STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM OCONEE COUNTY
Hon. Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2013-000515

THE STATE, ...APPELLANT,

v.

CODY ROY GORDON,.....RESPONDENT.

FINAL BRIEF OF RESPONDENT

KEITH G. DENNY, P.A.

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ISSUE ON APPEAL

I. WHETHER THE INCIDENT SITE RECORDING STATUTE IN S.C. CODE ANN. SEC. 56-5-2953 IS INEXCUSEABLY VIOLATED WHEN LAW ENFORCEMENT PLACES A DEFENDANT SUSPECTED OF DRIVING UNDER THE INFLUENCE IN THE DARK THEREBY OBSCURING THE DEFENDANT AND THE ADMINISTRATION OF THE HORIZONTAL-GAZE NYSTAGMUS TEST FROM THE INCIDENT SITE RECORDING.

STATEMENT OF THE CASE

On October 29, 2011, Mr. Gordon was stopped at a license and registration checkpoint and was detained on the suspicion of driving under the influence. The checkpoint was administered by the South Carolina Highway Patrol and manned by three (3) officers – although testimony at Mr. Gordon's trial and the South Carolina Highway Patrol Driver/Vehicle Inspection Report introduced at trial indicated on only two (2) officers were present at the checkpoint. Under cross-examination of the supervising officer, Cpl. B.W. Mayfield, it was admitted that another law enforcement officer was present and not reflected on the inspection report. (R. pp. 30-36)

Mr. Gordon was initially detained by L/Cpl. Greer who did not tape the first part of Mr. Gordon's investigative detention. The incident site video starts mid-sentence when L/Cpl. Greer directs Mr. Gordon to walk into the distance where L/Cpl. Greer begins administration the Horizontal-Gaze Nystagmus test. From the video, it is clear that the road was sufficiently blocked and L/Cpl. Greer's patrol car was out of the path of any oncoming traffic which could have presented an exigent circumstance relevant to the incident site recording of the field sobriety tests. In addition, the State did not submit an affidavit asserting the existence of any exigent circumstance which would have caused L/Cpl. Greer to move Mr. Gordon to a distant point in the night's darkness to administer the test. (R. pp. 30-36)

During L/Cpl. Greer's administration of the HGN test, Mr. Gordon's was obscured by the dark and his silhouette was partially visible. Moreover, L/Cpl. Greer's administration of the stimulus in front of Mr. Gordon is indiscernible and Mr. Gordon's upper body is not visible for significant portions of L/Cpl. Greer's administration of test. (R. p. 16, lines 10-13, R. pp. 30-36) Specifically, the incident site video was indiscernible as to the number of passes performed with

the stimulus, the duration of any prescribed hold time for determination of the onset of nystagmus, or the extent to which the stimulus was moved to either side of Mr. Gordon's head. (R. p. 4, lines 1-7) Subsequent to L/Cpl. Greer's HGN test, Mr. Gordon was given the Walk And Turn (WAT) test and the One-Legged Stand (OLS) test. Based on the dashcam video, Mr. Gordon was arrested at 23:55 on October 29, 2011 and read his *Miranda* rights. Mr. Gordon's Uniform Traffic Ticket (F-346464) erroneously listed the date of his violation as October 30, 2011 and the time of violation as 00:31. (R. pp. 30-36)

L/Cpl. Greer kept the patrol car dashcam focused on Mr. Gordon during the drive from the incident site to the Seneca Municipal Police Department for administration of the Datamaster breath analysis test. The dashcam camera skips forward three and a half minutes and then Mr. Gordon is seen back in the patrol car. At trial on cross-examination, L/Cpl. Greer was forced to admit that he took Mr. Gordon first to the Seneca DataMaster and then to the Oconee Law Enforce Center DataMaster. (R. pp. 30-31) When asked for the Seneca DataMaster breath site video, L/Cpl. Greer indicated the Seneca DataMaster machine was inoperable. (R. p. 31) However, no records were presented for any malfunction of the Seneca DataMaster and the video from Mr. Gordon's time at the Seneca DataMaster was not provided by the State. (R. pp. 30-36)

