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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley Robinson, Administrative Law Judge
H. Philip Hayes, Jr., OMVH Hearing Officer**

**South Carolina Department of Motor
Vehicles and South Carolina Department
of Public Safety,..... Respondents,**

v.

Edward Eli Saleeby, III,.....Appellant.

Appellate Case No. 2013-002081
(S.C. Ct. App. filed March 4, 2015)

PETITION FOR REHEARING

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SC Court of Appeals

Pursuant to RULE 221 SCACR, Edward Eli Saleeby, III, petitions this Court for rehearing in *Saleeby v. S.C. Dept. of Motor Vehicles*, App. Case No. 2013-002081 (S.C. App. filed March 4, 2015) (Unpublished Op. No. 2015 UP-106). This decision, affirming the order of the Honorable Shirley C. Robinson, Administrative Law Court, dated and filed August 2, 2013 and the order of the Honorable H. Phillip Hayes, Jr., dated October 24, 2012. Appellant, through his undersigned attorney, is informed that the deadline for this petition is March 19, 2015. Appellant requests that suspension of his driving privileges be stayed pursuant to the law, regulations, and rules of court herein applicable while this petition is pending. Should this petition be denied, the Respondent, S.C. Dept. of Motor Vehicles should take notice that Edward Eli Saleeby, III intends to petition the South Carolina Supreme Court for a writ of certiorari in this matter.

The Court's per curium opinion overlooked or misapprehended Appellant's three points of contention, each of which would support a reversal of the Administrative Law Court's decision to uphold the Office of Motor Vehicle Hearing's Order suspending Appellant's driver's license under implied consent urine testing. This Court should grant a rehearing based upon reconsideration of the following:

- 1. IT IS ERROR TO UPHOLD THE HEARING OFFICER'S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY REFUSING TO AFFIRMATIVELY ASSIST APPELLANT WITH OBTAINING A BLOOD TEST BECAUSE APPELLANT'S REQUEST WAS MADE PRIOR TO THE OFFICER OFFERING APPELLANT A BREATH OR URINE TEST.**

In affirming the trial court's decision to suspend Appellant's license for refusing to submit to a urine test, despite the officer refusing to provide affirmative assistance with a blood test, this Court cited to S.C. Code Ann. § 56-5-2951 (A) (Supp. 2009) without further opinion. This Court overlooked the undisputed fact that Appellant consented to the breathalyzer test and requested a blood test while being videotaped in the breathalyzer room. (R. p. 88, line 9 – p. 89, line 12). Appellant's submission of a breath sample resulted in a reading of .00 blood alcohol concentration. (R. p. 8, lines 3 – 4). OMVH took the position that Appellant's *express* statutory right to affirmative assistance in obtaining a blood test can only be effectuated after the arresting Officer read Appellant's *implied* consent rights prior to administering the breathalyzer. (R. p. 8, paragraph 2). The Court overlooked the OMVH artificially creating a timing requirement for the Appellant to qualify for affirmative assistance under S.C. Code Ann. § 56-5-2950 (D - E) (Supp. 2009). Despite the clear aim of the South Carolina Legislature in recently promulgating a right of those accused of driving under the influence to obtain the most reliable and comprehensive proof of any substance that could have been in their system, this Court adopted the OMVH Order which states that Appellant's right to affirmative assistance is only triggered upon the advisement of implied consent rights, which is exactly what the right to affirmative assistance is designed to ensure the full exercise of.

The question to admit or exclude test results under S.C. Code Ann. § 56-5-2950 must turn on whether the violation thwarted clear policy objectives underlying the statute. Appellant's request for a blood test should be honored by a law enforcement officer to comply with policy objections, without regard to whether that request complies with the order of testing which law enforcement attempts to following pursuant to SLED

regulations. *City of Florence v. Jordan*, 362 S.C. 227, 223 (2004) citing *State v. Huntley*, 349 S.C. 1 (2002). This Court should reconsider the conclusion of Unpublished Opinion No. 2015 UP-106 by rehearing this matter, withdrawing its earlier opinion, and issuing a new decision which reverses the ruling of the OMVH and ALJC; holding that Appellant's request for assistance with obtaining a blood test met the intent of Section 56-5-2950(D) and (E), and the officer's failure to comply with the statute precludes any suspension upon finding Appellant refused to submit to a urine test.

