

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUN 30 2015

Appeal From York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2014-002770

SC Court of Appeals

THE STATE,

Appellant,

vs.

STEVEN HOSS WALTERS,

Respondent.

RECORD ON APPEAL

ALAN WILSON
Attorney General

JAMES W. BOYD, Esquire

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 36425
Rock Hill, SC 297332
(803) 328-2600

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2014-002770

THE STATE,

Appellant,

vs.

STEVEN HOSS WALTERS,

Respondent.

RECORD ON APPEAL

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

ATTORNEYS FOR APPELLANT

JAMES W. BOYD, Esquire

Post Office Box 36425
Rock Hill, SC 297332
(803) 328-2600

ATTORNEY FOR RESPONDENT

INDEX

Index i

Transcript of Circuit Court dated Dec. 16, 20141

Uniform Traffic Ticket39

True-Billed Indictment.....40

Motion to Dismiss.....42

State’s Response to Motion to Dismiss44

SATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2014-GS-46-03405

STATE OF SOUTH CAROLINA)
vs.) TRANSCRIPT OF RECORD
STEVEN HOSS WALTERS, JR.)

DECEMBER 16, 2014
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE LEE ALFORD

APPEARANCES:

DANIEL PORTER, ASSISTANT SOLICITOR
YORK, SOUTH CAROLINA
ATTORNEY FOR THE STATE

JAMES W. BOYD, ESQUIRE
ROCK HILL, SOUTH CAROLINA
ATTORNEY FOR THE DEFENDANT

SHIRLEY BROOM
16TH Circuit Court Reporter

I-N-D-E-X

WITNESSES:

NO TESTIMONY TAKEN

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
S-1	Video		11
C-1	Response to Motion to Dismiss	38	
C-2	Motion to Dismiss	38	

1 THE COURT - Your Honor, before you we're bringing
2 the case of State vs. Steven Hoss Walters. He is charged
3 with DUI second offense under .10. The Indictment is 2014-
4 GS-46-03405. The State has one minor pre-trial motion,
5 Your Honor, and is ready to proceed. That motion is that
6 the Indictment actually says that Mr. Walters had a blood
7 alcohol concentration under .10, and the State would move
8 to have that amended to say refusal. Mr. Walters did not
9 give a breath sample. Just a matter of form, Your Honor.
10 If it's not necessary ---

11 THE COURT - Form. Form. What say you, Mr. Boyd?

12 MR. BOYD - Your Honor, at this point I'm not
13 going to object to an amendment. I think by raising it the
14 State could just re-indict and we're ready to go to trial,
15 hear the case, so but I'm not going to object to amendment
16 of the Indictment.

17 THE COURT - Well, you know, that's certainly
18 material to the Indictment, but I -- if you have no
19 objection to them amending it, I'll allow them to amend it.
20 Strike through while having a blood alcohol level of less
21 than .10?

22 MR. PORTER - Yes, Your Honor. Yes, please.
23 Amend the language to reflect refused to give a blood
24 alcohol sample.

1 THE COURT - Well, y'all do that. I'm not writing
2 the Indictment ---

3 MR. PORTER - Yes, Your Honor.

4 THE COURT - I'll strike through what's not -- but
5 you put -- you don't -- put in the language you want.

6 MR. PORTER - Your Honor, should I show the
7 language to ---

8 THE COURT - Sure, absolutely.

9 (WHEREUPON, DISCUSSION IS HELD BETWEEN COUNSEL
10 WHICH WAS NOT REPORTED.)

11 THE COURT - Has that been to the Grand Jury? I
12 guess it has if y'all are going to trial.

13 MR. PORTER - Yes, Your Honor, it has.

14 THE COURT - I started to say you could just re-do
15 it, but you don't want to ---

16 MR. PORTER - We'll just strike -- we will strike
17 any mention, Your Honor, of the -- of the sample or blood
18 alcohol concentration and just say under the influence of
19 alcohol and/or any other drug combination.

20 THE COURT - You're not going to say refused
21 breath sample. You're not putting that in here.

22 MR. BOYD - No, sir.

23 THE COURT - Striking that.

24 MR. PORTER - No, sir, Your Honor. We were going
25 to just not mention the refusal in the Indictment.

1 THE COURT - All right. Okay. Anything else?

2 MR. PORTER - No, Your Honor.

3 THE COURT - Anything on behalf of the defense?

4 MR. BOYD - Your Honor, I have a pre-trial motion.

5 We discussed that motion in chambers. I've provided you a

6 written copy and we're ready to go forward on that. I

7 think the Court's going to want to view the video-tape.

8 THE COURT - You gave me a ---

9 MR. PORTER - Your Honor, the State has provided a

10 motion in response to that. I have a copy of that as well

11 if you'd like to have another copy.

12 THE COURT - He's going to get my copy off my

13 desk.

14 MR. PORTER - Here's my motion in response, Your

15 Honor. The State will proffer the officer and the video

16 and reserve any argument on the motion until after that

17 proffer, Your Honor, if it please the Court.

18 THE COURT - All right, are you ready to proceed?

19 We need to see the video?

20 MR. PORTER - Yes, Your Honor. Your Honor, for

21 the purposes of the record, my name is Daniel Porter. I

22 represent the State of South Carolina. The Defendant is

23 represented by James Boyd. Sitting with me in the case is

24 Aaron Hayes. I would like to call first Lance Corporal

1 Mike McAdams of the South Carolina Highway Patrol. We'll
2 proffer the officer first, Your Honor, if that ---

3 THE COURT - Okay.

4 MR. PORTER - --- and then proceed to show the
5 video.

6 THE COURT - Okay.

7 MIKE MCADAMS, AFTER BEING FIRST DULY SWORN,

8 TESTIFIES AS FOLLOWS -

9 DIRECT EXAMINATION

10 BY MR. PORTER -

11 Q Good afternoon, Trooper McAdams. First I'd like to
12 start, is there -- was there a video recording of your
13 arrest of Mr. Walters?

14 A Yes, there is.

15 Q Did that video start upon activation of blue lights?

16 A Yes, it did.

17 Q Did that include any field sobriety test that you
18 administered?

19 A It does include all tests.

20 Q Did it show the arrest of the subject?

21 A It does.

22 Q Did it include Miranda Rights being read upon arrest?

23 A Yes, it does.

24 Q Have you viewed a copy of that recording before the
25 trial?

1 A Yes, I have.

2 Q And how did you mark that copy?

3 A I initialed it.

4 Q Okay.

5 MR. PORTER - Your Honor, at this point we would
6 ask the defense to stipulate this is a true and accurate
7 copy. We can show the video out of the camera, but we have
8 it queued up as well.

9 MR. BOYD - I'll stipulate.

10 THE COURT - Stipulation. Okay.

11 MR. PORTER - Thank you, Your Honor.

12 Q When you're on a stop such as this one, how would you
13 characterize the environment out on the roadway?

14 A Well, one just has to be very careful about the stop
15 and performing a field sobriety test so as to do it safely
16 in a manner so no one gets struck by any on-coming traffic.