While Mr. Gordon was being transported to the Seneca DataMaster test site and subsequently to the Oconee County Law Enforcement Center DataMaster site ("Oconee DataMaster"), L/Cpl. Greer engaged Mr. Gordon in conversation regarding Mr. Gordon's past arrests while L/Cpl. Greer's dashcam video continued to record the conversation. At the Oconee DataMaster site, Mr. Gordon refused submit to the breath test and was charged with Driving

Under the Influence, 1st Offense and his license was suspended. Mr. Gordon was booked into the Oconee County Detention Center. (R. pp. 30-36)

At trial before the Magistrate M. Todd Simmons, Mr. Gordon's counsel moved to dismiss the charge against Mr. Gordon on several grounds. These grounds included the State's failure to provide a video of Mr. Gordon at the Seneca DataMaster site, the State's failure to record the conduct and administration of the HGN test at the incident site, the State's failure to redact prejudicial statements against Mr. Gordon from the incident site video and Oconee DataMaster breath site video after the Court specifically ordered the State to do so, and the State's failure to provide maintenance records for the Oconee DataMaster equipment pursuant to S.C. Code Ann. Sec. 56-5-2954 because of obvious timing malfunctions with the Oconee DataMaster breath site recording equipment. The magistrate denied defense counsel's motions and Mr. Gordon was subsequently found guilty and sentenced. (R. pp. 30-36).

Mr. Gordon's appeal was timely filed and the above-referenced issues were preserved for appeal. The Honorable Judge Alexander S. Macaulay heard the appeal after receipt of the Return of the Criminal Appeal from Magistrate M. Todd Simmons of the Oconee County Summary Court. (R. p. 1) During arguments, Mr. Gordon's counsel referred to still photos and made them available to the Court and the State. The State reviewed the photos and did not raise any objection to the Circuit Court's consideration of the still photos. (R. p. 6, line 18). Although the record is not fully developed, the record does reflect that Judge Macaulay took a break and conferred with his law clerk wherein Judge Macaulay appeared to review the incident site video at the bench's laptop with the aid of his law clerk. (R. p.6, lines 19 -21).

After returning from his review with his law clerk, Judge Macaulay heard a summary of Mr. Gordon's additional issues on appeal such as the inaccuracies of the dashcam video

recording equipment and the malfunctioning timestamps of the video recording equipment at the Datamaster breath analysis site. (R. pp. 6-10) Judge Macaulay requested the State to specifically address the incident site video issue raised by Mr. Gordon's counsel. (R. p. 10, line 7) Judge Macaulay surmised that if the State performed the HGN test, then the State was relying on the test. Furthermore, if the State was relying on the test then it needed to be [r]eadable, viewable." (R. p.11, line 17).

In response and relying on *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), the State argued that as long as the defendant was partially visible on the video then the incident site recording statue requirements were satisfied. (R. p.12, lines 16 – 19). Other than arguing that partial conduct was sufficient, the State failed to argue or raise for the Court's consideration any other field sobriety tests which were performed. (R. p.14, lines 8 – 12). The Court inquired of the State of any additional sobriety tests that were performed to supplement the HGN test and the State did not identify any additional test or present argument for any other test to supplement the Court's consideration of the validity of the HGN test administration. (R. p.14, lines 17 – 20).

In granting Mr. Gordon's motion to dismiss, Judge Macaulay stated that the incident site video must include any field sobriety test administered. Moreover, by "includes" it must be reliable in the sense that it does have the representation that "can be discerned what is going on." (R. p.16, lines 5 – 8). In addition, if law enforcement is going to use the HGN test then they can bring the defendant closer to the vehicle rather than in the outer edge of the lighted area. (R. p.16, lines 10 – 13). The State timely filed a Notice of Appeal and this appeal follows.