2. IT IS ERROR TO UPHOLD THE HEARING OFFICER'S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY REFUSING TO ASSIST APPELLANT WITH OBTAINING A BLOOD TEST AS REQUIRED BY THE STATUTE AFTER APPELLANT SUBMITTED TO A BREATH TEST

In affirming the trial court's decision to suspend Appellant's license for refusing to submit to a urine test, this Court overlooked Appellant's submission to a breathalyzer test as an initial test, upon which, additional tests could follow. OMVH's Final Order states that, "(b)ecause Respondent refused a urine test, there was no initial test and therefore no duty to provide affirmative assistance for additional tests." (R. p. 8, lines 10 – 12) This Court misapprehends the fallacy of OMVH ignoring Appellant's breathalyzer results, finding that there was no initial test, and choosing to validate the arresting Officer's denial of affirmative assistance. This logic is opposite the South Carolina Supreme Court's consideration of one of the basic aspects of statutory interpretation. In *State v. Sweat*, 386 S.C. 339 (2010), the Court said "(c)ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been

intended by the Legislature or would defeat the plain legislative intention.” The case of *State v. Knighton*, January 4th, 1999 Case # 2923, (S.C. Ct. App. 1999) emphasizes the fundamental rule that a person who submits to breathalyzer testing has an unequivocal right to obtain a blood test. This Court’s affirmation of OMVH’s finding that Appellant was not entitled to affirmative assistance based on a lack of an initial test, is an erroneous statement of fact and law. Therefore, this Court should reconsider the conclusion of Unpublished Opinion No. 2015 UP-106 by rehearing this matter, withdrawing its earlier opinion, and issuing a new decision which reverses the ruling of the OMVH and ALJC. This rehearing would be proper because S.C. Code Ann. § 56-5-2950 (D - E) (Supp. 2009). requires the arresting Officer to honor Appellant’s request for affirmative assistance once Appellant submitted to the breath test. Based upon these facts and supporting authority, Appellant prays that this Court reverse and remand the matter with instructions to dismiss the driver’s license suspension proceeding against Appellant.

3. IT IS ERROR TO UPHOLD THE HEARING OFFICER’S FINDING THAT THE ARRESTING OFFICER DID NOT VIOLATE SECTION 56-5-2950 BY FAILING TO VIDEOTAPE APPELLANT’S ALLEGED REFUSAL TO TAKE THE URINE TEST

The conclusion that Appellant refused to submit to a urine test is unsupported by fact. (R. p. 87, line 17 – 20 & p. 89, line 6 – 12). Appellant believes that the alleged off-camera refusal to submit to urine testing should not have been considered by the OMVH hearing officer because videotape from the breathalyzer rooms shows that Appellant did not refuse a urine test when asked by arresting officer. (R. p. 89, line 6 – 12). Appellant believes this is an issue of first impression in South Carolina and that sound logic and

reasonable consideration of related case law supports Appellant's contention that an alleged refusal to submit to urine testing which can be video-taped, must be video-taped. As the South Carolina Court of Appeals stated in State v. Elwell, Opinion No. 4912 (2011) "the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence...In all cases, the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so." (See S.C. Code Ann. §56-5-2953 (A)(2)(b)-(c) (Supp. 2007)). While South Carolina courts have validated this principle of videotaping DUI evidence in detail, urine testing has not received the same attention, despite the administrative penalties for refusing to submit to breath and urine samples being equally severe.

