THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2014-CP-20-0255

The State.....Appellant

v.

Kathryn H. Dew.....Respondent

INITIAL BRIEF OF RESPONDENT

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The Circuit Court correctly affirmed the magistrate's granting of the respondent's motion to dismiss for failure to comply with the requirements of S.C. Code § 56-5-2953.

A. Judge Newman's Circuit court review of the Magistrate's decision is limited to matters of law only.
B. Contrary to the Appellant's assertion, *Gordon II* in no way mandates suppression as the appropriate remedy for a violation of the video recording requirements of § 56-5-2953.
C. The Purpose of § 56-5-2953 is to create direct evidence of a DUI arrest in order for the jury to be able to evaluate the subject's performance.
    a. The extent to which sobriety tests must be shown on video to satisfy S.C. Code § 56-5-2953 is not clear on its face, and those requirements must be strictly construed to give them the effect that the legislature intended.
    b. The legislature set the requirements of S.C. code section 56-5-2953 apart from other statutes by requiring certain portions of an arrest pursuant to that statute to be videotaped.
    c. The legislature has never amended the court's interpretations of S.C Code Section 56-5-2953 since the current version of the statute was enacted.
D. That the Walk and Turn Test is Not Sufficiently Shown on the Video, and thereby is not in Compliance with S.C. Code § 56-5-2953.
    a. The Horizontal Gaze Nystagmus test is fundamentally different from the Walk and Turn and One Leg Stand tests in several ways.
        i. That the suspect's head and the Officer's hands and arms are all that normally can be seen by a jury to evaluate whether the HGN test is performed correctly.

ii. That both of the suspect's feet must be able to be seen in conjunction with each other to be able to evaluate the walk and turn test.

E. That the failure of the police officer to position the video camera so the field sobriety test can be seen and evaluated is no excuse for failing to meet the requirements of S.C. Code Section 56-5-2953.

F. *Gordon II* is a case of compliance with S.C. Code § 56-5-2953. This case is a case of non-compliance with S.C. Code § 56-5-2953.

G. Redaction only operates in cases where the officer complied with the statute. Non-compliance still requires dismissal.

H. The Appellant erroneously, and rather illogically asserts that a motorist's performance on a field sobriety test is not required, merely the administration of the Test.

I. The Appellant's assertion that *Gordon II* says nothing about the walk and turn test does not mean that *Gordon II* does not speak to the Walk and Turn Test

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STATEMENT OF THE ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR IN AFFIRMING THE MAGISTRATE'S GRANTING OF THE RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF S.C. CODE § 56-5-2953?

STATEMENT OF THE CASE

The Statement of the Facts contained in the brief of the Appellant appears to be accurate with the following exceptions: The case was called for trial, not for motions. The motion to dismiss was made just prior to the start of the trial and the case would have gone to trial had the magistrate not dismissed it.

STATEMENT OF THE FACTS

The Statement of the Facts contained in the brief of the Appellant appears to be accurate insofar as it goes. However, in that this Court may only review matters of law, other important facts found by the Magistrate must also be included here.

The Magistrate made several significant findings of fact, which the Appellant fails to state in their initial brief.

First, the Magistrate found that in order to determine if the Defendant is performing the sobriety test as instructed by the officer, the portion of the Defendant's body that is performing the test must clearly be seen. *Magistrate's Return*, pg.2, last paragraph.

Second, that, the jury would not be able to determine from the video if the Defendant was in fact performing the walk and turn test as instructed because her feet were not clearly visible throughout the entirety of the test. *Magistrate's Return*, pg.2, first paragraph.

Third, the Magistrate found that the State's video was incomplete and therefore not in compliance with the videotaping statute. *Magistrate's Return*, pg.3.

Fourth, the Magistrate found that the conditions on the video and the way the Defendant was positioned relative to the camera prevented her feet from being seen so the jury would be unable to determine whether she was walking heel-to-toe as instructed by the trooper. *Magistrate's Return*, pg.2, first paragraph.

Fifth, the Magistrate apparently adopted the defense argument that the officer could have easily placed the Defendant in a position where she was walking perpendicular across the camera frame, as the officer did when he demonstrated the test. *Magistrate's Return*, pg.2, first paragraph.

