

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-001871

City of North Charleston Respondent,

v.

John Barra, ...Appellant,

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013- CP-10-5074

State of South Carolina

PLAINTIFF(S)

John Barra

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant

or

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(b), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: John Barra's appeal, filed on August 28, 2013, came before this Court on July 15, 2014. Upon review of the arguments and in viewing the video provided by the City, this Court finds that though the video was slightly blurred, the jury could find the Defendant guilty.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
If applicable, describe the property, including tax map information and address, referenced in the order: _____		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2117

Judge Code

7/21/2014

Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013- CP-10-5074

State of South Carolina
PLAINTIFF(S)

John Barra
DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant
or
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DISPOSITION TYPE (CHECK ONE)

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- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: John Barra's Motion to Reconsider is respectfully denied without a hearing.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

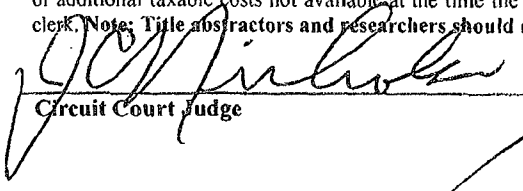
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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N/A		\$

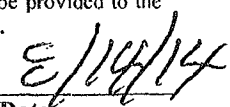
If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2117

Judge Code


Date

In the Court of Common Pleas

Case No: 13-CP-10-5074
Ticket No: 13490GC
Charge: DUI 1st 56-5-2930
Court Date: August 22, 2013

FILED
2013 SEP 17 PM 2:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

The defendant had a trial by jury in which he was convicted on August 22, 2013. The defendant now appeals his conviction.

I. The defendant first contends that the trial judge erred in admitting evidence of field sobriety tests administered to appellant where the arresting officer substantially deviated from his training while administering the field sobriety tests. The appellant goes through each test and how he asserts the officer in the case deviated from the test.

The appellant's argument fails because the appellant's attorney was allowed to question the officer who testified in this case on his administration of each test using the training manual. Furthermore, whether or not the officer conducted the test properly and whether this compromised the results of the tests were factual questions for the jury. The training manual is not a statute or law.

II. The appellant next claims that the trial judge erred in denying the appellant's Motion to Dismiss where a portion of the roadside video is blurred and distorted, and where the state offered no evidence that an exception should apply.

Prior to the trial, all parties and the presiding judge viewed the video tape in this case. The picture was a little out of focus for a minute, but not to the extent where you could not see the administration of the tests. § 56-5-2953 requires an affidavit if an officer fails to produce a video, which is not the situation in this case. You could still see the administration of the tests at all times. For these reasons, this appeal should be dismissed and the defendant's conviction should be upheld by this court.

Date: September 12, 2013

Thad J. Doughty
Associate Municipal Judge
City of North Charleston

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA,

Respondent,

vs.

JOHN BARRA,

Appellant/Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.:

2013-CP-10-5074

TICKET NO.: 13490GC

NOTICE OF APPEAL

(Municipal Court Conviction)

FILED
2013 AUG 28 PM 4:40
JULIE J. ARMSTRONG
CLERK OF COURT

The Appellant, John Barra, hereby gives notice of appeal from the verdict of the jury and the judgments and rulings of the Municipal Court Judge for North Charleston Municipal Court in the above action, to the Circuit Court of Common Pleas, in the County of Charleston.

This Notice of Appeal is made subsequent to a guilty conviction for Driving Under the Influence made against Mr. Barra on or about August 22, 2013 and subsequent sentence of 15 days imposed by the trial judge. The jury was selected on August 20, 2013 and the trial court heard motions on August 21, 2013. Among other motions, Appellant argued (1) that the field sobriety tests should be excluded from evidence and (2) that the case should be dismissed pursuant to S.C. Code Ann. § 56-5-2953. The trial judge denied both of these motions and from the trial judge's rulings comes this appeal.

- I. The trial judge erred in admitting evidence of the field sobriety tests administered to Appellant where the arresting officer substantially deviated from his training while administering the field sobriety tests.

This Court should remand the case for a new trial because the trial judge erred in denying Appellant's motion to submit evidence of the field sobriety tests where Appellant noted numerous instances of the officer deviating from his training in administering the tests. While the admission of evidence is within the sound discretion of the trial judge, the facts of this case

constitute an abuse of discretion. As shown below, any probative value of field sobriety testing is compromised where the officer deviates from his standards.

At trial, the State stipulated that the 2007 National Highway Traffic Safety Administration (NHTSA) standards were those under which the officer in this case was trained to administer the field sobriety tests. A copy of the relevant section of this manual is attached hereto as Exhibit A. Further, a copy of the incident site video is filed simultaneously with this pleading and reference is craved to the same. The aforementioned evidence is incorporated by reference to this Notice of Appeal.

The NHTSA standards for this officer expressly provide (bold and caps in original):

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o **THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER**
- o **THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE**
- o **THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.**

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

DUI Detection and Standard Field Sobriety Testing, Student and Instructor Manual 2007, Session VIII-19.

In *State v. Homan*, 732 N.E.2d 952, 89 Ohio St.3d 421, 2000-Ohio-212 (Ohio 2000), the Ohio Supreme Court discussed the importance of requiring that a police officer strictly comply with NHTSA standards when administering an FST. In *Homan*, the Court began its discussion by stating: "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.* at 424. The Court later noted: "The small margins of error that characterize field sobriety tests make strict compliance critical."

Id. at 425. Although the Ohio Supreme Court only requires substantial compliance (1) in cases regarding an administrative regulation that required urine specimens to be refrigerated when not in transit or under examination and (2) in cases regarding Department of Health regulations in regard to breathalyzer testing being admissible at trial, the Court distinguished field sobriety testing from these scenarios and required strict compliance of the administration of an FST. *Id.* at 425. Accordingly, pursuant to the reasoning in *Homan*, and because the arresting officer did not strictly comply with the testing procedures, the FST's in this case should be suppressed. Appellant is entitled to a new trial. The three tests administered in this case (Horizontal Gaze Nystagmus, Walk and Turn, and One-Leg Stand) were improperly administered as discussed below:

A. Horizontal Gaze Nystagmus ("HGN").

The HGN test was not administered in compliance with NHTSA standards. A copy of the NHTSA manual *DUI Detection and Standard Field Sobriety Testing*, Section VIII, along with the officer's incident report, is attached hereto and incorporated by reference.

1. The Horizontal Gaze Nystagmus ("HGN") test first requires the officer to check for smooth pursuit in each eye ("smooth pursuit"). The NHTSA standards require the officer to move the stimulus to the suspect's left eye until the eye goes as far as it can go, then back across the suspect's face to check the right eye. The officer should then repeat the procedure. Each pass from left to right to returning should take 8 seconds (2 seconds out, 2 seconds back, 2 seconds to the other side, and 2 seconds back again), so the initial pass and the repeat should total at least 16 seconds. Here, the officer completed the smooth pursuit portion of the test in 13 seconds, which includes any pauses. (Roadside Video 40:37 – 40:50). It is clear that the officer rushed this portion of the test.

2. Next, the officer attempted to administer the onset of nystagmus portion of the test. For this test, the officer should move the stimulus across the subject's face at a slower pace so that moving from center to the side should take approximately 4 seconds, and then the officer should repeat the procedure for the other eye ("onset of nystagmus"). The initial pass should take at least 16 seconds (4 seconds out, 4 seconds back in, 4 seconds to the other side, and 4 seconds back in. After repeating the procedure, this test should take 32 seconds. The officer moved the stimulus at a much greater speed than is prescribed by NHTSA standards for a total of 17 seconds or approximately twice as fast as directed (41:54 – 42:11). Notably, the NHTSA manual states: "It is important to use the full four seconds when checking for the onset of nystagmus." Session VIII-7.
3. During the maximum deviation portion of the test, the officer started the test, then quickly yanked the stimulus back, then started again, and the officer did not hold the stimulus for four seconds. This portion of the HGN requires the officer to move the stimulus to the suspect's left side until the eye has gone as far to the side as possible, and the officer should hold the stimulus in position for a minimum of four seconds ("maximum deviation"). Notably, the NHTSA manual states that "People exhibit slight jerking of the eye at maximum deviation, even when unimpaired, but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable." Session VIII-5.
4. NHTSA requires the checking of vertical nystagmus to hold the stimulus in place for approximately four seconds. Here the officer did not reach the four-second mark on either attempt.

5. The officer performed the maximum deviation portion and the onset of nystagmus portion out of order. The standards provide a specific order for the tests to be performed as noted by the language "after" and "next." Session VIII-7.

B. Walk and Turn.

The Walk-and-Turn test was not administered in compliance with NHTSA standards. The officer stated in his incident report (attached hereto as Exhibit B and incorporated by reference) that he observed 3 clues that he is trained to look for: (1) the Appellant separated his feet during the instructions, (2) Appellant took 10 steps, and (3) Appellant made an improper turn. Of these clues, there is no evidence on the video of the first. Interestingly, the other 2 clues involve an alleged failure to follow instructions, and as will be shown below, the officer failed to follow the instructions of his training throughout the administration of this test.

1. The officer is required to tell the Appellant: "Maintain this position until I have completed the instructions." The officer did not make this instruction to the Appellant. Accordingly, this "clue" observed by the officer should be invalidated. Notably, despite this portion of the test being one of the most difficult portions of the FST battery, Appellant maintained balance throughout. Additionally, the officer paraphrased the portion of the instructions "with heel of right foot 'against toe of left foot'" by simply stating "touch it heel to toe." Session VIII-9.
2. After the previous instruction, the officer is required to ask the Appellant if he understands the instructions thus far. The officer failed to do so.
3. The officer completely omitted the instruction: "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."
4. The officer completely omitted the instruction: "Once you start walking, don't stop until

you have completed the test.”

5. The officer omitted the instruction: “Begin, and count your first step from the heel-to-toe position as ‘One’” and simply said to begin.
6. NHTSA standards require the officer to “limit [his] movement which may distract the suspect during the test.” Here, especially during the first 9 steps, the officer walked alongside of the Appellant in the periphery of Appellant’s vision. Session VIII-11.
7. NHTSA standards indicate that individuals with back problems have difficulty performing this test. The Appellant advised the officer that he has back problems (Roadside Video 39:40), but the officer only investigated by asking if the back problems “stopped him from walking or turning or standing or anything like that.”
8. The officer demonstrated 5 steps instead of 3. Session VIII-9.
9. The officer advised the Appellant (Roadside Video 42:50) that on the ninth step, the Appellant should “keep his front foot planted and take a series of small steps and go back.” The officer omitted the word “turn” from this portion of the instructions, despite NHTSA standards requiring the same and despite the “turning” aspect being the most important aspect of this instruction. Notably, one of the 3 “clues” indicated by the officer was for an “improper turn.”
10. The officer stuttered through a portion of the instructions (Roadside Video 42:20) near the beginning of the instructional phase. This deficiency is only raised because in conjunction with all of the other mistakes and considering what Appellant was facing at the time, it contributed to the confusing nature of the instructions.
11. The officer advised the Appellant to take nine steps and then a series of small steps. The officer stated in his report that Appellant took 10 steps. However, Appellant counted his

steps out loud "one" through "nine." For the officer to count the "tenth" step, even though the Appellant did not count it, is "splitting hairs." Notably, the officer never advised the Appellant that he is not allowed to go over nine steps. Finally, there is no reason to believe that the "tenth" step was not the Appellant beginning his "turn."

C. One-Leg Stand.

The One-Leg Stand test was not administered in compliance with NHTSA standards, shown as follows:

- i. The officer failed to advise Appellant to keep his feet together.
- ii. The officer advised how to count by going to "one thousand five" instead of stopping at "one thousand three."
- iii. The officer advised Appellant (Roadside Video 44:20) that if Appellant "put[s] [his] foot down, that's okay." This instruction should invalidate the test without any further discussion. The four clues the officer looks for are (1) swaying, (2) using arms for balance, (3) hopping, and (4) putting the foot down. In other words, it was not okay for Appellant to put his foot down.
- iv. The officer advised the Appellant prior to commencing the test that if he puts his foot down, he can continue where he left off. This instruction is only to be given if the suspect puts his foot down during the test.

D. Conclusion.

Because (1) the NHTSA manual provides: **IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED**, (2) the officer did not strictly or substantially comply with

his training, (3) the officer attempted to "fail" Appellant because Appellant did not follow the officer's instructions even though the officer did not follow the instructions in the training manual, (4) *Homan* provides sound reasoning and guidance regarding the test for admitting field sobriety tests at a DUI trial, (5) the field sobriety testing is a primary component of probable cause and jury consideration, (6) any probative value of the field sobriety tests was compromised, and (7) the prejudicial effects of the tests were dramatically increased, this Court should reverse the trial court's decision to admit the evidence at trial and remand the case for a new trial. Specifically, the officer should not be allowed to testify about the tests, and any mention of them would be prejudicial to Appellant. The officer should not be allowed to testify regarding the results of any tests or his interpretations of them. Finally, the roadside video should be suppressed in full. To allow portions of it without the FST portions or other portions will be prejudicial to the Appellant in that it will raise questions in the jurors' minds. At a minimum, the video should be terminated prior to the first mention of field sobriety testing.

II. This trial judge erred in denying Appellant's motion to dismiss where a portion of the roadside video is blurred and distorted and where the State offered no evidence that an exception should apply.