STATEMENT OF FACTS

On October 29, 2011, Mr. Cody Roy Gordon was stopped at a license and registration checkpoint administered by the South Carolina Highway Patrol. At the incident site, L/Cpl. Greer administered field sobriety tests. There were no exigent circumstances that required deviation from the statutory-obligation for incident site video recording. At the incident site, L/Cpl. Greer placed Mr. Gordon in the distance beyond the discernible view of the patrol car's dash cam resulting in an obscured video. Not only is Mr. Gordon's conduct obscured but L/Cpl. Greer's administration of the HGN test is not discernible. (R. pp. 30–31) Mr. Gordon was arrested for Driving Under the Influence, 1st Offense and was taken into custody prior to midnight on October 29, 2011. (R. p. 30) After arrest, Mr. Gordon was transported to the Seneca Municipal DataMaster site for a breath analysis and subsequently transported to the Oconee County Law Enforcement Cetner for a breath analysis. (R. p. 31) The patrol car dashcam video continued to record Mr. Gordon's entire transport sequence and included a break in the video recording indicating the stop of the Seneca Municipal DataMaster site. (R. pp. 30-31).

The incident site video recording and the only DataMaster breath analysis site video provided by the State both included multiple instances of prejudicial statements made by Mr. Gordon. Magistrate Simmons ordered the State to redact both videos; however, the State failed to redact them and the Defendant's prejudicial statements were presented by the State to the jury over defense counsel's objections. At trial, Mr. Gordon's counsel objected and moved for dismissal based on the above-referenced issues and multiple instances of equipment malfunctions resulting in inaccuracies. (R. pp. 30 - 36).

Mr. Gordon was convicted of Driving Under the Influence, 1st Offense and sentenced by Magistrate M. Todd Simmons. Mr. Gordon timely filed a Notice of Appeal to the Court of

Common Pleas for the Tenth Judicial Circuit. (R. pp. 30-36). On appeal, the Honorable Alexander S. Macaulay heard the issues preserved for appeal from the trial court. After hearing arguments and reviewing the matter, Judge Macaulay dismissed with prejudice Mr. Gordon's conviction. (R. pp. 27 – 29) The Circuit Court's finding was that if the State was going to rely on a field sobriety test then the test must include the representation of the test being administered and that the conduct and administration must be discernible. (R. p.16, lines 5 – 8) This appeal follows.

ARGUMENT

I. INTENTIONALLY PLACING A DRIVER SUSPECTED OF DRIVING UNDER THE INFLUENCE IN THE DARK, WITHOUT EXIGENT CIRCUMSTANCES, TO CONDUCT THE HORIZONTAL GAZE NYSTAGMUS VIOLATES THE SOUTH CAROLINA INCIDENT SITE RECORDING STATUE WHEN THE VIDEO IS NOT DISCERNIBLE AS TO THE DEFENDANT'S CONDUCT OR THE TEST ADMINISTRATION; THEREFORE, THE CIRCUIT COURT DID NOT ERR BY DISMISSING WITH PREJUDICE THE RESPONDENT'S CONVICTION.

The circuit court reviews appeals from the magistrate court pursuant to S.C. Code Ann. Sec. 18-3-10 (Supp. 2004). The circuit court, acting as the appellate court, reviews the matters raised in the notice of appeal. S.C. Code Ann. Sec. 18-3-70 (Supp. 2004). *State v. Bailey*, 368 S.C. 39, 43, 626 S.E.2d 898, 900 (Ct. App. 2006). In criminal appeals, the circuit court does not conduct a de novo review; rather, it reviews the case for preserved errors raised to it by an appropriate exception. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011) (citing *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011)). The Court of Appeal's review is limited to correcting the circuit court's order for errors of law. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). Moreover, the Court of Appeals is limited to review issues that are properly preserved for appellate review when the issue has been raised and ruled on by the lower court. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 396 S.C. 479, 482, 722 S.E.2d 213, 214 (2011).