ARGUMENT

THE CIRCUIT COURT CORRECTLY AFFIRMED THE MAGISTRATE'S GRANTING OF THE RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF S.C. CODE § 56-5-2953.

A. Judge Newman's Circuit Court review of the Magistrate's decision is limited to matters of law only.

> "In criminal appeals from a municipal court, 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." *City of Cayce v. Norfolk S. Ry. Co.*, 391 S.C. 395, 399, 706 S.E.2d 6, 8 (2011); *see* S.C. Code Ann. § 14-25-105 (Supp.2010) ("There shall be no trial de novo on any appeal from a municipal court."). "Therefore, our scope of review is limited to correcting the circuit court's order for errors of law." *City of Rock Hill v. Suchenski,* 374 S.C. at 15, 646 S.E.2d at 880.

Judge Newman relied on the Magistrate's fact finding and correctly concluded that the Magistrate properly found that the State was in violation of S.C. Code § 56-5-2953.

Once Judge Newman upheld the Magistrate's Decision that the State had violated the statute, he affirmed the only remedy available under the law, dismissal.

B. *Gordon II* in no way mandates suppression as the appropriate remedy for a violation of the video recording requirements of § 56-5-2953.

In the very first paragraph of *Gordon II, State v. Gordon*, Op. No. 27554 (S.C. Sup. Ct. filed August 5, 2015), the Court said that the officer **complied** with § 56-5-2953:

> The dashboard camera on the officer's patrol car recorded the entire incident, including all field sobriety tests. *Gordon II* at second page, first full paragraph.

Nowhere in the case holding or dicta does *Gordon II* say that a violation of the video recording statute mandates suppression rather than dismissal. It simply carved out a narrow exception for the HGN test, and did not overrule any case law. The Gordon opinion was an affirmation, not a reversal.

The remedy for **non-compliance** with the video recording statute remains dismissal as stated in *City of Rock Hill v. Suchenski, 374 S.C. 15, 646 S.E.2d 880 (2007)*. What constitutes non-compliance will be discussed in greater detail, *Infra*.

C. The purpose of § 56-5-2953 is to create direct evidence of a DUI arrest in order for the jury to be able to evaluate the subject's performance.

a. The extent to which sobriety tests must be shown on video to satisfy S.C. Code § 56-5-2953 is not clear on its face, and those requirements must be strictly construed to give them the effect that the legislature intended.

Section 56-5-2953 mandates that field sobriety tests be videotaped. It does not, however specify what must be shown on the video; why the tests must be video taped or what defects in the video constitute a violation of the statute. Therefore the courts must ascertain and give effect to the intent of the legislature. Further, violations of § 56-5-2953 call for a range of punishment which can be imposed on convicted motorists. Therefore, § 56-5-2953 is penal in nature.

It is well settled that penal statutes must be strictly construed in favor of the Defendant and against the State.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State,* 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). When a statute is penal in nature, **it must be strictly construed against the State and in favor of the defendant**. *State v. Blackmon,* 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). (emphasis supplied). However, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat,* 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010).

Therefore, the statute must be construed in favor of the motorist, and must be read in the light most favorable to the respondent, who asserts that a video of the field sobriety tests (FST's) must show enough of the test for the jury to evaluate her performance on the test. It's axiomatic that the recording of a test, heavily weighted on whether the heel and toe touch during its performance, would have to show that portion of the test in order to comply with the video taping statute.

The Magistrate found that the jury would not be able to determine from the video if the Defendant was in fact performing the walk and turn test as instructed because her feet were not clearly visible throughout the entirety of the test.

As evidenced by this Court's decision in <u>*Suchenski,*</u> the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. *Town of Mt. Pleasant v. Roberts,* 713 S.E.2d 278 (S.C. 2011).

b. The Legislature set the requirements of S.C. code section 56-5-2953 apart from other statutes by requiring certain portions of an arrest pursuant to that statute to be videotaped.

