, where 95 and US-1
18 connect, where it says Bunnell is this far. It's north
19 county.

20 There's a -- there's a Dairy Queen up there. I
21 think you guys know where it is. He was pulling out of
22 that area, was following me for about 5 miles. It was just
23 kind of weird. He's way back there, but I knew it was him.
24 And he just blew past me. Like, (utters sounds). Super
25 fast. I mean no lights or anything. About 90 miles to 100

1 miles an hour (utters sound) past me.

2 Q Where was that at?

3 A That was approximately between -- halfway point
4 between the Dairy Queen and where I was stopped, which is
5 in front of the parts store on Woodland.

6 Q All right.

7 A And that was just odd to me. I just wanted to
8 bring that up in court in case it was an issue somewhere
9 or -- I don't know what was going on.

10 But he says he was going northbound US-1, but he
11 was going southbound US-1. And he wasn't moving while --
12 while -- when I got pulled over, he was pulling out of the
13 parking lot as I was coming to a stop. And he turned his
14 lights and sirens on right as I was stopping, at that
15 moment I was stopping. Lights and sirens. So I froze.

16 And that's why -- I wasn't in the middle of the
17 road. I was pulled off a little bit to the side, as far
18 over as I could get and stopping -- you know, as I was
19 stopping. You know what I mean? I can't obviously back up
20 and pull in again. But that's what -- that's where I was.

21 Q Do you remember what the weather conditions were
22 that night?

23 A It wasn't in the middle of the road.

24 I -- I want to say it was clear. But, still, the
25 grass I think was wet. It was super wet. It was very

1 soft. You know, because I didn't -- I wasn't going all
2 that fast when I pulled over. But the road is kind of
3 bumpy, you know. And when I was pulling over, it would
4 have been smooth except there's some kind of ruts going on
5 there in the grass and it did kind of pull the back of the
6 truck this way; and I just want to straighten it back up
7 that way. Just -- you know, it wasn't a big deal. But
8 these guys are kind of making it sound like I got stuck and
9 I couldn't go anywhere, and none of that is true.

10 Q Were you trying to flee from the police?

11 A No, sir. I would never run from the police.

12 Q Okay. And when you got back to the jail --
13 Corporal Barbagallo took you to the jail; is that correct?

14 A Yes, sir.

15 Q All right. Did you see Officer Mortimer there?

16 A Yes, he was.

17 Q All right. And did he apologize to you there?

18 A He was very apologetic.

19 Q Did he say why he was apologetic?

20 A He said that he didn't realize I was a family
21 member of a fallen officer --

22 MR. WARREN: Objection, Your Honor.

23 THE COURT: You know.

24 THE DEFENDANT: I'm saying the truth.

25 THE COURT: Hold -- hold --

1 THE DEFENDANT: This is what happened.

2 THE COURT: Listen.

3 MR. WARREN: First of all, I'll object to the
4 hearsay.

5 THE COURT: You have to be quiet.

6 THE DEFENDANT: I am.

7 THE COURT: Please, sir.

8 THE DEFENDANT: I am quiet.

9 THE COURT: Time out, everybody.

10 Now, listen, here's the rule: If there's an
11 objection made, you stop speaking. Okay?

12 Now, we're not here to try your family. We're
13 not here to try your family members. We're here to
14 try this particular case. So you must listen to the
15 question of your attorney and answer the question.

16 Now, Mr. Partington, if we could kind of stick to
17 the issue. All right?

18 MR. PARTINGTON: Yes, sir.

19 THE COURT: I don't know where we left it.

20 I'm sustaining the objection.

21 Please disregard the last comment, members of the
22 jury.

23 Go ahead, please.

24 BY MR. PARTINGTON:

25 Q That's basically all I had, Darrell.

1 Any -- anything else that is important that I did
2 not ask you?

3 THE COURT: Well, it might be important to him,
4 but it might not necessarily be relevant. So rephrase
5 your question there, Mr. Partington.

6 MR. PARTINGTON: Okay. I don't have further
7 questions --

8 THE COURT: Thank you.

9 MR. PARTINGTON: -- at this time, Your Honor.
10 Thank you.

11 THE COURT: Thank you.

12 All right. Now, does the State have any
13 cross-examination?

14 MR. WARREN: Yes, Your Honor.

15 THE COURT: All right. Go ahead, sir.

16 MR. WARREN: May it please the Court?

17 THE COURT: Yes, sir.

18 CROSS-EXAMINATION

19 BY MR. WARREN:

20 Q So the police are just lying? They're making all
21 this up?

22 A They're making quite a bit of it up. Yes, sir,
23 they are.

24 Q But you admit to having knowledge of the pot.

25 A Yeah.

1 Q Having control over the marijuana.

2 A Yeah.

3 Q And you admitted to marijuana.

4 A Yeah.

5 Q And you knew it was marijuana.

6 A Yeah.

7 Q And so you were headed home?

8 A Yes.

9 Q You were headed home from St. Augustine?

10 A Yes, I was headed home from St. Augustine.

11 Q Okay. And your home is where?

12 A Out by Dead Lake. St. Johns Park.

13 Q It's not on Url (phonetic)?

14 A No, it's not.

15 Q Then how come you -- you put your address as Url?

16 A I was living at Uhl at the time. I don't -- I

17 don't live there now.

18 Q But at the time --

19 A I don't --

20 Q -- you were living on Url?

21 A I don't live -- I -- I didn't -- I was going to

22 my home in St. Johns Park, is where I reside. But I was

23 going back and forth with my mother -- with that. I just

24 had -- we had a death in the family. My father passed

25 away.

1 Q So -- so you put Url as your home address.

2 A Which it was.

3 Q Okay. And Url is nowhere near going west on
4 State Road 100, is it?

5 A Sir, I was going home.

6 Q Is Url anywhere near State Road --

7 A Uhl is where I get my mail.

8 Q So you're -- you're claiming that a Bunnell law
9 enforcement officer is way up at 95 and US-1.

10 A Yes, that's correct.

11 Q Is that Bunnell city limits up there?

12 A I don't know where exactly the city limits are.

13 Q And so you're claiming that you're just tooling
14 along, and he's following you. And all of a sudden he --
15 blows by you 90 to 100 miles an hour?

16 A That's correct. That's what happened.

17 Q And then you decide to hang a left onto Woodland.

18 A That's correct.

19 Q And -- which is not anywhere near going towards
20 Uhl; correct?

21 A Url -- no, I don't where Url -- you're getting
22 that word from. I think what you mean is Uhl Path.

23 Q Is that anywhere near Url?

24 A I don't know what Url is. What is Url? Is that
25 any -- on your paperwork?

1 MR. WARREN: May I approach, Your Honor?

2 THE COURT: Would you show that to

3 Mr. Partington, please.

4 Yes, sir, you may.

5 THE DEFENDANT: It's Uhl Path. U-h-l Path.

6 BY MR. WARREN:

7 Q And where is that?

8 A That's my mother's address where I get my mail.

9 Q You recognize that document?

10 A Yeah.

11 Q What does it say is your physical address?

12 A 73 Uhl Path.

13 Q What does that say is your mailing address?

14 A I had dual residency, sir.

15 Q Is Uhl anywhere near going Woodland and going
16 westbound on State Road 100?

17 A I was going home that night.

18 Q Is Uhl -- Uhl Path anywhere near that direction?

19 A No, it's not.

20 Q Now -- so you just -- all of a sudden you just
21 happen to drive by a law enforcement officer who hits both
22 siren and lights?

23 A When I was pulling to the stop sign on Woodland
24 right in front of the part -- the parts store, yes, he
25 turned his lights on as he was pulling out of that parking

1 lot, out of the parts store, turned his lights on and his
2 sirens on at the same time. (Utters sound.)

3 Q And he didn't -- he didn't come up to your
4 window?

5 A He parked right behind me and did an inspection.

6 Q Without even talking to you?

7 A Yeah.

8 Q Wow, that's pretty --

9 A That's what he did.

10 Q Yeah. Okay.

11 A Sorry to tell you that, but...

12 Q And then he just motioned to you to go on?

13 A That's what he did.

14 Q And so your first description was you're just
15 driving up on the -- the roadway and all of a sudden, when
16 you're going down the bridge, you see and hear him coming
17 up on you extremely fast, making other cars move off the
18 road. Is that your --

19 A That's right.

20 Q And then later you said, "Well, I was driving as
21 far over to the right side so I could make sure that he
22 could pass me all the way across the bridge."

23 A Without scraping --

24 Q So which one is it?

25 A -- the side of the truck.

1 Which what?

2 Q Which version is it?

3 A Which part of it?

4 Q Are you driving on the far right breakdown lane
5 as far as you can go so he can get by you?

6 A I'm --

7 Q Or -- or is he coming up so fast as you're coming
8 down the bridge that then you have to brake to get out of
9 the way?

10 A I -- I was braking as he was coming up behind me.
11 I was braking --

12 Q And so if he's driving --

13 A -- as fast as I could physically do it.

14 Q He's driving recklessly and --

15 A Yeah.

16 Q -- and forcing people off the road?

17 A Oh, yeah. He was very close behind me. It was
18 scary, very scary.

19 Q And then once you pull over -- of course you used
20 your -- your blinker; right?

21 A Yes, I did.

22 Q So he's lying about that as well; right?

23 A Yes, he is.

24 Q And then you are cordial, "What's going on,
25 officers?" Is that how you're acting? "Here's my hands"?

1 A I was very startled. Okay. I was very scared,
2 because they were running up telling me to freeze, put my
3 hands up.

4 Q And so all this -- this testimony from the other
5 officers about having to pull you out of the vehicle --

6 A Correct. Got out --

7 Q -- they -- they just made all that up?

8 A They made all that up. And I got out willingly.
9 Very calmly too, I might add.

10 Q And then you got out willingly, so they decided
11 to pound -- pile on top of you?

12 A Yeah. After the truck started rolling, they got
13 very excited. They pulled my shoulders out to my side.
14 They kicked me behind my knees. I went down very sharply,
15 very abruptly. And they knew -- whatever.

16 Q So what -- what -- did they -- did Officer
17 Mortimer tackle you?

18 A Yes. It was like a tackle, yes, sir.

19 Q Oh. Okay. So instead of the two officers and
20 then hitting your knees, now it's a tackle?

21 A It was both.

22 Q Or it was a tackle before --

23 A They did that. And then he tackled me at about
24 the same time. Okay. So my knees got kicked, and he
25 jumped right on top of me.

1 Q And, of course, he's going to do this laying on
2 top of you with no hands and no feet so he can put all of
3 his 280 pounds on you?

4 A That's right. And he was going through my
5 pockets, and his feet were off the ground.

6 Q So everything that you can think of that paints
7 law enforcement in a bad light you have piled onto your
8 testimony here today --

9 A I'm telling you the truth.

10 Q So an officer pulls you over for no reason, and
11 then supposedly motions you on without even speaking to
12 you.

13 A I didn't say no reason. I told you what I had
14 with the lights going on. I told you why -- he told you
15 why he pulled me over too.

16 Q The officer is the one that's driving
17 recklessly --

18 A That's right.

19 Q -- forcing people off the road?

20 A Correct.

21 Q The officer -- even though you're compliant --
22 decides that they need to pound on you, knock you to the
23 ground, and then squish you --

24 A That's what he did.

25 Q -- and then they apologize about it?

1 A He did -- yes, he did. And now he's lying about
2 it.

3 MR. WARREN: I don't have anything further, Your
4 Honor.

5 THE COURT: All right.

6 Anything further on redirect?

7 MR. PARTINGTON: Just briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. PARTINGTON:

10 Q Darrell, you talked about the plant material.

11 A Yes, sir.

12 Q Did you know that that was marijuana or did you
13 just --

14 A I was told it was marijuana by the guy -- the
15 hitchhiker personnel [verbatim].

16 Q All right. But you don't know for sure?

17 A It smelled like marijuana.

18 Q Okay. So you assumed that it was; correct?

19 A Yes.

20 Q Okay. And the Uhl address, your mom lives there?

21 A We were both living there at the time, both
22 shared occupancy.

23 Q Okay.

24 A Because I was living out at the lake too. I
25 spent about four days at the lake helping my uncle. We

1 have a lot of land there for -- it's family estate. I pick
2 up sticks and shovel dirt, whatever needs to be done.

3 Q What is your stable mailing address?

4 A 73 Uhl Path is where I get my mail.

5 Q You don't get your mail out at the lake?

6 A No, sir, I don't.

7 Q All right. And that's why you gave the Uhl
8 address that evening?

9 A I wanted to make sure my -- I would receive my
10 mail.

11 MR. PARTINGTON: No further questions, Your
12 Honor.

13 THE COURT: All right. Thank you, sir.

14 Mr. Warren?

15 MR. WARREN: No further questions, Your Honor.

16 THE COURT: All right. Thank you, Mr. McDonough.
17 You may stand down now, please. Just watch your --
18 watch your step.

19 (Defendant stepped down.)

20 THE COURT: Call your next witness,
21 Mr. Partington.

22 MR. PARTINGTON: Your Honor, at this time the
23 Defense would rest.

24 THE COURT: Thank you, sir.

25 All right. While we're here, I guess I'll just

1 ask Mr. Warren. Do you --

2 MR. WARREN: No rebuttal, Your Honor.

3 THE COURT: No rebuttal at this point?

4 MR. WARREN: No, sir.

5 THE COURT: All right. Thank you.

6 Members of the jury, the State and the Defense
7 have now each rested their respective cases, so the
8 evidence is now closed. And what I'm going to do is
9 put you in recess for a short while. And we're going
10 to review some instructions that I will be giving you
11 for your deliberation.

12 I'd like you to come back about -- why don't we
13 say about 2:15, about 30 minutes. And then when you
14 return, if you just -- again, just kindly wait out in
15 the hallway, and we'll let you know when it's ready to
16 come in. I'll have you come back in and we'll go into
17 the closing argument part of the case.

18 Now, it's still too soon to be speaking about the
19 case, so please do not discuss the case among
20 yourselves. Let no one speak to you about it.

21 You may leave your notepads right there on your
22 seats during the recess. But if you want to go out
23 and get a cup of coffee or anything like that, you can
24 do that, just as long as you're back at 2:15. All
25 right?

1 Stand in recess. Thank you.

2 (The jury exited the courtroom, after which the
3 following proceedings were had:)

4 THE BAILIFF: Jury's left the courtroom, sir.

5 THE COURT: Thank you, Mr. Bailiff.

6 Okay. Gentlemen, the jury is out now.

7 Mr. Partington, any further motions you'd like to
8 present?

9 MR. PARTINGTON: Your Honor, I would just renew
10 the same motions that I made previously and based on
11 the same argument as -- after the State's resting of
12 their case.