This Court should dismiss the charge against Appellant because, pursuant to *Rock Hill v. Suchenski*, 374 S.C. 12; 646 S.E.2d 879 (2007) and S.C. Code Ann. § 56-5-2953, the video is insufficient and warrants dismissal. Specifically, the video becomes blurry from the 44:27 mark until the 46:30 mark of the roadside video. The entire one-leg stand test is distorted. It is difficult if not impossible to determine whether the suspect was swaying, using arms for balance, or otherwise making any lateral movement. No affidavit has been submitted by the arresting officer regarding this malfunction or what efforts have been used to keep it in working order. No exceptions exist.

In *State v. Hercheck*, 743 S.E.2d 798, 801 (2013), the South Carolina Supreme Court stated: “[W]e agree with the court of appeals’ analysis concerning the legislative purpose behind the videotape requirements. In *Roberts*, this Court stated that ‘the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest.’” Here, evidence has been lost due to the camera’s inexplicable malfunction.

Such an event is not necessarily fatal to any case of this nature, because § 2953 specifically contemplates:

Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed.

S.C. Code Ann. § 2953(B) (emphasis added). Here, the State offered no affidavit, testimony, or other evidence regarding the condition of the video recording equipment, whether this issue has occurred in the past, or attesting to whether any reasonable efforts have been made to maintain the equipment. Indeed, in *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013), the Court of Appeals clearly placed the burden on the prosecution to show what *reasonable* efforts were made to maintain the equipment. Here, the prosecution made *no* attempt to show any effort to maintain the equipment.

Appellant is not requesting a precedent be set that any time a video is deficient, the case should result in a dismissal. Appellant is requesting that the State be held to its burden of proving the existence of an exception. The issue of whether efforts were reasonable is not reached here because there is no evidence of any efforts. Had the officer simply provided an

affidavit stating that his camera had not exhibited problems in the past and stated the frequency and nature of any inspections, then the trial court could have made a determination whether reasonable efforts were made to maintain the equipment. No affidavit was provided in this case.

This case is distinguishable from *Murphy v. State*, 709 S.E.2d 685, 392 S.C. 626 (Ct. App. 2011). In *Murphy*, during the traffic stop Murphy was made to walk a straight line. However, during this sobriety test, the videotape only recorded her from essentially the knees up, and in portions only displayed half her body as she walked to the limit of the camera's field of view. In addition, HGN was conducted. However, the officer conducted this test in the spot where Murphy stood after completing the straight line test, with her back to the car, on the fringe of the dashboard camera's field of view. The Court of Appeals upheld the conviction but made clear that *Murphy* was decided under the old (pre-2009) DUI law. *Id.*, fn 4. Specifically, the 2009 amendment added the requirement that "[t]he video recording at the incident site must . . . include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953(A)(1)(ii).

Accordingly, because the State did not prove any exception applies regarding the violation of § 2953, this Court should reverse the trial judge's ruling and dismiss the charge against Appellant or remand the charge for dismissal of the charge.

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Dated: 7/28/13

Attorney for Appellant/Defendant

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA,

Respondent,

vs.

JOHN BARRA,

Appellant/Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.:

TICKET NO.: 13490GC

MOTION TO RECONSIDER

TO THE HONORABLE J.C. NICHOLSON, JR. and FRANCES DANIEL AUSTIN, ESQUIRE:

The Appellant, John Barra, hereby moves this Honorable Court to reconsider its decision to dismiss this appeal pursuant to Rule 59(e), SCRCP and Rule 29, SCRCrimP. Appellant reiterates all of his arguments set forth in its Notice of Appeal which contained his memorandum and all of the arguments set forth at the hearing, but Appellant is more specifically moving this Court to reconsider its decision regarding whether the incident site videotape violated S.C. Code Ann. § 56-5-2953.

BACKGROUND

Appellant was convicted on or about August 22, 2013 for driving under the influence and subsequently sentenced to 15 days incarceration. Appellant timely filed and served his notice of appeal, and the Municipal Judge timely issued his Return. At the appeals hearing, this Court heard the arguments of counsel and reviewed the incident video. Because this Court found that the blurring on the video from time stamp 44:27 of the video until 46:30 was not a violation of S.C. Code Ann. § 56-5-2953, it did not rule on whether an affidavit of the arresting officer was required or whether an exception existed. By Order filed July 28, 2014, this Court held that "though the video was slightly blurred, the jury could find the Defendant guilty. Appellant's

counsel received written notice of this Order on August 4, 2014. The Order did not address Defendant's other argument regarding the admissibility of the field sobriety tests, even though this issue was argued and orally ruled upon at trial. This motion to reconsider followed.

- I. This Court should reconsider its finding that the blurry video complied with S.C. Code Ann. § 56-5-2953 where the One-Leg Stand, which is a test of balance, does not provide enough quality to determine whether Appellant hopped, swayed, used arms for balance, or exhibited other incriminating or exculpatory signs during that test.**

This Court should dismiss the charge against Appellant because, pursuant to *Rock Hill v. Suchenski*, 374 S.C. 12; 646 S.E.2d 879 (2007) and S.C. Code Ann. § 56-5-2953, the video is insufficient and warrants dismissal. Specifically, the video becomes blurry from the 44:27 mark until the 46:30 mark of the roadside video. The entire One-Leg Stand test is distorted. It is difficult if not impossible to determine whether the suspect was hopping, swaying, using arms for balance, making any lateral movement, or otherwise displaying incriminating or exculpatory signs during the test. As described below, these types of movements are essential to this test.

S.C. Code Ann. § 56-5-2953(A) provides:

A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording at the incident site must:

(i) not begin later than the activation of the officer's blue lights;

(ii) include any field sobriety tests administered; and

(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

(emphasis added).

State v. Gordon, 2014 S.C. App. LEXIS 89 (S.C. Ct. App. Apr. 23, 2014) is similar to the case at hand. In *Gordon*, the incident site video did not show the defendant's head during the

Horizontal Gaze Nystagmus (“HGN,” known to some as the “pen test”) portion of the standardized field sobriety tests. The Court of Appeals held that “the head must be shown during the HGN test in order for that test to be recorded, and we affirm that finding.”

This case constitutes a stronger violation of S.C. Code Ann. § 56-5-2953 than *Gordon*. In order for a police officer to evaluate the performance of the HGN test, the one administered in *Gordon*, the officer “watches the driver’s eyeballs to detect involuntary jerking.” *Gordon*, fn. 1. According to the NHTSA training manual, of which this case’s trial judge reviewed and allowed cross examination of the officer, the officer “should look for three clues of nystagmus in each eye: (1) the eye cannot follow a moving object smoothly; (2) Nystagmus is distinct and sustained when the eye is held at maximum deviation for a minimum of four seconds; (3) The angle of onset of nystagmus is prior to 45 degrees.” (emphasis added). The officer then determines whether the suspect exhibited 4 of the 6 clues.¹ Stated another way, according to *Gordon*, when the primary focus of the test is the head, the police must video-record the head.

For the One-Leg Stand (“OLS”), the test that is the focus of this issue, according to the NHTSA manual, the officer looks for the following clues:

- A. The suspect sways while balancing. This refers to side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.
- B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.
- C. Hopping. Suspect is able to keep one foot off the ground but resorts to hopping in order to maintain balance.
- D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.

In other words, this test is a **balance test**. During the incident site video, the blur that last approximately two minutes makes it difficult, if not impossible, to evaluate Appellant’s balance

¹ Three clues in each of two eyes equals a total of six clues.

during the test and impossible to evaluate whether Appellant swayed while balancing or used his arms for balance.

Our appellate courts have reiterated on several occasions that “strict compliance” of § 56-5-2953 is required. In *Town of Mt. Pleasant v. Roberts*, 713 S.E.2d 278, 393 S.C. 332 (2011), our Supreme Court provided its first in-depth discussion of the meaning and standards of § 56-5-2953, stating:

Furthermore, 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, 393 S.C. at 349. (emphasis added). See also *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011) (citing *Roberts* to impose “strict compliance” with § 56-5-2953 and dismissing a DUI charge because the officer moved the defendant off-camera during the breath test procedure); *City of Greer v. Humble*, 5108, (Ct. App. 2013) (citing *Roberts* to impose “strict compliance” with § 56-5-2953 and dismissing a DUI charge because the officer did not provide an affidavit describing what “reasonable efforts” were used to maintain the video equipment); *State v. Sawyer*, 2014 S.C. App. LEXIS 180 (S.C. Ct. App. June 4, 2014) (citing *Roberts* to impose “strict compliance” with 2953 and suppressing a breath site video because the video recording did not provide audio). “The purpose of Section § 56-5-2953 is to create direct evidence of a DUI arrest.” *Roberts*.

This Court noted that the defendant could be seen and that it was apparent that he lifted his leg. However, Appellant asks this Court to reconsider whether strict compliance occurred with regard to § 56-5-2953 when it cannot be determined whether Appellant swayed, hopped, or used arms for balance during this balancing test. If one cannot fully evaluate Defendant’s

balance during a balance test, or if the NHTSA “clues” cannot be observed, then § 56-5-2953 was violated. “Close enough” does not meet the “strict compliance” requirements of § 56-5-2953 and of the *Roberts* line of cases.

II. This Court should reconsider its decision to dismiss the appeal because no affidavit was provided to justify support any argued exception to § 56-5-2953.

This Court should not be concerned with whether a dismissal of this case due to the blurry two-minute span of video would impede the ability to prosecute future DUI’s because § 56-5-2953 created a safety net for law enforcement and prosecutors in this very instance, if appropriate.

S.C. Code Ann. § 56-5-2953 provides:

Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed.

(emphasis added).

Stated another way, in this case, had the arresting officer simply submitted a sufficient affidavit, Appellant’s argument would fail. Because the officer did not submit an affidavit stating the video recording equipment “was in an inoperable condition” and “stating which reasonable efforts have been made to maintain the equipment in an operable condition.

“Operable” is defined as “fit, possible, or desirable to be used.” <http://www.merriam-webster.com/dictionary/operable>. Here, there is nothing “fit” or “desirable” about a video recording of inferior quality. It is of no consequence that only a two-minute portion of video was

of inferior quality when that portion of the video fully encompassed the One-Leg Stand and when § 56-5-2953 requires that “any field sobriety tests” be recorded and when *Gordon* provides that a video that does not include the head during the HGN test is insufficient. Here, evidence of Defendant’s balance during a balance test was lost due to the camera’s inexplicable malfunction. Additionally, the officer’s “clues” cannot be evaluated due to the blurriness.

Here, the State offered no affidavit, testimony, or other evidence regarding the condition of the video recording equipment, whether this issue has occurred in the past, or attesting to whether any reasonable efforts have been made to maintain the equipment. Indeed, in *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013), the Court of Appeals clearly placed the burden on the prosecution to show what *reasonable* efforts were made to maintain the equipment. In *Greer*, the Court of Appeals upheld the municipal court’s finding that the prosecution did not make a sufficient showing that reasonable efforts were made to maintain the equipment when the evidence indicated that the police did not adequately respond to complaints concerning the video. Here, the prosecution made *no* attempt to show any effort to maintain the equipment. It is not too much to ask the State in this case to do the simple task of providing the statutorily required affidavit before bringing a person charged with DUI to trial. Requiring the State to do so is the only way to ensure that the camera is maintained so that videos of inferior quality are not produced in the future. Had the officer simply provided an affidavit stating that his camera had not exhibited problems in the past and stated the frequency and nature of any inspections, then the trial court could have made a determination whether reasonable efforts were made to maintain the equipment.

Accordingly, because the State did not prove any exception applies regarding the violation of § 56-5-2953, this Court should reverse the trial judge's ruling and dismiss the charge against Appellant or remand the charge for dismissal of the charge.

III. This Court should reconsider its decision to dismiss the appeal and remand this case for a new trial because the trial judge erred in admitting evidence of the field sobriety tests administered to Appellant where the arresting officer substantially deviated from his training while administering the field sobriety tests.

This Court's order did not address Appellant's argument regarding the admissibility of field sobriety testing, and therefore, it is mandatory for Appellant to include this issue in this motion in order to preserve the issue for appeal. Accordingly, Appellant requests this Court alter or amend its judgment to hold that the trial judge erred in admitted any evidence of the field sobriety tests and remand the case for a new trial. In his initial motion to suppress, Appellant noted numerous instances of the officer deviating from his training in administering the tests. While the admission of evidence is within the sound discretion of the trial judge, the facts of this case constitute an abuse of discretion. As shown below, any probative value of field sobriety testing is compromised where the officer deviates from his standards.

At trial, the State stipulated that the 2007 National Highway Traffic Safety Administration (NHTSA) standards were those under which the officer in this case was trained to administer the field sobriety tests. A copy of the relevant section of this manual is attached hereto as Exhibit A. Further, a copy of the incident site video is filed simultaneously with this pleading and reference is craved to the same. The aforementioned evidence is incorporated by reference to this Notice of Appeal.

The NHTSA standards for this officer expressly provide (bold and caps in original):

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER
- o THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE
- o THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

DUI Detection and Standard Field Sobriety Testing, Student and Instructor Manual 2007, Session VIII-19.