17 Q Would you characterize it as a safe environment?

18 A If it's done properly, yes.

19 Q How do you insure the safety of yourself and the
20 subject?

21 A Well, I try to keep as many lights as I can like my
22 headlights and my tail lamps and along with the blue stripe
23 lights on top. As many lights as I can helps let the
24 traffic know that I am stopped here on the shoulder.

1 Q And during this video, did you offer any field
2 sobriety tests?

3 A Yes, I did.

4 Q What test were those?

5 A The three, and they would be -- the first one was the
6 horizontal gaze nystagmus test. The second one was the
7 nine-step walk and turn test, and the third one was the
8 one-legged stand test.

9 Q Thank you. How does the environment affect the manner
10 in which you position the subject?

11 A Well, I have to position them so as to keep them
12 safely on the shoulder there and not in the path of on-
13 coming traffic, also make sure that the guard rail on the
14 right side doesn't interfere with any of the field sobriety
15 testing.

16 Q And when you offer the horizontal gaze nystagmus test,
17 how did you position Mr. Walters?

18 A I positioned him with his back towards the camera so
19 that his face was facing his vehicle.

20 Q And why would you do that?

21 A Because we're taught in training that blue lights or a
22 lot of bright lights flashing in somebody's face can
23 interfere with the horizontal gaze nystagmus test and cause
24 false positives.

1 Q And why did you leave those flashing lights on during
2 the test?

3 A It was just to have as much light as I could to alert
4 the on-coming traffic that I am stopped here and to make it
5 as safe as possible.

6 Q And for clarification, is that the -- the area of the
7 stop was on I-77 mile marker 84, I believe. Correct?

8 A That's right.

9 Q Is that a well-lit area of the highway?

10 A Not particularly well-lit, no.

11 Q How wide is the shoulder of that portion of I-77?

12 A If I had to guess I'd say somewhere between six to ten
13 feet.

14 Q Okay. Moving on to the walk and turn test that you
15 mentioned, how does the roadway environment affect the
16 manner in which you position the suspect?

17 A Well, again, I wanted to keep him as straight a line
18 as possible, that way there's no chance of him getting near
19 lane number four where traffic is, and also there's no
20 chance that he's going to run out of room and hit the guard
21 rail.

22 Q So that's why -- you position the Defendant how in
23 that situation?

24 A Pretty much directly facing my car.

1 Q How does the subject's ability to stand affect your
2 positioning of the Defendant? Stability ---

3 A Well, I also have to make sure if he were to lose his
4 balance he's not going to be in danger falling into on-
5 coming traffic.

6 Q And how would you characterize the ability of the
7 subject and this arrest on that night with respect to his
8 stability?

9 A Well, since I did see a lot of clues in the nine step
10 walk and turn test, I had to make extra careful attention
11 that he's far enough away from the traffic lane that we're
12 doing this test safely.

13 MR. PORTER - Thank you, Trooper McAdams. I
14 believe the defense has stipulated that this is a true and
15 accurate copy, Your Honor. At this point we'd like to
16 publish it to Your Honor.

17 THE COURT - You may publish.

18 MR. PORTER - Your Honor, the State moves this
19 video in as State's evidence 1.

20 THE COURT - Admitted without objection.

21 (WHEREUPON, VIDEO IS ENTERED INTO EVIDENCE AS
22 STATE'S EXHIBIT NUMBER 1.)

23 MR. PORTER - Thank you, Your Honor.)

24 (WHEREUPON, VIDEO IS PLAYED FOR THE COURT)

1 Q Trooper McAdams, is that the full version of the field
2 sobriety test that you administered on the roadside that
3 night?

4 A Yes, it is.

5 Q And we just watched you read Miranda. Correct?

6 A Yes, we just did.

7 Q And at that point he is under arrest.

8 A At that point he is.

9 Q We watched you at one point back up from the
10 Defendant's car after he was positioned in the roadway.
11 Why did you do that?

12 A Because we've been told that it's important to have
13 all nine steps captured on camera and wanted to make sure
14 none of the steps were blocked by the hood of my car.

15 Q So you made every effort to comply with what you've
16 been instructed to as the current status of law.

17 A That's right.

18 MR. PORTER - Thank you, Your Honor. Please
19 answer any questions that Mr. Boyd may have.

20 MR. BOYD - A few questions.

21 CROSS EXAMINATION

22 BY MR. BOYD -

23 Q You stated that you had him -- you turned the head to
24 his car because you'd been trained that blue lights or
25 flashing lights can cause nystagmus?

1 A They can skew the results. That's right.

2 Q Okay. And is that in your training manual?

3 A I'm not really sure at this time. I know I've been
4 told that verbally. I'm not sure if that's in the NHTSA
5 manual or not.

6 Q Who told you that?

7 A I don't have a name for you. I would say that's
8 something that I hear around the highway patrol office and
9 whatnot is that you don't want to have flashing lights in
10 their eyes.

11 Q Were you taught that in any of your actual training of
12 the courses you took?

13 A As I recall at the Criminal Justice Academy they --
14 when we did simulated traffic stops, I remember as I recall
15 always having the person's back to the patrol car.

16 Q And did -- my question to you was, were you told or as
17 part of your training that the flashing lights can cause
18 nystagmus?

19 A I don't remember exactly where I've heard that. I
20 just know in my seven years on the road I've heard that
21 more than once.

22 MR. BOYD - That's all the questions I have.

23 THE COURT - Counsel let me -- go ahead if you
24 have questions ---

25 MR. PORTER - One more question.

1 RE-DIRECT EXAMINATION

2 BY MR. PORTER -

3 Q With respect to your viewing the test, does this
4 positioning offer you a better view? Is there -- does --
5 do the flashing lights interfere with your viewing the
6 Defendant's or the subjects at this point not any nystagmus
7 present?

8 A Yes, it could, because at the very least a lot of
9 flashing lights is going to make somebody squint, and if
10 they're squinting, I'm not going to have a good of view of
11 the eyes, and it's going to mess with the test.

12 Q The purpose would be two-fold then, both for your
13 observation, as well as accuracy.

14 A That's right.

15 THE COURT - I wanted to see the first part of
16 this nystagmus test again. You might want to look that up.

17 MR. PORTER - Yes, Your Honor.

18 (WHEREUPON, PORTION OF VIDEO IS REPLAYED FOR THE
19 COURT.)