> The legislature firmly intended the trier of fact to have the ability to evaluate a person's performance on field Sobriety tests (FST's). Our Supreme Court articulated this intention by saying, "It is instructive that the Legislature has not mandated videotaping in any other criminal context. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance (*Roberts* at 349.)

c. **The Legislature has never amended the court's interpretations of S.C Code Section 56-5-2953 since the current version of the statute was enacted.**

The courts have required strict compliance with the statute and required severe sanctions for non-compliance ever since *Suchenski* was decided in 2007. The legislature has amended the statute since *Suchenski*, but nothing in the amended statute altered the *Suchenski* holding that failure to comply with the statute's terms requires dismissal. Not once since the current version of the statute, as well as the prior version, has the legislature stepped in to tell the courts that they have been interpreting the statute incorrectly. Therefore we must presume that the legislature approves of the court's handling of cases, which fall under the statute.

The respondent's position is reinforced by decisions of the Supreme Court, which says,

> The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the legislature's inaction is

evidence that our interpretation is correct. E.g. *McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012.)

Therefore, the General Assembly had every opportunity to amend the strict compliance requirement of the statute as the courts have required but did not. Therefore it is assumed that the legislature approves of the court's handling of cases which fall under the statute, and approves of the severe sanctions the courts have imposed. Therefore the Respondent argues that the Legislature intended dismissal to be the sole remedy for a violation of § 56-5-2953

D. That the walk and turn test is not sufficiently shown on the video, and thereby is not in compliance with S.C. Code § 56-5-2953.

a. The horizontal gaze nystagmus test is fundamentally different from the walk and turn and one leg stand tests in several ways.

i. That the suspect's head and the Officer's hands and arms are all that normally can be seen by a jury to evaluate whether the HGN test is performed correctly.

The Supreme Court in *Gordon II* carved out an exception and applied it to the HGN test on the grounds that neither side was prejudiced because the jury could not tell if Gordon passed or failed the test by the video because of its poor quality. The court said the test had very little probative value because the movement of the subject's eyes could rarely be seen and that the jury could not determine whether the subject passed or failed the test for that reason.

The HGN, as with the Walk and Turn test, is scored on a pass/fail basis based upon all of the clues that the officer is supposed to note. The HGN comprises more than just eye movement. The *Gordon II* Court made no mention of any other clue besides eye movement. (*National Highway Traffic Safety Administration DWI Detection and Standard Field Sobriety Testing Participant Guide*, Session 8, Pg. 25 of 62.)

The Court in *Gordon II* added a footnote which strongly implies that the specific holding in *Gordon II* is a narrow exception, and reaffirms the legislative intent that the subject's performance is required to be shown, when possible, and that the failure to do so subjects the State to sanctions. *Gordon II, State v. Gordon*, Op. No. 27554 (S.C. Sup. Ct. filed August 5, 2015) Footnote 3 reads: "Of course, this would be different if the actual eye movement is recorded."

ii. That both of the suspect's feet must be able to be seen in conjunction with each other to be able to evaluate the walk and turn test.

Every State trooper is trained to perform FST's in accordance with the *National Highway Traffic Safety Administration DWI Detection and Standard Field Sobriety Testing Participant Guide.* The manual every trooper receives in conjunction with his training says the following about the correct administration of the walk and turn:

> According to the *National Highway Traffic Safety Administration DWI Detection and Standard Field Sobriety Testing Participant Guide, March 2013 Edition*, the Walk and Turn test is administered and interpreted in a standardized manner, i.e., the same way every time... In the Walking Stage the subject takes nine heel to toe steps, turns in a prescribed manner, takes nine heel to toe steps back, counts the steps out loud, and watches their feet. During the turn, the subject keeps their front foot on the line, turns in a prescribed manner, and uses the other foot to take several small steps to complete the turn. The Walking Stage divides the subject's attention among a balancing task (walking heel to toe and turning); a small muscle control task (counting out loud); and a short-term memory task (recalling the number of steps and the turning instructions). The walking stage divides the subject's attention between a task of listening, comprehending and carrying out the

instruction. (NHTSA DWI Participant Guide, March 2013, Session 7, Pg. 11, 12 of 26).

This paragraph clearly illustrates the importance of any video showing a clear view of both feet, and of the interaction between the feet as the test is performed. To expect a trier of fact to evaluate the motorist's conduct while walking away from the camera, or directly towards it, is absurd.

E. The failure of the police officer to position the video camera so the field sobriety test can be seen and evaluated is no excuse for failing to meet the requirements of S.C. Code § 56-5-2953.