13 THE COURT: Thank you, sir.

14 MR. PARTINGTON: Yes, sir.

15 THE COURT: All right. Having heard the Defense
16 case, I'll maintain my ruling, deny the motion for
17 judgment of acquittal, find that it is sufficient to
18 create a jury issue on all of these matters.

19 Okay. Gentlemen, I'd like to go over the jury
20 instructions now. And what I'd like to do is go first
21 through the instructions, then we'll take up any
22 specials.

23 Okay. First instruction is 3.1, Introduction to
24 Final Instruction, and that appears standard. I'll
25 give that one.

1 Next we have 3.2, Statement of Charge.

2 Any objection to that, Mr. Partington?

3 MR. PARTINGTON: No, Your Honor.

4 THE COURT: Next we have -- it's styled as 28.6,
5 Fleeing to Elude a Law Enforcement Officer.

6 Okay. That's standard, 28- -- 28.6.

7 To prove the crime of fleeing to elude a law
8 enforcement officer, the State must prove the
9 following three elements beyond a reasonable doubt:

10 Number 1. Darrell Eugene McDonough was operating
11 a vehicle upon a street or highway in Florida.

12 Number 2. A duly authorized law enforcement
13 officer ordered the defendant to stop or remain
14 stopped.

15 Number 3. Darrell Eugene McDonough, knowing he
16 had been ordered to stop by a duly authorized law
17 enforcement officer, willfully refused or failed to
18 stop the vehicle in compliance with the order.

19 This is followed by definitions for "operator,
20 street or highway, vehicle," and the word "willfully."
21 This appears to be in accordance with the standard
22 instruction.

23 Mr. Partington, any objection to that one?

24 MR. PARTINGTON: No objection.

25 THE COURT: Thank you.

1 And next we have standard 25.7, Drug
2 Abuse-Possession.

3 Okay. It reads, Certain drugs and chemical
4 substances are by law known as, quote, "controlled
5 substances," end quote. Cannabis is a controlled
6 substance.

7 To prove the crime of possession of cannabis, the
8 State must prove the following three elements beyond a
9 reasonable doubt:

10 Number 1. Darrell Eugene McDonough possessed a
11 certain substance.

12 Number 2. The substance was cannabis.

13 Number 3. Darrell Eugene McDonough had knowledge
14 of the presence of the substance.

15 And this is followed by the definitions: To
16 "possess;" and possession may be actual or
17 constructive; and then actual possession.

18 And then "Give if applicable." Followed by,
19 "Mere proximity to a controlled substance is not
20 sufficient to establish control over that controlled
21 substance when it is not in a place over which the
22 person has control.

23 MR. WARREN: And, Judge, I would ask that that
24 not be included, any of that constructive possession
25 language, in that there's an admission -- testimony as

1 to where it was and an admission by the defendant that
2 he knew about it, exercised control over it. So I
3 would ask that that not be given.

4 THE COURT: All right. Mr. Partington?

5 MR. PARTINGTON: Your Honor, we would just ask
6 for the standard instruction, which I believe goes
7 down through the definition of "actual possession."
8 And then -- I don't have an objection to stopping at
9 the "Give if applicable," not even stating that or
10 anything below that.

11 THE COURT: Basically, just removing reference to
12 any of the potential applicable paragraphs?

13 MR. PARTINGTON: Yes, sir.

14 THE COURT: I see.

15 Those would discuss the constructive possession,
16 actual possession, joint possession, inference of
17 knowledge.

18 What's your position on that, State?

19 MR. WARREN: I think that's fine, Judge.
20 Although, I still think that the last two -- I guess
21 it -- I guess it's not necessary to have "If from the
22 evidence you are convinced that ... knew of the
23 illicit nature of the controlled substance..." I
24 don't know if that's necessary to put in there. Those
25 last two paragraphs --

1 THE COURT: Um-hum.

2 MR. WARREN: Or should they all be --

3 THE COURT: Well, I'm looking at the paragraphs
4 after the words "Give if applicable."

5 I'll take out the "Mere proximity to a controlled
6 substance is not sufficient to establish control..."

7 The next paragraph is control -- correction --
8 Constructive possession means the controlled substance
9 is in a place over which the defendant had control. I
10 take that one out.

11 Third subparagraph: In order to establish
12 constructive possession of a controlled substance --
13 we'll take that one out.

14 Next we have, Possession may be joint, that is,
15 two or more persons may jointly possess an article. I
16 would take that one out.

17 The next one is, If a person has exclusive
18 possession of a controlled substance, knowledge of its
19 presence may be inferred or assumed. I would take
20 that one out.

21 And then the next subparagraph, If a person does
22 not have exclusive possession of a controlled
23 substance, knowledge of its presence may not be
24 inferred or assumed. I would take that one out.

25 So it looks like, by agreement, we'd be taking

1 out all those subparagraphs.

2 And then we have an italicized instruction:
3 "Knowledge of the illicit nature of the controlled
4 substance. Give if applicable."

5 And your position, State, is?

6 MR. WARREN: Actually, I think he's admitted to
7 knowledge of it, so -- that he knew it was -- it was
8 marijuana. They told him it was marijuana.

9 THE COURT: Um-hum. And this is the "Knowledge
10 of the illicit nature of the controlled substance is
11 not an element of the offense of possession of
12 cannabis. Lack of knowledge of the illicit nature of
13 a controlled substance is an affirmative defense," et
14 cetera.

15 MR. WARREN: He has not raised an that
16 affirmative defense, at least I don't believe so,
17 unless Mr. Partington wanted to argue that.

18 MR. PARTINGTON: Judge, I would argue for that
19 part of the instruction. I think -- Mr. McDonough
20 testified that he was given what he believed -- or was
21 told was cannabis and that it smelled like cannabis to
22 him. But I think that's still sufficient for the jury
23 to wonder whether it actually was or not.

24 MR. WARREN: Well, I think he would've had to
25 have raised the -- in his testimony that he didn't

1 know what it was in order to get that. Because by its
2 definition, it's not an element of the offense. And
3 it would have to be an affirmative defense. And I
4 don't believe an affirmative defense has been raised
5 in this case, that he did not have knowledge of what
6 the substance was -- the substance was. He said he
7 was chewing on a stem, a cannabis stem.

8 THE COURT: Okay.

9 MR. WARREN: I don't see where an affirmative
10 defense has been raised.

11 MR. PARTINGTON: I'm okay with leaving that out,
12 Your Honor.

13 THE COURT: Okay. I think given what's been
14 presented in evidence, it would not be -- it would not
15 be -- and I don't think any issue is being raised at
16 this point on the question of knowledge. So I'll take
17 that out.

18 So, basically, what we're taking out is
19 everything below the previous page, "Give if
20 applicable." So we just take all that out.

21 I'll give the instructions at the top, beginning
22 with "Certain drugs and chemical substances are by law
23 known as controlled substances," down through the
24 definition of actual possession.

25 MR. WARREN: Yes, sir.

1 MR. PARTINGTON: Yes, sir.

2 THE COURT: Okay. Next we have Plea of Not
3 Guilty; Reasonable Doubt; and Burden of Proof, and
4 that appears to be standard.

5 Is that okay, Mr. Partington?

6 MR. PARTINGTON: No objection, Your Honor.

7 THE COURT: Okay. Next we have Weighing the
8 Evidence, with six subparts. I think we've omitted
9 some, but we can go through that.

10 Standard 3.9, Weighing the Evidence. And let's
11 see.

12 1. Did the witness seem to have an opportunity
13 to see and know the things about the witness -- about
14 which the witness testified?

15 Number 2. Did the witness seem to have an
16 accurate memory?

17 Number 3. Was the witness honest and
18 straightforward in answer attorneys' questions?

19 Number 4. Did the witness have some interest in
20 how the case should be decided?

21 Number 5. Does the witness -- does the witness's
22 testimony agree with the other testimony and the other
23 evidence in the case?

24 Number 6 -- now, in the book No. 6 is, Has the
25 witness been offered or received any money, preferred

1 treatment, or other benefit in order to get the
2 witness to testify?

3 The parties agree to take that one out?

4 MR. WARREN: Yes, Judge. I would request to take
5 that out.

6 MR. PARTINGTON: Yes, sir.

7 THE COURT: All right. Then in the book, No. 7
8 is, Had any pressure or threat been used against the
9 witness that affected the truth of the witness's
10 testimony?

11 Parties agree to take that one out?

12 MR. PARTINGTON: Yes, sir.

13 MR. WARREN: Yes, Judge.

14 THE COURT: Then No. 8 is what I think is
15 included in proposed No. 6: Did the witness at some
16 time -- actually, it should read "some other time." I
17 think we left out the word "other."

18 Did the witness at some other time make a
19 statement that is inconsistent with the testimony the
20 witness gave in court?

21 MR. WARREN: I know that we -- there really
22 hasn't been any impeachment through deposition
23 testimony or anything of that nature. So maybe -- I
24 don't know if that really belongs in there.

25 MR. PARTINGTON: I don't see the need for it.

1 THE COURT: So you agree to take that one out?

2 MR. PARTINGTON: Yes, sir.

3 THE COURT: All right. Then we'll remove No. 6,
4 referencing inconsistent statement.

5 Next in the book is No. 9: Has the witness been
6 convicted of a felony, misdemeanor involving
7 dishonesty, false statement?

8 I think we can agree to take that one out.

9 MR. PARTINGTON: Yes, sir.

10 MR. WARREN: Yes, sir.

11 THE COURT: And No. 10: Does the witness have a
12 general reputation for dishonesty or truthfulness?

13 I guess we can agree to take that one out.

14 MR. WARREN: Yes, sir.

15 MR. PARTINGTON: Yes, sir.

16 THE COURT: So I think, Mr. --

17 Why don't we just leave in 1 through 5 and delete
18 6 --

19 MR. WARREN: I think Mr. Partington had one other
20 request that he added within that.

21 THE COURT: Okay.

22 MR. PARTINGTON: Your Honor, in the standard jury
23 instructions, 3.8(e) -- just after No. 10, it says,
24 "Give as applicable and if requested." The one
25 sentence on law enforcement witness --

1 I don't know if you're using -- it's J -- page
2 J-34 in the 2014 pamphlet.

3 THE COURT: All right. It reads, The fact that a
4 witness is employed in law enforcement does not mean
5 that [his] [her] testimony deserves more or less
6 consideration than that of any other witness.

7 You're requesting that one?

8 MR. PARTINGTON: Yes, sir.

9 THE COURT: Any objection to that?

10 MR. WARREN: I don't have any objection to that.

11 THE COURT: Okay. So we'll include that
12 instruction.

13 MR. WARREN: That's a new instruction, it looks
14 like.

15 THE COURT: Yeah, it must be a new one. I don't
16 think I've seen that before.

17 MR. WARREN: And I'll just put it under the
18 No. 6, if that's okay with everybody.

19 THE COURT: I think that will be okay, right
20 after No. 6.

21 And let's see here. Now, there is -- it looks,
22 Mr. Warren, what's happened here -- they've also --
23 yes, they've actually merged some of the former
24 instructions into this new 3.9. They include the
25 expert witness instruction within 3.9, right after the

1 instruction on law enforcement.

2 MR. WARREN: Yes. I would ask instead of that
3 expert witness that you include the State's Requested
4 Jury Instruction.

5 THE COURT: All right. We haven't gotten quite
6 to that yet. Let me just look at the expert
7 instruction.

8 Okay. It looks, gentlemen, like that expert
9 witness instruction in the new one is the same as the
10 old one, which was numbered as 3.9(a). It's just no
11 longer a separate instruction.

12 So do you have any objection, Mr. Partington,
13 just leaving it as it is?

14 MR. PARTINGTON: I do, Your Honor. I would agree
15 with the State's request to just insert his requested
16 jury instruction there. My only --

17 THE COURT: Which one is that, now?

18 MR. PARTINGTON: The State submitted a proposed
19 jury instruction indicating that a law enforcement
20 with adequate training and experience with narcotics
21 can identify and render an opinion regarding a
22 controlled substance such as cannabis by its
23 appearance and odor.

24 THE COURT: So you're agreeing to that?

25 MR. PARTINGTON: Yes, sir.

1 THE COURT: Okay. Well, let me see. Before I
2 address that, I'd like to get back to the expert
3 first, if I may.

4 The expert witness instruction that's proposed is
5 on the State's proffered 3.9(a). So if we leave that
6 as it is, then the last paragraph that you have,
7 Mr. Warren, relating to "you may rely upon your own
8 conclusion about the witness" would also have to be
9 separate, because that too was moved around.

10 You notice also they -- they incorporated in
11 3.- -- the new 3.9 "the defendant in this case has
12 become a witness."

13 MR. WARREN: Yes.

14 THE COURT: A lot of things were changed around.

15 MR. WARREN: Oh, I see. Yes.

16 THE COURT: You see?

17 MR. WARREN: It was all added into this -- under
18 3.9.

19 THE COURT: Right. So for simplicity, it looks
20 like they've just reallocated these -- moved around
21 these instructions.

22 I would suggest that we just take the State's
23 proposed, which is the 3.7, followed by 3.9, with the
24 six subparts, followed by the instruction on the law
25 enforcement officer.

1 Next would be the 3.9(a), Expert Witnesses.

2 Next would come the State's -- by agreement, the
3 State's Requested Jury Instruction on a law
4 enforcement officer with adequate training and
5 experience with narcotics can identify and render an
6 opinion regarding a controlled substance such as
7 cannabis by its appearance and odor.

8 And next take up defendant testifying. The
9 defendant in this case has become a witness. You
10 should apply the same rules to consideration of his
11 testimony that you apply to the testimony of the other
12 witnesses.

13 Then take out 3.9(d), Defendant not Testifying.

14 Then it looks like we next would have -- there
15 are statements in there.

16 Would the Defense have any objection with 3.9(e),
17 Defendant's Statements?

18 MR. PARTINGTON: No objection to 3.9(e), Your
19 Honor.

20 THE COURT: 3.9(e). Okay. That will go next.

21 Then we have Rules for Deliberation, 1 through --
22 yes, 1 through 8, subparts. Okay. I can give that
23 one.

24 Next we have 3.11, Cautionary Instruction. I'll
25 give that one.

1 Then we have 3.12, Verdict.

2 Now, I noticed, Mr. Warren, you've included
3 reference to a lesser. Are there any lesser offenses?

4 MR. WARREN: There are not. I thought I had
5 taken that out, Your Honor.

6 THE COURT: Yeah, it's still on my paragraph one.

7 MR. WARREN: So if I just take out --

8 THE COURT: Actually, if you take out -- if it
9 reads "you may find the defendant guilty as charged in
10 the Information or not guilty" instead of "guilty of
11 any lesser included crime."