20 MR. PORTER - Would you like us to keep playing
21 the video, Your Honor?

22 THE COURT - No. I just wanted to see that part
23 again. Go ahead.

24 MR. PORTER - At this point the State has no
25 further questions for the witness, Your Honor.

1 MR. BOYD - No further.

2 THE COURT - Thank you, sir. You can stand down.

3 Anything further?

4 MR. PORTER - No, Your Honor.

5 THE COURT - Counsel?

6 MR. BOYD - Your Honor, my -- I'd filed --
7 previously filed a motion. The -- my position is, Your
8 Honor, that the head being facing away, you cannot see the
9 full nystagmus test, particularly there are several things
10 you can't see. One thing, according to my understanding of
11 the instructions, the object is supposed to be 12 to 15
12 inches from the person. You cannot tell when he initially
13 starts how far his finger is from the head, so that's a
14 crucial part of the test right there. You can see the
15 finger go out and -- on either side. There's a period
16 during the test where the finger disappears in front of the
17 head, and this is a relatively short test, probably last
18 only about a minute, but during that period of time I
19 counted about, approximately, six seconds in which the
20 finger couldn't be seen at all because of the head -- it
21 was at -- totally in front. It goes out a period again and
22 then disappears again in front of the head for an
23 additional period of time, which I don't think it was quite
24 as long as the first but some period of time. There are
25 periods in there in which the finger is in front of the

1 head when the finger can't be seen at other times also. I
2 submit that that does not comply with the statute in the
3 case law in Gordon that the head must be seen. It doesn't
4 show a complete test as required by the statute. That has
5 been interpreted by the Courts. Your Honor, I can also
6 make some argument about some other things concerning the
7 other tests, but that's my argument on the eye nystagmus
8 test.

9 THE COURT - All right, if you want any other
10 arguments on record.

11 MR. BOYD - Yes, sir. Your Honor, as far as the
12 walk and turn test, the -- as my client takes the walk and
13 turn test going toward the patrol car, he takes more than
14 nine steps and it does disappear after that point, however,
15 I would submit his going farther than he's supposed is part
16 of the -- it's not supposed to be part of the test, but it
17 ends up being part of the test, and you cannot see the feet
18 during that period of time. You cannot see when he turns
19 around at that time. In addition, you can -- at -- there's
20 some points that you can't tell whether his heels are
21 touching his toes, that that I submit is part of the test.
22 There is a -- I think in the walk and turn test there's two
23 basic -- two of the clues or one of them is whether the
24 person's keeping a straight line or not, and, frankly, in
25 some portions of the test he fails that part of the test.

1 He doesn't keep a straight line. That's separate and apart
2 from the clue of whether his heels are touching his toes,
3 and I submit because of positioning, one cannot see that
4 either. So I would submit that the walk and turn test also
5 fails to meet the standards of the full test.

6 THE COURT - Well, let me say this, your argument
7 on the heel to test is totally out in the blue. I -- no
8 merit to that argument whatsoever. I can clearly see the
9 officer placed him the right distance for him to do the
10 test. Now, you're out on the side of the road with a
11 little short shoulder there, you know, preferably it
12 should've been moved away from that guard rail and up where
13 there's more room, but maybe the officer didn't feel like
14 he could do that. I don't know why -- but I think if you
15 didn't have the guard rail there you might have a little
16 more room to work with, but that's all he had when he was
17 doing the test, a little a narrow shoulder there. Very
18 hard to do any of these tests and that except maybe the
19 stand -- the one-legged stand, but there's no question to
20 what he positioned him such with the camera that if he had
21 properly performed the test and gone nine steps and made
22 his turn and come back nine steps, you could've seen every
23 bit of it. Okay? That's all that matters. The fact that
24 he disobeyed the instructions and went 10, 11 and 12 steps
25 and gotten out of the -- a little bit out of the camera

1 view, that's not a violation. You see the nine. Okay?
2 And the fact that he didn't follow the instruction is not
3 something that the officer could do anything about it. It
4 is a failure to follow instruction, which is one of the
5 grounds upon which they can grade them insofar as that
6 field sobriety test. If the didn't follow the
7 instructions, that's one of the things they look for in
8 determining whether there's a, you know, a person's under
9 the influence. So there's no merit to that. He came up
10 the nine steps, he went 10, 11 and 12, he did something
11 back -- just after he got out of the camera range he did
12 something there, but then he came back up into camera range
13 and tried to do a turn and he about fell down when he tried
14 to make that turn, so he certainly didn't make that turn
15 correctly when he was turning around and come back; he lost
16 his balance and almost fell there, and so he -- then he
17 walked back. Now, I could see heel to toe. You can't see
18 in a night light with that video camera and the light that
19 you have, you cannot see the heel and toe perfectly, but
20 you could tell well enough that he was doing that pretty
21 well heel to toe fairly straight, but he fell off the line
22 a couple of times. He lost his balance and fell of the
23 line a couple of times and so -- and that's part of the
24 test and you could see all of that. Seeing him when he
25 begun, seeing -- and if he had followed instructions, he

1 certainly -- all of it would've been on the -- on the film.
2 You can't anticipate that he's going to keep on going when
3 he gets to the nine, so, you know, I don't have a problem
4 with that. I think that's properly done and I think it's
5 everything you need to see on camera is there. I can see
6 the heel to toe and I can see the line he was walking. I
7 also saw that he lost his balance a couple of times,
8 stepped off the line to get his balance, which is something
9 that they look at. I also see that he didn't follow
10 instructions of the officer, which is also something they
11 use to judge whether somebody passed the test or not,
12 whether they followed instructions, understood instructions
13 or followed them. So that part I'm not worried about. The
14 only concern I got is -- and thought he did fairly well --
15 the officer might not agree -- on the one-legged stand,
16 because people have trouble with that one anyway, but he
17 managed to get I think 13 steps. There's a lot people have
18 trouble getting 13 on one foot, so I thought he did pretty
19 good on that. He didn't -- they like for you to go about
20 30 counts, but a lot of people can't go 30 counts, but I
21 think he did pretty good with 13, because most of them I've
22 seen don't make it to 13 if they get charged, and so that
23 one's okay. The only one, the nystagmus test is the one
24 that gives me a little bit of a problem, because what I've
25 gone by is, it's interesting, the officer says he -- he

1 puts the guy's back of his head facing him, and now he's
2 facing the flashing light, the officer is, and he's looking
3 into the eyes and checking, and he says that the flashing
4 lights may affect nystagmus, that jerking of the eyes,
5 whatever. He's saying that. But yet most of the defense
6 attorneys may come in, they want the person looking
7 directly at the camera, and they -- all kind of appeals
8 have been filed saying you couldn't get a full face view of
9 the person when the test is being administered, therefore,
10 the test was invalid and the case has to be thrown out.
11 That's what they say. It's what defense attorneys say, and
12 -- but most of the ones I've seen, the officers and the -
13 stations the Defendant face to face with a proper distance
14 with a properly positioning of the Defendant and they do it
15 side-to-side. They're looking at each other in the face
16 and this from the side, so the camera's looking at them,
17 the Defendant is here and the officer is here, and the
18 camera is here, and he's looking this way, and you can see
19 every movement that the officer administering the field
20 sobriety test makes. So you can see if he's doing it
21 properly. Comes out far enough, holds it long enough,
22 comes back in, holds it enough, goes out far enough, holds
23 it long enough, you can see all those things. You can't
24 see the eyes. I told somebody I've never seen the eyes. I
25 think if you -- if you have an officer with one of these