In *State v. Homan*, 732 N.E.2d 952, 89 Ohio St.3d 421, 2000-Ohio-212 (Ohio 2000), the Ohio Supreme Court discussed the importance of requiring that a police officer strictly comply with NHTSA standards when administering an FST. In *Homan*, the Court began its discussion by stating: "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.* at 424. The Court later noted: "The small margins of error that characterize field sobriety tests make strict compliance critical." *Id.* at 425. Although the Ohio Supreme Court only requires substantial compliance (1) in cases regarding an administrative regulation that required urine specimens to be refrigerated when not in transit or under examination and (2) in cases regarding Department of Health regulations in regard to breathalyzer testing being admissible at trial, the Court distinguished field sobriety testing from these scenarios and required strict compliance of the administration of an FST. *Id.* at 425. Accordingly, pursuant to the reasoning in *Homan*, and because the arresting officer did not strictly comply with the testing procedures, the FST's in this case should be suppressed. Appellant is entitled to a new trial. The three tests administered in this case (Horizontal Gaze Nystagmus, Walk and Turn, and One-Leg Stand) were improperly administered as discussed below:

A. Horizontal Gaze Nystagmus ("HGN").

The HGN test was not administered in compliance with NHTSA standards. A copy of the NHTSA manual DUI Detection and Standard Field Sobriety Testing, Section VIII, along with the officer's incident report, is attached hereto and incorporated by reference.

1. The Horizontal Gaze Nystagmus ("HGN") test first requires the officer to check for smooth pursuit in each eye ("smooth pursuit"). The NHTSA standards require the officer to move the stimulus to the suspect's left eye until the eye goes as far as it can go, then back across the suspect's face to check the right eye. The officer should then repeat the procedure. Each pass from left to right to returning should take 8 seconds (2 seconds out, 2 seconds back, 2 seconds to the other side, and 2 seconds back again), so the initial pass and the repeat should total at least 16 seconds. Here, the officer completed the smooth pursuit portion of the test in 13 seconds, which includes any pauses. (Roadside Video 40:37 – 40:50). It is clear that the officer rushed this portion of the test.
2. Next, the officer attempted to administer the onset of nystagmus portion of the test. For this test, the officer should move the stimulus across the subject's face at a slower pace so that moving from center to the side should take approximately 4 seconds, and then the officer should repeat the procedure for the other eye ("onset of nystagmus"). The initial pass should take at least 16 seconds (4 seconds out, 4 seconds back in, 4 seconds to the other side, and 4 seconds back in. After repeating the procedure, this test should take 32 seconds. The officer moved the stimulus at a much greater speed than is prescribed by NHTSA standards for a total of 17 seconds or approximately twice as fast as directed (41:54 – 42:11). Notably, the NHTSA manual states: "It is important to use the full four seconds when checking for the onset of nystagmus." Session VIII-7.

3. During the maximum deviation portion of the test, the officer started the test, then quickly yanked the stimulus back, then started again, and the officer did not hold the stimulus for four seconds. This portion of the HGN requires the officer to move the stimulus to the suspect's left side until the eye has gone as far to the side as possible, and the officer should hold the stimulus in position for a minimum of four seconds ("maximum deviation"). Notably, the NHTSA manual states that "People exhibit slight jerking of the eye at maximum deviation, even when unimpaired, but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable." Session VIII-5.
4. NHTSA requires the checking of vertical nystagmus to hold the stimulus in place for approximately four seconds. Here the officer did not reach the four-second mark on either attempt.
5. The officer performed the maximum deviation portion and the onset of nystagmus portion out of order. The standards provide a specific order for the tests to be performed as noted by the language "after" and "next." Session VIII-7.

B. Walk and Turn.

The Walk-and-Turn test was not administered in compliance with NHTSA standards. The officer stated in his incident report (attached hereto as Exhibit B and incorporated by reference) that he observed 3 clues that he is trained to look for: (1) the Appellant separated his feet during the instructions, (2) Appellant took 10 steps, and (3) Appellant made an improper turn. Of these clues, there is no evidence on the video of the first. Interestingly, the other 2 clues involve an alleged failure to follow instructions, and as will be shown below, the officer failed to

follow the instructions of his training throughout the administration of this test.

1. The officer is required to tell the Appellant: "Maintain this position until I have completed the instructions." The officer did not make this instruction to the Appellant. Accordingly, this "clue" observed by the officer should be invalidated. Notably, despite this portion of the test being one of the most difficult portions of the FST battery, Appellant maintained balance throughout. Additionally, the officer paraphrased the portion of the instructions "with heel of right foot 'against toe of left foot'" by simply stating "touch it heel to toe." Session VIII-9.
2. After the previous instruction, the officer is required to ask the Appellant if he understands the instructions thus far. The officer failed to do so.
3. The officer completely omitted the instruction: "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."
4. The officer completely omitted the instruction: "Once you start walking, don't stop until you have completed the test."
5. The officer omitted the instruction: "Begin, and count your first step from the heel-to-toe position as 'One'" and simply said to begin.
6. NHTSA standards require the officer to "limit [his] movement which may distract the suspect during the test." Here, especially during the first 9 steps, the officer walked alongside of the Appellant in the periphery of Appellant's vision. Session VIII-11.
7. NHTSA standards indicate that individuals with back problems have difficulty performing this test. The Appellant advised the officer that he has back problems (Roadside Video 39:40), but the officer only investigated by asking if the back problems "stopped him from walking or turning or standing or anything like that."

8. The officer demonstrated 5 steps instead of 3. Session VIII-9.
9. The officer advised the Appellant (Roadside Video 42:50) that on the ninth step, the Appellant should "keep his front foot planted and take a series of small steps and go back." The officer omitted the word "turn" from this portion of the instructions, despite NHTSA standards requiring the same and despite the "turning" aspect being the most important aspect of this instruction. Notably, one of the 3 "clues" indicated by the officer was for an "improper turn."
10. The officer stuttered through a portion of the instructions (Roadside Video 42:20) near the beginning of the instructional phase. This deficiency is only raised because in conjunction with all of the other mistakes and considering what Appellant was facing at the time, it contributed to the confusing nature of the instructions.
11. The officer advised the Appellant to take nine steps and then a series of small steps. The officer stated in his report that Appellant took 10 steps. However, Appellant counted his steps out loud "one" through "nine." For the officer to count the "tenth" step, even though the Appellant did not count it, is "splitting hairs." Notably, the officer never advised the Appellant that he is not allowed to go over nine steps. Finally, there is no reason to believe that the "tenth" step was not the Appellant beginning his "turn."

C. One-Leg Stand.

The One-Leg Stand test was not administered in compliance with NHTSA standards, shown as follows:

- i. The officer failed to advise Appellant to keep his feet together.
- ii. The officer advised how to count by going to "one thousand five" instead of stopping at "one thousand three."

- iii. The officer advised Appellant (Roadside Video 44:20) that if Appellant “put[s] [his] foot down, that’s okay.” This instruction should invalidate the test without any further discussion. The four clues the officer looks for are (1) swaying, (2) using arms for balance, (3) hopping, and (4) putting the foot down. In other words, it was not okay for Appellant to put his foot down.
- iv. The officer advised the Appellant prior to commencing the test that if he puts his foot down, he can continue where he left off. This instruction is only to be given if the suspect puts his foot down during the test.

D. Conclusion.

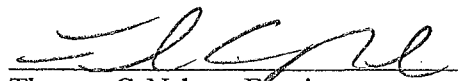
Because (1) the NHTSA manual provides: **IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED**, (2) the officer did not strictly or substantially comply with his training, (3) the officer attempted to “fail” Appellant because Appellant did not follow the officer’s instructions even though the officer did not follow the instructions in the training manual, (4) *Homan* provides sound reasoning and guidance regarding the test for admitting field sobriety tests at a DUI trial, (5) the field sobriety testing is a primary component of probable cause and jury consideration, (6) any probative value of the field sobriety tests was compromised, and (7) the prejudicial effects of the tests were dramatically increased, this Court should reverse the trial court’s decision to admit the evidence at trial and remand the case for a new trial. Specifically, the officer should not be allowed to testify about the tests, and any mention of them would be prejudicial to Appellant. The officer should not be allowed to testify regarding the results of any tests or his interpretations of them. Finally, the roadside video

should be suppressed in full. To allow portions of it without the FST portions or other portions will be prejudicial to the Appellant in that it will raise questions in the jurors' minds. At a minimum, the video should be terminated prior to the first mention of field sobriety testing.

CONCLUSION

Appellant reserves all of his issues and arguments raised in this appeal. In this motion to reconsider, Appellant respectfully requests this Court reconsider its decision to dismiss this appeal because (1) the two-minute interval of blurriness on the incident site video fully encompasses the One-Leg Stand standardized field sobriety test, (2) the blurriness negatively affects the ability of the viewer to evaluate Appellant's balance on this balance test, (3) this inferior video violates S.C. Code Ann. § 56-5-2953, and (4) no affidavit was submitted by the arresting officer setting forth that the video was in an inoperable condition or what efforts were made to maintain the equipment. Further, Appellant requests this Court hold that the trial judge erred in allowing evidence of the field sobriety tests at trial and remand this case for a new trial, in the event this Court does not dismiss the case for the violation of S.C. Code Ann. § 56-5-2953.

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Dated: 8/7/14

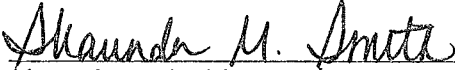
Attorney for Appellant/Defendant

CERTIFICATE OF SERVICE

The foregoing Motion for Reconsideration was served on August 7, 2014, by placing a copy of same in the United States Mail with sufficient first class postage affixed thereto and addressed as follows:

The Honorable J.C. Nicholson, Jr.
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Frances Daniel Austin, Esquire
2500 City Hall Lane
North Charleston, South Carolina 29406



Shaunda M. Smith
Paralegal

STATE OF SOUTH CAROLINA
CITY OF NORTH CHARLESTON

STATE OF SOUTH CAROLINA,

vs.

JOHN BARRA,

Defendant.

IN THE MUNICIPAL COURT

TICKET NO.: 13490GC

**PRE-TRIAL MOTIONS, TRIAL MOTIONS,
AND MOTIONS *IN LIMINE***

TO JOSEPH M. KAISER:

1. Defendant respectfully requests the Court to consider his motions contained herein, or in the alternative, to allow him to proffer the motions into the record of the case for preservation of the issues for appellate purposes.

2. The charge should be dismissed because the arresting officer lacked probable cause to make the arrest.

3. The field sobriety tests ("FST's") should be suppressed because the officer made incorrect statements thereby inducing the defendant to submit to the tests. The defendant is not required to submit to FST's. *See* S.C. Code Ann. § 56-5-2953(A)(1)(b) ("A refusal to take a field sobriety test does not constitute disobeying a police command"). The officer states "before I let you drive away, I would like you to do the standard field sobriety tests. [Inaudible] when I let you go, I'm making sure I'm not putting an impaired driver back on the road." (Roadside Video 39:07). The officer then asked whether Defendant had any "problems" doing the tests and gave brief description of the physical requirements regarding the same and asked about whether Defendant has any physical impairments. In sum, the arresting officer made it sound as if the tests were required. *See Sponar v. South Carolina Dept. of Public Safety*, 603 S.E.2d 412, 415, 361 S.C. 35 (Ct. App. 2004) (reaffirming the Supreme Court's rule in implied consent cases:

“[I]f the arrested person is reasonably informed of his rights, duties and obligations under our implied consent law and he is neither tricked nor misled into thinking he has no right to refuse the test to determine the alcohol content in his blood, urine or breath, the test will generally be held admissible”). Here, Defendant was clearly misled.

4. The Horizontal Gaze Nystagmus (“HGN”) test was not administered in compliance with NHTSA standards. A copy of the NHTSA manual DUI Detection and Standard Field Sobriety Testing, Section VIII, along with the officer’s incident report, is attached hereto and incorporated by reference:

- a. The Horizontal Gaze Nystagmus (“HGN”) test first requires the officer to check for smooth pursuit of each eye (“smooth pursuit”). The NHTSA standards require the officer to move the stimulus to the suspect’s left eye until the eye goes as far as it can go, then back across the suspect’s face to check the right eye. The officer should then repeat the procedure. Each pass from left to right to returning should take 8 seconds, so the initial pass and the repeat should take 16 seconds. The HGN then requires the officer to move the stimulus to the suspect’s left side until the eye has gone as far to the side as possible, and the officer should hold the stimulus in position for a minimum of four seconds (“maximum deviation”). The officer should then move the stimulus across the subject’s face and check the other eye for a minimum of four seconds. Finally, the officer should move the stimulus from center to the side of the left eye at a speed that will take approximately 4 seconds and repeat the procedure for the other eye (“onset of nystagmus”).
- b. Here, the officer completed the smooth pursuit portion of the test in 13 seconds, which includes any pauses. (Roadside Video 40:37 – 40:50). It is clear that the

officer rushed this portion of the test.

- c. Next, the officer attempted to administer the onset of nystagmus portion of the test, which is out of order as prescribed by NHTSA standards. Additionally, the officer moved the stimulus at a much greater speed than is prescribed by NHTSA standards. (41:54 – 42:11). Notably, the NHTSA manual states: “It is important to use the full four seconds when checking for the onset of nystagmus.”
 - d. During the maximum deviation portion of the test, which was taken out of order, the officer started the test, then quickly yanked the stimulus back, then started again, and the officer did not hold the stimulus for four seconds. Notably, the NHTSA manual states that “People exhibit slight jerking of the eye at maximum deviation, even when unimpaired, but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable.”
 - e. Finally, NHTSA requires the checking of vertical nystagmus to hold the stimulus in place for approximately four seconds. Here the officer did not reach the four-second mark on either attempt.
5. The Walk-and-Turn test was not administered in compliance with NHTSA standards.
- a. The NHTSA standards require the officer to give “the following verbal instructions, accompanied by demonstrations:
 - i. “Place your left foot on the line” (real or imaginary). Demonstrate.
 - ii. “Place your right foot on the line ahead of the left foot, with heel of right foot “against toe of left foot.” Demonstrate.
 - iii. “Place your arms down at your sides.” Demonstrate.

