THE STATE OF SOUTH CAROLINA
In The Supreme Court

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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S.C. Sup. Ct. Opinion No. 27554
Heard June 3, 2015 – Filed August 5, 2015

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Appellate Case No. 2014-001337

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THE STATE, ..... PETITIONER,

v.

CODY ROY GORDON,.....RESPONDENT.

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**PETITION FOR REHEARING**

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Petitioner, the State of South Carolina, respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR, and submits there are important reasons for the Court to exercise its discretion to grant rehearing in this matter. The State hereby seeks rehearing on the grounds that the Court may have misapprehended or overlooked several crucial points in affirming the opinion of the Court of Appeals, as modified.

First, the State submits that not only did the Court of Appeals err by remanding the case to the magistrate court for further consideration, it more significantly erred by directly

misapplying the standard of review based on a misapprehension of the magistrate court's factual findings, an error which has now been perpetuated by this Court. By affirming the Court of Appeals as modified, this Court seems to have mischaracterized a portion of the State's argument. The circuit court, the Court of Appeals, and now this Court have either ignored or misconstrued the magistrate's factual findings which, because they were not clearly erroneous and necessarily encompassed the requirements of the video recording statute, were binding on the appellate courts and mandated affirming or reinstating Respondent's convictions without resort to further statutory interpretation. Second, the State submits this Court's statutory interpretation itself warrants rehearing because it is in conflict with State v. Henkel, Op. No. 27541 (S.C. Sup. Ct. filed July 1, 2015) (Shearouse Adv. Sh. No. 25 at 31), a prior decision of this Court addressing the legislative intent of the video recording statute. Third, the State submits the Court may have overlooked the lack of adequate guidance for the bench and bar in regard to the practical application of its opinion to future driving under the influence (DUI) cases because it leaves several key issues unanswered and creates new ambiguities for drivers, law enforcement officers, prosecutors, defense attorneys, and judges.

For all of these reasons, the State respectfully asks this Court to grant this petition for rehearing and issue an opinion which reverses the Court of Appeals' decision in its entirety, removes any language that conflicts with this Court's prior decisions, and reinstates Respondent's conviction. Alternatively, the State asks this Court to issue an opinion which clarifies for the bench and bar exactly what circumstances warrant dismissal of a case versus only redaction of the field sobriety test from the video and exclusion of testimony about the test.

## Misapplication of the Standard of Review

In its opinion, this Court correctly recites the standard of review: that in criminal cases the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. However, the Court then follows the lead of the circuit court and the Court of Appeals by disregarding this standard and concluding the magistrate "erred as a matter of law in finding that the officer's recording was only required to show Gordon's conduct generally." Yet, this is NOT what the magistrate found.

At trial, Respondent made several pretrial motions, including a motion to dismiss on grounds that the State failed to adhere to S.C. Code section 56-5-2953, which requires that the officer video record Respondent's conduct at the incident site, including the field sobriety tests administered. The trial judge watched the video, heard arguments, reviewed the relevant statute, and reviewed recent case law before ruling "**the State properly captured on the roadside video [Respondent's] conduct as required by S.C. Code § 56-5-2953** and as interpreted by Murphy"[1] and denying the motion. (App.p.32-p.33).[2] It is disturbingly unclear why this finding of fact was not given the proper deference by any of the three appellate courts who considered the trial court's ruling, particularly where this Court now concludes: "the statutory requirement that the HGN field sobriety test be video recorded is satisfied." Qualitatively, this conclusion is no different from the factual finding that was made by the magistrate judge. That finding was based on a review of the relevant statute including the provision which requires the video recording of "any field sobriety tests administered."

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[1] Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2007).

[2] Although the lighting is not perfect, Respondent's head is visible during the approximately two-minute long HGN test, and it is clearly visible during a majority of that HGN test because the officer's flashlight is pointed directly at Respondent.

This Court correctly acknowledges the State: (1) "argues the Court of Appeals misconstrued the decision of the magistrate as lacking sufficient findings of fact," and (2) "contends that the Court of Appeals 'misapprehended or overlooked the clear and unambiguous language of the statute, which does not include any requirement that "the head must be visible on the recording" of an HGN field sobriety test.'" However, the Court seems to have missed one major point of the State's argument.[3] That point did not concern whether the statute does or does not require that the head must be visible. Instead, the point was that IF the statute DOES encompass this requirement, and the requirement is so "obvious" such that "common sense dictates" seeing the head is part and parcel of the required videotaping of the HGN test, then the magistrate's factual finding that the video recording of Respondent's HGN test satisfied the statute MUST have encompassed the same obvious and common sense finding: that Respondent's head WAS sufficiently visible.

The statute requires that the "conduct at the incident site" be recorded and goes on to specify that "the video recording [of that conduct] at the incident site must include any field sobriety tests administered." Here, Respondent argued to the trial court that his head was not visible during the video recording of the HGN field sobriety test and that this violated the terms of the statute. The trial court reviewed the video recording and found it sufficiently captured Respondent's conduct. No more detailed finding was required. The trial court's reference to Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), which itself notes the statutory language had been amended after Murphy's arrest, shows the magistrate was aware of the

[3] As to the second major point of the argument, which this Court did address, the State continues to maintain that the head does not need to be visible to comply with the plain and unambiguous terms of the statute. As in Murphy, the statute does NOT require that the recording capture "a continuous full view of the accused." It also does NOT require a recording of a particular quality, or a recording in the best possible lighting conditions, or any other such limitation. As long as the recording includes "any field sobriety tests administered," it is in compliance with the plain, unambiguous language of the statute, and the circuit court erred in finding otherwise. It is also in compliance with the legislative intent behind the statute as described by the Court in State v. Henkel because it captures the interactions between Respondent and the officer.

specific requirement that the video recording include the field sobriety tests, and still found the video was sufficient. If the circuit court applied the proper standard of review on appeal, it should have affirmed the trial court because its finding was supported by evidence in the record. The Court of Appeals and this Court likewise should have affirmed without further analysis.