1 lapel cameras or something, you probably could, but you --
2 with the video camera out of a police car from 20 feet away
3 or so, you're not going to be able to see the eyes even if
4 the person was looking at the camera, and so but from the
5 side you can't tell either. But at least from the side you
6 can tell that they're in a proper position, how far the
7 officer is away from the Defendant, whether he's taking his
8 hands to the proper lengths, holding it to the proper
9 amount of time and holding it back here in the proper
10 amount of time and that sort of thing, whether he runs the
11 test long enough, because if you've got that view, then
12 someone else who is viewing that would be able to testify
13 whether the officer did it right or not. Okay? That's the
14 concern I have, and I've had people come in where experts
15 testify the officer didn't hold it out here long enough,
16 that he was supposed to make more passes than he made and
17 he didn't hold it here long enough and to be able to get a
18 correct reading and that sort of thing, but if you can't
19 see the officer's hand -- okay -- the whole time, I don't
20 know how you can critic that. You have to guess at what he
21 did when he was in front of his face, and it's not -- of
22 course, the officer can testify as to what he did, but you
23 can't really -- nobody can cross examine him and say, well,
24 it looks like here you didn't hold it long enough. You

1 can't see that. Now, so that's the concern I've got in
2 this case.

3 MR. PORTER - I appreciate that, Your Honor. I
4 would like to respond if you -- if you ---

5 THE COURT - Sure.

6 MR. PORTER - In this situation I would argue --
7 the State would argue that the same problem is presented if
8 you position the Defendant such that he is perpendicular to
9 -- facing perpendicular to the line sight, because the
10 logical argument then is, well, we cannot tell exactly how
11 far out he is gone, because you are looking directly into
12 the line of travel of the test, so that you are - you're
13 basically looking down a line which looks like a point.
14 You cannot see the end of that line or the beginning. All
15 you can see is that point as you're looking through, so the
16 problem is presented either way, and that I believe ---

17 THE COURT - But you can the -- you're right. The
18 argument can be presented any way, and we getting all kind
19 of arguments on appeal. I'm getting them all from
20 Magistrate's Court, City Courts. I hear them on appeal
21 during Common Plea Non-Jury. I heard four week before last
22 over there. And it's all on that kind of basis. Two of
23 them are the nystagmus test. Two of them were on the
24 datamaster room. In those cases I affirmed them all on
25 appeal, but that is an issue they're raising, but the thing

1 is, two of them are on the nystagmus -- but you could see
2 the hand throughout. Okay? You could see the hand. Now,
3 you can argue, then you can question the officer, well, how
4 far out were you here, doesn't look like -- but you can't
5 tell exactly how far out, but you can see the whole test.
6 The hands are visible the whole time and whether he's got a
7 light -- you know, holding a light and what -- they're both
8 visible the whole time. At least you can see that. Here
9 with the head blocking it out, you can't see all that, and
10 that's -- that's -- you know a part of that test, so -- and
11 that's what gives me a problem. It goes up on appeal --
12 these things are getting reserved like a heartbeat.

13 MR. PORTER - Well, Your Honor, the current -- the
14 current interpretation of whether an HGN test is
15 sufficiently recorded with respect to 56-5-2953(A) is State
16 vs. Gordon, and that test, specifically, directed the
17 Magistrate Court to make a finding that the head was
18 visible on camera. It was not a positioning of the head.
19 It was not any of that. It was, is the head visible such
20 that the subject we -- the point from which any evidence
21 comes, the head of the subject is visible on camera and it
22 can be viewed by the finder of fact at trial. In this
23 situation, Your Honor, I think from any -- from any three
24 hundred and sixty --- unless you have a three hundred and
25 sixty degree view of the Defendant at all times, there will

1 always be a ground against which to impeach the submitted -
2 - the video for saying, well, from this angle we can't see
3 this aspect; from this angle we can't see this aspect. In
4 this situation, the officer as proffered by the State has
5 given reasons that in his training and his experience he
6 positioned the Defendant in such a manner. Further, Your
7 Honor, if you saw at the very end of the video that was
8 offered, the Defendant was very unstable. It is practical
9 to place the Defendant such that the vehicle, the trooper
10 vehicle is behind the Defendant, so that if he becomes
11 unsteady he can fall onto ---

12 THE COURT - Counsel, cut that off. You know
13 better than that. That's the most ridiculous argument I've
14 ever heard.

15 MR. PORTER - I apologize, Your Honor, but my
16 original -- my point that I ---

17 THE COURT - He positioned him so he can fall on
18 the police -- come on, please. Look, I understand what
19 you're saying, what you're trying to do, but the issue is
20 he could've placed him like this -- if he'd placed him like
21 this you got no problem. This is the first time I've ever
22 heard -- as a matter of fact, I've heard defense attorneys
23 try to ask officers, isn't that blue light and all that's
24 flashing in his face, won't that affect the nystagmus, and
25 they say no. This is the first officer I've heard testify

1 that it will affect the nystagmus, and not only that, you
2 couldn't do a side-view even, where you're looking at the
3 officer and not looking straight at the lights. Here
4 you've got to look away from the lights but the officer
5 then is looking into the lights, you know, flashing lights.
6 So that's the first argument that I've heard that the
7 flashing light will affect nystagmus. First time I've
8 heard that in all of these years, and that's the first one
9 I've had where if I -- if I was looking at the back of the
10 head while they were doing the nystagmus, the first one that
11 I've seen. Okay? And so I'm not criticizing anybody. I
12 know you're -- the officer was working in a very narrow
13 area there. There's no reason why he couldn't have done it
14 at least this way. Now, I've had appeals that say in the
15 face of the -- the Defendant had to be facing the camera,
16 which would be directly into the flashing light. I don't
17 think you have to go that far. I think a side view where
18 you could see the officer doing the test is plenty. I
19 think that's sufficient, and that's the way I've ruled, but
20 where you're looking at the back of the head where you
21 can't see the whole hand, -- now, I'll be honest with you,
22 be honest with you -- and I don't mind putting this on the
23 record, because I've put it in an Order before, the Supreme
24 Court has ruled -- I don't agree with the Supreme Court on
25 that issue. My feeling is that if you can see, you know, a

1 test or if a test is not run -- done properly or you can't
2 see it all, then you should get rid of that test and go
3 with what you have and let the jury decide it on what you
4 have. The Supreme Court says no, if there's any problem
5 with any part of the -- a video, they toss the whole case;
6 I don't agree with that, and -- of course, you've got a
7 minority opinion, which includes the Chief Justice, which
8 would agree with my view of it, but we're not in the
9 majority; that's the problem and my -- kind of hoped that
10 they would maybe take another look at this and maybe look
11 at it in a different way. I don't know if they will or
12 not. Maybe all these appeals that are floating down on
13 their doorsteps might cause them to take another look at
14 it. But right now that's the law that I'm bound by, and
15 that's what I have to go by. These are statutory, statutes
16 are requirements, and unless the Defendant -- normally in a
17 statutory situation unless the Defendant can show some
18 prejudice, then the case doesn't get tossed. In a
19 constitutional violation a case can get tossed, but
20 shouldn't be, but that's the position of Chief Justice and
21 one other Justice takes, but it -- but they were in the
22 minority, and so I have to go with what they say. Now,
23 what -- anybody got a copy of Gordon so I can see exactly
24 what it said. I don't think it's going to apply this case.