- iv. "Maintain this position until I have completed the instructions. Do not start to walk until told to do so."
- v. "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)
- vi. Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:
 - vii. "When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back." (Demonstrate 3 heel-to-toe steps.)
 - viii. "When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this." (Demonstrate).
 - ix. "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."
 - x. "Once you start walking, don't stop until you have completed the test."
 - xi. "Do you understand the instructions?" (Make sure suspect understands.)
 - xii. "Begin, and count your first step from the heel-to-toe position as 'One.'"
- b. Here, the officer stated that he observed 3 clues that he is trained to look for: (1) the Defendant separated his feet during the instructions, (2) Defendant took 10 steps, and (3) Defendant made an improper turn. Of these clues, there is no evidence on the video of the first. Interestingly, the other 2 clues involve an alleged failure to follow instructions, and as will be shown below, the officer failed to follow the instructions of his training throughout the administration of this test.
 - i. The officer is required to tell the Defendant: "Maintain this position until I have completed the instructions." The officer did not make this

instruction to the Defendant. Accordingly, this "clue" observed by the officer should be invalidated. Notably, despite this portion of the test being one of the most difficult portions of the FST battery, Defendant maintained balance throughout. Additionally, the officer paraphrased the portion of the instructions "with heel of right foot 'against toe of left foot'" by simply stating "touch it heel to toe."

- ii. After the previous instruction, the officer is required to ask the Defendant if he understands the instructions thus far. The officer failed to do so.
- iii. The officer completely omitted the instruction: "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."
- iv. The officer completely omitted the instruction: "Once you start walking, don't stop until you have completed the test."
- v. The officer omitted the instruction: "Begin, and count your first step from the heel-to-toe position as 'One.'"
- vi. NHTSA standards require the officer to "limit [his] movement which may distract the suspect during the test." Here, especially during the first 9 steps, the officer walked alongside of the Defendant in the periphery of Defendant's vision.
- vii. NHTSA standards indicate that individuals with back problems have difficulty performing this test. The Defendant advised the officer that he has back problems (Roadside Video 39:40), but the officer only investigated by asking if the back problems "stopped him from walking or turning or standing or anything like that."

- viii. The officer demonstrated 5 steps instead of 3.
 - ix. The officer advised the Defendant (Roadside Video 42:50) that on the ninth step, the Defendant should "keep his front foot planted and take a series of small steps and go back." The officer omitted the word "turn" from this portion of the instructions, despite NHTSA standards requiring the same and despite the "turning" aspect being the most important aspect of this instruction. Notably, one of the 3 "clues" indicated by the officer was for an "improper turn."
 - x. The officer stuttered through a portion of the instructions (Roadside Video 42:20) near the beginning of the instructional phase. This deficiency is only raised because in conjunction with all of the other mistakes and considering what Defendant was facing at the time, it contributed to the confusing nature of the instructions.
 - xi. The officer advised the Defendant to take nine steps and then a series of small steps. At first, based upon what the officer stated in his report, the Defendant took 10 steps. However, the Defendant counted his steps out loud "one" through "nine." For the officer to count the "tenth" step, even though the Defendant did not count it, is "splitting hairs." Notably, the officer never advised the Defendant that he is not allowed to go over nine steps.
6. The One-Leg Stand test was not administered in compliance with NHTSA standards.
- a. The NHTSA standards require the officer to give "the following verbal instructions, accompanied by demonstrations:

- i. Initiate the test by giving the following verbal instructions, accompanied by demonstrations.
- ii. "Please stand with your feet together and your arms down at the sides, like this." (Demonstrate)
- iii. "Do not start to perform the test until I tell you to do so."
- iv. "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)
- v. Explain the test requirements, using the following verbal instructions accompanied by demonstrations:
- vi. "When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground." (Demonstrate one leg stance.)
- vii. "You must keep both legs straight, arms at your side."
- viii. "While holding that position, count out loud in the following manner: 'one thousand and one, one thousand and two, one thousand and three, until told to stop.'" (Demonstrate a count, as follows: "one thousand and one, one thousand and two, one thousand and three, etc." Officer should not look at his foot when conducting the demonstration - OFFICER SAFETY.)
- ix. "Keep your arms at your sides at all times and keep watching the raised foot."
- x. "Do you understand?" (Make sure suspect indicates understanding.)
- xi. "Go ahead and perform the test." (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)

- xii. Observe the suspect from a safe distance. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.
- b. Here, the officer did not indicate any clues in his report. Additionally, the officer failed to follow NHTSA protocol as follows:
 - i. The officer failed to advise the Defendant to keep his feet together.
 - ii. The officer advised how to count by going to "one thousand five" instead of stopping at "one thousand three."
 - iii. The officer advised the Defendant (Roadside Video 44:20) that if Defendant "put[s] [his] foot down, that okay." This instruction should invalidate the test without any further discussion. The four clues the officer looks for are (1) swaying, (2) using arms for balance, (3) hopping, and (4) putting the foot down. In other words, it is not okay to put the foot down.
 - iv. The officer advised the Defendant prior to commencing the test that if he puts his foot down, he can continue where he left off. This instruction is only to be given if the suspect puts his foot down during the test.

7. The FST's should be suppressed in full for the reasons discussed above. The officer should not be allowed to testify about the tests, and any mention of them would be prejudicial to Defendant. The officer should not be allowed to testify regarding the results of any tests or his interpretations of them. Finally, the roadside video should be suppressed in full. To allow portions of it without the FST portions or other portions will be prejudicial to the Defendant in that it will raise questions in the jurors' minds. The basis for this motion for

suppression is as follows:

- a. The NHTSA standards expressly provide (bold and caps in original):

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o **THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER**
- o **THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE**
- o **THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.**

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

- b. *State v. Homan*, 732 N.E.2d 952, 89 Ohio St.3d 421, 2000-Ohio-212 (Ohio 2000)

has become a landmark case discussing the importance of strict compliance when an officer administers an FST. Accordingly, pursuant to the reasoning in *Homan* and because the arresting officer did not strictly comply with the testing procedures, the FST's in this case should be suppressed.

- c. Any mention of FST's or admission of the video are more prejudicial than probative.

8. This Court should dismiss the charge against Defendant because, pursuant to *Rock Hill v. Suchenski*, 374 S.C. 12; 646 S.E.2d 879 (2007) and S.C. Code Ann. § 56-5-2953, the video is insufficient and warrants dismissal. Specifically, the video becomes blurry from the 44:27 mark until the 46:30 mark of the roadside video. The entire one-leg stand test is distorted. It is difficult if not impossible to determine whether the suspect was swaying, using arms for balance, or otherwise making any lateral movement. No affidavit has been submitted by the arresting officer regarding this malfunction or what efforts have been used to keep it in working order. No exceptions exist. This case is much like *Murphy v. State*, 709 S.E.2d 685, 392 S.C. 626 (Ct. App. 2011). In *Murphy*, during the traffic stop Murphy was made to walk a straight

line. However, during this sobriety test, the videotape only recorded her from essentially the knees up, and in portions only displayed half her body as she walked to the limit of the camera's field of view. In addition, HGN was conducted. However, the officer conducted this test in the spot where Murphy stood after completing the straight line test, with her back to the car, on the fringe of the dashboard camera's field of view. While the Court of Appeals upheld the conviction, the Court noted that *Murphy* was under the old (pre-2009) DUI law. In footnote 4, the Court referenced the amendment to the statute that any field sobriety tests administered be recorded. From this footnote, it can be expected that the result in *Murphy* would have been different under the new law, which this case is under. Further, *Greer v. Humble*, 2108 (Ct. App. 2013) requires the state to make a showing of the reasonable efforts to maintain the video camera in operable condition.

9. Defendant reserves the right to make additional motions prior to trial and during trial.

10. Defendant reserves the right to make motions *in limine* prior to the jury being sworn, after the jury being sworn, during the course of trial, or at any other time Defendant is entitled by law to make such motions.

11. Defendant reserves the right to make any other motions a criminally-accused Defendant is entitled to make, without limitation.

Defense Counsel's Signature on Following Page.

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Attorney for Defendant

STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO.: 2013-CP-10-5074

STATE OF SOUTH CAROLINA)
)
VS.)
)
JOHN BARRA,)
)
DEFENDANT.)
_____)

MOTIONS HEARING

held before the Honorable J.C. Nicholson, Jr.
Mia Perron, Circuit Court Reporter, 9th Judicial Circuit
in the Charleston County Courthouse
Charleston, South Carolina
on Tuesday, July 15, 2014, Commencing at 9:52 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
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[None]

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PROCEEDINGS

1
2 THE COURT: South Carolina, State vs. John
3 Barra. Anybody here on that?

4 MR. NELSON: Yes, sir. Good morning.

5 THE COURT: Who is here on behalf of who?

6 MR. NEELY: Judge, I'm Kris Neely, on behalf of
7 the City of North Charleston.

8 THE COURT: I'm sorry. What's your --

9 MR. NEELY: Kris Neely.

10 THE COURT: Yes, sir, Mr. Neely.

11 And?

12 MR. NELSON: Tom Nelson, on behalf of the
13 Defendant John Barra.

14 THE COURT: Give me a chance to look at the
15 return real quick. Okay?

16 MR. NELSON: Yes, sir.

17 [Whereupon, the Court reviews documents]

18 THE COURT: I'll be glad to hear you,
19 Mr. Nelson.

20 MR. NELSON: Thank you, Your Honor.

21 And I have a couple of cases. If I may hand
22 them up?

23 THE COURT: Yes, sir.

24 MR. NELSON: And I've also included a copy of
25 the roadside video, if you take it under advisement

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1 and decide to watch that later. Most of my brief has
2 the appropriate time stamps placed in there.

3 [Whereupon, Mr. Nelson proffers documents to the
4 Court]

5 THE COURT: Have you seen the return?

6 MR. NELSON: Yes, Your Honor.

7 THE COURT: I'll be glad to hear you.

8 MR. NELSON: Thank you, sir.

9 There's two issues on appeal. One of them will
10 result in a remand, if Your Honor agreed with my
11 position, and the other would result in a dismissal.

12 Regarding the remand, we went to pretrial for
13 the trial judge to exclude any evidence of the field
14 sobriety test. A contemporaneous objection at that
15 trial was made when he denied it. He allowed me to
16 proffer testimony from the officer prior to the -- or
17 prior to the trial starting and allowed me to cross-
18 examine the officer on the test during the trial. I
19 do not believe the Court stepped in as his role of
20 gatekeeper of this evidence. As he put in his return,
21 my arguments failed because I was allowed to cross-
22 examine the officer using the officer's own training
23 manual.

24 There's some case law in South Carolina, State
25 v. Sullivan, from the '90s. And I included that in

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1 the package. That doesn't touch on this issue, per
2 se, but that was the first time, and really about the
3 only time, they really talked about the admission of
4 field sobriety testing. Our Supreme Court allowed the
5 horizontal gaze nystagmus test in. And I'll be happy
6 -- if Your Honor would like to hear a little bit about
7 that test?

8 THE COURT: Which case are you talking about?
9 State v. Sullivan?

10 MR. NELSON: Yes, sir.

11 THE COURT: All right. What does State v.
12 Sullivan say?

13 MR. NELSON: In that case they were reviewing
14 whether or not the horizontal gaze nystagmus, which
15 I'll abbreviate as HGN test, whether that should be
16 admissible at trial. That's known to many as the pen
17 test, where the officer follows certain procedures and
18 he looks for a type of jerking in the eye, looking for
19 intoxication.

20 In State v. Sullivan, the Court did note that --
21 this is their holding: we hold the testimony relating
22 to the HGN test was admissible in the present case
23 because the HGN test was used in conjunction with
24 other insobriety tests to establish evidence of DUI.

25 That's about as close to this case as our

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1 Supreme Court has gotten regarding this test. But
2 what's important about that is they did find that this
3 was a testing package. You don't look at one test,
4 you look at all three of the tests put together.

5 There is some case law from Ohio that I find --
6 I believe this Court should find persuasive and I --

7 THE COURT: Well, what about this State v.
8 Gordon and State v. Snyder?

9 MR. NELSON: Those touch on my next issue, Your
10 Honor, issue number two.

11 THE COURT: All right. I mean, why didn't the
12 question of the field sobriety test, why isn't that
13 sort of a -- was this a jury trial or a non-jury
14 trial?

15 MR. NELSON: It was a jury trial.

16 THE COURT: Well, it really doesn't make any
17 difference, for the purpose of my argument. I mean,
18 why isn't that a factual question for the jury to
19 decide? They either believed the sobriety test or
20 they didn't believe it. They either believed it was
21 done properly or it wasn't done properly. I don't
22 know why that's an error of law.

23 MR. NELSON: Yes, Your Honor.

24 These field sobriety tests, they weren't just
25 made up one day. There's years of studies to put on
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1 these tests and --

2 THE COURT: I understand. But it's still a
3 factual question on whether the jury believes the
4 testimony based on the testimony about the field
5 sobriety tests. I know some of them are probably on
6 the video, and they should be, so they go watch it and
7 say, hey, it's a good test or it's not a good test. I
8 don't know of any law that says they've got to do it
9 this way, one, two, three, four, five.