12 You see that, Mr. Partington?

13 MR. PARTINGTON: Yes, Judge.

14 THE COURT: So let's just make it read, "You may
15 find the defendant guilty as charged in the
16 Information," and then strike out the words "or guilty
17 of such lesser included crime as the evidence may
18 justify," and leave in "or not guilty." So, "You may
19 find the defendant guilty as charged in the
20 Information or not guilty."

21 And then the next paragraph, which is, If you
22 return a verdict of guilty, it should be for the
23 highest offense which has been proven beyond a
24 reasonable doubt. If you find that no offense has
25 been proven beyond a reasonable doubt, then, of

1 course, your verdict must be not guilty.

2 I think that too references lessers. And if
3 there's no lesser, we probably should take that
4 paragraph out.

5 MR. WARREN: Yes, sir.

6 THE COURT: That okay?

7 MR. WARREN: Let me see.

8 THE COURT: If you want it in, I'll leave it in.
9 But it's just --

10 MR. WARREN: I'm just -- if you return a verdict
11 of guilty --

12 You want me to take out "it should be for the
13 highest offense"?

14 THE COURT: Well, I think you just take the
15 entire paragraph out. What we're leaving in is "You
16 may find the defendant guilty as charged in the
17 Information or not guilty."

18 And then there is no lesser, so there's no
19 ref- -- no need to reference a highest offense which
20 has been proven beyond a reasonable doubt.

21 MR. WARREN: So that whole paragraph you'd like
22 me to take out?

23 THE COURT: I don't see the need for it, unless
24 you want it.

25 MR. WARREN: No, I don't think --

1 THE COURT: I tend -- I tend to think it might
2 create some confusion if they're wondering what's the
3 highest offense, you know.

4 MR. WARREN: Right, and because they have two --

5 THE COURT: They may think that one is worse than
6 another, and they're only supposed to find him guilty
7 of one and not the other.

8 MR. PARTINGTON: And, Judge, we would ask just
9 for the first line -- first sentence to be taken out
10 but that the -- if you find that no offense has been
11 proven beyond a reasonable doubt, then, of course,
12 your verdict must be not guilty.

13 THE COURT: Okay. What do you say, Mr. Warren?

14 MR. WARREN: I was just trying to get it back in
15 there. I had taken it out. I think I can get it back
16 in.

17 That's fine, Judge.

18 THE COURT: Okay. We'll just take out the first
19 line that reads, If you return a verdict of guilty, it
20 should be for the highest offense which has been
21 proven beyond a reasonable doubt. And then just keep
22 in the next line, it just says, If you find that no
23 offense has been proven beyond a reasonable doubt,
24 then, of course, your verdict must be not guilty.

25 Only one verdict may be returned as to the crime

1 charged. This verdict must be unanimous, that is, all
2 of you must agree to the same verdict. The verdict
3 must be in writing and for your convenience the
4 necessary form of verdict -- it would be "has been
5 prepared for you."

6 MR. WARREN: I'd still like to see, If you find
7 that the offense has been proven beyond a reasonable
8 doubt, then your verdict must be guilty. And then, If
9 you find that no offense -- because it just --

10 MR. PARTINGTON: That's the first sentence of
11 that second paragraph?

12 MR. WARREN: Yeah. I'm just --

13 MR. PARTINGTON: If you find that the offense --

14 MR. WARREN: That the --

15 MR. PARTINGTON: -- has been proven beyond a
16 reasonable doubt, you should return a verdict of
17 guilty --

18 MR. WARREN: I think so.

19 MR. PARTINGTON: -- period?

20 That seems fair, Judge. And then --

21 THE COURT: How -- would you read it again?

22 MR. PARTINGTON: If you find that the offense has
23 been proven beyond a reasonable doubt, you should
24 return a verdict of guilty, period. And then the
25 second sentence would be exactly as it -- as it is

1 there.

2 THE COURT: Okay. So we'll just modify the
3 second paragraph, If you find --

4 MR. PARTINGTON: That the offense has been
5 proven --

6 THE COURT: Has been proven beyond a reasonable
7 doubt --

8 MR. PARTINGTON: You should return a verdict of
9 guilty.

10 MR. WARREN: I've written in here, "If you find
11 that the offense has been" -- should I do "offenses
12 have been proven beyond a reasonable doubt, then your
13 verdict must be guilty"?

14 THE COURT: You should return a verdict of
15 guilty.

16 MR. WARREN: And you should --

17 THE COURT: And then the next line would be, If
18 you find that no offense has been proven beyond a
19 reasonable doubt, then, of course, your verdict must
20 be not guilty.

21 MR. WARREN: And should I do in the plural, "the
22 offenses have"?

23 THE COURT: Or offenses have --

24 MR. WARREN: Or just "the offense"?

25 I'll just leave it at "the offense," because each

1 of them would be separate.

2 THE COURT: Yeah. Yeah, I think that's -- just
3 "the offense," yeah.

4 MR. WARREN: Or "an offense"? If you find that
5 an offense has been proven...

6 I think that's fine as it is, because it -- it
7 clears it up on the next one, Single Defendant,
8 Multiple Counts.

9 THE COURT: Um-hum. I think if you find -- if
10 you find that the offenses have been proven beyond a
11 reasonable doubt, then you should return a verdict of
12 guilty. If you find that no offense has been proven
13 beyond a reasonable doubt, then, of course, your
14 verdict must be not guilty.

15 Is that okay?

16 MR. PARTINGTON: I agree with that, yes, sir.

17 MR. WARREN: Yes, sir.

18 THE COURT: Okay. All right.

19 So, If you find that the offenses have been
20 proven beyond a reasonable doubt, then you should
21 return a verdict of guilty. If you find that no
22 offense has been proven beyond a reasonable doubt,
23 then, of course, your verdict must be not guilty.

24 Okay. Now, the next proposed instruction is
25 3.12(a), Single Defendant, Multiple Counts or

1 Informations.

2 Any objection to that, Mr. Partington? 3.12(a).

3 MR. PARTINGTON: No, Your Honor.

4 THE COURT: I'll give that one.

5 And next we have 3.13, Submitting Case to the
6 Jury. This appears to be the newest instruction with
7 all the references to electronic communications.

8 MR. WARREN: I think I did that one separately.

9 THE COURT: Um-hum.

10 MR. WARREN: In my -- my printout here it doesn't
11 have it. But per my working one -- but I'm pretty
12 sure I pulled it from the new one. Yes.

13 THE COURT: Okay. All right. Next we have a
14 verdict form. And I do have some suggestions on this
15 one, Mr. Warren.

16 MR. WARREN: Okay.

17 THE COURT: I think we need to break out the
18 guilty and not guilty as to Count I and Count II. So
19 I would suggest that -- if it's okay with you -- to
20 read, We the jury find the defendant, Darrell Eugene
21 McDonough, as follows, and then take out the "check
22 only one" there. But then the next would be Count I.

23 MR. WARREN: About "check only one as to each
24 count"?

25 THE COURT: Right. And after each count -- Count

1 I -- put "check only one."

2 So we would have Count I: (Check only one)

3 Guilty of the charge of fleeing or attempting to
4 elude, or not guilty.

5 And then beneath that, Count II: (Check only
6 one)

7 Possession of cannabis not more than 20 grams. I
8 think we left out the word "guilty." I think you
9 probably want to insert that. Guilty of the charge of
10 possession of cannabis not more than 20 grams, or not
11 guilty.

12 Then, So say we all. Dated, et cetera.

13 MR. WARREN: Just to kind of go back over this
14 one area, Your Honor, regarding Weighing the Evidence.

15 THE COURT: 3.9.

16 MR. WARREN: Yes, sir.

17 THE COURT: Yeah, they've changed this
18 instruction.

19 MR. WARREN: You want me to -- I plugged in the
20 new six that we discussed.

21 Do you want me to cut and paste in order Expert
22 Witnesses, State's Requested Jury Instruction,
23 Defendant not Testifying, Defendant's Statements, and
24 then put in "You may rely upon your own conclusion
25 about the witness"?

1 THE COURT: Let's see here real quick.

2 You know, I think -- do you happen to have access
3 to the Supreme Court website?

4 MR. WARREN: Unfortunately, their website is
5 down.

6 THE COURT: Oh, really?

7 MR. WARREN: Yeah.

8 THE COURT: Okay.

9 MR. WARREN: It was -- it was up this morning.
10 But I've been trying to get on for the last half
11 hour --

12 THE COURT: Oh, okay.

13 MR. WARREN: -- and I keep getting an error.

14 THE COURT: Yeah, because I'm looking at the
15 newest instruction in the West, and they've just
16 renumbered things and reassigned certain instructions.

17 If you can do so, we can -- after No. 6, add the
18 language, The fact that a witness is employed in law
19 enforcement does not mean that his testimony deserves
20 more or less consideration than that of any other
21 witness.

22 MR. WARREN: Now, I put that in as No. 6. Do you
23 want me just to take the number out?

24 THE COURT: You could -- I guess you could number
25 it. It's not numbered in the book. But, yes --

1 Is that okay, Mr. Partington? We could number it
2 as 6.

3 MR. PARTINGTON: Six is -- that's fine.

4 THE COURT: We're taking out the old 6
5 referencing inconsistent statements. We'll just
6 renumber the law enforcement officer one as 6.

7 And then we would have to follow that with the
8 one that states, The defendant in this case has become
9 a witness.

10 MR. WARREN: You want that one next?

11 THE COURT: It is -- in the new instruction it's
12 actually contained within 3.9.

13 So we would take out your special -- your
14 numbered 3.9(c) and just paste that language in as the
15 next No. 7. The defendant in this case has become a
16 witness. You should apply the same rules to
17 consideration of his testimony that you apply to the
18 testimony of the other witnesses.

19 And next is, again, renumbered in the new book,
20 It is entirely proper for a lawyer to talk to a
21 witness about what testimony the witness would give if
22 called to the courtroom. The witness should not be
23 discredited by talking to a lawyer about his or her
24 testimony.

25 And then the last one is what you have in your

1 proposed. You may rely upon your own conclusion about
2 the witness. Actually, it's -- it's actually worded a
3 little differently. You may rely upon your conclusion
4 about the credibility of any witness. A juror may
5 believe or disbelieve all or any part of the evidence
6 or the testimony of any witness.

7 But then I think with that, you can take out
8 3.9(c), which is the one referencing defendant
9 testifying, since that would already be contained
10 within 3.9.

11 And that reference to the lawyer talking to a
12 witness is in 3.10. That was the old one. They took
13 it out and put in this new one.

14 MR. WARREN: Yeah. I'm having a hard time doing
15 this, I can tell you.

16 THE COURT: Well, actually, I tell you what,
17 let's do this: If you can just add in the one about
18 the fact that a witness is employed in law enforcement
19 as No. 6.

20 MR. WARREN: And then -- then you can just plug
21 them in individually as you go?

22 THE COURT: Sure.

23 MR. WARREN: Yeah, if you would do that, Judge.
24 For whatever reason, this thing is not cooperating
25 with me.

1 THE COURT: Yeah. They're all covered. It's
2 just they've reallocated them.

3 MR. WARREN: Right.

4 THE COURT: Made it a little more difficult to do
5 them.

6 All right. Let me go through the instructions
7 with you, gentlemen, as I now have them and make sure
8 we've got them correct.

9 3.1, Introduction to Final Instruction.

10 3.2, Statement of the Charge.

11 28.6, Fleeing to Elude a Law Enforcement Officer.

12 25.7, Drug Abuse - Possession. Just reading the
13 portion through "actual possession."

14 Next, 3.7, Plea of Not Guilty; Reasonable Doubt;
15 Burden of Proof.

16 3.9, Weighing the Evidence, with the five
17 subparts that were in the original proposed. Adding
18 the renumbered six.

19 The fact that a witness is employed in law
20 enforcement does not mean that his testimony deserves
21 more or less consideration than that of any other
22 witness.

23 And that followed by, The defendant in this case
24 has become a witness. You should apply the same rules
25 to consideration of his testimony that you apply to

1 the testimony of the other witnesses.

2 Followed by, It is entirely proper for a lawyer
3 to talk to a witness about what testimony the witness
4 would give if called to the courtroom. The witness
5 should not be discredited by talking to a lawyer about
6 his or her testimony.

7 Followed by, You may rely upon your own
8 conclusion about the credibility of any witness. A
9 juror may believe or disbelieve all or any part of the
10 evidence or the testimony of any witness.

11 Okay. Next would be 3.9(a).

12 MR. PARTINGTON: And, Judge, that's --

13 THE COURT: Actually, that's already -- that's in
14 the new one as well, isn't it?

15 MR. PARTINGTON: That's been subsumed into the
16 new 3.9. But we would object to that -- we agree with
17 the State's proposed instruction. But the Expert
18 Witness instruction, there were no expert witnesses in
19 this case. The Court did not declare any expert
20 witnesses.

21 You're allowing law enforcement to testify based
22 on their training and experience. But we would argue
23 that that's not the same as an expert witness. We
24 would just ask that that -- that language be left out.

25 MR. WARREN: I think that that might confuse the

1 jury, Your Honor. I think we covered it through the
2 adequate training. And you never announced that he
3 was an expert.

4 THE COURT: Okay. So you want to just agree to
5 remove that?

6 MR. WARREN: Yeah, we can agree to remove that
7 one.

8 THE COURT: All right. We'll take that one out.

9 Next we have -- let's see. Defendant testifying,
10 I've already given that one, and not testifying.

11 Next is Defendant's Statements.

12 MR. WARREN: I would ask that the State's
13 Requested Jury Instruction go before that one.

14 THE COURT: Which one is that?

15 MR. WARREN: I sent it up there. It's this one
16 sentence, bold --

17 THE COURT: What does -- what does it read?

18 MR. WARREN: It reads, A law enforcement officer
19 with adequate training and experience with narcotics
20 can identify and render an opinion regarding a
21 controlled substance such as cannabis by its
22 appearance and odor.