South Carolina law provides that a driver suspected of driving under the influence who is given field sobriety tests must have his conduct videotaped at the incident site unless a statutory exception exists and the exception documented with a sworn affidavit. S.C. Code Ann. Sec. 56-5-2953(A) – (B). The issues of what conduct must be actually present on the incident site video as well as the implicit acts of law enforcement have been reviewed by this Court and the South Carolina Supreme Court. In *Town of Mount Pleasant v. Roberts*, the South Carolina Supreme

Court evaluated the effect of the local municipality willfully avoiding compliance with the State statute mandating incident site video recording. Although acknowledging that statutory exceptions exists for noncompliance with S.C. Code Ann. Sec. 56-5-2953, the Court found that the municipality's "protracted failure to equip its patrol vehicles with video cameras . . . defeats the intent of the Legislature and violates the statutorily-created obligation to videotape DUI arrests." *Id.* at 347, 713 S.E.2d at 285.

In *Murphy v. State*, 392 S.C. 626, 632, 709 S.E.2d 685, 688 (Ct. App. 2011), this Court evaluated whether the incident site video must contain a continuous full view of the accused and capture all field sobriety tests. This Court held that "provided all other requirements are met, the video need only record the accused's conduct." *Id.* This Court determined that the 'conduct' required to be captured on the incident site video was the accused's "behavior, action or demeanor." *Id.* at 631, 709 S.E.2d at 688.

In *State v. Elwell*, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011), *aff'd* 052913 SCSC, 27259, this Court evaluated whether the statutory twenty-minute pre-test observation period was required when there is a refusal to take the breathalyzer test. In determining that the observation period was not required, this Court made a clear determination that the legislative intent for the S.C. Code Ann. Sec. 56-5-2953 was to "reduce the number of DUI trials heard as swearing contests" between the State and the defendant. *Elwell* at 336, 721 S.E.2d at 454. This Court further clarifies this point by adding footnote 6 wherein the Court states: "The statute protects both the State *and the defendant* from sometimes unreliable memories of those testifying at trial." *Elwell* at 337, 721 S.E.2d at 455, n6.

Here, this case presents a novel question: Should the State be allowed to position the defendant in a manner that *obscures* the defendant's performance during a field sobriety test and

makes the test administration indiscernible and *then allow the State to use its sole impression* of the test administration against the defendant at trial? It is inconceivable to believe that the South Carolina Legislature would have intended to implement an incident site recoding statute crafted with such precise language if all law enforcement had to do was 1) turn on the incident site video camera, and then 2) move the defendant so far away from the camera that the defendant's responses and test administration are barely visible and, at times, completely obscured by no fault of the defendant and where suitable lighting alternatives exist. Indeed, the plain language of S.C. Code Ann. Sec. 56-5-2953 expressly provides for exceptions and the method to document the exceptions. Where no exceptions exist, the proper remedy is dismissal. *Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). To allow law enforcement such an abuse would strip away the defendant's constitutional freedom from being forced to testify at trial about the defendant's recollection of events in contrast to law enforcement's recollection. In essence, this is the precise situation that this Court believed that the Legislature intended to avoid as enunciated in *Elwell*.

Analysis

A. The Circuit Court's dismissal was not an error because L/Cpl. Greer moved Mr. Gordon out of the lighted view of the incident site video recorder to administer the Horizontal Gaze Nystagmus (HGN) resulting in defendant's conduct to be obscured and the HGN test administration indiscernible.

Pursuant to the laws of this State, "[a] person who violates Section 56-5-2930 . . . must have his conduct at the incident site and breath test site video recorded . . . [t]he video recording at the incident site must . . . include any field sobriety tests administered." S.C. Code Ann. Sec. 56-5-2953(A)(1)(a)(ii) (emphasis added). The South Carolina Supreme Court established that dismissal is an appropriate remedy for violations of S.C. Code Ann. Sec. 56-5-2953(A) where

the violation is not mitigated by an exception outlined in S.C. Code Ann. Sec. 56-5-2953(B). *City of Rock Hill v. Suchenski,* 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007).