10 MR. NELSON: That's why I brought up this case
11 of State v. Ohio.

12 THE COURT: Well, but that case -- Sullivan is
13 about examining some eyes and getting into the medical
14 belief on the testimony about the dilation or non
15 dilation of the eyes. And the Supreme Court said that
16 was okay. It didn't say they've got to follow certain
17 procedures.

18 MR. NELSON: They've got a test -- in Sullivan,
19 they did not attack the administration of the test and
20 whether the officer complied with his own training.

21 If you look at the officer's training manual,
22 which was included with my brief --

23 THE COURT: Well, I don't argue that there's a
24 training manual and he may deviate from it or he may
25 go by it, but that's not error of law.

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1 MR. NELSON: When he deviates from it, the
2 prejudicial effect far exceeds any probative value
3 these tests would give. These tests are hard enough.

4 THE COURT: All right. Let's move on to your
5 second argument --

6 MR. NELSON: Thank you, Your Honor.

7 THE COURT: -- about the video.

8 MR. NELSON: On the second argument regarding
9 the video, there was a portion of nearly two minutes
10 on the video. And Your Honor -- I know Your Honor
11 heard the case of State v. Roberts, so you're familiar
12 with Shakenski [phonetic] and that line of cases.
13 This goes along those same lines. On that video there
14 was about a two-minute stretch, and I've cited the
15 time stamps in my brief, where the video goes very
16 blurry. And there's four things in that test that the
17 officer looks for, and you cannot make out whether the
18 defendant was exhibiting some of these clues because
19 of the blurriness of the video.

20 And when the statute was rewritten in 2009 --
21 and this was a post-2009 arrest -- they added
22 something that they didn't have before where they said
23 the video should include all field sobriety tests
24 administered. In this case, you cannot see well the
25 one-legged stand test. And that's where the defendant

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1 is asked to raise his leg for thirty seconds and count
2 out loud while trying to keep his balance.

3 When I filed this brief -- or since I filed this
4 brief, another case has come out that has supported my
5 position, and that was State v. Gordon. And that
6 test, the Court of Appeals came out and said, when we
7 do the horizontal gaze nystagmus test, which involves
8 the pen going back and forth, it is required that the
9 defendant's head be shown on that test.

10 Well, here it should be required that you can
11 see the defendant's full body and you can determine
12 whether or not he's swaying or whether or not he's
13 using his arms for balance, because those are two of
14 the important clues of that test, according to the
15 officer's own manual.

16 THE COURT: So the only test, field sobriety
17 part of the test, that was blurred was the raising the
18 leg, is that correct --

19 MR. NELSON: Yes, sir.

20 THE COURT: -- on the video?

21 MR. NELSON: A little bit before and after. But
22 that's the only field sobriety test that was --

23 THE COURT: How about did he do any other
24 sobriety tests other than that one?

25 MR. NELSON: He did all three of the standard

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1 field sobriety tests.

2 THE COURT: So the other two were on the video?

3 MR. NELSON: Yes, sir. And I raise no issue
4 with the quality of that video.

5 THE COURT: All right. So your position is
6 because of the poor quality and inability to see it,
7 the conviction should be reversed; is that correct?

8 MR. NELSON: Yes, sir.

9 And if you look at State v. Gordon and Shakenski
10 and Roberts, a lot of these cases they're starting to
11 use language that says strict compliance with the
12 videotaping requirements is required. Here they did
13 not strictly comply because they did not capture all
14 aspects of the one-legged stand.

15 Now, if Your Honor is concerned you might open
16 up some can of worms on minor deviations and video and
17 things like that, that is no concern here because the
18 State, under 56-5-2953, they can fix these problems
19 with the video later by simply submitting an affidavit
20 from the arresting officer and if the arresting
21 officer says that the agency has used reasonable
22 methods to maintain this equipment and it was due to a
23 failure that they couldn't avoid it, then there would
24 be no dismissal in this case. Here, I didn't see any
25 evidence. There was no affidavit submitted, there was

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1 no testimony from the officer regarding the reasonable
2 efforts to maintain the videotaping equipment. So
3 their ability to get around 25-2953 [phonetic] at
4 trial, they missed the opportunity without an
5 affidavit.

6 THE COURT: Anything else?

7 MR. NELSON: That's my arguments, Your Honor.

8 THE COURT: Thank you very much.

9 Mr. Neely?

10 MR. NEELY: Thank you, Judge. As far as the
11 first issue with the field sobriety test, Your Honor,
12 I think --

13 THE COURT: I'm not concerned about that.

14 MR. NEELY: Thank you, Your Honor.

15 THE COURT: I think that's a factual question
16 for the jury to determine. I don't buy into his
17 argument on that, but I'm seriously listening to his
18 argument on the second portion.

19 MR. NEELY: Okay. Well, the second portion
20 dealt with -- I'll deal first with the blurriness of
21 the video. I think that the issue is not so much
22 whether or not there's a quality problem. And here we
23 have a case of whether the quality of the video is
24 okay.

25 THE COURT: Well, if you can't see it, it's like

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1 not having it.

2 MR. NEELY: Well, you can see it. I mean,
3 the -- it's my understanding that the camera went
4 blurry for a few seconds, for about a minute, and came
5 back out. But you can still see the defendant, you
6 can still see the officer standing there, you can
7 still see the flashlight. It's not as if he's off the
8 video or he's no longer present.

9 I think if you go back to the Gordon case that
10 he presented, we're talking about a set of facts where
11 the defendant is not on camera for awhile. And that's
12 what makes it different, Your Honor.

13 Here we have the defendant present. It's blurry
14 for a second. That's more of a technical issue. But
15 it's still operable, it's still capturing what's going
16 on. And the jury had a chance to see that. The jury
17 made an evaluation that that was sufficient. And,
18 Your Honor, they believed what they saw to be enough.

19 As far as the affidavit, the affidavit comes
20 into play, Judge, when we're looking at whether or not
21 the camera is inoperable. And if you go back to the
22 section that he referred to, it dealt with whether or
23 not you were able to capture the video.

24 THE COURT: Well, if it's blurry, isn't it
25 inoperable?

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1 MR. NEELY: No, Your Honor. We argue that it's
2 not inoperable. It went out. I mean --

3 THE COURT: Well, if you can't see it, then why
4 is it operable?

5 MR. NEELY: You can see it, Your Honor. And
6 maybe we can review the CD if you want to see it
7 yourself. But it's not as if he's not present.
8 You're able to make out what's going on. Clearly, the
9 quality is different. And if the Court wanted to look
10 at the quality as an issue, it would have made it
11 clear that quality was a requirement.

12 But, Your Honor, you know that certain vehicles
13 record better than others and certain cameras go into
14 and out of focus. But I don't think that just because
15 you miss a minute of the full I guess field sobriety
16 test -- and when I say miss, it's not as clear as the
17 others. If that was captured as clearly as the
18 others, it would be sufficient enough to throw it out.

19 Your Honor, we find that -- we found that --
20 well, Judge Bligen [phonetic] found, and we believe,
21 that the blurriness was not enough to say that it was
22 inoperable. It captured everything that happened that
23 night and the jury was able to make their
24 determination based on what it saw at the time.

25 It would be the City's position, Your Honor,

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1 that if you were to take the defendant's argument and
2 place it in most cases, anytime someone walks in front
3 of a camera, anytime something flashes in front of a
4 camera, we would miss a second or however amount of
5 time, of that particular I guess field sobriety test
6 and that would dismiss that particular DUI. Your
7 Honor, here we have --

8 THE COURT: Well, the statute says you're
9 supposed to record the field sobriety test, doesn't
10 it?

11 MR. NEELY: It does.

12 THE COURT: And then that's the obligation of
13 the State to record it and make sure it's being
14 recorded. Isn't that the obligation of the State?

15 MR. NEELY: It is.

16 THE COURT: Okay.

17 MR. NEELY: And it's the State's position that
18 we did that, Your Honor.

19 THE COURT: Well, what does it have to do with
20 whether you're walking through it and you don't see
21 it? If you don't see it, you haven't complied with
22 the statute.

23 MR. NEELY: Your Honor --

24 THE COURT: Now, as far as the blurriness,
25 that's a different argument.

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1 MR. NEELY: Okay.

2 THE COURT: I thought you said if somebody walks
3 through it and you don't see the field sobriety test,
4 that's okay.

5 MR. NEELY: I don't think that that's okay in
6 the grand sense of things. If you're walking across
7 the camera in front of the defendant, when another
8 officer is out on scene and he walks across the camera
9 in front of the defendant while he's doing the
10 sobriety test you may miss a second or two. And I
11 think if you were to extend that argument, it would
12 say that that few seconds was sufficient, or at least
13 enough, to say that that particular test shouldn't be
14 thrown out.

15 THE COURT: I'm going to look at the tape and
16 see what you can see and what you can't see. Thank
17 y'all very much.

18 MR. NELSON: Thank you, Judge.

19 MR. NEELY: Thank you, Judge.

20 MR. NELSON: Your Honor, regarding that disk,
21 all the agencies have different software. There's a
22 lot of files on there that all kind of work together.
23 I believe the one that you need to click on is called
24 auto run.

25 THE COURT: Called what?

1 MR. NELSON: Auto run.

2 THE COURT: Auto run?

3 MR. NELSON: Otherwise, you're going to see
4 about fifty different files and not sure which one to
5 select.

6 THE COURT: Do you know where it is on here?

7 MR. NELSON: If you would like me to --

8 THE COURT: Well, y'all come on up here and show
9 her where it is and we'll look at it real quick.

10 [Whereupon, an off-the-record bench conference
11 is held]

12 THE COURT: The Court has reviewed the video and
13 even though it's blurry, you can still see the subject
14 raising his legs on the leg raise.

15 And as far as the video itself being not -- the
16 video itself requiring an affidavit from the officer
17 as being non-functional, the video is functional,
18 although it is blurry. You can still see, as I said,
19 the leg movement on the leg raise. And I believe the
20 jury could have seen it.

21 Your appeal is denied. Thank you very much.

22 [HEARING CONCLUDES AT 10:13 A.M.]

23

24

25

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the appeals hearing held before the Honorable J.C. Nicholson, Jr., on July 15, 2014.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 6th day of December, 2014.



Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

SESSION VIII

CONCEPTS AND PRINCIPLES OF THE STANDARDIZED FIELD SOBRIETY TESTS

SESSION VIII

CONCEPTS AND PRINCIPLES OF THE STANDARDIZED FIELD SOBRIETY TESTS

Upon successfully completing this session, the participant will be able to:

- o Discuss the development and validity of the research and the standardized elements, clues and interpretation of the three standardized field sobriety tests.
- o Discuss the different types of nystagmus and their effects on the Horizontal Gaze Nystagmus test.
- o Discuss and properly administer the three Standardized Field Sobriety Tests.
- o Discuss and recognize the clues of the three Standardized Field Sobriety Tests.
- o Describe in a clear and convincing fashion and properly record the results of the three Standardized Field Sobriety Tests on a standard note taking guide.
- o Discuss the limiting factors of the three Standardized Field Sobriety Tests.

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| B. SFST Field Validation Studies | o Instructor-Led Demonstration |
| C. Horizontal Gaze Nystagmus | o Participant Practice Session & Demonstration |
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| H. Limitations of the Three Tests | |
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OVERVIEW OF SFST RESEARCH AND DEVELOPMENT

1. For many years law enforcement officers have utilized field sobriety tests to determine the impairment of a person's driving due to alcohol influence. The performance of the person on those field sobriety tests was used by the officer to develop probable cause for arrest and as evidence in court. A wide variety of field sobriety tests existed and there was a need to develop a battery of standardized valid tests.
2. Beginning in late 1975, extensive scientific research studies were sponsored by NHTSA through a contract with the Southern California Research Institute (SCRI) to determine roadside field sobriety tests were the most accurate. SCRI published the following three reports:
 - o California: 1977 (Lab)
 - o California: 1981 (Lab and Field)
 - o Maryland, D.C., V.A., N.C., 1983 (Field)
3. SCRI traveled to law enforcement agencies throughout the United States to select the most commonly used field sobriety tests. Six tests were used in the initial stages of this study.
4. Laboratory research indicated that three of these tests, when administered in a standardized manner, were a highly accurate and reliable battery of tests for distinguishing BACs above 0.10:
 - o Horizontal Gaze Nystagmus (HGN)
 - o Walk-and-Turn (WAT)
 - o One-Leg Stand (OLS)
5. NHTSA analyzed the laboratory test data and found:
 - o HGN, by itself, was 77% accurate
 - o WAT, by itself, was 68% accurate
 - o OLS, by itself, was 65% accurate
 - o By combining HGN and WAT an 80% accuracy can be achieved.
6. The final phase of this study was conducted as a field validation.
 - o Standardized, practical and effective procedures were developed
 - o The tests were determined to discriminate in the field, as well as in the laboratory.

7. The three standardized test were found to be highly reliable in identifying subjects whose BACs were above 0.10. The results of the study unmistakably validated the SFSTs.