23 THE COURT: Is that okay, Mr. Partington?

24 MR. PARTINGTON: Yes, Your Honor. That tracks
25 the language in the --

1 THE COURT: Okay.

2 MR. PARTINGTON: -- case -- in the case law.

3 THE COURT: All right. I will put that one in
4 right after the 3.9 and before Defendant's Statements.

5 And then we have 3.9(e), Defendant's Statements.

6 Then 3.10, Rules for Deliberation.

7 3.11, Cautionary Instruction.

8 3.12, Verdict, amended to read, You may find the
9 defendant guilty as charged in the Information or not
10 guilty.

11 If you find that the offense -- if you find that
12 the offenses have been proven beyond a reasonable
13 doubt, then you should return a verdict of guilty. If
14 you find that no offense has been proven beyond a
15 reasonable doubt, then, of course, your verdict must
16 be not guilty.

17 MR. PARTINGTON: Yes, sir.

18 THE COURT: Next 3.12(a), Single Defendant,
19 Multiple Counts or Informations.

20 Next, 3.13, Submitting Case to Jury.

21 I'll just note that if they're -- the item -- if
22 they wish to see the item identified as the cannabis,
23 then I'll do that in open court. Let them come back
24 out and examine it. But we'll retain it here at the
25 clerk's station.

1 MR. PARTINGTON: Yes, sir.

2 THE COURT: All right. And next we have the
3 verdict form with the amendment to the Count I and
4 Count II. I think that's everything.

5 Any further instructions either side is
6 requesting at this time?

7 MR. PARTINGTON: No, Your Honor.

8 MR. WARREN: I don't think so, Your Honor.

9 THE COURT: Okay. Thank you.

10 Gentlemen, let's take about ten minutes.

11 And, Mr. Bailiff, let's take it till a quarter to
12 3:00. That will be about 15 minutes.

13 And if you could print out the verdict form,
14 Mr. Warren.

15 MR. WARREN: Yes, sir.

16 THE COURT: And then we'll -- we'll come back at
17 that time.

18 Now, Mr. McDonough, I want to ensure that you
19 understand what we're doing now. We've gone over the
20 instructions that I will read to the jury. These
21 consist of some standard instructions by the Supreme
22 Court as well as certain special instructions agreed
23 by the parties.

24 Have you been able to follow along as we've gone
25 through the instructions?

1 THE DEFENDANT: Trying to.

2 THE COURT: Okay. It's a little bit difficult,
3 but that's why you have an attorney.

4 If you have any questions about these
5 instructions, you can talk to Mr. Partington during
6 the break about that. All right?

7 THE DEFENDANT: Okay.

8 THE COURT: All right. We'll stand in recess for
9 15 minutes.

10 THE BAILIFF: All rise.

11 THE COURT: Thank you.

12 THE BAILIFF: Court's in recess.

13 (Court recessed at 2:30 p.m. and reconvened at
14 2:50 p.m., after which the following proceedings were
15 had out of the presence of the jury:)

16 THE COURT: All right. Thank you.

17 The State is present. The defendant is present
18 with counsel.

19 Counsel, I went on during the break the West Law
20 and just printed up substitute pages for instructions
21 3.9 and 3.10.

22 And, Mr. Bailiff, if you could just give one of
23 these to the Defense and one to the State.

24 THE BAILIFF: Yes, sir.

25 THE COURT: Mr. Warren, have you printed up a new

1 verdict form?

2 MR. WARREN: I have, Your Honor, and it should be
3 the last page on the packet that was handed up to you.

4 THE COURT: Okay. All right. So you have
5 printed up a new set. Let's take a look.

6 All right. I have first 3.1, Introduction.

7 3.2, Statement of Charge.

8 Then we have 28.6.

9 25.7.

10 Plea of Not Guilty; Reasonable Doubt; Burden of
11 Proof. That's 3.7.

12 Next, 3.9.

13 Oh, I see. You went ahead and cut and pasted,
14 didn't you?

15 MR. WARREN: Well, I couldn't cut and paste. I
16 just was able to type in towards the bottom.

17 THE COURT: Okay. What I did, I printed off
18 off of West 3.9, Weighing the Evidence.

19 MR. WARREN: Yes, sir.

20 THE COURT: And it looks like I -- I covered
21 everything you did. I just eliminated the parts that
22 we did not need to put in. And it looks like we
23 covered everything that's in there. So I guess that's
24 okay. So I think we can just stick with Mr. Warren's.
25 If that's all right, Mr. Partington?

1 MR. PARTINGTON: Yes, sir. That looks good.

2 THE COURT: Okay. Next we have State's Requested
3 Jury Instruction regarding law enforcement officer.
4 I'll give that one.

5 Next we have Defendant's Statements, 3.9(e).
6 I'll give that one.

7 Next, 3.10, Rules for Deliberation. And, again,
8 I just took -- in my copy -- the West 3.10 and --

9 MR. WARREN: It's slightly different.

10 THE COURT: I think it's a little different.
11 There is one -- you notice on the West, No. 7?

12 MR. WARREN: Yes, sir.

13 THE COURT: This is the new one about the jury is
14 not to discuss any questions that a juror -- jurors
15 wrote that you were not asked by the Court and must
16 not hold that against either party. I'm not sure
17 that what --

18 MR. WARREN: They didn't write asking questions,
19 though.

20 THE COURT: Yeah. I think that applies if the
21 jury had been permitted to ask questions, which we
22 have not had.

23 So I guess I'll just give yours, Mr. Warren. If
24 that's okay with the Defense.

25 MR. PARTINGTON: Yes, sir.

1 MR. WARREN: The only thing is, Your Honor, No. 7
2 on mine is the new plugged-in one under 3.9.

3 THE COURT: I can just draw a line through that
4 so I don't repeat it.

5 MR. WARREN: Yeah. It is entirely proper for a
6 lawyer to talk to a witness?

7 THE COURT: Yes, sir. I'll just take that out of
8 your 3.10, since I've already read it in the other
9 one.

10 Okay. Next we have 3.11, Cautionary Instruction.

11 3.12, Verdict. And it reads, You may find the
12 defendant guilty as charged in the Information or not
13 guilty. If you find that the offenses have been
14 proven beyond a reasonable doubt, then you should
15 return a verdict of guilty. If you find that no
16 offense has been proven beyond a reasonable doubt,
17 then, of course, your verdict must be not guilty.

18 Is that okay, Mr. Partington?

19 MR. PARTINGTON: Yes, Your Honor.

20 THE COURT: Okay.

21 Next we have 12 -- 3.12(a), Single Defendant,
22 Multiple Counts or Informations. I'll give that one.

23 And next 3.13, Submitting Case to Jury.

24 MR. WARREN: And I didn't clean this one up, so
25 it still has the options.

1 THE COURT: Yes. What I will do is just -- and
2 when we get to the lower portion, A or B, I'll take
3 out B, and just note that the exhibits will be sent
4 into the jury room when you begin to deliberate. That
5 being -- I believe one exhibit being the diagram or
6 photo -- overhead photo. And I'll instruct them if
7 they wish to see the other exhibit, they will just
8 knock on the door, ask the bailiff if they can observe
9 that exhibit. We'll then have them all come out and
10 examine the exhibit in our presence.

11 MR. WARREN: Yes, sir.

12 THE COURT: Next we have the proposed form of
13 verdict: We the jury find the defendant, Darrell
14 Eugene McDonough as follows: (Check only one as to
15 each count)

16 Count I: (Check only one), followed by two
17 lines:

18 Guilty of the charge of fleeing or attempting to
19 elude, or not guilty.

20 Count II: (Check only one)

21 Guilty of the charge of possession of cannabis
22 not more than 20 grams, or not guilty.

23 So say we all.

24 Dated this blank day of April, 2014.

25 Foreperson.

1 Is that acceptable to the Defense?

2 MR. PARTINGTON: Your Honor, I did not see a copy
3 of --

4 MR. WARREN: No, I -- I only made one. I don't
5 have a copy either.

6 THE COURT: I'm sorry.

7 Madam Clerk, if you could just pass this down to
8 Mr. Partington, please. You can make a couple of
9 copies if that's all right.

10 (Brief pause.)

11 MR. PARTINGTON: That's fine. Thank you.

12 THE COURT: Okay. Is that acceptable?

13 MR. PARTINGTON: Yes, Your Honor.

14 THE COURT: Okay. All right.

15 With that, gentlemen, anything further before we
16 bring in the jury?

17 MR. WARREN: No, Your Honor.

18 THE COURT: All right. Then with that, we'll
19 bring in the jury, Mr. Bailiff. And I'd like them
20 seated in the jury box. We'll then begin opening
21 statements.

22 (The jury entered the courtroom, after which the
23 following proceedings were had:)

24 THE COURT: Okay. Ladies and gentlemen, please
25 come on in and resume your seats.

1 THE BAILIFF: The jury's present, sir.

2 THE COURT: Thank you, Mr. Bailiff.

3 All right. Thank you, ladies and gentlemen.

4 Well, I was only off about 45 minutes. I
5 apologize. We did have some matters of law, members
6 of the jury, that I did have to take up with counsel,
7 including the preparation of my jury instructions.
8 We've now done that, so we're now ready to proceed.

9 Members of the jury, the trial is now at that
10 stage of opening -- correction -- closing arguments.

11 Now, counsel will now at this time make their
12 final arguments to you. Counsel for the State will
13 have the first final argument, followed by counsel for
14 the Defense. And then counsel for the State may make
15 one, then, brief rebuttal argument. Then, at that
16 point, the Court will instruct you on the law
17 following these arguments.

18 Now, the attorneys in making these arguments to
19 you will be commenting upon the testimony that you
20 have heard through the witnesses and the evidence that
21 has been presented in the form of documents and other
22 things.

23 Now, they, as you, will be recalling the evidence
24 that has been presented. The attorneys will not
25 intentionally try to mislead you as to any evidence,

1 but understand that sometimes their recollection of
2 the evidence may differ from yours. You are required
3 to follow your recollection of the evidence.

4 Now, these final arguments are not evidence
5 themselves. The attorneys are not witnesses, but
6 they're advocates presenting their position in the
7 light of the evidence and the applicable law. So this
8 is intended to help you better understand the
9 positions of the sides and the issues in the case.
10 You should give both sides your close attention.

11 With that, counsel for the State, Mr. Warren, may
12 proceed with your closing argument.

13 MR. WARREN: Mr. Partington.

14 Your Honor.

15 THE COURT: Thank you, sir.

16 MR. WARREN: Ladies and gentlemen of the jury,
17 again, thank you for all your attention. I know you
18 have paid attention to this case. And we could not
19 have more opposition in testimony here between the law
20 enforcement officers and the defendant. And it's your
21 job to sort through that and cut through to what is
22 the truth and what is reasonable.

23 And I use that word "reasonable" because I think
24 if you use your common sense and reason, you can cut
25 through to what the real truth here is, and I would

1 submit to you that it's as the State's witnesses
2 testified.

3 Here we have a law enforcement officer; he has no
4 ax to grind. He doesn't know this defendant. And why
5 in the world is he going to act like this defendant
6 says he did? Why are all of these officers going to
7 act that way? That's just bizarre.

8 If you accept the defendant's version of the
9 events, you accept every type of bad behavior, clichéd
10 bad behavior that you hear about law enforcement all
11 wrapped into one. That's just not reasonable.

12 And so I submit to you that what Deputy -- I
13 messed it up as well -- Barbagallo testified to -- and
14 he's the main witness -- is what really happened.

15 Why would he say he's sitting up by 13 -- he's
16 sitting stationary? There -- there is no reason for
17 him to be all the way up at I-95 and US-1. That's so
18 far outside of his jurisdiction. Absolutely makes no
19 sense. None. And then to allegedly blow by this
20 defendant. It makes no sense.

21 He's where he was. He's sitting doing routine
22 patrol just north of the overpass. And just as he
23 said, he sees this vehicle. He gets in behind it,
24 calls it out. Turns on his lights.

25 Now, Deputy Miley hears him call it out. Now, if

1 you -- and then later hears the siren. Now, if you
2 believe the defendant's version of the events, the
3 siren was automatic, right away. That's just not the
4 way it was.

5 It makes absolutely no sense for a law
6 enforcement officer -- he wants you to believe that he
7 complied with everything, everything. Every step of
8 the way he was pure perfect. "I stopped. I had my --
9 my driver's license and my registration, and I've got
10 it right here by the window."

11 Really? You stop in the middle of the road, and
12 you've got it out already by the window before the
13 officers even come up?

14 And for an officer to go up and, you know, shake
15 some light and go back to his vehicle -- or pound on
16 the back of the vehicle, I think is what he said, and
17 then not even approach the driver, what kind of
18 nonsense is that?

19 It's 11:00 p.m. He is not -- he -- he's not just
20 going to have somebody stop there without approaching.
21 He wants to know what's going on inside of the car.

22 This idea that he would go fool around with the
23 light, tap on it, go back to his car, and then say
24 something over the PA, and then say, "Oh, be on your
25 way -- you hear (indicating) -- it's ludicrous. It

1 makes no sense. And that's where your -- again, your
2 common sense comes in.

3 The officer tried to get him pulled over. He had
4 plenty of opportunity to pull over when the lights
5 went on. A reasonable person is going to pull onto
6 Woodland and immediately pull off to the side. That's
7 what a compliant person is going to do.

8 There's no other -- no other traffic between
9 them. It's not like he's going after somebody else.
10 If he was, he would've -- he would've had his siren on
11 right away and he would have blown by him. It makes
12 no sense the defendant -- the defendant's version of
13 the events.

14 Turns on his lights, expecting the vehicle to
15 pull in -- off to the side, anywhere along here.
16 Could've -- there's so many places this -- this -- the
17 driver, Mr. McDonough, could have pulled off. He
18 didn't do so.

19 But he wants you to believe that "I complied. I
20 stopped in the middle of the road." That's nonsense.
21 He's not complying. And then everything that comes
22 out of his mouth after that is just -- just pound on
23 law enforcement, and he's pure perfect.

24 It makes much more sense that because he's
25 stopped in the middle of the road, the officer would

1 say, you know, I can't do it here. I'm going to have
2 him pull up. So he instructs him to pull up. But
3 what does he do? He takes off. You know why, I would
4 submit to you? He's going to destroy some evidence.

5 He's trying to find this pot that has been given
6 to him by some hitchhiker. And, of course, he's only
7 chewing on a stem.

8 But he admitted it was pot. He knew it was pot.
9 He's in possession of it. It was given to him.

10 But he wants us to believe that he's trying to
11 comply with law enforcement. Well, he's driving away.
12 He says the officers -- he said two different versions
13 of it. The officer came up so fast he had to be all
14 the way on the right-hand side while going across the
15 bridge. All the way over. And the officer almost ran
16 another car -- or made another car take evasive
17 action.