In developing the incident site recording statute, the Legislature used unambiguous terms that require the alleged violator's *conduct* to be recorded during the *administration* of *any* field sobriety tests. 'Conduct' is defined as: "personal behavior, whether by action or inaction; the manner in which a person behaves." Black's Law Dictionary 315 (8th ed. 2004). With regards to the HGN field sobriety test, the investigating officer is trained to order the driver to conform to specific conduct in order for the HGN test to be administered. The driver's conduct during the HGN test administration and the investigating officer's perception of the tests results are used routinely used by the State at trial.

Specifically, the investigating officer is trained to provide the following instructions: "I am going to check your eyes. Keep your head still and follow this stimulus with your eyes only. Keep following the stimulus with your eyes until I tell you to stop." Moreover, the investigating officer is trained to have the driver 1) place their feet together, 2) keep their hands at their sides and 3) look straight ahead and keep their head still. DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing Student Manual VIII-6 (2006). When the investigating officer actually conducts the HGN test, the officer is required to perform a minimum number of passes of a stimulus in front of the driver's eyes with each pass to be performed within a recommended time for holding the driver's eyes in a given position. According to the National Highway Traffic Safety Administration, interpretation of the results are valid only when 1) the tests are administered in the prescribed manner, 2) the standardized clues are used to assess the driver's performance, and 3) the standardized criteria are employed to interpret the performance. DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing Student

Manual VIII-19 (2006). Simply stated, if the HGN test is not administered correctly, then the results are not reliable.

In *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 345, 713 S.E.2d 278, 284 (2011), the Town of Mount Pleasant sought to avoid compliance with S.C. Code Ann. Sec. 56-5-2953 because the Town was not obligated by statute to purchase cameras for its patrol cars nor was the Town obligated to request additional videotape equipment from the Department of Public Safety. In that case, the South Carolina Supreme Court made it clear that the legislative purpose behind the videotape requirement was "to create direct evidence of a DUI arrest." *Id.* at 347, 713 S.E.2d 278, 285 (2011). The Court reviewed whether the intentional avoidance by the Town to not equip their patrol cars with video recording equipment was a sufficient exception to the incident site recording statute. The Court held that the municipality's willful failure to equip their cars violated the Legislature's intention of a statutory-obligation to have a video of a DUI arrest. *Id.* at 347-48, 713 S.E.2d 278, 285-86 (2011). The Court found the town's explanations to be disingenuous because the reasons seemed to imply that law enforcement could circumvent the incident site recording statute by purposefully not requesting cameras. *Id.*

In this case, the State takes a similarly disingenuous approach. By all outward appearances, the statutory aspects of S.C. Code Ann. Sec. 56-5-2953(A) appear to have been met. However, L/Cpl. required Mr. Gordon to stand so far in the dark that any discernible review of L/Cpl. Greer's administration of the HGN test and Mr. Gordon's conduct during the test has been negated resulting in a useless video for Mr. Gordon's defense. (R. p. 14, lines 17-20) *See State v. Elwell*, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011) ("[56-5-2953] protects both the State *and the defendant* from sometimes unreliable memories of those testifying during trial."). The Circuit Court posited to the State during the appeal, if the State is going to

administer the test, then the State is intending to rely on the test. And if the State is going to rely on the test, the test needs to be visible. (R .p.11, lines 11 – 15. Allowing law enforcement to force a defendant to stand outside the discernible viewing area of the incident site recorder during administration of a field sobriety test, without a valid exception, is a disingenuous method to circumvent the recording statute.

Therefore, the Circuit Court's dismissal with prejudice of Mr. Gordon's conviction was not an error because a valid exception did not exist to support the State's failure to adequately provide the incident site video showing Mr. Gordon's conduct and HGN test in a discernible manner.

B. An issue that has not been raised and ruled on by the lower court may not be presented for consideration for the first time on appeal; therefore, the State's objection to the Circuit Court's consideration of still photographs and the culmination of additional field sobriety tests are not reviewable issues by this Court.