SFST VALIDATION STUDIES

1. Three SFST validation studies were undertaken between 1995 and 1998:
 - o Colorado - 1995
 - o Florida - 1997
 - o San Diego - 1998
2. The Colorado SFST validation study was the first full field study that utilized law enforcement personnel experienced in the use of SFSTs.
 - o The initial study utilized only a few experienced officers in DWI enforcement in both a laboratory setting and field setting.
 - o Correct arrests decisions were made 93% of the time based on the 3-test battery (HGN, WAT, OLS). Substantially higher than the initial study results.
3. The Florida SFST field validation study was undertaken in order to answer the question of whether SFSTs are valid and reliable indices of the presence of alcohol when used under present day traffic and law enforcement conditions.
 - o Correct decisions to arrest were made 95% of the time based on the 3-test battery (HGN, WAT, OLS).
 - o This is the third SFST field validation study that has been undertaken. Each has shown that the SFST 3-test battery is the only scientifically validated and reliable method for discriminating between impaired and unimpaired drivers.
4. The San Diego SFST validation field study was undertaken because of the nationwide trend towards lower the BAC limits to 0.08. The question to be answered was "does SFST discriminate at BAC's below 0.10".
 - o Correct arrest decisions were made 91% of the time based on the 3-test battery (HGN, WAT, OLS) at the 0.08 level and above.

- o The results of this study provide a clear evidence of the validity of the 3-test battery. To support arrest decisions at above or below 0.08, it strongly suggests that the SFSTs also accurately discriminate BACs at 0.04 and above.

OVERVIEW OF NYSTAGMUS

Nystagmus

Nystagmus is defined as an involuntary jerking of the eyes. Alcohol and certain other drugs cause Horizontal Gaze Nystagmus.

Categories of Nystagmus

There are three general categories of nystagmus:

1. Vestibular Nystagmus is caused by movement or action to the vestibular system.
 - A. Types of vestibular nystagmus:
 - o Rotational Nystagmus occurs when the person is spun around or rotated rapidly, causing the fluid in the inner ear to be disturbed. If it were possible to observe the eyes of a rotating person, they would be seen to jerk noticeably.
 - o Post Rotational Nystagmus is closely related to rotational nystagmus: when the person stops spinning, the fluid in the inner ear remains disturbed for a period of time, and the eyes continue to jerk.
 - o Caloric Nystagmus occurs when fluid motion in the canals of the vestibular system is stimulated by temperature as by putting warm water in one ear and cold in the other.
 - o Positional Alcohol Nystagmus (PAN) occurs when a foreign fluid, such as alcohol, that alters the specific gravity of the blood is in unequal concentrations in the blood and the vestibular system.
2. Nystagmus can also result directly from neural activity:
 - o Optokinetic Nystagmus occurs when the eyes fixate on an object that suddenly moves out of sight, or when the eyes watch sharply contrasting moving images.

Examples of optokinetic nystagmus include watching strobe lights, rotating lights, or rapidly moving traffic in close proximity. The Horizontal Gaze Nystagmus test will not be influenced by optokinetic nystagmus when administered properly.

- o Physiological Nystagmus is a natural nystagmus that keeps the sensory cells of the eye from tiring. It is the most common type of nystagmus. It happens to all of us, all the time. This type of nystagmus produces extremely minor tremors or jerks of the eyes. These tremors are generally too small to be seen with the naked eye. Physiological nystagmus will have no impact on our Standardized Field Sobriety Tests, because its tremors are generally invisible.
- o Gaze Nystagmus occurs as the eyes move from the center position. Gaze nystagmus is separated into three types:
 - (1) Horizontal Gaze Nystagmus occurs as the eyes move to the side. It is the observation of the eyes for Horizontal Gaze Nystagmus that provides the first and most accurate test in the Standardized Field Sobriety Test battery. Although this type of nystagmus is most accurate for determining alcohol impairment, its presence may also indicate use of certain other drugs.
 - (2) Vertical Gaze Nystagmus is an involuntary jerking of the eyes (up and down) which occurs when the eyes gaze upward at maximum elevation. The presence of this type of nystagmus is associated with high doses of alcohol for that individual and certain other drugs. The drugs that cause Vertical Gaze Nystagmus are the same ones that cause Horizontal Gaze Nystagmus.

Note: There is no drug that will cause Vertical Gaze Nystagmus that does not cause Horizontal Gaze Nystagmus. If Vertical Gaze Nystagmus is present and Horizontal Gaze Nystagmus is not, it could be a medical condition.

 - (3) Resting Nystagmus is referred to as a jerking of the eyes as they look straight ahead. Its presence usually indicates a pathology or high doses of a Dissociative Anesthetic drug such as PCP. If detected, take precautions. (OFFICER SAFETY.)
- 3. Nystagmus may also be caused by certain pathological disorders. They include brain tumors and other brain damage or some diseases of the inner ear. These pathological disorders occur in very few people and in even fewer drivers.

Medical Impairment

The examinations that you can conduct to assess possible medical impairment include:

- o Pupil size
- o Resting Nystagmus
- o Tracking ability

PROCEDURES

Procedures to Assess Possible Medical Impairment

Prior to administration of HGN, the eyes are checked for equal pupil size, resting nystagmus, and equal tracking (can they follow an object together). If the eyes do not track together, or if the pupils are noticeably unequal in size, the chance of medical disorders or injuries causing the nystagmus is present.

Procedures of Horizontal Gaze Nystagmus Testing: The Three Clues

The test you will use at roadside is "Horizontal Gaze Nystagmus" -- an involuntary jerking of the eyes occurring as the eyes gaze toward the side. Some jerking will be seen if the eyes are moved far enough to the side.

1. The Lack of Smooth Pursuit (Clue Number One) - The eyes can be observed to jerk or "bounce" as they follow a smoothly moving stimulus, such as a pencil or penlight. The eyes of an unimpaired person will follow smoothly, i.e., a marble rolling across a smooth pane of glass, or windshield wipers moving across a wet windshield.
2. Distinct and Sustained Nystagmus At Maximum Deviation (Clue Number Two) - Distinct and sustained nystagmus will be evident when the eye is held at maximum deviation for a minimum of four seconds. People exhibit slight jerking of the eye at maximum deviation, even when unimpaired, but this will not be evident or sustained for more than a few seconds. When impaired by alcohol, the jerking will be larger, more pronounced, sustained for more than four seconds, and easily observable.
3. Onset of Nystagmus Prior To 45 Degrees (Clue Number Three) - The point at which the eye is first seen jerking. If the jerking begins prior to 45 degrees it is evident that the person has a BAC above 0.08, as shown by recent research.

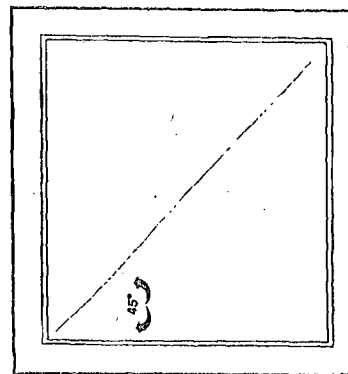
The higher the degree of impairment, the sooner the nystagmus will be observable.

Estimating a 45-Degree Angle

It is important to know how to estimate a 45-degree angle. How far you position the stimulus from the suspect's nose is a critical factor in estimating a 45-degree angle. (i.e., If the stimulus is held 12" in front of the suspect's nose, it should be moved 12" to the side to reach 45 degrees. Likewise, if the stimulus is held 15" in front of the suspect's nose, it should be moved 15" to the side to reach 45 degrees.)

For practice, a 45-degree template can be prepared by making a 15"-square cardboard and connecting its opposite corners with a diagonal line.

To use this device, hold it up so that the person's nose is above the diagonal line. Be certain that one edge of the template is centered on the nose and perpendicular to (or, at right angles to) the face. Have the person you are examining follow a penlight or some other object until suspect is looking down the 45-degree diagonal. Note the position of the eye. With practice, you should be able to recognize this angle without using the template.



Specific Procedures

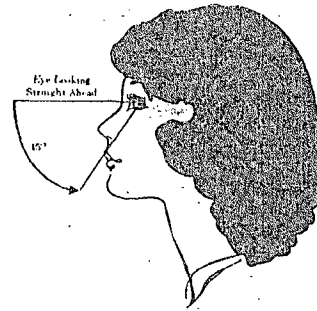
If the suspect is wearing eyeglasses, have them removed.

Give the suspect the following instructions from a safe position. **(FOR OFFICER SAFETY KEEP YOUR WEAPON AWAY FROM THE SUSPECT):**

- o "I am going to check your eyes."
- o "Keep your head still and follow this stimulus with your eyes only."
- o "Keep following the stimulus with your eyes until I tell you to stop."

Position the stimulus approximately 12-15 inches from the suspect's nose and slightly above eye level. Check to see that both pupils are equal in size. If they are not, this may indicate a head injury. You may observe Resting Nystagmus at this time, then check the suspect's eyes for the ability to track together. Move the stimulus smoothly across the suspect's entire field of vision. Check to see if the eyes track the stimulus together or one lags behind the other. If the eyes don't track together it could indicate a possible medical disorder, injury, or blindness.

Check the suspect's left eye by moving the stimulus to your right. Move the stimulus smoothly, at a speed that requires approximately two seconds to bring the suspect's eye as far to the side as it can go. While moving the stimulus, look at the suspect's eye and determine whether it is able to pursue smoothly. Now, move the stimulus all the way to the left, back across suspect's face checking if the right eye pursues smoothly. Movement of the stimulus should take approximately two seconds out and two seconds back for each eye. Repeat the procedure.



After you have checked both eyes for lack of smooth pursuit, check the eyes for distinct and sustained nystagmus at maximum deviation beginning with the suspect's left eye. Simply move the object to the suspect's left side until the eye has gone as far to the side as possible. Usually, no white will be showing in the corner of the eye at maximum deviation. Hold the eye at that position for a minimum of four seconds, and observe the eye for distinct and sustained nystagmus. Move the stimulus all the way across the suspect's face to check the right eye holding that position for a minimum of four seconds. Repeat the procedure.

Note: Fatigue Nystagmus. This type of nystagmus may begin if a subject's eyes are held at maximum deviation for more than 30 seconds.

Next, check for onset of nystagmus prior to 45 degrees. Start moving the stimulus towards the right (suspect's left eye) at a speed that would take approximately four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Now, move the stimulus to the left (suspect's right eye) at a speed that would take approximately four seconds for the stimulus to reach the edge of the suspect's shoulder. Watch the eye carefully for any sign of jerking. When you see it, stop and verify that the jerking continues. Repeat the procedure. NOTE: It is important to use the full four seconds when checking for onset of nystagmus. If you move the stimulus too fast, you may go past the point of onset or miss it altogether.

If the suspect's eyes start jerking before they reach 45 degrees, check to see that some white of the eye is still showing on the side closest to the ear. If no white of the eye is showing, you either have taken the eye too far to the side (that is more than 45 degrees) or the person has unusual eyes that will not deviate very far to the side.

ADMINISTRATIVE PROCEDURES

1. CHECK FOR EYEGLASSES
2. VERBAL INSTRUCTIONS
3. POSITION STIMULUS (12-15 INCHES)
4. EQUAL PUPIL SIZE AND RESTING NYSTAGMUS
5. TRACKING
6. LACK OF SMOOTH PURSUIT
7. DIST. & SUSTAINED NYSTAGMUS @ MAX. DEV.
8. ONSET OF NYSTAGMUS PRIOR TO 45°
9. TOTAL THE CLUES
10. CHECK FOR VERTICAL GAZE NYSTAGMUS

NOTE: Nystagmus may be due to causes other than alcohol. These other causes include seizure medications and some other drugs. A large disparity between the performance of the right and left eye may indicate a medical condition.

Test Interpretation

You should look for three clues of nystagmus in each eye.

1. The eye cannot follow a moving object smoothly.
2. Nystagmus is distinct and sustained when the eye is held at maximum deviation for a minimum of four seconds.
3. The angle of onset of nystagmus is prior to 45 degrees.

Based on the original research, if you observe four or more clues it is likely that the suspect's BAC is above 0.10. Using this criterion you will be able to classify about 77% of your suspects accurately. This was determined during laboratory and field testing and helps you weigh the various field sobriety tests in this battery as you make your arrest decision.

Vertical Gaze Nystagmus

The Vertical Gaze Nystagmus test is simple to administer. During the Vertical Gaze Nystagmus test, look for jerking as the eyes move up and are held for approximately four seconds at maximum elevation.

1. Position the stimulus horizontally, about 12-15 inches in front of the suspect's nose.
2. Instruct the suspect to hold the head still, and follow the object with the eyes only.
3. Raise the object until the suspect's eyes are elevated as far as possible.
4. Hold for approximately four seconds.
5. Watch closely for evidence of jerking.

Horizontal and Vertical Gaze Nystagmus can be observed directly and does not require special equipment. You will need a contrasting stimulus for the suspect to follow with their eyes. This can be the tip of your index finger, penlight, or pen. The stimulus used should be held slightly above eye level, so that the eyes are wide open when they look directly at it. It should be held approximately 12-15 inches in front of the nose. Remain aware of your position in relation to the suspect at all times.

OFFICER SAFETY IS THE NUMBER ONE PRIORITY ON ANY TRAFFIC STOP.