18 But in the next breath he says, well, the officer
19 really doesn't catch up to him down here, and so he
20 has to quickly get off the side of the road and get
21 off into the swale area.

22 Now, if you look at this, you can see how large
23 the vehicles are. And you'll be able to take this
24 back with you. But that's a lot -- if you look at the
25 size of the vehicles in relation to this roadway, it's

1 a lot of distance covered until he loses control here.

2 And this -- this looks like a large truck. I
3 mean, going 30 to 40 miles an hour, this takes a good
4 amount of time. He had plenty of opportunity to pull
5 over. But I submit to you he's trying to get this pot
6 out the window. He's either eating it, thus getting
7 some on his -- on his chest, or he's trying to crumble
8 it up and pitch it out the window.

9 And this is -- the vehicle was described as going
10 over into this lane several times over here until he
11 finally loses control down here.

12 And really? You're going to pull off the road
13 and you're not going to put your car into park? You
14 think the law enforcement officer is going to be able
15 to get out so quickly, with his gun drawn, to say
16 hands on the wheel, so you can't put it in park?

17 Nobody testified that the car rolled away except
18 for the defendant. Now, the officer did testify that
19 he was trying -- still trying to get out of the swale
20 when he pulled up. He was gunning it, which makes the
21 most sense.

22 So I submit to you that -- as the tryer of
23 fact -- that those are the facts of this case. The
24 defendant was notified by a duly authorized law
25 enforcement officer through his overhead bank of

1 lights, through his flashing front lights, through the
2 light on the dash, through the other lights in the
3 grill, that he's the person of interest to pull over.
4 He doesn't pull over. He pulls down the street and
5 stops in the middle of the street.

6 And when the officer orders him "go on through
7 the intersection and pull over," he doesn't because he
8 has marijuana. And so what better -- this gives him
9 the opportunity to get rid of it.

10 So it leads us to the elements of the charges.
11 And I would submit to you that the State has proved --
12 through witness testimony and through evidence
13 admitted that we have proved these elements beyond a
14 reasonable doubt. And I'll go through them.

15 For fleeing to elude a law enforcement officer,
16 element one, Darrell Eugene McDonough was operating a
17 vehicle upon a street or highway in Florida. No
18 debate about that. Officer testified that this is a
19 street or highway. He said he was on a street or
20 highway. He was operating the motor vehicle.

21 Number two. A duly authorized law enforcement
22 officer ordered the defendant to stop or remain
23 stopped. You have the officer, through his lights, in
24 a fully marked vehicle, trying to get this vehicle to
25 stop, and he is not stopping.

1 He tells him, when he stops in an inappropriate
2 place, to go stop in another place, and he doesn't do
3 it. Plenty of opportunity, and you can see that on
4 the map.

5 Number three. Darrell Eugene McDonough, knowing
6 he had been ordered to stop by a duly authorized law
7 enforcement officer, willfully refused or failed to
8 stop the vehicle in compliance with the order. He
9 goes another half a mile before he loses control of
10 the vehicle.

11 No signal to turn over. This nonsense about
12 trying to get off to the side while on the bridge --
13 he's saying that he's -- he's way off to the side in
14 the breakdown lane. That's just non- -- he's
15 swerving. Plenty of opportunity to stop in a safer
16 place than at the bottom of the bridge in a swale.

17 Now, it will give you some definitions, but I
18 think that these are self-evident definitions, and I
19 won't be belabor you with those.

20 That will be the first thing you see on the jury
21 verdict form. And you'll be given a jury verdict
22 form, and on that it will have the two counts. "Check
23 only one as to each count."

24 Count I, fleeing or attempt to elude. Guilty or
25 not guilty.

1 My request, if you find that we've proven the
2 case beyond a reasonable doubt, is to check the first
3 box, guilty.

4 It will give you -- then you go down to the next
5 count. Same thing, check only one.

6 Then the next count is drug abuse or possession
7 of cannabis under 20 grams. And it reads like this:
8 To prove the crime of possession of cannabis, the
9 State must prove the following three elements beyond a
10 reasonable doubt:

11 Darrell Eugene McDonough possessed a certain
12 substance.

13 He admitted he possessed the substance. He knew
14 about it. It was in his control.

15 Number two. The substance was cannabis.

16 No debate about that. They can talk all they
17 want to about having an FDLE expert come in here and
18 testify it's cannabis. Cannabis is readily
19 identifiable. It's identifiable to law enforcement.
20 And the law is -- and you'll hear what the law is --
21 that a law enforcement officer that has been trained
22 and has the experience can testify as to the
23 substance. The defendant said it was cannabis, so
24 there's no debate about that.

25 Number three. Darrell Eugene McDonough has

1 knowledge -- had knowledge of the presence of the
2 substance. Again, no debate. Proved beyond a
3 reasonable doubt. He said he had it in his
4 possession. He knew it was there and he knew what it
5 was. He said it was given to him by some hitchhiker.

6 It will go on to describe what possess means.
7 But, again, he had it. It's on the bench of his
8 truck. He has it on his chest. And you observed it.
9 And you'll have an opportunity to look at it again if
10 you'd like. All you have to do is ask the Court and
11 come back out here and you can view it again.

12 This is where your common sense comes in. Life
13 experience. It's cannabis. It smells like it. It
14 clumps -- buds like it. It's cannabis. Testified to.
15 Agreed to.

16 Now, the Judge will instruct you on what
17 reasonable doubt is. And, again -- I won't go through
18 the whole thing -- but it's not a forced doubt. It's
19 not a possible or a speculative or imaginary doubt.
20 It's not a mere possible doubt.

21 I would submit to you that the State has proven
22 beyond a reasonable doubt that the defendant fled from
23 law enforcement in an attempt to elude them, and he
24 possessed cannabis.

25 You'll also be given instructions on weighing the

1 evidence, and we'll go through that. And it talks
2 about whether or not the witness seemed to have an
3 accurate memory. Was the witness honest and
4 straightforward in answering questions. And, again,
5 leave that to you. It's your role to determine the
6 credibility of each witness.

7 There's another instruction in here -- and this
8 goes back again to the cannabis, and I've already
9 touched on it. And it will tell you -- this is the
10 law -- a law enforcement officer with adequate
11 training and experience with narcotics can identify
12 and render an opinion regarding a controlled substance
13 such as cannabis by its appearance and odor.

14 I would submit to you that -- that it's been
15 done, and it's proved beyond a reasonable doubt that
16 that substance, State's Exhibit No. 2, is cannabis.

17 So, ladies and gentlemen, I'm not going to
18 belabor it. You've -- you've sat diligently, listened
19 intently. I'm sure that you've heard the evidence.
20 And I believe that the reasonableness and common sense
21 will carry through and carry the day here.

22 I'll have one more brief opportunity to address
23 you after the Defense.

24 Thank you.

25 THE COURT: Thank you, State.

1 Defense. Mr. Partington.

2 MR. PARTINGTON: Thank you, Your Honor.

3 State.

4 Good afternoon, ladies and gentlemen. Thank you
5 again on behalf of Mr. McDonough for your
6 attentiveness during this lengthy day.

7 Now you, after hearing everything, get to hear
8 the instructions from the Judge and then go back and
9 deliberate. And you make the decision as to what
10 happens in this case. You have the power as the fact
11 finder to determine the outcome. And our argument to
12 you, on behalf of Mr. McDonough, is that outcome
13 should be not guilty as to both counts charged in the
14 Information.

15 And the reason that the State or the government
16 has not met its burden to prove this case beyond a
17 reasonable doubt as to each and every element of the
18 crimes charged -- you may remember, yesterday we
19 talked a little bit about baking or making bread. And
20 the elements were like ingredients. And if you leave
21 one of the ingredients out, like yeast, you don't have
22 bread. Well, the same situation -- analogous
23 situation with a criminal offense. If you leave one
24 of the elements out, you don't have a case and the
25 result should be not guilty.

1 My argument to you, on Mr. McDonough's behalf, is
2 that the State has not proven each charge, fleeing and
3 eluding, or possession of cannabis, to the legal
4 standard beyond a reasonable doubt; and, therefore,
5 the only lawful verdict is not guilty.

6 Specifically as to the fleeing and eluding, the
7 charge -- and you'll get a copy of these to take back
8 in the jury room with you. Fleeing -- fleeing to
9 elude a law enforcement officer. It specifically
10 requires that the defendant has to know that he's been
11 ordered to stop. That's element No. 3. And then that
12 he willfully refused or failed to stop the vehicle in
13 compliance with that lawful order.

14 You've heard the testimony. And Mr. McDonough
15 did stop. And I think what we have here is -- like
16 the phrase from the late '60's movie Cool Hand Luke,
17 and then it's been repeated in many TV and television
18 episodes since then, "What we have here is a failure
19 to communicate."

20 Mr. McDonough wasn't even given the courtesy of
21 somebody coming up to him and telling him "you need to
22 stop. I'm conducting a traffic stop. This is what I
23 want you to do." And so there was miscommunication.

24 Deputy Barbagallo says that he told him what to
25 do over a PA system or some kind of speaker system.

1 But isn't it odd that Deputy Miley testified he was
2 close by, sitting at the Auto Zone with his window
3 down and he didn't hear anything, didn't hear any
4 instructions over a PA system or audio system. That
5 should raise a reasonable doubt in your mind.

6 Of course, if we had sufficient evidence -- and
7 you can determine that a lack of evidence is a reason
8 to find reasonable doubt. If we had video, we
9 probably wouldn't even need to be here today.

10 Deputy Barbagallo testified his vehicle was video
11 equipped, and there were two other cars; but yet, for
12 some reason, we have no video. That is a lack of
13 evidence, and that should raise a reasonable doubt in
14 your mind.

15 Now, Darrell told you, based on the hand motions
16 and actions of the officer, he believed he was free to
17 go, so he continued on about his way. He turned left
18 onto West State Road 100 and began his path over the
19 overpass and west, out to the lake.

20 And as soon as he realized he wasn't free to go,
21 he pulled over at the first safe place. All of this
22 happened within a half a mile. But I submit to you
23 that within a quarter mile or less of Mr. McDonough
24 actually realizing, oh, wait, I guess I'm not free to
25 go, he's right behind me with his lights and sirens

1 going, then he pulls over as directed.

2 And Officer Miley said in that situation, it's
3 driver's discretion as to where you would pull over.

4 Would you want -- as Mr. McDonough --

5 MR. WARREN: Objection.

6 MR. PARTINGTON: -- would he want to --

7 MR. WARREN: Objection to the --

8 MR. PARTINGTON: Okay.

9 MR. WARREN: Golden rule, Your Honor.

10 MR. PARTINGTON: Let me rephrase.

11 THE COURT: Yes. Sustain the objection. You may
12 proceed.

13 MR. PARTINGTON: Thank you, Judge.

14 My argument to you is why would Mr. McDonough
15 pull over on a dark overpass at 11:00 o'clock or a
16 little after 11:00 at night when he could continue
17 down and pull over off to the side of the road? Why
18 would you pull over in a dangerous area when you can
19 pull over in what you believe to be a safe area?
20 Which is what he did.

21 Now, Deputy Barbagallo testified this morning
22 that he never did talk to Mr. McDonough during the
23 initial stop. And he admitted under questioning that
24 he can't know what Darrell was thinking. But, yet,
25 the government wants to hold him accountable for a

1 fleeing and eluding, a criminal offense, without even
2 giving him the courtesy of making it clear what they
3 wanted him to do.

4 All he -- all the deputy had to do -- or the
5 corporal at the time had to do, walk up to the window,
6 "Sir, I've pulled you over. This is what I want you
7 to do." Communicate to him: Do you understand? Yes.
8 This whole thing could have been avoided. It was a
9 miscommunication, not a criminal offense.

10 Mr. McDonough has been waiting over a year to
11 finally get the chance to tell his side of the story
12 and explain it to someone who would listen, and today
13 he's had that -- had that opportunity.

14 As to the marijuana possession, the Judge will
15 instruct you that the State has to prove three
16 elements beyond and to the exclusion of a reasonable
17 doubt. And the second element, the substance was
18 cannabis.

19 My argument to you is that that has not been
20 proven beyond and to the exclusion of a reasonable
21 doubt. You don't have any lab testing to prove that
22 element. You have Deputy Barbagallo's opinion. And
23 my argument is that a lab test should be required to
24 confirm that opinion.

25 Deputy Barbagallo, you heard, has some training

1 and experience, but no degrees or extensive study in
2 botany or plant identification or chemistry or even
3 pharmacy. He testified -- and these were his words --
4 it was basic training. Nothing extensive. But he
5 talked about his training and experience.

6 Our argument to you is when -- when somebody's
7 freedom is at stake, when the government is trying to
8 prove a criminal offense, that for proof beyond a
9 reasonable doubt you should have more than opinion
10 testimony. You should have independent lab testing
11 results to confirm it.

12 Ultimately, you decide what happened on
13 April 17th, 2013, and that decision has to be
14 unanimous. It has to be the decision of each of you
15 individually, and then the jury as a whole. And we
16 talked about this yesterday, having the courage of
17 your convictions, to argue what you believe as you
18 deliberate with your other jurors. And I hope -- you
19 said you could do that; I trust that -- I trust that
20 you will.

21 Based on what you've heard, the lack of evidence,
22 the conflict in the evidence -- you might suspect that
23 Mr. McDonough is guilty of something or think that
24 he's possibly -- possibly guilty or even probably
25 guilty or -- or that his guilt is likely. But if you

1 think any of those things, the lawful verdict would be
2 not guilty. And the reason for that is the
3 standard -- and the Judge will instruct you on this,
4 the highest standard in all the law is beyond a
5 reasonable doubt as to each element of the crime
6 charged.

7 And we've argued to you for numerous reasons why
8 that standard hasn't been met. And Mr. McDonough is
9 asking you to render a not guilty verdict as the only
10 just result in this case.

11 I think I've covered pretty much everything. I
12 don't want to belabor it. But we are asking that you
13 check the not guilty box as to each count on the
14 verdict form.

15 The State asked you to infer that Mr. McDonough
16 tried to destroy the evidence. If he had wanted to do
17 that, he could have, but he didn't. And so I don't
18 think you can make that inference. And that is part
19 of why we believe that the only just result in this
20 case is not guilty.

21 He wasn't fleeing and eluding from the police.
22 He did not destroy or try to tamper with evidence.
23 And the State has not proven their case beyond a
24 reasonable doubt.