25 MR. PORTER - Yes, Your Honor, I do have ---

1 THE COURT - I've got it back so -- here it is
2 right here on the computer. Let me look at it.

3 (WHEREUPON, DISCUSSION IS HELD BETWEEN THE COURT
4 AND THE LAW CLERK WHICH WAS NOT REPORTED.)

5 MR. PORTER - Your Honor, here's a copy of the
6 Sawyer if you like.

7 THE COURT - Yes, I've got them all back there in
8 a folder.

9 MR. PORTER - Would you like a copy of Sawyer?
10 Your Honor, briefly, I would like to incorporate my memo.
11 I forgot to do that at the beginning of my motion, Your
12 Honor. I apologize. I would like to incorporate that into
13 the record in response to this motion, just to -- for
14 purposes of ---

15 THE COURT - Okay.

16 MR. PORTER - Thank you, Your Honor.

17 (WHEREUPON, THERE'S A PAUSE IN THE RECORD WHILE
18 THE COURT REVIEWS CASES)

19 THE COURT - Anything else you want to say, either
20 side?

21 MR. PORTER - Judge, just for the -- to be clear,
22 Your Honor, the State -- I wanted to make sure that I had
23 expressed -- that the State feels that it's complied with
24 2953(A) that it met the requirements of State vs. Gordon
25 and that State even if the -- if the Court is inclined to

1 find that those are not, in fact, the case, then the State
2 would submit that 2953(B) under the totality of the
3 circumstances test would allow -- should allow the State to
4 proceed forward. It's -- I incorporated it in my motion,
5 Your Honor, at the end that under the totality of the
6 circumstances, Your Honor, the Defendant is not prejudiced
7 by this nystagmus test sufficiently to merit dismissal of
8 the case. The State should be allowed -- as you have
9 mentioned, the Chief Justice mentioned in the Sawyer
10 dissent that the State should be allowed to go forward with
11 the evidence that it has, the trooper's testimony, the
12 Defendant's refusal to provide a breath sample. Both of
13 those are clearly direct evidence of DUI, and at that
14 point, Your Honor, I think we have made the full amount of
15 our arguments.

16 THE COURT - Okay.

17 MR. PORTER - Thank you, Your Honor.

18 THE COURT - Anything else you want to say, Mr.
19 Boyd?

20 MR. BOYD - No, Your Honor, I think I've covered
21 everything.

22 THE COURT - This is what (B) says. I'm looking
23 at (B). It says nothing in this section may be construed
24 as prohibiting the introduction of other evidence in the
25 trial of a DUI charge. Failure by the arresting officer to

1 produce the video-tapes required by this section is not
2 alone ground for dismissal if the arresting officer submits
3 a sworn affidavit certifying that the video-tape equipment
4 at the time of the arrest -- arrest cite was in inoperable
5 condition, stating reasonable efforts had been made to
6 maintain the equipment and certifying there was no other
7 operable breath test facility available in the County, that
8 all evidence submits a sworn affidavit certifying that it
9 was physically impossible to produce the video-tape because
10 the person needed emergency medical treatment or exigent
11 circumstances existed. That's not what we have here.
12 We're don't have a missing the video-tape in this case or
13 portions of video-tape missing because of exigent
14 circumstances. We don't have it that. Subsection (B) I
15 don't think it applies to the case, and so you're back to
16 (A).

17 MR. PORTER - All right, Your Honor, further on in
18 the statute it reads: Nothing in this section prohibits
19 the Court from considering any other boundaries and for
20 failure to produce a video recording, and Your Honor, the
21 reason that I made that specific mention is, Gordon
22 specifically requires -- it addresses whether the recording
23 -- it -- whether the nystagmus test is recorded in --
24 within definition of 56-5-2953(A), so what we're talking
25 about here is whether the failure to produce the video

1 recording based upon the totality of the circumstances, so
2 in this situation the nystagmus test -- if you're inclined
3 to say that the nystagmus test was not properly recorded,
4 then that is, in fact, that it was -- we're not producing -
5 - the State is not able to produce the video. So you've
6 got ---

7 THE COURT - That's not what -- here's the
8 problem. What does Suchenski say? I've been totally in
9 disagreement with Suchenski ever since it was decided, and
10 I predicted years ago that they would -- when it was --
11 came back before the Supreme Court they'd reverse it, but
12 you know what, they didn't; they affirmed it and much to my
13 dismay. But that's their decision, not mine. And in
14 Suchenski I think you should be able to just take that -- I
15 mean before Suchenski, I think you should just be able to
16 take out that test if you don't think it was properly done
17 or shows everything it should show. You should just be
18 able to take it out and go forward with the totality of the
19 circumstance, everything else, and that's what the Chief
20 thinks, too.

21 MR. PORTER - Yes, Your Honor.

22 THE COURT - But as I say -- and the other member
23 of the dissenting team in Sawyer; however, that's not what
24 Suchenski says and it was ---

1 MR. PORTER - Yes, Your Honor. Suchenski and
2 Sawyer both refused to -- did not -- the Court did not rule
3 on the 2953(B) motion because it was not properly preserved
4 for appeal. Both opinions state that 2953(B) argument was
5 not ---

6 THE COURT - You don't have an argument under (B).
7 That's what I'm trying to tell you. There is no missing
8 tape; there is not missing audio portion; there is no
9 malfunctioning video that an affidavit says reasonable
10 efforts have been made. You don't have anything with
11 regard -- you've got the video, it just doesn't show what
12 it's -- what it should show.

13 MR. PORTER - And that's what -- that's what I am
14 alleging is the failure to produce that the statute
15 contemplates, Your Honor. The nystagmus test is not
16 properly recorded. In Gordon, the Court stated that in
17 order for the -- in order for the test to be properly
18 recorded under 2953(A) -- I admit it is a bit of a
19 legalistic argu -- a word game here on plain, but in 2953 -
20 - the Gordon states for 2953(A) for nystagmus to be
21 recorded, the head has to be visible on camera, otherwise
22 it is not recorded properly under 2953 ---

23 THE COURT - That case stands for that case.
24 That's not -- that's not this case. I mean ---

25 MR. PORTER - Well, that's ---

1 THE COURT - Whether the head is shown or not --
2 they sent it back to determine whether the head was shown
3 on video or not. We don't even know that. One of the
4 allegations was it was not shown, but that -- I think the
5 Circuit Judge made that finding. They said the Circuit
6 Judge on appeal can't make a fact finding, sent it back to
7 the Magistrate and let them make that -- they said the head
8 had to be shown, but it doesn't say just because the head
9 is shown the test is good. That's not what it says at all.
10 It does say the head has to be shown. It's shown here, but
11 in the horizontal gaze nystagmus test it's done from the
12 back of the head is what you see and you can't see -- the
13 problem is you can't see the test fully administered.