Procedures for Walk-and-Turn Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

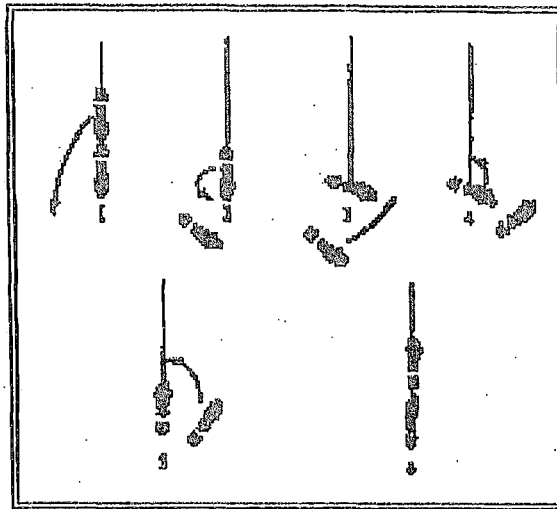
For standardization in the performance of this test, have the suspect assume the heel-to-toe stance by giving the following verbal instructions, accompanied by demonstrations:

- o "Place your left foot on the line" (real or imaginary). Demonstrate.
- o "Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot." Demonstrate.
- o "Place your arms down at your sides." Demonstrate.
- o "Maintain this position until I have completed the instructions. Do not start to walk until told to do so."
- o "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Walking Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- o "When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back." (Demonstrate 3 heel-to-toe steps.)
- o "When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this." (Demonstrate).
- o "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."
- o "Once you start walking, don't stop until you have completed the test."
- o "Do you understand the instructions?" (Make sure suspect understands.)
- o "Begin, and count your first step from the heel-to-toe position as 'One.'"



3. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. Original research demonstrated that the behaviors listed below are likely to be observed in someone with a BAC above 0.10. Look for the following clues each time this test is given:

- A. Cannot keep balance while listening to the instructions. Two tasks are required at the beginning of this test. The suspect must balance heel-to-toe on the line, and at the same time, listen carefully to the instructions. Typically, the person who is impaired can do only one of these things. The suspect may listen to the instructions, but not keep balance. Record this clue if the suspect does not maintain the heel-to-toe position throughout the instructions. (Feet must actually break apart.) Do not record this clue if the suspect sways or uses the arms to balance but maintains the heel-to-toe position.
- B. Starts before the instructions are finished. The impaired person may also keep balance, but not listen to the instructions. Since you specifically instructed the suspect not to start walking "until I tell you to begin," record this clue if the suspect does not wait.
- C. Stops while walking. The suspect pauses for several seconds. Do not record this clue if the suspect is merely walking slowly.
- D. Does not touch heel-to-toe. The suspect leaves a space of more than one-half inch between the heel and toe on any step.
- E. Steps off the line. The suspect steps so that one foot is entirely off the line.

- F. Uses arms to balance. The suspect raises one or both arms more than 6 inches from the sides in order to maintain balance.
- G. Improper turn. The suspect removes the front foot from the line while turning. Also record this clue if the suspect has not followed directions as demonstrated, i.e., spins or pivots around.
- H. Incorrect number of steps. Record this clue if the suspect takes more or fewer than nine steps in either direction.

Note: If suspect can't do the test, record observed clues and document the reason for not completing the test, e.g. suspect's safety.

If the suspect has difficulty with the test (for example, steps off the line), continue from that point, not from the beginning. This test may lose its sensitivity if it is repeated several times.

Observe the suspect from a safe distance and limit your movement which may distract the suspect during the test. **Always consider officer safety.**

Based on original research, if the suspect exhibits two or more clues on this test or fails to complete it, classify the suspect's BAC as above 0.10. Using this criterion, you will be able to accurately classify 68% of your suspects.

4. Test Conditions

Walk-and-Turn test requires a designated straight line, and should be conducted on a reasonably dry, hard, level, nonslippery surface. There should be sufficient room for suspects to complete nine heel-to-toe steps. Note: Recent field validation studies have indicated that varying environmental conditions have not affected a suspect's ability to perform this test.

The original research indicated that individuals over 65 years of age, back, leg or inner ear problems had difficulty performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

5. Combined Interpretation of Horizontal Gaze Nystagmus and Walk-and-Turn Tests

Based on the original research, combining four or more clues of HGN and two or more clues of the Walk-and-Turn, suspects can be classified as above 0.10 BAC 80% of the time.

Procedures for One-Leg Stand Testing

1. Instructions Stage: Initial Positioning and Verbal Instructions

Initiate the test by giving the following verbal instructions, accompanied by demonstrations.

- o "Please stand with your feet together and your arms down at the sides, like this." (Demonstrate)
- o "Do not start to perform the test until I tell you to do so."
- o "Do you understand the instructions so far?" (Make sure suspect indicates understanding.)

2. Demonstrations and Instructions for the Balance and Counting Stage

Explain the test requirements, using the following verbal instructions, accompanied by demonstrations:

- o "When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground." (Demonstrate one leg stance.)
- o "You must keep both legs straight, arms at your side."
- o "While holding that position, count out loud in the following manner: "one thousand and one, one thousand and two, one thousand and three, until told to stop." (Demonstrate a count, as follows: "one thousand and one, one thousand and two, one thousand and three, etc." Officer should not look at his foot when conducting the demonstration - OFFICER SAFETY.)
- o "Keep your arms at your sides at all times and keep watching the raised foot."
- o "Do you understand?" (Make sure suspect indicates understanding.)
- o "Go ahead and perform the test." (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)

Observe the suspect from a safe distance. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.

3. Test Interpretation

You may observe a number of different behaviors when a suspect performs this test. The original research found the behaviors listed below are the most likely to be observed in someone with a BAC above 0.10. Look for the following clues each time the One-Leg Stand test is administered.

- A. The suspect sways while balancing. This refers to side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.
- B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.
- C. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance.
- D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.

Note: If suspect can't do the test, record observed clues and document the reason for not completing the test, e.g. suspect's safety.

Remember that time is critical in this test. The original research has shown a person with a BAC above 0.10 can maintain balance for up to 25 seconds, but seldom as long as 30.

Based on original research, if an individual shows two or more clues or fails to complete the One-Leg Stand, there is a good chance the BAC is above 0.10. Using that criterion, you will accurately classify 65% of the people you test as to whether their BAC's are above 0.10.

Observe the suspect from a safe distance and remain as motionless as possible during the test so as not to interfere. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds.

4. Test Conditions

One-Leg Stand requires a reasonably dry, hard, level, and non-slippery surface. Suspect's safety should be considered at all times.

The original research indicated that certain individuals over 65 years of age, back, leg or inner ear problems, or people who are overweight by 50 or more pounds had difficulty performing this test. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

5. Taking Field Notes on Suspects' Performance of Field Sobriety Tests

For purposes of the arrest report and courtroom testimony, it is not enough to record the total number of clues on the three tests. The number of clues is important to the police officer in the field because it helps determine whether there is probable cause to arrest. But to secure a conviction, more descriptive evidence is needed.

The officer must be able to describe how the suspect performed on the tests, and exactly what the suspect did.

The standard note taking guide provided in this Manual is designed to help you develop a clear description of the suspect's performance on the tests.

6. Taking Field Notes on The Eye Procedures

First, have subject remove glasses.

The section for Medical Assessment appears at the bottom of the guide's front page.

Equal Pupils	☐ Yes	☐ No
Equal Tracking	☐ Yes	☐ No
Vertical Nystagmus	☐ Yes	☐ No
Other (i.e., Resting Nystagmus)	_____	

- o Check "Yes" or "No" box for equal pupil size.
- o Check "Yes" or "No" box for equal tracking.

In the section labeled "other", record any facts, circumstances, conditions, or observations that may be relevant to this procedures (i.e., Resting Nystagmus).

The section on the Horizontal Gaze Nystagmus test appears on the bottom of the guide's front side.

Complete the entire test for both eyes, writing "yes" or "no" for each nystagmus clue.

HORIZONTAL GAZE NYSTAGMUS

- ⊕ LACK OF SMOOTH PURSUIT
- ⊕ DISTINCT AND SUSTAINED NYSTAGMUS AT MAXIMUM DEVIATION
- ⊕ ONSET OF NYSTAGMUS PRIOR TO 45 DEGREES

LEFT	RIGHT

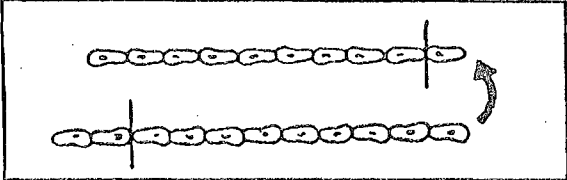
- o Write "yes" if the clue is present;
- o Write "no" if the clue is not present.

In the section labeled "other," record any facts, circumstances, conditions or observations that may be relevant to this test.

- o Examples of additional evidence of impairment emerging during nystagmus test:
 - suspect unable to keep head still;
 - suspect swaying noticeably;
 - suspect utters incriminating statements.
- o Examples of conditions that may interfere with suspect's performance of the Horizontal Gaze Nystagmus test:
 - wind, dust, etc. irritating suspect's eyes;
 - visual or other distractions impeding the test (always face suspect away from rotating lights, strobe lights and traffic passing in close proximity).

7. Taking Field Notes on Walk-and-Turn Testing

The section on the Walk-and-Turn test appears at the top of the guide's back side.

<u>WALK AND TURN</u>		
CANNOT KEEP BALANCE STARTS TOO SOON		
	FIRST NINE STEPS	SECOND NINE STEPS
STOPS WALKING		
MISSES HEEL-TO-TOE		
STEPS OFF LINE		
RAISES ARMS		
ACTUAL STEPS TAKEN		
IMPROPER TURN (Describe)		
CANNOT DO TEST (EXPLAIN)		
OTHER:		

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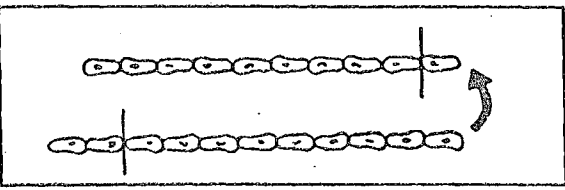
The first two clues, "cannot keep balance" and "starts too soon" apply only during the instructions stage of the test. Record the number of times each of those clues appear.

For example, if the suspect's feet "break apart" from the heel-to-toe stance twice during the instructions stage, write "2" in the box alongside the "cannot keep balance" clue. Similarly, if the suspect never "starts too soon," write "0" in that box. Note: Actual steps taken is for scoring purposes only. Wrong number of steps is the validated clue.

Don't leave boxes blank. If a particular clue never shows up, write "0" in the corresponding box.

Record the next five clues separately for the walk down the line, and then up the line.

- A. If a suspect stops walking, record it by drawing a vertical line across the toe of the step at which the stop occurred. Do this for the first as well as the second nine steps. Place the letter "S" at bottom of the vertical line to indicate stops walking.

<u>WALK AND TURN</u>											
CANNOT KEEP BALANCE STARTS TOO SOON											
FIRST NINE STEPS <table border="1" style="margin: 0 auto; width: 100%;"> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> </table> SECOND NINE STEPS <table border="1" style="margin: 0 auto; width: 100%;"> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> <tr><td style="height: 20px;"></td></tr> </table>											
STOPS WALKING MISSES HEEL-TO-TOE STEPS OFF LINE RAISES ARMS ACTUAL STEPS TAKEN											
IMPROPER TURN (Describe) CANNOT DO TEST (EXPLAIN) OTHER:											

- B. If suspect fails to touch heel-to-toe, record how many times this happens. Draw a vertical line across the toe of the step at which the miss occurred. Place the letter "M" at the top of the vertical line to indicate missed heel to toe.
- C. If suspect steps off the line while walking, record it by drawing a line from the appropriate foot print at an angle in the direction in which the foot stepped. Do it for each nine steps.
- D. If suspect uses arms to balance, give some indication of how often or how long this happens.
- o Example: suspect raised arms from sides three times; place a check for each occurrence in appropriate box.
 - o Example: suspect held arms away from sides during 3 through 7; place a check for each occurrence in appropriate box.
 - o Example: suspect "flapped" arms continuously; make a note.
- E. Record the actual number of steps taken by suspect in each direction.

For the next point, "improper turn," record a description of the turn.

If you note that the suspect "cannot perform test," indicate explicitly why you did so.

- o Example: "off line three times;"
- o Example: "staggered six steps to right, nearly fell;"
- o Example: "fear of injury."

At end of the test, examine each factor and determine how many clues have been recorded. Remember, each clue may appear several times, but still only constitutes one clue.

In the section labeled "other," record any facts, circumstances, conditions or observations that may be relevant to this test.

- o Examples of additional evidence of impairment during Walk-and-Turn test:
 - suspect verbally miscounts steps;
 - suspect utters incriminating statements.

- o Examples of conditions that may interfere with suspect's performance of the Walk-and-Turn test:

- wind/weather conditions;
- suspect's age, weight;
- suspect's footwear.

8. Taking Field Notes on the Combined Interpretation of Nystagmus and Walk-and-Turn

By combining four or more clues of HGN with two or more clues of the WAT test, suspects can be correctly classified as above 0.10 BAC 80% of the time.

9. Taking Field Notes on One-Leg Stand Testing

The section on the One-Leg Stand test appears midway down the page.

By recording when things happen as well as what happens, you will be able to prepare a more descriptive arrest report.

You will place check marks in or near the small boxes to indicate how many times you observed each of the clues. You will do this separately for the test on the left leg (L) or on the right leg (R).