25 Thank you again for your time and attention.

1 Thank you, Your Honor.

2 THE COURT: Thank you, sir.

3 Mr. Warren, rebuttal?

4 MR. WARREN: Yes, Your Honor.

5 A failure to communicate. The officer
6 communicated by -- by the bar lights, all the lights
7 to get him to pull over. By siren to get him to pull
8 over. By PA -- and before the siren part of it --
9 instructed him to pull over.

10 The defendant, by his actions, did none of those
11 things. He stops in the middle of the roadway beyond
12 the places to pull over. He continues driving
13 erratically until he loses control of the vehicle.

14 The fact that there's no video does not raise a
15 reasonable doubt. It just means there's no video.
16 And the officer explained, We don't have -- the
17 sheriff's department doesn't have video. They don't
18 have video in all their cars. Not all the cars the
19 video works. They didn't have video. It's as simple
20 as that. But that doesn't create a reasonable doubt.

21 We wouldn't be here if that -- if they had video?
22 What does that mean? Does that mean it'd be a slam
23 dunk? I don't know.

24 This idea that the overpass was dark and it --
25 the safety -- it was not safe to pull over there -- it

1 was safe to pull over here; pull into here; pull into
2 here; pull over here. All the way up along here
3 there's a breakdown lane on hard pavement, where
4 people can see you. But it's safer at the bottom of
5 the hill where it's completely dark, away from all the
6 city lights? It's safer to go off into a swale?
7 Absolutely not. He lost control of the vehicle.

8 Fleeing and eluding has been proved beyond a
9 reasonable doubt.

10 And the charge of the cannabis -- no lab testing?
11 It doesn't require lab testing. It's not a
12 requirement. It's not -- it should -- according to
13 the Defense, it should be required. But you're not
14 going to hear that in the -- in the law that the Judge
15 gives you.

16 He's not going to tell you that a lab -- it's a
17 requirement to have a lab result to prove that the
18 substance was cannabis. Cannabis is one of those
19 substances that is so unique in texture, odor and
20 appearance that the law is that a law enforcement
21 officer with experience can testify that it's
22 cannabis. That's what the law is. And he did.
23 Fifty-plus instances as a law enforcement officer
24 identifying cannabis using the Lynn Peavey kits. Used
25 a Lynn Peavey kit in this case; testified to that it

1 gave a positive for THC. But it's the visual. It's
2 the odor. It's the -- it's the looking at it. That
3 tells you it's cannabis. And that's where your common
4 sense comes in.

5 Lab testing is not required. It's not part of
6 the law. It's not part of the law that the Judge will
7 read to you. It is not something that the State has
8 to prove, that this was lab tested. Don't make the
9 State prove more than it has to. That's not the law.
10 It's beyond a reasonable doubt.

11 Deputy Barbagallo has life experience, as many
12 people do, in seeing cannabis. Saw it in the
13 military. Saw it growing up in the '60s and '70s.
14 Saw it as a -- when he worked with Parks and
15 Recreation over nine years.

16 He has the knowledge. And the Court, through the
17 law, allows that -- allowed -- he testified to it.
18 And you will hear a law enforcement officer with
19 adequate training and experience with narcotics --
20 experience -- can identify and render an opinion
21 regarding a controlled substance such as cannabis by
22 its appearance and odor.

23 Now, if it was cocaine, that might be -- might be
24 something different, but it's not. It's cannabis.

25 So I'd submit to you the State has proven each

1 and every element of both charges beyond and to the
2 exclusion of a reasonable doubt.

3 Thank you.

4 THE COURT: Thank you, Counsel.

5 All right. Members of the jury, I thank you for
6 your attention during this trial. Please pay
7 attention to the instructions I'm about to give you.

8 And I will furnish you a copy of these very
9 instructions, members of the jury, if you wish to look
10 at them during your deliberation, so you don't need to
11 take a lot of notes on that.

12 Statement of Charge.

13 Darrell Eugene McDonough, the defendant in this
14 case, has been accused of the crimes of fleeing or
15 attempting to elude and possession of cannabis not
16 more than 20 grams.

17 Fleeing to Elude a Law Enforcement Officer.
18 Florida Statute 316.1935(1).

19 To prove the crime of fleeing to elude a law
20 enforcement officer, the State must prove the
21 following three elements beyond a reasonable doubt:

22 First. Darrell Eugene McDonough was operating a
23 vehicle upon a street or highway in Florida.

24 Second. A duly authorized law enforcement
25 officer ordered the defendant to stop or remain

1 stopped.

2 Third. Darrell Eugene McDonough, knowing he had
3 been ordered to stop by a duly authorized law
4 enforcement officer, willfully refused or failed to
5 stop the vehicle in compliance with the order.

6 Definitions.

7 "Operator" means any person who is in actual
8 physical control of a motor vehicle upon the highway
9 or who's -- who is exercising control over or steering
10 a vehicle being towed by a motor vehicle.

11 "Street or highway" means the entire width
12 between boundary lines of every way or place of
13 whatever nature when any part thereof is open to the
14 public for purposes of vehicular traffic.

15 "Vehicle" means every device, in, upon, or by
16 which any person or property is or may be transported
17 or drawn upon a highway, excepting devices used
18 exclusively upon stationary rails or tracks.

19 "Willfully" means intentionally, knowingly, and
20 purposely.

21 Drug Abuse-Possession. Statute 893.13(6)(a).

22 Certain drugs and chemical substances are by law
23 known as controlled substances. Cannabis is a
24 controlled substance.

25 To prove the crime of possession of cannabis, the

1 State must prove the following three elements beyond a
2 reasonable doubt:

3 First. Darrell Eugene McDonough possessed a
4 certain substance.

5 Second. The substance was cannabis.

6 Third. Darrell Eugene McDonough had knowledge of
7 the presence of the substance.

8 To "possess" means to have personal charge of or
9 exercise the right of ownership, management, or
10 control over the thing possessed.

11 Possession may be actual or constructive.

12 Actual possession means:

13 a. The controlled substance is in the hand
14 of or on the person, or

15 b. The controlled substance is in a
16 container in the hand of or on the person, or

17 c. The controlled substance is so close as
18 to be within ready reach and is under the control of
19 the person.

20 Plea of Not Guilty; Reasonable Doubt; and Burden
21 of Proof.

22 The defendant has entered a plea of not guilty.
23 This means you must presume or believe that the
24 defendant is innocent. The presumption stays with the
25 defendant as to each material allegation in the

1 Information through each stage of the trial unless it
2 has been overcome by the evidence to the exclusion of
3 and beyond a reasonable doubt.

4 To overcome the defendant's presumption of
5 innocence, the State has the burden of proving, number
6 one, the crime with which the defendant is charged was
7 committed; and, number two, the defendant is the
8 person who committed the crime.

9 The defendant is not required to present evidence
10 or prove anything.

11 Whenever the words "reasonable doubt" are used
12 you must consider the following:

13 A reasonable doubt is not a mere possible doubt,
14 a speculative, imaginary or forced doubt. Such a
15 doubt must not influence you to return a verdict of
16 not guilty if you have an abiding conviction of guilt.
17 On the other hand, if, after carefully considering,
18 comparing and weighing all the evidence, there is not
19 an abiding conviction of guilt, or, if, having a
20 conviction, it is one which is not stable but one
21 which wavers and vacillates, then the charge is not
22 proved beyond every reasonable doubt and you must find
23 the defendant not guilty because the doubt is
24 reasonable.

25 It is to the evidence introduced in this trial,

1 and to it alone, that you are to look for that proof.

2 A reasonable doubt as to the guilt of the
3 defendant may arise from the evidence, conflict in the
4 evidence, or the lack of evidence.

5 If you have a reasonable doubt, you should find
6 the defendant not guilty. If you have no reasonable
7 doubt, you should find the defendant guilty.

8 Weighing the Evidence.

9 It is up to you to decide what evidence is
10 reliable. You should use your common sense in
11 deciding which is the best evidence, and which
12 evidence should not be relied upon in considering your
13 verdict. You may find some of the evidence not
14 reliable, or less reliable than other evidence.

15 You should consider how the witnesses acted, as
16 well as what they said. Some things you should
17 consider are:

18 Did the witness seem to have an opportunity to
19 see and know the things about which the witness
20 testified?

21 Did the witness seem to have an accurate memory?

22 Was the witness honest and straightforward in
23 answering the attorneys' questions?

24 Did the witness have some interest in how the
25 case should be decided?

1 Does the witness's testimony agree with the other
2 testimony and the other evidence in the case?

3 The fact that a witness is employed in law
4 enforcement does not mean that his testimony deserves
5 more or less consideration than any of -- any other
6 witness.

7 The defendant in this case has become a witness.
8 You should apply the same rules to consideration of
9 his testimony that you apply to the testimony of the
10 other witnesses.

11 It is entirely proper for a lawyer to talk to a
12 witness about what testimony the witness would give if
13 called to the courtroom. The witness should not be
14 discredited by talking to a lawyer about his
15 testimony.

16 You may reply upon your own conclusion about the
17 witness. A juror may believe or disbelieve all or any
18 part of the evidence or the testimony of any witness.

19 A law enforcement officer with adequate training
20 and experience with narcotics can identify and render
21 an opinion regarding a controlled substance such as
22 cannabis by its appearance and odor.

23 Defendant's Statements.

24 A statement claimed to have been made by the
25 defendant outside of court has been placed before you.

1 Such a statement should always be considered with
2 caution and be weighed with great care to make certain
3 it was freely and voluntarily made.

4 Therefore, you must determine from the evidence
5 that the defendant's alleged statement was knowingly,
6 voluntarily, and freely made.

7 In making this determination, you should consider
8 the total circumstances, including but not limited to
9 whether, when the defendant made the statement, he had
10 been threatened in order to get him to make it, and
11 whether anyone had promised him anything in order to
12 get him to make it.

13 If you conclude the defendant's out of court
14 statement was not freely and voluntarily made, you
15 should disregard it.

16 Rules for Deliberation.

17 These are some general rules that apply to your
18 discussion. You must follow these rules in order to
19 return a lawful verdict:

20 You must follow the law as it is set out in these
21 instructions. If you fail to follow the law, your
22 verdict will be a miscarriage of justice. There is no
23 reason for failing to follow the law in this case.
24 All of us are depending upon you to make a wise and
25 legal decision in this matter.

1 This case must be decided only upon the evidence
2 that you have heard from the testimony of the
3 witnesses and have seen in the form of the exhibits in
4 evidence and these instructions.

5 This case must not be decided for or against
6 anyone because you feel sorry for anyone, or are angry
7 at anyone.

8 Remember that the lawyers are not on trial. And
9 your feelings about them should not influence your
10 decision in this case.

11 Your duty is to determine if the defendant has
12 been proven guilty or not, in accord with the law. It
13 is the judge's job to determine a proper sentence if
14 the defendant is found guilty.

15 Whatever verdict you render must be unanimous,
16 that is, each juror must agree to the same verdict.

17 Your verdict should not be influenced by feelings
18 of prejudice, bias, or sympathy. Your verdict must be
19 based on the evidence, and on the law contained in
20 these instructions.

21 Cautionary Instruction.

22 Deciding a verdict is exclusively your job. I
23 cannot participate in that decision in any way.
24 Please disregard anything I may have said or done that
25 made you think I preferred one verdict over another.

1 Verdict.

2 You may find the defendant guilty as charged in
3 the Information or not guilty. If you find that the
4 offenses have been proven beyond a reasonable doubt,
5 then you should return a verdict of guilty. If you
6 find that no offense has been proven beyond a
7 reasonable doubt, then, of course, your verdict must
8 be not guilty.

9 Only one verdict may be returned as to the crime
10 charged. This verdict must be unanimous, and, that
11 is, all of you must agree to the same verdict. The
12 verdict must be in writing and for your convenience
13 the necessary form of verdict has been prepared for
14 you. I'll review that with you, members of the jury.

15 The verdict appears on one piece of paper. At
16 the top -- top of the page is the name of the case,
17 State of Florida vs. Darrell Eugene McDonough. And
18 the word "Verdict."

19 And then it says, We the jury find the defendant,
20 Darrell Eugene McDonough, as follows. And then a
21 brief instruction, Check only one as to each count.

22 That's followed by, Count I: (Check only one).

23 Then that's followed by two lines. The first
24 line: Guilty of the charge of fleeing or attempting
25 to elude.

1 Second line: Not guilty.

2 Next we have Count II, with an instruction:
3 (Check only one), followed by two lines.

4 First line reads: Guilty of the charge of
5 possession of cannabis not more than 20 grams.

6 And the second line: Not guilty.

7 Then the words "So say we all," meaning it is
8 your unanimous verdict.

9 And dated at Bunnell, Flagler County, Florida.
10 This day is the 22nd day of April, 2014.

11 And then your foreperson will sign at the very
12 bottom once the jury has reached its unanimous
13 verdict.

14 Single Defendant, Multiple Counts or
15 Informations.

16 A separate crime is charged in each count of the
17 Information and, while they have been tried together,
18 each crime and the evidence applicable to it must be
19 considered separately and a separate verdict returned
20 as to each. A finding of guilty or not guilty as to
21 one crime must not affect your verdict as to the other
22 crime charged.

23 Submitting Case to Jury.

24 In just a few moments you will be taken to the
25 jury room by the court deputy. First thing you should

1 do is to choose a foreperson who will preside over
2 your deliberations. The foreperson should see to it
3 that your discussions are carried out in an organized
4 way and that everyone has a fair chance to be heard.
5 It is also the foreperson's job to sign and date the
6 verdict form when all of you have agreed on a verdict
7 and to bring the verdict form back to the courtroom
8 when you return.

9 My procedure would be when you come back I'll
10 have you identify the foreperson. Ask the foreperson
11 if a verdict has been reached; and if so, I'll ask the
12 foreperson to hand that to the deputy. I will then
13 review the verdict to see it's in proper legal form;
14 and if so, I'll then have the clerk publish it.

15 During deliberations, jurors must communicate
16 about the case only with one another and only when all
17 jurors are present in the jury room. You are not to
18 communicate with any person outside the jury about
19 this case. Until you have reached a verdict, you must
20 not talk about this case in person or through the
21 telephone, writing, or electronic communication, such
22 as a blog, twitter, e-mail, text message, or any other
23 rules -- any other means, rather. Do not contact
24 anyone to assist you during deliberations. These
25 communications rules apply until I discharge you at

1 the end of the case. If you become aware of any
2 violation of these instructions or any other
3 instruction I have given in this case, you must tell
4 me by giving a note to the court deputy.