The motorist cannot control where the traffic stop is made or where the police officer stops the patrol car. The police officer is in total control of the location of his patrol car when making the traffic stop in at least the following ways: **1.** The police officer controls where the camera is pointed; and, **2.** where the headlights shine; and, **3.** whether or not the camera is pointing in a direction where there is extraneous light interfering with the recording; and, **4.** where the suspect is standing and in which direction with reference to the camera; and, **5.** which direction the camera is facing during the walk and turn and the one leg stand tests; and, **6.** whether or not any Field Sobriety tests are done at all. The motorist has no control over any of these things.

Further, the respondent knows of no law which prevents the officer from moving the motorist to a parking lot or other safe place to perform the FST's if the officer deems the incident location too unsafe to correctly perform the FST's on camera and comply with the video recording statute.

Any error caused by the officer's choice of location is an error the officer introduced. It is well settled that a party cannot complain of an error it introduced. *State v. Stroman*, 281 S.C. 508, 316, S.E.2d 395 (1984).

In this case, Trooper Ford is a senior officer who has made numerous, if not hundreds of arrests involving impaired drivers. (Brief of Appellant, Statement of the Case, 1st sentence.) To say that he cannot know what is being recorded on the camera during such a stop is absurd.

F. *Gordon II* is a case of <u>compliance</u> with S.C. Code § 56-5-2953. Respondent's case is a case of <u>non-compliance</u> with S.C. Code § 56-5-2953.

Nowhere in *Gordon II* does the Supreme Court suggest that mandatory dismissal for failure to comply with S.C. Code § 56-5-2953 is not the appropriate remedy for non-compliance with § 56-5-2953. The Supreme court held that "the statute requires that the motorist's head (must) be recorded in the video..." This comes straight from *Gordon I*.

The Supreme Court held that there were three important things visible on the recording which rendered the video to be in compliance with S.C. Code § 56-5-2953. First, that the officer's administration of the test was visible; Second, that Gordon's face was visible; and third, that the officer's flashlight and arm were visible as he administers the test.

The HGN test is a pass/fail test, heavily weighted on the subject's eye movement. The Supreme Court correctly observed, that, " the eyes of the motorist are rarely, if ever, seen," and therefore the "...viewing of a video of an HGN field sobriety test has very little probative value."

In *Gordon II*, footnote 3, the court strongly implies that if the eyes were visible, and the test were administered incorrectly, then S.C. Code § 56-5-2953, read with the prevailing case law would mandate dismissal.

The walk and turn, however is different in that it is a test, heavily weighted on whether or not balance can be maintained by walking nine steps forward, turning around and walking nine steps back, all the while touching heel to toe. Unlike the HGN, where the eye movement is rarely, if ever, seen, there is no reason

that the jury could not evaluate the walk and turn test if the video met the requirements of S.C. Code § 56-5-2953.

The Magistrate found that "the respondent's feet were not clearly visible during her performance of the walk and turn test for several reasons..." Unlike the HGN, the jury can easily evaluate the degree of impairment, if any, that the motorist displays during the walk and turn test, as long as the test is captured on video. Here, the Magistrate found that it was not.

G. Redaction only operates in cases where the officer complied with the statute. Non-compliance still requires dismissal.

The Supreme Court's opinion in *Gordon II* was decided on relevance grounds, that the poor quality of the video rendered the evidence of HGN more prejudicial than probative, rather than not in compliance with the statute. The court found that the poor quality evidence may simply be excluded by redaction if more prejudicial than probative. This remedy would apply only in situations not involving a violation of the statute. The Respondent argues that dismissal remains the only remedy for a violation of the videotaping statute.

In this case, the Magistrate found that the videotaping statute was violated, and thus was correct in his Order of Dismissal.

H. The Appellant erroneously and rather illogically asserts that a motorist's performance on a field sobriety test is not required, merely the administration of the test.

The assertion by the State could not be more incorrect, (Brief of Appellant, paragraph B.). Ever since the prior version of the statute, before the 2009 amendments, a motorist's conduct at the scene must be recorded. The 2009 amendments did not change the requirement that conduct at the scene must be recorded. This court in *Murphy* equated performance with conduct.