This Court is limited to review issues that are properly preserved for appellate review when the issue has been raised and ruled on by the lower court. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 396 S.C. 479, 482, 722 S.E.2d 213, 214 (2011) (citing *Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 880 (2007) (citing *Williams v. Williams*, 329 S.C. 569, 579, 496 S.E.2d 23, 29 (Ct.App.1998) , *rev'd* on other grounds, 335 S.C. 386, 517 S.E.2d 689 (1999) ("The circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party."); *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992) (circuit court sitting on appeal did not address

an issue and Wal-Mart made no motion pursuant to Rule 59(e), SCRCP , to have the court rule on the issue; thus the allegation was not preserved for further review by the Court of Appeals).

The State now argues for the first time on appeal that the Circuit Court considered the still photographs as the only basis for supporting the decision to reverse and dismiss Mr. Gordon's conviction. The record is absent of any objection preserving the Circuit Court's review of this issue to this Court. (R. p. 6, lines 18-22) In addition, there were no motions for reconsideration pursuant to SCRCP Rule 59(e) that would have preserved this issue for the Court of Appeals. Failure of the State to timely raise an objection requires that this Court to now review an issue that was not presented to the lower court for a ruling. Because that issue was not properly preserved, it cannot be raised for the first time on appeal to this Court. *Id.*

Next, the State contends that the Circuit Court's lacked any evidentiary support to find that Mr. Gordon's head was not sufficiently visible during the administration of the HGN test. In addition to not properly raising this issue for consideration, the State, in its Initial Brief of the Appellant, admits that during some part of the HGN test Mr. Gordon's head is not visible. Moreover, the Circuit Court clearly states that in its finding that the video must "include" which "means that is it must be reliable in the sense that it does have the representation . . . you can discern what is going on." (R. p.16, lines 5 – 8). Although the Circuit Court provided its justification and identified that the trooper could have brought Mr. Gordon closer to the car, the State for the first time in this appeal is challenging the basis of the Circuit Court's decision. Again, the State never raised the issue to the lower court for a determination and ruling. The record is absent of any objection or clarification by the State to the basis of the Circuit Court's decision. Therefore, this issue is not properly preserved for appeal. *Id.*

Finally, the record reflects that the State failed to make any argument regarding consideration of any other field sobriety test. However, the State, in its brief, relies upon the additional tests for reversal of the Circuit Court. The Circuit Court had the complete Return from the trial court for its review. (R. pp. 30-36). Moreover, the record reflects that Judge Macaulay took a break to perform a review when Mr. Gordon's counsel addressed the deficiencies in the lighting present in the incident site video. (R. p. 6, lines 19-21). While the record is not clear the specific intent of the Circuit Court's review with his law clerk of the Return, the State never addressed this issue to the lower court. Therefore, this issue of whether the Circuit Court had a sufficient evidentiary basis to render its decision is not properly preserved for this Court.

CONCLUSION

For the reasons set forth above, Mr. Gordon respectfully requests this Court to deny the State's appeal and affirm the Circuit Court's dismissal with prejudice of his conviction of Driving Under the Influence, 1st Offense.

Respectfully submitted,

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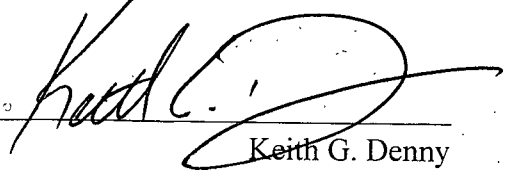
BY: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of the Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information In Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (including social security numbers, names of minor children, financial account numbers and home addresses).

Walhalla, South Carolina
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PROOF OF SERVICE

I hereby certify that on August 21, I mailed, first-class with postage prepaid two (2) copies of the **Final Brief of Respondent** to the following address(es):

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Sworn to before me this **21st** day of **August, 2013.**

Notary Public for South Carolina

My Commission Expires: 10/12/22