14 MR. PORTER - Your Honor, if I may quote from
15 Gordon. The Magistrate is to make factual findings in
16 light of the Circuit Court. In our determination the test
17 must be recorded on camera, specifically for the HGN test
18 the head has to be visible on the recording.

19 THE COURT - Yes.

20 MR. PORTER - So in order for ---

21 THE COURT - That's that case. That has nothing
22 to do with whether the test is being -- you can see him
23 administering the test on the tape. It has to do with the
24 head. They're saying the head wasn't visible when he was
25 doing the test, the head of the Defendant was not visible.

1 You see, you've got the same situation here. If somebody
2 that's running the test and you can see everything they're
3 doing but you can't see the head, then arguably, you know,
4 he's doing what he's supposed to do and it should come in.
5 Okay? But in that case it said you couldn't see the head
6 and can't see the officer administering the test; if you
7 can't see the head it doesn't come in.

8 MR. PORTER - And it was just part -- part of the
9 overall argument I was making in my motion that for -- the
10 HGN test can be removed, the video could go -- there are
11 other remedies available; dismissal is not the appropriate
12 remedy, Your Honor. That's all -- that's the only argument
13 I'm trying to make. I believe it's been made, Your Honor.

14 THE COURT - Well, the Chief Justice would agree
15 with it, and that was the position ---

16 MR. PORTER - I agree with her.

17 THE COURT - --- I had. I'm in agreement with her
18 as well, but you know what, it doesn't matter, because
19 that's not the law, and I've got to follow the law, and the
20 law right now is in a three to two decision is different
21 than that, but I -- I agree with you that you should be
22 able to look at the totality of the circumstances. You
23 should be able to remove a portion of a tape that doesn't
24 meet the test and go with what you do have and let -- and
25 let it be decided on that, or if the alleged violation of

1 the field sobriety video is not -- is not prejudicial to
2 the Defendant, then I still think it comes in if you can't
3 show actual prejudice. I still think it comes in. My view
4 -- but I'm not -- but I'm not the one who's -- I've got to
5 follow what the Supreme Court said, ---

6 MR. PORTER - Yes, Your Honor.

7 THE COURT - --- and that's what I've got to look
8 at. No sense for me to decide it one way and let it go up
9 and get reversed and send it back, you know, and they
10 reverse it and that's the end of it anyway, but I mean --
11 you know, my job is to follow the law and -- to the best of
12 my ability. I may misinterpret it; I don't know, but I'm
13 trying not to. Here's the thing about Suchenski, it was
14 decided by four persons. There were four persons who
15 decided Suchenski, two Circuit Judges sitting in lieu of
16 Justices on the Supreme Court, that being Judge Manning and
17 Judge Johnson who is now deceased who was a Circuit Judge
18 at that time, and then there was acting Chief Justice --
19 let's see -- Waller, Justice Moore and there was a dissent
20 by Justice Burnett, so you had -- the Court -- it's not the
21 usual make-up is what I'm trying to say, because you had
22 two Circuit Judges sitting in lieu of Justices only there,
23 including the Chief Justice when Suchenski was decided.
24 And I thought maybe when they looked at that again -- I
25 didn't really agree with that, but that was the law until

1 they changed it, and lo and behold, they had a chance to
2 change it they didn't do it. And they say, well, you know,
3 we decided Suchenski, and they've changed the law since
4 then, but they didn't put anything in the new law that
5 would overrule or change Suchenski. So therefore, they had
6 to be aware that this had been decided and it was out there
7 and they didn't make any change in the law, therefore, they
8 must agree with our interpretation in Suchenski. That's
9 what they're saying in Sawyer and these other -- so that's
10 where we are. I mean -- so, you know, I have to accept the
11 law as they hand it down. They say if any part of the
12 video-taping strictly construed against the State on this,
13 if any part of it is not -- is not -- is missing or not
14 done correctly, then you've got to throw out the whole
15 case, and that's what Suchenski says. You know, I didn't
16 think that was the law, but it's what I've got to follow,
17 and then Sawyer and two or three other cases have affirmed
18 Suchenski, so -- and the legislature hasn't changed, made
19 any change in the wording of the statute after Suchenski
20 was decided, so I mean where do you -- what can you do? I
21 mean that's where we are. That's the law. That's what I
22 have to follow. My problem is with the horizontal gaze
23 nystagmus test, I would -- if would left up to me and I
24 think the appropriate way to be to take that part of the
25 test out, go forward with everything else. Okay? And let

1 - look at the facts and rule on it that way. That's what I
2 would do. But I think under Suchenski, which is the
3 current law, I have to toss the case. I have to throw it
4 out, dismiss it, because I don't think the horizontal gaze
5 nystagmus test was properly done. I don't think you can
6 see it. I don't mean not properly done. It may very well
7 have been properly done by the officer, but you can't see
8 it being done, and I think that is a violation of the
9 video-taping statute, that you can't see the test actually
10 being administered, so on that I think the Appellate Court
11 would toss this case if it got there. And if they going to
12 toss it when it gets there, I'm going to toss it here.
13 Okay? You still can appeal and they may disagree with me,
14 and you may get to try it again. I don't know. In any
15 event, I just don't -- following the law as I have to
16 follow it, not the way I see it, but the way I have follow
17 it, I don't think that test was properly done -- I don't --
18 so that you could see the actual test being administered,
19 and I think that the test should be done in the matter that
20 you could tell -- you can see it being administered. I
21 don't say you got to see the eyes of the Defendant. I
22 affirmed two cases on appeal a couple weeks ago where the
23 officer was facing the Defendant and administered the test
24 this way, and the appeal was that you couldn't see a full
25 face view of the Defendant, therefore, it wasn't properly

1 taken, and I affirmed the lower Court on that and said, no,
2 you didn't have to show the whole face, along as long as
3 you could show the test being administered so that you
4 could tell whether it's being done right or not, that that
5 was all that was required by the statute, video-tape that
6 and have a full view of the Defendant and the officer, and
7 so that's what I ruled in those cases. I might get
8 reversed in those, who knows, but I -- but that's the ruled
9 on those. I think it's proper. And this -- what's
10 different about this case is, you've got the back of the
11 head to the camera of the Defendant; I can't see the
12 officer's hand a good bit of the time, a finger. I don't
13 know what's going on there; I can't see. You say well, --
14 you know, I can say, well, I know the officer did it right
15 because he -- I'm sure he's trained here, but you can't say
16 that, and so if somebody can't look at that and tell that
17 the test is being administered properly, then it's being --
18 not been properly video-taped, so hopefully -- everybody
19 needs to get their ducks in a row in these things. We're
20 getting way too many appeals from the lower Court. I think
21 this is okay. That facing like this with the camera here,
22 I think that's okay, but I decided two of those that said
23 it was okay. They were on appeal from lower Court. I
24 don't know whether they'll go up or not. If they go up,
25 maybe we'll get a ruling on that and we'll know whether