5 If you need to communicate with me, send a note
6 through the court deputy, bailiff, signed by the
7 foreperson. If you have any questions, I will talk
8 with the attorneys before I answer, so it may take
9 some time. You may continue with your deliberations
10 while you wait for my answer. I will answer any
11 questions, if I can, in writing or orally here in open
12 court.

13 Now, your verdict finding the defendant either
14 guilty or not guilty must be unanimous. The verdict
15 must be the verdict of each juror, as well as of the
16 jury as a whole.

17 Now, during trial an item received into evidence
18 was -- was received into evidence, that being an item
19 identified as the cannabis. Now, I would permit the
20 jury to examine this item in open court. It will be
21 maintained here in the possession of the clerk. And
22 if you do wish to examine it, then just please knock
23 on the door and ask that you'd like to see the item.
24 We'll have you come out. I will then have you examine
25 the item in court.

1 The other exhibit, which is the diagram and
2 photograph, that you can take with you to the jury
3 room.

4 Now, in closing, let me remind you that it is
5 important that you follow the law spelled out in these
6 instructions in deciding your verdict. There are no
7 other laws that apply to this case. Even if you do
8 not like the laws that must be applied, you must use
9 them. For two centuries we have lived by the
10 constitution and the law. And no juror has the right
11 to violate the rules that we all share.

12 Counsel, did the Court publish all the
13 instructions that we reviewed at our conference?

14 MR. PARTINGTON: Yes, Your Honor.

15 MR. WARREN: Yes, sir.

16 THE COURT: Thank you.

17 And, gentlemen, any further instructions either
18 side is requesting that we have not covered?

19 MR. PARTINGTON: No, Your Honor.

20 MR. WARREN: No, sir.

21 THE COURT: Okay. Thank you.

22 Then with that, members of the jury, I'm going to
23 address Mr. Lewis.

24 Mr. Lewis, you have served as what we call the
25 alternate juror in this case. In a case of this

1 nature, if it goes more than a day or so in length,
2 which this has, it's important that we have someone
3 that can fill in in the event one of the other jurors
4 cannot serve.

5 But I now have a panel of six, which is required
6 by law, so I can now release you from your service
7 with my great thanks.

8 And, Mr. Lewis, I've noted that you, as all the
9 jurors, have been very attentive during the trial.
10 And I appreciate your time today. We could not have
11 tried the case without your being here. But I can now
12 release you, Mr. Lewis.

13 Mr. Lewis, do you need an excuse from work or
14 school or anything of that nature at this time?

15 MR. LEWIS: No, sir.

16 THE COURT: Mr. Lewis, what I would ask of you,
17 if you will please leave your notes -- we're going to
18 destroy any notes that you might have taken -- and
19 your pen and your badge so we can use that for another
20 day. You can leave that as well.

21 You're welcome to stay if you would like or
22 you're free to go now.

23 Do you have anything in the jury room that you
24 need to get out?

25 MR. LEWIS: No, sir.

1 THE COURT: Then with that, Mr. Lewis, again, I
2 thank you very much. I'll instruct you now, as I
3 would the other jurors, that you have the very special
4 privilege of not talking about this case with anyone
5 if you don't want to talk about it. If you do want to
6 talk about it, then you're free to do so now.

7 But that's a special privilege that jurors have.
8 You don't need to talk to you -- talk about it if you
9 don't wish to. The attorneys will not be approaching
10 you to talk about it. But if you want to talk about
11 it, that's your right. Okay?

12 Mr. Lewis, thank you, sir. I'll let you stand
13 down. And you're free to go now or stay if you wish.

14 THE BAILIFF: Sir, your badge.

15 THE COURT: Yeah, I know you might like to keep
16 that as a souvenir, but I'm afraid we have to keep
17 that for another day. Thank you.

18 Now, members of the jury, one last thing I would
19 ask of you. If you'd please leave any cell phone
20 device you might have with you here in the courtroom.
21 The bailiff will guard it and make sure no one touches
22 it. But it's important that we not have anything go
23 in the jury room that might be a distraction to you.

24 And with that, I'm going to give you a copy of
25 the instructions, members of the jury, to take with

1 you. And the exhibit in evidence, which was the
2 overhead photograph, that can go back as noted. We'll
3 keep the other exhibit in the courtroom. Unless you
4 wish to look at it later, just let the bailiff know.
5 Okay?

6 Thank you, folks. I'll now let you retire to the
7 jury [verbatim] to deliberate your verdict.

8 I'll also give you the copy of the verdict form.

9 (The jury retired to consider their verdict at
10 3:50 p.m.)

11 THE COURT: Okay. Gentlemen, I believe -- did
12 you-all get your copies now of the verdict form and
13 the instructions? I think y'all have that.

14 MR. WARREN: Yes, Your Honor.

15 MR. PARTINGTON: Yes, sir.

16 THE COURT: Okay. Gentlemen, we'll stand in
17 recess.

18 If you'll please leave a number, if needed, to
19 reach you if we -- if you happen to be out.

20 And, Mr. McDonough, yourself too, please stay
21 either with your attorney or let him know where you
22 are at all times in case we need to get you. Okay?

23 THE BAILIFF: They're all set, sir.

24 THE COURT: All right. Jury is out, Mr. Bailiff?

25 THE BAILIFF: Yes, sir.

1 THE COURT: All right. Then we'll stand in
2 recess. Thank you.

3 THE BAILIFF: All rise.

4 (Court recessed at 3:52 p.m. and reconvened at
5 4:30 p.m., after which the following proceedings were
6 had out of the presence of the jury:)

7 THE COURT: Please have a seat everyone.

8 The State is present. The defendant is present
9 with counsel.

10 Mr. Bailiff, has the jury indicated that it has
11 reached a verdict?

12 THE BAILIFF: Yes, sir.

13 THE COURT: All right. If we're ready, we can
14 please bring in the jury.

15 (The jury entered the courtroom, after which the
16 following proceedings were had:)

17 THE COURT: Okay. Ladies and gentlemen, please
18 come on in and resume your seats.

19 All right. Thank you, ladies and gentlemen.

20 The jury is now back.

21 Members of the jury, thank you. Have you elected
22 a foreman or forewoman?

23 And who would that be, please?

24 MR. GATES: (Indicating.)

25 THE COURT: Okay. That is Mr. -- Mr. Gates, is

1 it?

2 MR. GATES: Correct.

3 THE COURT: Mr. Gates, has the jury reached a
4 verdict?

5 MR. GATES: Yes, sir.

6 THE COURT: Would you please hand it to the
7 bailiff for my review?

8 (Mr. Gates complies.)

9 THE COURT: All right. Thank you.

10 The verdict appears to be in proper legal form.
11 There's one thing, however.

12 Mr. Gates, did you use a pencil to sign this?

13 MR. GATES: That's all we had back there.

14 THE COURT: You did not have a pen?

15 I'm going to give you a black ink pen. I would
16 ask, if you would, please, to mark on this verdict
17 with a black ink pen and sign it, if you would.

18 (Mr. Gates complies.)

19 THE COURT: All right. Thank you, sir.

20 All right. Thank you.

21 Mr. Gates, you have now just written on top of
22 the pencil marks -- is that correct? -- with a black
23 ink pen?

24 MR. GATES: Correct.

25 THE COURT: Thank you.

1 Madam Clerk, I'm going to have you now publish
2 the verdict.

3 Thank you.

4 THE CLERK: In the Circuit Court, Seventh
5 Judicial Circuit, In and For Vol- -- it says Vol- --
6 Flagler County --

7 THE COURT: We'll correct that. It should read
8 Flagler.

9 Thank you, Madam Clerk.

10 THE CLERK: -- Flagler County, Florida.

11 State of Florida vs. Darrell Eugene McDonough.

12 Case No. 13-00325-CFFA.

13 Verdict. We the jury find the defendant, Darrell
14 Eugene McDonough, as follows:

15 Count I: Guilty of the charge of fleeing or
16 attempting to elude.

17 Count II: Guilty of the charge of possession of
18 cannabis not more than 20 grams.

19 So say we all.

20 Dated at Bunnell, Flagler County, Florida, this
21 22nd day of April, 2014.

22 THE COURT: Thank you, Madam Clerk.

23 Do counsel for the State or Defense wish the jury
24 to be polled on the verdict?

25 MR. PARTINGTON: Yes, Your Honor.

1 THE COURT: All right. Thank you.

2 Madam Clerk, would you please poll the jury on
3 the verdict?

4 THE CLERK: Juror number one --

5 THE COURT: And, members of the jury, just --
6 just answer -- answer in response to the clerk as she
7 calls your name.

8 Go ahead.

9 THE CLERK: Juror number one, is this your true
10 and correct verdict?

11 JUROR NO. 1: Yes.

12 THE COURT: Juror number two, is this your true
13 and correct verdict?

14 JUROR NO. 2: Yes, ma'am.

15 THE CLERK: Juror number three, is this your true
16 and correct verdict?

17 JUROR NO. 3: Yes.

18 THE COURT: Juror number four, is this your true
19 and correct verdict?

20 JUROR NO. 4: Yes.

21 THE CLERK: Juror number five, is this your true
22 and correct verdict?

23 JUROR NO. 5: Yes.

24 THE CLERK: Juror number six, is this your true
25 and correct verdict?

1 JUROR NO. 6: Yes, it is.

2 THE COURT: Thank you, members of the jury.

3 Ladies and gentlemen of the jury, I wish to
4 advise you of a couple of things. First of all, this
5 concludes your jury service.

6 As I noted with Mr. Lewis, you have the absolute
7 right to keep the things that went on during the
8 course of the proceedings to yourselves. If you wish
9 to speak of it, you're now free to do so. You can
10 talk with anyone you wish. But the attorneys
11 themselves will not be approaching you to talk about
12 your service. But if you wish to, you're certainly
13 free to do that.

14 Now, may I ask, do any of you have any property
15 in the jury room that you need to get out? You've all
16 gotten your things?

17 How about your cell phones?

18 Mr. Bailiff -- Corporal, if we could just
19 distribute the cell phones to everybody. Please make
20 sure they get back their phones.

21 (Brief pause.)

22 THE COURT: Thank you.

23 Ladies and gentlemen, if you could just leave
24 your badges here and your notes here, then we will
25 shred your notes to ensure that no one will ever see

1 your notes.

2 Do any of you require an excuse from work or
3 school?

4 JURORS: (Indicating.)

5 THE COURT: I think there were a couple of you.
6 The four gentlemen in front.

7 Madam Clerk, if we could --

8 THE CLERK: Okay.

9 THE COURT: -- take care of that.

10 Okay. Now, ladies and gentlemen, I want to let
11 you know, first, this is the type of case that could
12 not have been resolved but for the service of a jury.
13 So you performed your service. And on behalf of the
14 State, I wish to thank you for your service and giving
15 of your time.

16 The good news is that you are not subject to
17 recall as a juror for another year, so that -- that --
18 hopefully that will not happen very soon.

19 Okay. Now, with that, I'm going to release you
20 folks from your service with my great thanks.

21 And those of you that need an excuse, if you'll
22 just stop right by the clerk's office there -- clerk's
23 desk here and she will give you an excuse. All right?

24 Thank you very much. You're free to go now,
25 folks.

1 Thank you very much, sir. Appreciate it.

2 (The jury exited the courtroom, after which the
3 following proceedings were had:)

4 THE COURT: May I ask, has the State prepared a
5 sentencing score sheet?

6 MR. WARREN: Yes, Judge. He'll be entitled to a
7 PSI.

8 THE COURT: PSI. All right.

9 MR. WARREN: And he -- he scores 4.2 points.

10 THE COURT: 4.2?

11 MR. WARREN: Yes, sir.

12 THE COURT: All right.

13 MR. WARREN: Total sentence points. So any
14 nonstate prison sanction.

15 THE COURT: All right.

16 MR. WARREN: I can tell you that he has no
17 scorable prior history. He had a possession of
18 cannabis charge back in 2007 that was taken care of
19 through a diversion.

20 THE COURT: All right.

21 Mr. Partington, what's your position?

22 MR. PARTINGTON: Your Honor, the charge does
23 require a mandatory adjudication. I don't believe
24 there's any discretion with that. But -- and I'm not
25 sure -- with such a low score -- I haven't talked to

1 Mr. McDonough about this -- whether it be better just
2 to proceed to sentencing.

3 I'm not sure what the State is requesting, if
4 they're asking for first-time drug offender conditions
5 or what. But I hate to drag it out 30 days with a PSI
6 when, you know -- depending on the circumstances. But
7 I would differ to the -- differ to the Court.

8 We would ask that he be allowed to remain on bond
9 pending -- pending any sentencing if the Court --

10 THE COURT: Yeah, I think he's actually on an
11 ROR, so...

12 THE CLERK: Yes.

13 THE COURT: I was looking at this. I don't think
14 there is a bond posted.

15 Wait a second.

16 Okay. What's your position, State?

17 MR. WARREN: Your Honor, again, he has no prior
18 history. I don't have a strong position for
19 incarceration.

20 THE COURT: Okay.

21 MR. WARREN: It is -- you know, I'll just say
22 this: It's disturbing how -- you know, how he has
23 spoke of the law enforcement officers and that -- you
24 know, the supposedly terrible things that they did to
25 him. I believe none of that was really borne out by

1 the evidence.

2 You know, this idea that a 280-pound person is
3 laying on top of him, you know, reaming him, I just --
4 but I have no strong position either way, Judge.

5 THE COURT: All right. Here's what I'd be
6 willing to do: If the defendant wishes to waive the
7 PSI, I'd proceed to sentence him today. And I would
8 be sentencing him to a term of supervised probation or
9 community control. I'm not sure yet which. But I
10 would not include a jail sentence at this point.

11 You want to talk to him for a moment about that?

12 MR. PARTINGTON: If I could.

13 THE COURT: Go ahead.

14 Could you work up a score sheet, or do you want
15 to do that a little later?

16 MR. WARREN: I have -- I should have one in here.

17 THE COURT: Okay.

18 (Brief pause.)