> While certainly an individual's performance on such tests would be part and parcel of his or her "conduct" at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct. Therefore, the recording need not display all field sobriety tests provided it captures the accused's conduct.[4] Murphy v. State, 392 S.C. 626, 709 S.E.2d 685. (Ct. App. 2011)@ 632, footnote 4.

The Respondent knows of no South Carolina case which holds that mere administration of FSTs is all that is required to comply with § 56-5-2953.

I. The appellant asserts that *Gordon II* says nothing about the walk and turn test

While the Appellant's statement is true on its face, the practice of law requires a certain degree of skill in reading and interpreting statutes and case law to fit situations which do not necessarily apply to the facts in a woodenly literal sense. One of the best examples which any attorney should be familiar with, is the landmark decision in *Brown v. the Board of Education of Topeka,* 347 U.S. 483 (1954), which mandated the desegregation of schools and overruled the "separate but equal doctrine" which was articulated in *Plessy v. Ferguson* 163 U.S. 537 (1896). The facts of *Plessy* involve railroads, and had nothing to do with schools, but the legal principles were applied to the schools.

Similarly, while neither *Gordon* case is a walk and turn case, the legal principles expounded in *Gordon* are analogous and apply to the walk and turn test as well as any of the other standard FST's.

J. The Appellant erroneously asserts that non-compliance can be excused by the totality of the circumstances exception.

The appellant relies on § 56-5-2953 (B), which outlines certain exceptions to the videotaping requirements in subsection (A).

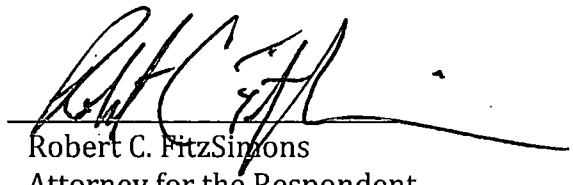
> Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the **totality of the circumstances**; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

In the instant case, a video recording **was** produced, and therefore subsection (B) is not implicated. Further, for the Appellant to attempt to rely on subsection (B) serves as an admission that the State, in fact violated subsection (A).

A case which solicitors often cite in support of the totality of circumstances exception is *State v. Manning*, Appellate Case No. 2012-161686 (2012). In that case the court excused the officer from the videotaping requirements because the motorist required emergency medical treatment. Videotaping was impossible in that case because the officer arrived after Manning was taken away in an ambulance prior to the officer's arrival, and both were never at the scene of the accident together. Nothing in the Respondent's case implicates subsection B.

CONCLUSION

The Respondent, having asserted her arguments and provided her grounds and legal authority, respectfully prays that this court will affirm the Order of the Circuit Court and uphold the Magistrate's dismissal of her case.



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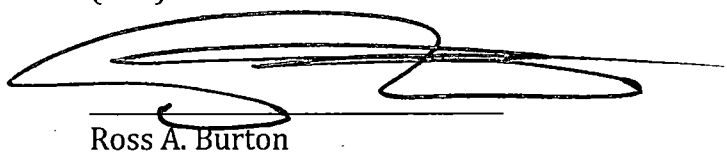

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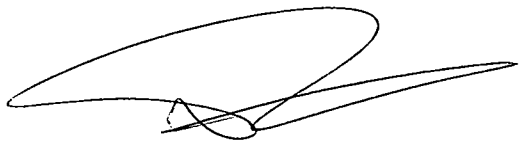
CERTIFICATE OF COUNSEL

I hereby certify that the Respondent's Designation of Matters to be Included in The Record of appeal contains no irrelevant material.



Ross A. Burton
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Dated: October 28th, 2015

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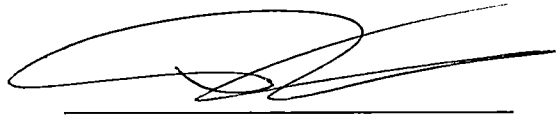
PROOF OF SERVICE

I hereby certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matter to be included on the Record of Appeal upon the Appellant's Attorney of Record, Marcus K. Gore, via United States Mail, postage prepaid, on this 28th day of October, 2015 addressed to P.O. Box 1993, Blythewood, SC 29016.



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