1 that's acceptable, but I just do not believe if I let this
2 one in -- I mean if I go forward with this one I think
3 there's a very good chance I'll be reversed, so I'm not
4 going to do that. I'm going to try to follow the law, so
5 I'm -- I don't think that test was properly done -- if
6 properly video-taped, not properly done; let me get my
7 words straight. I don't think it was properly video-taped
8 so that you could see it was properly done. Okay? And
9 because of that I'm going to dismiss the case. I don't
10 have any choice I think under the authority of Suchenski
11 that's handed down to me; by precedent I've got to follow
12 it whether I necessarily agree with it or not. So that's
13 where we are. I'm going to dismiss the case.

14 MR. PORTER - Yes, Your Honor.

15 (WHEREUPON, A DISCUSSION IS HELD BETWEEN THE
16 COURT, THE COURT REPORTER AND COUNSEL REGARDING ANY
17 EXHIBITS WHICH WAS NOT REPORTED.)

18 (WHEREUPON, DOCUMENTS MARKED AS COURT'S EXHIBIT
19 NUMBERS 1 and 2.)

20 (END OF TRANSCRIPT)

21

22

23

24

25

Steven Hoss Walters Jr.
 #3356
 10-21-86
 24B-65-4320

FILED - RECORDS
 2014 JUL 15 PM 11:42

Form 438
 Rev. 9/10
 SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
 UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME: Steven
 MIDDLE NAME: Hoss
 LAST NAME: Walters

STREET AND NO.: 1670 Sturgis Rd
 CITY: Rock Hill
 STATE: SC
 ZIP CODE: 29730

STATE LICENSED: SC
 DRIVER'S LICENSE NO.: 101201816
 CDL: YES NO
 DRI. LIC. CLASS: D

VEH. LIC. NO.: TH1444
 STATE: SC
 MAKE OF VEH.: CHEVY
 YEAR: 83
 COAL VEH.: AUTO MOTORCYCL
 HAZ. MT.: MOPED MTRCYCL
 OTHER:

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT: General Sessions
 STREET AND NO.: 1675 York Hwy
 CITY: York
 STATE: SC
 ZIP CODE: 29745

DATE OF TRIAL: 10/28/14
 TIME OF TRIAL: 0430
 VIOLATION - COURT APPEARANCE REQUIRED: YES NO
 VIOLATION SECTION NO.: 56-5-2930

OWNER OF VEHICLE: Walters
 DATE OF ARREST: 7/13/14

ADDRESS OF OWNER: Rock Hill SC
 DATE OF VIOLATION: 7/13/14

BAIL DEPOSITED: Jail
 NAME OF ARRESTING OFFICER: M G McAdams
 RANK: 4/01

DESCRIPTION OF ACCUSED: W/M 10/27/86 58/185 151/151 B
 COUNTY: York
 BADGE: 558
 TROOP: 4

DATE BAIL REC'D. BY: []

CASE BEFORE: MAGISTRATE MUN. COURT
 CIRCUIT COURT FAMILY COURT FEDERAL COURT

NAME OF TRIAL COURT: []
 IF DIFFERENT FROM ABOVE: []

DEFENDANT: DID NOT APPEAR APPEARED

NOLLE PROSSED: DISPOSITION: GUILTY
 FORFEITED BOND: PLED: NOLLO CONTENDERE

TRIAL BY: TRIAL JUDGE JURY

VERDICT OF TRIAL IF ANY: GUILTY NOT GUILTY

DATE OF TRIAL IF ANY: [] 20

JAIL SUSPEND: [] FINE: [] AMT. COLLECTED: [] AMT. SUSPENDED: []

COMMITTED TO: Vehicle Searched: Arrest as Result of Collision:

CERTIFIED CORRECT: [] DATE: []

OFFENSE CODE: 99
 B.A. LEVEL: Refuse

SOCKET NO.: []

H 018841

TRIAL COURT COPY

DOCKET NO. 2014-GS-46- 03405

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

40

WITNESSES

SCHP/McAdams

The State of South Carolina

County of York

Defendant

COURT OF GENERAL SESSIONS

November 6, Term 2014

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

H018841

THE STATE

vs.

Defendant

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

TRUE BILL

STEVEN HOSS WALTERS Jr.

Rebecca W. Meares
Foreperson of Grand Jury

Date: 11/6/14

VERDICT

Indictment for

DRIVING VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS

Foreperson of Petit Jury

Date:

SC Code: 56-5-2930

CDR Code: 3356

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

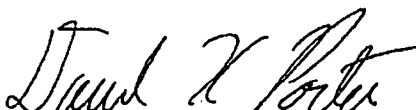
INDICTMENT

At a Court of General Sessions, convened on November 6, 2014, the Grand Jurors of York County present upon their oath:

DRIVING VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS

The Defendant, Steven Hoss Walters, did in York County, South Carolina, on or about July 13, 2014, drive a vehicle while under the influence of alcohol and/or any other drug or a combination of drugs and/or substances which cause impairment and while having a blood alcohol level of less than .10, to the extent that his faculties to drive are materially and appreciably impaired; such not being the first offense within a period of ten years including and immediately preceding the foregoing date, all in violation of Section 56-5-2930, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)	IN THE MAGISTRATE COURT
)	SIXTEENTH CIRCUIT COURT
COUNTY OF YORK)	
)	
State,)	Ticket No.: H018841
)	
Plaintiff,)	
)	MOTION TO DISMISS
v.)	
)	
Steven H. Walters, Jr.,)	
)	
Defendant.)	

The above named Defendant, through his undersigned attorney moves the Court to dismiss the above entitled matter. The grounds for this Motion are as follows:

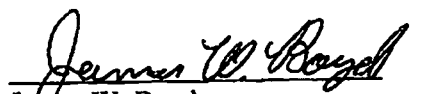
1. On July 13, 2014, the Defendant was arrested for DUI. The Defendant was given a several field sobriety test. One of the tests that were given to the Defendant was the Horizontal Gaze Nystagmus Test (HGN). During the HGN the Defendant's head is turned from the camera so that only the back of his head is visible. As a result, his face is not visible and only a partial view of the movement of the pen is shown.

2. The Defendant was also given a Walk and Turn Test. On the video the view of the Defendant's feet is blocked during the last few steps by the patrol car. During the Walk and Turn Test the Defendant is positioned such that it cannot be determined whether or not the Defendant is touching heel to toe.