In addition, if the suspect puts the foot down during the test, you will record when it happened (write the count on new note guide). For example, when standing on the left leg the suspect lowered the right foot at a count of "one thousand and thirteen", and again at "one thousand and twenty". Your diagram should look like the sketch to the left. You must also pay attention to the suspect's general appearance and behavior while the test is being performed.

At end of the test, examine each factor and determine how many distinct clues have appeared.

IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:

- o THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER
- o THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE
- o THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

At end of the test, examine each factor and determine how many clues have been recorded. Remember, each clue may appear several times, but still only constitutes one clue.

TEST YOUR KNOWLEDGE

INSTRUCTIONS: Complete the following sentences.

1. Walk-and-Turn is an example of _____ field sobriety test.
2. The Walk-and-Turn requires a real or imaginary line and _____

3. During the _____ stage of the Walk-and-Turn, the suspect is required to count out loud.
4. Per the original research, the Walk-and-Turn can determine whether a suspect's BAC is above or below 0.10, _____ percent of the time.
5. In the Walk-and-Turn test, a suspect who steps off the line during the first 9 steps and once again during the second 9 steps and who raises arms for balance twice during the second nine steps has produced _____ distinct clue(s).
6. The Walk-and-Turn may not be valid when administered to persons who are over _____ years of age.
7. During the _____ stage of the One-Leg Stand the suspect must maintain balance for 30 seconds.
8. The One-Leg Stand requires that the suspect keep the foot elevated for _____ seconds.
9. Per original research, the One-Leg Stand can determine whether a suspect's BAC is above or below 0.10, _____ percent of the time.
10. In the One-Leg Stand test, a suspect who sways has exhibited _____ clue(s).
11. In the One-Leg Stand test, a suspect who raises arms, hops, and puts foot down has exhibited _____ clue(s).
12. The maximum number of clues for Horizontal Gaze Nystagmus that can appear in one eye is _____.
13. Per original research, the HGN test can determine whether a suspect's BAC is above 0.10, _____ percent of the time.
14. The third clue of HGN is an onset of nystagmus prior to _____ degrees.

North Charleston Police

SC0100800

INCIDENT REPORT

INFORMATION ONLY

CASE NUMBER

2013003675

INC. Yes

INTD. No

INCIDENT TYPE

68-03-2940(1), 2930 DUI 1ST (REFUSED)

COMPLETED

FORCED ENTRY

PREMISE TYPE

UNITS ENTERED

TYPE VICTIM

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)

DORCHESTER RD AT BREAM RD, NORTH CHARLESTON, SC

ZIP CODE

WEAPON TYPE

INCIDENT DATE

24 HR. CLOCK

TO

DATE

24 HR. CLOCK

DISP. DATE

DISP. TIME

TIME ARRIVED

DEPART. TIME

LOCATION NO.

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)

RELATIONSHIP TO SUBJECT

RESIDENT

RACE

SEX

AGE

ETH

DAYTIME PHONE

EVENING PHONE

ADDRESS

CITY

STATE

ZIP CODE

LOCATION NO.

VICTIM'S NAME (LAST, FIRST, MIDDLE)

RELATIONSHIP TO SUBJECT

RESIDENT

RACE

SEX

AGE

ETH

DAYTIME PHONE

EVENING PHONE

HEIGHT

WEIGHT

HAIR

EYES

FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS

CITY

STATE

ZIP CODE

LOCATION NO.

VISIBLE INJURY (VICTIM) YES NO EXPLAIN

COMPLAINANT OF ANY NON-VISIBLE INJURIES YES NO

VICTIM NO. 1 USING ALCOHOL YES NO UNK

DRUGS YES NO UNK

TYPE

TWO MAN VEH

ONE MAN VEH

DETECTIVE PLACED

OTHER

ALONE

ASSISTED

J-This Jurisdiction

S-State

O-Out of State

U-Unknown

SUSPECT

RUNAWAY

WANTED

WARRANT

ARREST

JAIL

SUMMONS

NAME (LAST, FIRST, MIDDLE)

RACE

SEX

AGE

ETH

DATE OF BIRTH

HEIGHT

WEIGHT

HAIR

EYES

FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

DAYTIME PHONE

EVENING PHONE

ADDRESS

CITY

STATE

ZIP CODE

LOCATION NO.

SUBJECT NO. 1 USING ALCOHOL YES NO UNK

ARRESTED NEAR OFFENSE SCENE YES NO

DATE/TIME OF OFFENSE

DATE/TIME OF ARREST

DRUGS YES NO UNK TYPE

TOTAL # ARRESTED

DAY OF THE WEEK

HOW REPORTED

A= OFFICER DISPATCHED ON CALL

D= COMPLAINT WRITTEN IN

OFF FACTOR

A= RESISTANCE/HOSTILITY

E= COMPLAINT FREQUENTLY INTOXICATED

S M T W T F S UNK

B= REPORT TAKEN BY PHONE

E= OFFICER INITIATED

C= UNFOUNDED CALLS

F= DOMESTIC

C= COMPLAINANT WALKED IN

F= OTHER

D= MENTAL SUBJECT

N= NORMAL

DUI 1st (Refused)

On February 1, 2013 at approximately 0032 hours I, Pfc T. Bennett was patrolling the area of Dorchester Road and Bream Road which is located in the City of North Charleston, County of Charleston. When I observed a Red 1997 Mazda Pickup truck bearing a South Carolina License plate number P382211 in lane # 1, the vehicle appeared to be approaching a moped that was also in lane #1 at a high rate of speed. I activated the front radar antenna in unit #572 (which was tested and passed all tests. I am also a certified speed measuring device operator through the SCCJA) which locked the vehicle in at 55mph in a 40mph zone the vehicle then slowed down in just enough time to not collide with the moped. The vehicle then kept tapping its brakes and was right behind the moped; the vehicle switched into lane #2 at which time I observed the vehicle to swerve almost and accelerate in speed and then decelerate. The vehicle then switched

JURISDICTION OF THEFT

LAW ENFORCEMENT AGENCY

JURISDICTION OF RECOVERY

LAW ENFORCEMENT AGENCY

TYPE (GROUP)

STOLEN

DAMAGED

BURNED

RECOVERED

SEIZED

TOTAL VALUE

SUBJECT IDENTIFIED YES NO

SUBJECT LOCATED YES NO

S.F.

ACTIVE UNFOUNDED

ADM. CLOSED

ARRESTED UNDER 18

EX-CLEAR UNDER 18

REASON FOR EXCEPTIONAL CLEARANCE 1. OFFENDER DEATH 2. NO PROSECUTION 3. EXTRACTION DENIED 4. VICTIM DELORES COOPERATION 5. JUVENILE IN CUSTODY

REPORTING OFFICER(S)

DATE

UNIT NUMBER

APPROVING OFFICER

DATE

UNIT NUMBER

BENNETT, THOMAS EUGENE

2/1/2013 12:32:03 AM

272

LEWIS, SIDNEY LEE

151

FOLLOWUP INVESTIGATION YES NO

OFFICER

000080

ADDITIONAL NARRATIVE

Agency Name: NORTH CHARLESTON POLICE DEPARTMENT	ORI #: SC0100900	Report Date/Time: 02/01/2013 00:32	OCA #: 2013003875
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DUI 1st (Refused)

back into lane #1 crossing the solid yellow lines and dotted white lines several times on the left side of the roadway and had trouble maintaining its speed by speeding up and slowing down. I conducted a traffic stop on the vehicle which pulled completely off the road into the grass median and stopped, the vehicle then began backing up and stopped abruptly. I made contact with the driver later identified as Mr. John Barra and could smell a strong odor of an alcoholic beverage coming from inside the vehicle. I asked Mr. Barra for his driver's license, proof of insurance, and proof of registration I observed him to be very lethargic with his motions. During this time Mr. Barra was fidgeting with his wallet and other paperwork. I asked Mr. Barra where he was coming from tonight and he stated North Charleston in a slurred speech, I asked where in North Charleston and he stated that he lived in North Charleston so I asked him again where he was coming from and he stated downtown. I asked if he had consumed any alcoholic beverages tonight and he stated yes one beer, I asked how long ago he stated earlier. I asked how earlier and he stated around 7pm. I asked Mr. Barra to step out of the vehicle and when he did he lost his balance almost falling over, I asked Mr. Barra to step to the back of his truck and during this time I observed Mr. Barra to be unsteady on his feet. I asked Mr. Barra if he would consent to taking the Standardized Field Sobriety Test, which he did. The outcome of the Tests are as follows:

I asked Mr. Barra if he had any medical conditions that would prevent him from walking or standing he stated no. I then asked if he had any eye conditions and if he wore glasses or contacts. He stated no.

I then began with the administering of the first SFST, the Horizontal Gaze Nystagmus or HGN. I provided him instructions on how to perform the HGN and verified that he was able to clearly see my chosen stimulus (silver end of my pen) before beginning the HGN. I then checked for equal pupil size and for any resting nystagmus. I observed that his pupils were equal in size (extremely dilated) and did not see any resting nystagmus. I then checked for an equal tracking of both eyes to my stimulus. I observed that both eyes equally tracked my stimulus. Next, I checked for a lack of smooth pursuit of each eye as it followed my stimulus. I did observe a clear, distinct lack of smooth pursuit in each of his eyes. Next, I checked for a distinct & sustained horizontal nystagmus at a maximum deviation in each eye. I observed a very clear, distinct & sustained horizontal nystagmus at a maximum deviation in each eye. I then checked for an onset of horizontal nystagmus prior to a 45° angle in each eye. I did observe a very clear, distinct onset of horizontal nystagmus prior to a 45° angle in each eye. Lastly, I checked for any visible sustained vertical gaze nystagmus or VGN and it was very clearly observed. I did observe that both of his scleras or the "whites" of his eyes were red in color (commonly referred to as "bloodshot") & that his eyes were glossy in appearance. I am trained and certified to administer the SFSTs by the S.C. Criminal Justice Academy, allowing me to administer this HGN. I observed all 6 of the clues I'm trained to look for which indicated that there was a good probability that driver's faculties or abilities to drive had been materially & appreciably impaired by his consumption of alcoholic beverage(s).

I then moved into administering the second SFST, the Walk-And-Turn or WAT. I began by instructing him that I would explain & demonstrate how to perform the WAT before instructing him to begin. I then explained and demonstrated the WAT before asking him if he had any questions & if he understood the instructions. He replied that he had no questions & that he understood the instructions as provided and demonstrated. I then instructed to begin the WAT when he was ready. I then allowed him to attempt the WAT. I observed 3 of the clues I'm trained to look for, (1- That he could not stand properly during the instruction phase by separating his feet; 2- That he took the wrong number of steps which he took 10 forward and 10 back; and 3- That he made an improper turn), which in conjunction with the results of the HGN indicated a higher probability that suspect's faculties or abilities to drive had been materially & appreciably impaired by his consumption of alcoholic beverage(s).

Lastly, I moved into administering the third and final SFST, the One-Leg Stand or OLS. I began by instructing him that I would explain & demonstrate how to perform the OLS before instructing him to begin. I then explained while demonstrating the OLS before asking him if he had any questions & if he understood the instructions. He replied that he had no questions & that he understood the instructions as provided and demonstrated. He was instructed to begin the OLS when he was ready. He then attempted to perform the OLS. Mr. Barra did not count during the test and stopped by putting his foot down and then asked this officer if I was going to take him to jail. Mr. Barra attempted to start the test again at which point he stopped and could not complete the test. A minimum of 2 observable clues are needed for this test to validate that someone's faculties or abilities to drive had been materially & appreciably impaired by his consumption of alcoholic beverage(s).

Mr. Barra was placed under arrest for driving under the influence. He was handcuffed behind the back and the handcuffs were checked for proper fit and double locked. He was then read his Miranda Warnings and placed into the back seat of Patrol unit #572, which was searched for contraband after the last person was removed. Mr. Barra was then transported to the Charleston County detention center and escorted into the DATA MASTER room. I activated the SLED camera and advised Mr. Barra that everything was being audibly and visually recorded at this time. I read his Miranda Warnings again and activated the DATA MASTER machine (which I am certified to operate through the SCCJA Certification DMT001208). I printed out the Advisement of Implied consent rights and read them to him. I observed Mr. Barra for the mandatory 20 minute observation period. The DATAMASTER then began its self check and validated that it was working properly. Mr. Barra refused to provide a breath sample. Mr. Barra was provided with all his copies of the paper work including the South Carolina Department of Motor Vehicles notice of suspension form. Mr. Barra was then booked, lodged, and pending a bond hearing.

During an inventory of the vehicle officers located in the center console a small clear hard plastic round container with a green plant like material in it. On top of the container was the mark K-2, which is known as a synthetic herb to smoke. As well as two smoking pipes next it, all

00008T

ADDITIONAL NARRATIVE

Agency Name: NORTH CHARLESTON POLICE DEPARTMENT	ORI #: SC0100800	Report Date/Time: 02/01/2013 00:32	OCA #: 2013003675
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DUI 1st (Refused)

items were confiscated and placed into the North Charleston police department evidence room to be destroyed.

The vehicle was towed by Ray's towing.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-001871

City of North Charleston Respondent,

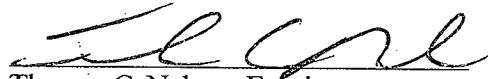
v.

John Barra, ...Appellant,

APPELLANT'S RULE 210(g) CERTIFICATE

Pursuant to Rule 210(g), SCACR, the undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

FUTERAL & NELSON, LLC



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Dated: 8/20/15

Attorney for Appellant