The breathalyzer video of Appellant shows the law enforcement officer misadvised the Appellant about the availability of a blood test, administers a breath test which results in .00 bac, and then asks for a urine test, which the Appellant does not refuse. (R. p. 83, line 1 – 15 & p. 87, line 15 – 20). To honor the arresting Officer's claim that the Appellant changed his mind and refused a urine test while walking to the patrol car from the breathalyzer room, only because the Hearing Officer parsed the words of Appellant that he "did not recall refusing," validates Appellants belief that in an implied consent hearing, the word of a law enforcement officer will be honored by the Hearing Officer over common sense and the weight of the evidence. (R. p. 106, line 12 – p. 107, line 5). The arresting Officer had a video camera operational in his car on the evening of Appellant's arrest, but he chose not to videotape the alleged refusal of the urine test. (R.

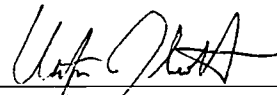
p. 87, lines 11 -14). Appellant urges this Court to reverse the decision of the OMVH and ALJC because the Court has noted that the failure to comply with the videotape statutes requires an appropriate, and perhaps severe, sanction. *See State v. Johnson* (by requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended compliance with the provisions of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance; dismissal is the appropriate sanction for an officer's unexcused violation of Section 56-5-2953. Based upon the aforementioned, this Court should reverse and remand the matter with instructions to dismiss the suspension proceeding against Appellant due to the failure of the arresting Officer to videotape Appellant's alleged refusal to submit to a urine test.

CONCLUSION

For the three reasons stated above, as well as relevant case law relied on by Appellant during the instant appeal and attached hereto, the Appellant urges this Court to grant this petition to rehear Appellate Case No. 2013-002081 (Unpublished Opinion No. 2015 UP-106). Appellant respectfully requests this Court withdraw its prior petition, rehear this matter, and issue a new decision resulting in a decision to remand the matter to the lower Court with instructions that the driver's license suspension proceeding against Appellant be dismissed with prejudice

Respectfully Submitted,

This 17 day of March, 2015



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RELEVANT AUTHORITY

CASES

Chisolm v. SC Dep't of Motor Veh., 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013)

City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007).....

Florence Co. Democratic Party v. Florence Co. Republican Party,
398 S.E.2d 124, 727 S.E.2d 418 (2012).....

Miller v. Aiken, 364 S.C. 303, 613 S.E.2d 364 (2005)

Richardson v. SC Dept. of Motor Veh., 12-ALJ-21-0027-AP (2013).....

State v. Allen, 314 S.C. 539, 431 S.E.2d 563 (1992).....

State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).....

State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011).....

State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013)

State v. Graves, 269 S.C. 356, 237 S.E.2d 584 (1977).....

State v. Hercheck, 403 S.C. 597, 743 S.E.2d 798 (2013)

State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011)

State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011).....

State v. Knighton, 334 S.C. 125, 512 S.E.2d 117 (Ct. App. 1999).....

State v. Stephenson, 18 S.C.L. (2 Bail.) 334 (Ct. App. Law & Equ. 1831).....

Town of Fairfax v. Smith, 285 S.C. 458, 330 S.E.2d 290 (1985)

Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011).....

STATUTES

S.C. Code Ann. § 56-5-2950 (Supp. 2013).....1, 11, 12, 17, 20, 21, 25, 26

S.C. Code Ann. § 56-5-2953 (Supp. 2013).....28, 29

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S.C. Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge
H. Phillip Hayes, Jr., OMVH Hearing Officer

Docket No. 11-ALJ-21-0563-AP
Docket No. 10-OMVH-01-3433-CC

South Carolina Department of Motor
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Appellate Case No. 2013-002081

PROOF OF SERVICE

I certify that I have hand delivered the following documents to the Clerk of the South Carolina Court of Appeals and upon filing, mailed the same to the South Carolina Department of Motor Vehicles:

- 1. Appellant's petition for rehearing.

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