South Carolina Code Annotated Section 56-5-2953(A)(1)(a)(ii) requires the incident site video to include, "include any field sobriety test administrated". The Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. In the present case the State

failed to comply with the video taping requirements with regard to the HGN and the walk and turn test. Therefore the Defendant's performance, an important part of the test was not videotaped. The remedy for non-compliance of Section 56-5-2953 is dismissal of the case. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 323, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007).

FOR ALL THE ABOVE REASONS the Defendant moves the Court to dismiss the above entitled charge.


James W. Boyd
Attorney at Law
1544 Ebenezer Road
Post Office Box 36425
Rock Hill, SC 29732
(803) 328-2600
ATTORNEY FOR DEFENDANT

Rock Hill, South Carolina
December 11, 2014

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	OF THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)	
)	Indictment: 2014GS4603405
)	
The State,)	SOLICITOR'S RESPONSE TO MOTION
)	TO DISMISS
)	
v.)	
)	
Steven Hoss Walters Jr.)	

RECEIVED
 2015 APR 27 PM 4:17
 DAVID HAMILTON
 CLERK OF COURT
 YORK COUNTY, SC
 CERTIFIED TRUE COPY

The State, through the undersigned attorney, responds to the defendant's motion to dismiss as follows:

The defense filed a motion on December 11th, 2014, to dismiss the indictment against Mr. Walters for failure to comply with the video recording requirements of S.C. Code Ann. §56-5-2953. The State asserts that the video recording of Mr. Walters at the incident site complies with the current requirements under South Carolina law. The State further asserts that dismissal is not the appropriate remedy.

The current video recording statute that governs this motion includes the following language: "The video recording at the incident site must...include any field sobriety tests administered..." S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) (emphasis added). In *State v. Gordon*, the Court of Appeals interpreted what the statute requires for compliance. The court held that "...if the actual tests cannot be seen on the recording, the requirement [of videotaping] is pointless," and that a defendant's head must be shown during the HGN (horizontal gaze nystagmus) test in order for that field sobriety test to be recorded. *State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014). The court remanded the case to the magistrate court with

instructions for the magistrate to make specific findings as to whether the video recording captured the defendant's head.

Applying *Gordon* reasoning to the current case, the State has complied with the statute. The defendant states two grounds for dismissal, objecting to the recording of both the HGN and WAT (Walk and Turn) tests. This response will address both in turn.

The State asks that the court deny the motion with respect to the HGN test and find that the test was sufficiently recorded within the meaning of the statute. The video shows the defendant's head on camera. In addition, the Trooper can be seen administering the test. The video recording statute as interpreted by *Gordon* does not, and should not require the State to show the defendant's eyeballs twitching. The video recording satisfies the requirements of the statute by showing the defendant's head during the HGN test.

The State asks that the court deny the motion with respect to the WAT test and find the test was recorded within the meaning of the statute and within the interpretation of *Gordon*. The video shows the full WAT test as it is administered. All 9 steps of the WAT test are shown on camera. The defendant does walk off camera, but those steps were not part of any instruction given by Trooper McAdams. The Trooper positioned the defendant and camera such that the WAT test could be recorded in its entirety. The State should not be punished for the defendant's inability to follow instructions; especially when that inability is evidence of the defendant's materially and appreciably impaired state.

Beyond the requirements of the statute and *Gordon*, the defendant is unable to perform the WAT test in a manner in which his feet could touch heel to toe on each step. The defendant stumbles as he assumes the starting position. He crosses his steps. He places his feet out of line.

He falls well out of line during the turn. All of these events make it clear that the defendant was unable to perform the test satisfactorily. Were his performance close enough to passing that heel to toe touching was an issue, a finder of fact should take that into account when considering the sufficiency of the evidence. However, that is not the case before the court. The defendant's performance is poor enough to make it evident that he was not able to physically or mentally follow the instructions of the Trooper.

For the above reasons, the State requests that the motion to dismiss be denied because the Trooper recorded the field sobriety tests within the definition of the video recording statute and its interpretation by the *Gordon* opinion.

IF the court is inclined to grant the motion on any of the three grounds requested, the State argues that dismissal is not the appropriate remedy.

The Supreme Court has held that failure to produce a video recording that complies with 56-5-2953 may be a ground for dismissal if no subsection (B) exclusions apply. *City of Rock Hill v. Suchenski*, 374 S.C. 12 at 16, 646 S.E.2d 879 at 881 (2007). The *Suchenski* court held that the statute provides for dismissal of charges when the statute is *inexcusably* violated. *Id.* at 16, 881 (emphasis added). The court declined to take up whether the statute was excusably violated because the issue was not preserved for appeal. The Court reiterated that dismissal interpretation from *Suchenski* in *State v. Sawyer*, 409 S.C. 475, 763 S.E.2d 183. In *Sawyer*, the Court also declined to consider whether §56-5-2953(B) exceptions could allow a video that did not conform to the requirements of subsection (A) be admitted because the grounds were not preserved for review. *Id.*

Since this argument has not been heard by an appellate court, Chief Justice Toal's dissent in *Sawyer* is instructive. In her dissent, she opines that the video recording statute does not specify a remedy for noncompliance and that defects in the recording go to the weight rather than admissibility of the evidence. *Id.* at 483-6, 187-9. She also states that 56-5-2953(B) provides that noncompliance is not alone grounds for dismissal, and that the statute does not prohibit the State from going forward on other evidence. *Id.*

In light of the above, the State argues that the Legislature intended for 56-5-2953 to be malleable in certain situations, evidenced by the presence of subsection (B), in the discretion of the trial judge. Further, the holdings from both *Suchenski* and *Sawyer* indicate that subsection (B) could supply a reason to admit a defective video or at the very least allow the State to go forward on other evidence. Finally, Chief Justice Toal's dissent in *Sawyer* shows an appellate analysis of the full video recording statute that supports the State's position.

For these reasons, the State requests that it be allowed to go forward on other evidence should the video be found in violation of 56-5-2953.



Daniel K. Porter, Assistant Solicitor

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUN 30 2015

Appeal From York County
The Honorable Lee S. Alford, Circuit Court Judge SC Court of Appeals
Appellate Case Tracking No. 2014-002770

THE STATE,

Appellant,

vs.

STEVEN HOSS WALTERS, JR.,

Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

James W. Boyd, Esquire
Post Office Box 36425
Rock Hill, SC 29732

I further certify that all parties required by Rule to be served have been served.

This 30th day of June, 2015.



SALLY ELLISON
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: _____



WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar Number 15608
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEY FOR APPELLANT

June 30, 2015



RECEIVED
JUN 30 2015
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

June 30, 2015

James W. Boyd, Esquire
Post Office Box 36425
Rock Hill, SC 29732

Re: The State v. Steven Hoss Walters, Jr.
Appellate Case No. 2014-002770

Dear Mr. Boyd:

Enclosed please find two (2) copies of the Record on Appeal, along with proof of service, in the above-referenced State's appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: The Honorable Jenny A. Kitchings (original & 9 copies enclosed)
Victim Services