By misapplying the standard of review based on a misapprehension of the magistrate court's factual findings, the circuit court, the Court of Appeals, and this Court have unnecessarily resorted to a statutory interpretation that, if as correct and obvious as suggested, was the same statutory interpretation already made by the magistrate when he found the videotape was sufficient. Rehearing should be granted.

**Conflict with Henkel**

Here, the Court's entire opinion seems to be based on the premise that the legislative intent behind the videotaping requirement is to provide sufficient evidence for the jury to independently evaluate whether a driver passed or failed each field sobriety test that was administered. Indeed, the Court specifically holds:

> Neither Gordon nor the State would have been prejudiced by the exclusion of the HGN test video or testimony because of the alleged poor quality of the video. Since the focus of the HGN test is the movement of the eyes, the jury would not have been able to determine if Gordon passed or failed by simply looking at this video. Moreover, the viewing of a video of an HGN field sobriety test has very little probative value to a jury because the eyes of the motorist are rarely, if ever, seen.

State v. Gordon, Op. No. 27554 (Sup. Ct. filed August 5, 2015) (Shearouse Adv. Sh. No. 30 at 14) (emphasis added). By comparison, in Henkel this Court described a much different legislative intent. In Henkel this Court found:

> Subsection (A) was intended to capture the interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop where there are no other witnesses. . . . During a traffic stop, the subject, his vehicle, and his

> interaction with the officer can be videotaped by the car-mounted camera that is initiated by the officer's blue lights.

State v. Henkel, Op. No. 27541 (Sup. Ct. filed July 1, 2015) (Shearouse Adv. Sh. No. 25 at 36). As recognized in Henkel, the overarching purpose of subsection 56-5-2953(A) is clear: to ensure that the driver's "conduct" at the incident site and breath test site is recorded. This allows a jury to weigh whether the conduct supports the allegation of driving under the influence. Indeed, capturing the driver's overall conduct was the precise purpose described in Murphy, supra. The subparts of 56-5-2953(A)(1) simply identify particular aspects of that conduct which must also be included in the video recording. Pursuant to Murphy and its analysis of the predecessor statute, an officer could comply by video recording some, but not all, of the field sobriety tests administered. The amendment simply eliminated this possibility by requiring that any and all field sobriety tests be video recorded. It requires a video recording of the officer's administration of the field sobriety tests, not a recording that captures every detail or the actual results of the tests for the jury's independent evaluation. Indeed, it would be absurd to require video recording of the "involuntary jerking of the eyeball," which is the only relevant observation in an HGN test. State v. Sullivan, 310 S.C. 311, 313, 426 S.E.2d 766, 768 (1993). The State submits that as long as a juror can tell that the arresting officer is administering the test, there is compliance with the statute and any challenge to the quality of the test should go solely to the weight of the evidence. This is in accord with the legislative intent described in Henkel, but not the legislative intent which is the foundation for this Court's decision in Gordon. Any other interpretation does not seem to be practical, reasonable or consonant with the purpose, design, and policy of the lawmakers. As noted by the Court of Appeals, "the purpose of section 56-5-2953 is to create direct evidence of a DUI arrest." As implicitly found by the magistrate, that purpose was fulfilled. The video recording of the three field sobriety tests provided the

State, the defendant, and the jury with direct evidence of Respondent's arrest, as well as his "conduct at the incident site," including the "interactions between the subject and the officer." The State respectfully submits this is all that was required and asks this Court to grant rehearing to bring Gordon in compliance with Henkel.

**Guidance to the Bench and Bar**

To the extent this Court is not inclined to rehear the substantive issues addressed above, the State respectfully submits it should still grant rehearing to provide guidance to the bench and bar in regard to the practical application of its opinion to statutory compliance in future DUI cases. Specifically, it would be useful to clarify for the bench and bar what other specific incident site videotaping requirements are implied by the statute, and what specific circumstances warrant dismissal of the case versus redaction of the video and exclusion of testimony about the test. The opinion leaves several key issues unanswered and creates new ambiguities for drivers, law enforcement officers, prosecutors, defense attorneys, and judges, all of whom could benefit tremendously from more clarity. For example, what circumstances, if any, would warrant dismissal of a case where a video recording conclusively verifies that an HGN test was performed, but where the defendant's head is not shown during all or part of that video recording. Likewise, what circumstances, if any, would warrant dismissal of a case where a video recording conclusively verifies that a walk-and-turn test was performed, but where the defendant's feet or legs are not shown during all or part of that video recording. Additionally, under what circumstances could a video of a field sobriety test be of such poor quality that its admission is ever more prejudicial than probative.

## Conclusion

Based on the foregoing argument and the arguments raised in the Brief of Petitioner, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an opinion which reverses the Court of Appeals' decision in its entirety, removes any language that conflicts with this Court's prior decisions, and reinstates Respondent's conviction. Alternatively, the State asks this Court to issue an opinion which clarifies for the bench and bar exactly what circumstances warrant dismissal of a case versus redaction of the field sobriety test from the video and exclusion of testimony about the test.

Respectfully submitted,

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Columbia, South Carolina
August 20, 2015

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**PROOF OF SERVICE**

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I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Petition for Rehearing* dated August 20, 2015, on Respondent by depositing two copies of the brief in the United States mail, postage prepaid, addressed to his attorney of record:

Keith G. Denny, Esquire
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I further certified that all parties required by Rule to be served have been served. This 20th, day of August, 2015.

Angela Bennett
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