19 THE COURT: Mr. Partington?

20 MR. PARTINGTON: We'd waive the PSI and proceed
21 to sentencing.

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

23 MR. PARTINGTON: Yes, sir.

24 THE COURT: Please step to the -- step up here to
25 the podium, please.

1 THE DEFENDANT: Okay. I don't know what a PSI
2 is, though.

3 THE COURT: Well, come -- we'll talk about it.
4 Just come on up.

5 All right. We have the matter of Mr. --

6 And I think this is, again, a misprint.

7 It should -- it's Mr. Darnell -- or Darrell,
8 rather -- Darrell Eugene McDonough.

9 All right. Mr. McDonough, in the matter of State
10 v. Darrell Eugene McDonough, having been found guilty
11 by the jury of Counts I and II of the Amended
12 Information, the Court will adjudge you guilty of
13 Count II, fleeing or attempting to elude --

14 MR. WARREN: That would be Count I.

15 THE COURT: Count I. I'm sorry. Count I. Thank
16 you. Fleeing or attempting to elude. The charge is a
17 third-degree felony offense. And Count II, possession
18 of cannabis not more than 20 grams. Adjudge you
19 guilty of the first-degree misdemeanor offense.

20 I'm going to proceed to the issue of a sentence.
21 The Court has just announced too that with your waiver
22 of the presentence investigation, the PSI, the Court
23 would proceed to impose a sentence of supervision.
24 I'm not sure at this point whether it's going to
25 include some community control or not. But I'm

1 willing to hear both sides on that issue.

2 You have the right to be heard in your sentence.

3 And, Mr. Partington, I'll be glad to give you an
4 opportunity to be heard, anything either in mitigation
5 or bar you'd like to present of sentence.

6 MR. PARTINGTON: Your Honor, we, of course, would
7 request just regular probation and not the community
8 control, which is essentially house arrest.

9 We'd point out the fact he has a very low score
10 in the scheme of things; 4.2, I think was his total
11 sentence points. Other than that 2007 or 2008
12 possession of marijuana under 20, which was a
13 misdemeanor that was handled nonjudicially, I don't
14 believe he has any prior record.

15 So we would ask the Court to take a scaled
16 approach to sentencing, allowing him at least the
17 chance at regular probation first. Should he not be
18 successful with that for some reason, then community
19 control, or, worst case, a prison sentence might be
20 appropriate down the road.

21 But we would ask the Court to at least start with
22 the lowest level of supervision and then proceed --
23 proceed from there. Understanding that it would
24 require drug offender conditions.

25 THE COURT: Um-hum.

1 MR. PARTINGTON: No alcohol. Random UAs. No
2 illegal drugs. If he had a valid prescription, he
3 would be allowed to take that upon providing proof to
4 his supervising officer.

5 And that's our request, Your Honor.

6 THE COURT: All right. Thank you.

7 Would the State wish to be heard on its
8 recommend -- recommendation at this point?

9 MR. WARREN: Originally the -- I believe the
10 original offer in this case was 24 to 48 months drug
11 offender probation, obviously with adjudication,
12 license suspension.

13 Again, the -- the thing that just concerns me
14 is -- and I know how testimony goes -- but just his --
15 just throwing everything at -- that law enforcement
16 did all these things --

17 THE DEFENDANT: They did.

18 MR. WARREN: -- egregious to him, and just
19 complete lack of respect for law enforcement.

20 And having said that, I'll leave that to the
21 Court.

22 THE COURT: All right. And now do you wish to be
23 heard?

24 THE DEFENDANT: Right now?

25 THE COURT: Do you?

1 THE DEFENDANT: Can I be heard?

2 THE COURT: This is your right. You have the
3 right to be heard before I impose a sentence.

4 Please raise your right --

5 THE DEFENDANT: He's implying --

6 THE COURT: Please raise your right hand to be
7 sworn.

8 THE CLERK: Do you swear or affirm the testimony
9 you're about to give is the truth, the whole truth,
10 and nothing but the truth, so help you God?

11 THE DEFENDANT: I do.

12 THE COURT: All right. Now, Mr. McDonough, are
13 you the defendant -- are you the defendant in this
14 case?

15 THE DEFENDANT: Yes.

16 THE COURT: All right. You understand the Court
17 has just adjudged you guilty of the two charges.

18 Now, you're here for your sentencing today. You
19 have the right to be heard before I impose a sentence.

20 Is there anything you would like to say before I
21 do so?

22 THE DEFENDANT: Yes, sir. He's implying that I'm
23 lying about everything that I said up there.
24 Mr. Mortimer and all of the things that I said
25 happened happened. Okay.

1 Mr. Mortimer was in the presence of 12 sheriff's
2 deputies at the jail, that he said he didn't go to,
3 that they're -- they're -- they're covering for him.
4 Nobody is going to say anything. He jumped on top of
5 me.

6 Everything I said was absolutely true. And --
7 and this is so unjust -- okay -- because this is
8 unfair to me.

9 Now you're going to put me in their hands. Okay.
10 I don't know if any of them --

11 I believe you were there that night at the jail.

12 But for him to say and to excuse me of just
13 trying to slander the officers -- it's not my fault it
14 looks bad what I said they did. Okay. But I'm not
15 lying up here. They did everything.

16 I pleaded with them at my window on the side of
17 the road, as I was getting out, as I was doing exactly
18 what he was telling me, with no resistance, pleading
19 about my shoulder, my collarbone, Please don't do all
20 the things -- like, don't slam me. I'll do whatever
21 you say, but don't slam me on the ground. Okay.

22 Everything I asked them not to do they did it.
23 Okay. I don't know why. I don't know why they just
24 wanted to just rough me -- rough me up. There were
25 six cops there. And three -- there are only three

1 that testified. Well, there's two or three other ones
2 that -- all three of them are saying that they don't
3 remember who they were. And one of those guys was the
4 ones that stopped my truck from riding off.

5 And saying I'm stuck, I lost control -- I never
6 lost control of my vehicle. That's all speculation.

7 And I just -- I want to say that before going
8 anywhere, because now you're putting me in these
9 guys's hands. It's not that I don't trust them
10 specifically. But right now I don't trust the
11 agency -- all right -- because overall, they're
12 screwing me over. They're -- they're -- they're
13 withholding evidence.

14 And I -- I was speaking my -- what was
15 happening -- you guys -- every time it seemed like I
16 was saying something that would make the police
17 officers look bad, you told me to shut up or I'd be in
18 contempt of court. And I barely got a chance to say
19 anything.

20 I talked for ten minutes, where this guy had,
21 like, two hours to sit up here and convince them of
22 things that he -- he's so sure about, but he wasn't
23 even there. And I gave my true testimony.

24 And you guys don't care that these guys ride
25 around with no video cameras and do this to people.

1 It's just so wrong.

2 THE COURT: Okay. Now, nothing you've told me
3 sounds like any mitigation or anything of that nature.

4 Let me ask you a few questions.

5 Are you employed somewhere?

6 THE DEFENDANT: Yes. I work every day. I'm
7 very --

8 THE COURT: What -- what do you do?

9 THE DEFENDANT: I work for the family. I cut
10 grass, and I pick up limbs. I do -- I burn yard
11 trash. We have a family estate out at Dead Lake that
12 I work hard at to keep it maintained.

13 THE COURT: And this is how you earn your
14 livelihood, by doing the --

15 THE DEFENDANT: Yeah. I don't --

16 THE COURT: -- trimming work and --

17 THE DEFENDANT: -- I don't make very much money
18 at all.

19 THE COURT: All right. Now, do you own any
20 property?

21 THE DEFENDANT: No.

22 THE COURT: Do you have a truck?

23 THE DEFENDANT: It's not mine. No.

24 THE COURT: It's not yours. All right.

25 How did you get here today?

1 THE DEFENDANT: I drove.

2 THE COURT: You're not driving home because
3 you're not -- your license is automatically revoked
4 today. So you're going to have to have somebody pick
5 you up.

6 Do you -- how long have you lived in this area?

7 THE DEFENDANT: All my life. Never caused -- I
8 don't cause people problems.

9 THE COURT: All right. So you have family here;
10 right? You have family here in the county?

11 THE DEFENDANT: Yes, I do.

12 THE COURT: All right. Now, how far did you go
13 in school, Mr. McDonough?

14 THE DEFENDANT: I went through some college, and
15 I have emergency medical training for EMT.

16 THE COURT: Okay.

17 THE DEFENDANT: I -- I went through hair school,
18 cosmetology, sky dive training. I was going to be a
19 sky dive instructor. I've got ski school
20 instructing knowledge. Probably have a Ph.D. in
21 snowboarding, if there was such a thing.

22 THE COURT: All right. Okay.

23 Mr. Partington, do you have any questions of
24 Mr. McDonough on any of these matters?

25 MR. PARTINGTON: Not at this time, Judge.

1 THE COURT: How about you, Mr. Warren?

2 MR. WARREN: No, Your Honor.

3 THE COURT: All right. Thank you.

4 Well, then, having reviewed the matter, heard the
5 trial today, and having heard from both counsel and
6 the defendant, I'm going to impose sentence now.

7 As to Count I, having adjudged the defendant
8 guilty of fleeing or attempting to elude, I will
9 sentence him to a term of three years drug offender
10 probation to be supervised by the Department of
11 Corrections.

12 The Court will revoke his driving privileges for
13 a term of one year by reason of the conviction for
14 fleeing or attempting to elude. It's a mandatory
15 revocation, so you can't drive home. You must turn in
16 your license.

17 Do you have it with you right now? I'll have
18 you -- I'll have you turn it in to the clerk.

19 Now, your conditions will include, Mr. McDonough,
20 you can't use any drugs unless prescribed by a doctor.
21 Prescription medication is okay, but no other illegal
22 substance.

23 You must undergo a substance abuse evaluation.
24 Follow any recommended treatment. You must have
25 random urinalysis testing to make sure that you are

1 not violating.

2 I will require as a condition of his issuance of
3 a new driver's license that he undergo attendance at
4 a -- an authorized safety class at the direction of
5 the Department of Motor Vehicles, a safe driving
6 class.

7 Count II, I will adjudge the defendant -- having
8 adjudged the defendant guilty of possession of
9 cannabis, sentence him to a term of concurrent
10 one-year drug offender probation with Count I. Same
11 conditions to apply: No drugs unless prescribed; no
12 alcohol; substance abuse evaluation, and treatment if
13 recommended; and random urinalysis testing.

14 The Court will impose the required costs: \$418
15 felony court cost; State's cost of prosecution and
16 investigation --

17 Any objection to that, Mr. Partington?

18 MR. PARTINGTON: No objection, Your Honor.

19 THE COURT: Thank you.

20 -- 100 to the State Attorney; 150 to the
21 agencies, which is --

22 MR. WARREN: Bunnell Police Department.

23 THE COURT: -- Bunnell PD --

24 Thank you.

25 -- \$50 application fee; and \$100 for the benefit

1 of the Public Defender's Office.

2 All right. Now, Mr. McDonough, you have 30 days
3 to appeal. If you can't afford a lawyer, I would
4 appoint one for you.

5 Now, what you're going to have to do, since it's
6 late in the day, is -- I'll permit you to go home.
7 You can't drive your own vehicle, of course. But you
8 can go home. You must report to Probation and Parole
9 here in Bunnell first thing tomorrow morning. I want
10 you there by 9:00 in the morning.

11 THE DEFENDANT: Where is that?

12 THE COURT: It's over here to the east of the
13 courthouse. The first little shopping center.
14 Larry's subs is in there.

15 THE DEFENDANT: Oh. Okay.

16 THE COURT: You know where that is?

17 THE DEFENDANT: What's the name of it?

18 THE COURT: It's Probation and Parole.

19 THE DEFENDANT: How do I get there?

20 THE CLERK: Department of Corrections.

21 THE COURT: Department of Corrections. That --
22 that's where you're going to check in.

23 THE DEFENDANT: How do I get there?

24 THE COURT: You'll get yourself there by 9:00 in
25 the morning.

1 THE DEFENDANT: Okay. Do I drive myself there?

2 THE COURT: No, you do not. You're not allowed
3 to drive.

4 THE DEFENDANT: So how -- how do you -- how am I
5 supposed to get there from -- from out there?

6 THE COURT: Do I look like a taxi driver? Do I
7 look like the guy that gives you transportation? You
8 figure it out.

9 You get there by 9:00 in the morning.

10 I'm going to give you a copy of an Action Form.
11 And when you get to Probation and Parole, they're
12 going to check you in, go through the requirements
13 with you.

14 Now, I want you to go home tonight. You stay at
15 home, or with your family. And then tomorrow morning
16 you report in to Probation and Parole.

17 Now, if you're not there on time and we have to
18 come looking for you, you're not -- you're going to go
19 straight to jail. You will not be released until I
20 see you again. So it's important you be there. Okay?

21 THE DEFENDANT: Yeah, sure.

22 THE COURT: Now, Mr. Bailiff needs some prints
23 today and some DNA today --

24 THE BAILIFF: Yes, sir.

25 THE COURT: -- from the defendant.

1 Anything further, gentlemen?

2 MR. PARTINGTON: No, Your Honor.

3 MR. WARREN: No, Your Honor.

4 THE COURT: Okay. If not, please step over here.

5 Now, see the bailiffs; they'll take your DNA test and
6 your fingerprints.

7 Mr. McDonough, I will give you one -- one
8 concession here. I will allow you -- if you do
9 everything you're supposed to do with no violations at
10 the halfway point of your supervision, you can ask for
11 early termination of your probation. So if you've had
12 no violations, do everything you're supposed to do,
13 you advise your probation officer and he can
14 communicate with me that you are authorized and
15 recommended for early termination. And if you do
16 that, I'll sign an order without the need of a
17 hearing. Okay?

18 THE DEFENDANT: I didn't hear that last sentence.

19 THE COURT: I'm saying that I'll do that without
20 you having to come back to a hearing.

21 But if you -- if you violate your probation, I
22 will not let you early terminate without a hearing.
23 Okay?

24 Thank you.

25 (Brief pause.)

1 MR. WARREN: Thank you, Your Honor. May I be
2 excused?

3 THE COURT: Yes.

4 We'll stand adjourned, gentlemen. Thank you very
5 much.

6 MR. WARREN: Thank y'all.

7 THE COURT: Thank you.

8 (The proceedings concluded at 5:00 p.m.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER
2

3 STATE OF FLORIDA)
4)
5 COUNTY OF FLAGLER)

6 I, Rhonda Bounds, Registered Professional Reporter,
7 Seventh Judicial Circuit of Florida, do HEREBY CERTIFY that
8 I was authorized to and did **stenographically report** the
9 foregoing proceedings, and that the transcript, Volumes I
10 and II, Pages 1 through 279, is a true and correct record
11 of my **stenographic notes**.

12 Signed this 20th day of June, 2014, at Bunnell,
13 Flagler County, Florida.

14
15
16 Rhonda Bounds RPR
17 Rhonda Bounds, RPR
18 Seventh Judicial Circuit of
19 Florida
20
21
22
23
24
25