STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OCT 15 2012
SC Court of Appeals

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-211546

THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the circuit court judge commit an error of law by retroactively applying a statutory change to the implied consent statute and excluding the results of Hilton's breath alcohol test where the officer who conducted the test fully complied with the statutory requirements in effect at the time of Hilton's arrest and the General Assembly manifested a clear intention for its substantive changes to the implied consent statute to be applied prospectively through the inclusion of a savings clause in the amending legislation?

II.

Assuming the statutory changes to the implied consent statute applied retroactively and required Hilton's breath alcohol test to be administered within two hours of his arrest, did the circuit court judge err in finding either Hilton's test was not conducted within the two-hour time limit or Hilton was not provided with a complete written report as required by the implied consent statute when Hilton's breath alcohol test was conducted within two hours of his arrest, Hilton was given a written report containing all of the information required by the implied consent statute but incorrectly listing the time of arrest, and the prosecutor provided Hilton with written notice of the correct time of arrest prior to the commencement of any proceeding where the test results were introduced as evidence?

STATEMENT OF THE CASE

On May 10, 2008, Respondent Michael J. Hilton was arrested following an investigation into an automobile and motorcycle collision that resulted in the death of the driver of the motorcycle and serious injuries to a passenger on the motorcycle. In September of 2008, the Horry County grand jury indicted Hilton for one count of felony driving under the influence resulting in a death and one count of felony driving under the influence resulting in great bodily injury. Prior to trial, Hilton filed a motion seeking the exclusion of any evidence related to a breath alcohol test conducted after the collision. On October 25, 2011, a hearing was conducted on Hilton's motion in the Horry County court of general sessions before the Honorable Benjamin H. Culbertson, circuit court judge. Following the hearing, the circuit court judge issued an order dated March 26, 2012, suppressing the breath alcohol test results in Hilton's case. The State then timely filed a notice of appeal.

STATEMENT OF FACTS

At 10:15 p.m. on the evening of May 10, 2008, Respondent Michael J. Hilton was driving on a highway in Myrtle Beach, South Carolina, when the vehicle he was driving collided with a motorcycle. (Tr. p. 91; Defense Exhibit "D" – S.C. Traffic Collision Report Form). Forty-four-year-old Angelo Gonzalez, the driver of the motorcycle, was killed as a result of the collision, and thirty-six-year-old Susan Reader, a passenger on the motorcycle, was seriously injured in the collision. (Defense Exhibit "D"). Several people witnessed Hilton's vehicle and the motorcycle collide, and law enforcement was contacted. (Defense Exhibit "D").

Approximately ten minutes later, Trooper Pete Schmidt of the South Carolina Highway Patrol arrived at the scene of the collision. (Tr. pp. 92-93; Defense Exhibit "D"). After investigating the incident, Trooper Schmidt arrested Hilton at 10:47 p.m. (Tr. p. 90; pp. 96-97; Defense Exhibit "E" – Letter). Trooper Schmidt then issued uniform traffic tickets to Hilton for failure to yield the right-of-way, felony driving under the influence resulting in a death, and felony driving under the influence resulting in great bodily injury. (Tr. p. 91; Defense Exhibit "B" – Uniform Traffic Tickets).

Following Hilton's arrest, he was transported to the Myrtle Beach Police Department for a breath alcohol test to determine his alcohol concentration. (Defense Exhibit "A" – Breath Alcohol Analysis Test Report; Defendant's Memorandum in Support of Motion to Exclude Evidence, dated Oct. 25, 2011, p. 1). Trooper Schmidt began the statutorily-required twenty-minute pre-test observation period at 11:39 p.m., entered the "arrest time" into the Datamaster machine as 10:15 p.m., and attempted to

first conduct a simulator test at 11:54 p.m.[1] (Tr. p. 90; Defense Exhibit "A"). However, the simulator solution used by the Datamaster machine failed to test within the proper limits three times, and the officer was unable to conduct the simulator test with that particular sample. (Tr. pp. 103-104; p. 173; Defense Exhibit "A"; Defense Exhibit "G" – Datamaster Machine Status Records). Trooper Schmidt then replaced the simulator solution in the Datamaster machine with a new sample, and the new simulator solution tested within an appropriate range. (Tr. pp. 103-104; p. 173; p. 179; Defense Exhibit "A"). Thereafter, at 12:32 a.m. on May 11, 2008, Hilton submitted to the breath alcohol test, and the results showed his breath alcohol concentration was 0.15 percent. (Tr. p. 45; p. 104; pp. 199-200; State's Exhibit "A" – Datamaster Machine Breath Records, p. 6; Defense Exhibit "A").

Subsequently, Hilton was indicted for felony driving under the influence resulting in a death and felony driving under the influence resulting in great bodily injury. (Indictments). Prior to trial, Hilton filed a motion seeking the exclusion of "all evidence of testing, including any and all field sobriety tests, chemical analyses and tests, including blood alcohol tests and Data Master tests, performed on the Defendant both prior and subsequent to his arrest." (Motion to Exclude Evidence, dated Sept. 23, 2011). On October 3, 2011, the prosecutor served Hilton with a letter stating:

> It has come to the attention of the State in your case that the time of arrest as indicated on the Datamaster report of 22:15 reflected the time of violation or time of incident and not the actual time of arrest. This was discovered after reviewing the written and video documentation associated

[1] At the time Trooper Schmidt entered 10:15 p.m. into the Datamaster machine as the "arrest time," the standard operating procedure in Myrtle Beach was to use the time of the collision as the "arrest time." (Tr. pp. 90-91). Notably, the standard operating procedure in Myrtle Beach was consistent with the S.L.E.D. policy setting forth the proper procedure for the administration of an implied consent breath alcohol test, which instructed Datamaster operators to enter the "arrest or violation time in twelve hour format" when entering the "arrest time" into a Datamaster machine. (Tr. pp. 146-147; State's Exhibit "C" – S.L.E.D. Policies and Procedures on Implied Consent, p. 10).

> with your case. Pursuant to South Carolina Code Section 56-5-2950 subsection (d) you must be informed of the actual time of arrest in writing. The actual time of arrest in your case was 22:47:54 as recorded on the roadside video.[2]

(Defense Exhibit "E"). Thereafter, on October 25, 2011, a hearing was conducted on Hilton's motion. (Tr. p. 5).

During the hearing, Hilton indicated he was moving to exclude the breath alcohol test results.[3] (Tr. pp. 5-6). In arguing for the suppression of that evidence, Hilton conceded the statute in effect at the time of his arrest did **not** require a breath alcohol test to be conducted within two hours of arrest, but he argued the statute was amended within a year of his arrest to impose a two-hour time limit for the performance of such a test. (Tr. p. 11; p. 116). Hilton asserted the statutory charge was procedural in nature, which he claimed meant it should be applied retroactively to his case. (Tr. p. 12). Furthermore, Hilton argued the letter submitted to him by the prosecutor correcting his time of arrest was not sufficient to constitute a written report as required by the implied consent statute.[4] (Tr. pp. 15-16).

In response, the prosecutor argued the statutory changes to S.C. Code Ann. § 56-5-2950 were substantive in nature and did not apply retroactively to Hilton's case based on the plain language of the savings clause included in the amending legislation. (State's Memorandum in Opposition to Motion to Exclude Evidence, dated Nov. 8, 2011, pp. 10-

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[2] The prosecutor provided the letter to Hilton immediately before the originally-scheduled hearing on Hilton's motion to exclude the breath alcohol test results, and the circuit court judge continued the hearing until October 25, 2011, at Hilton's request. (Order Suppressing Breath Test Results, dated March 26, 2012, p. 3, n. 2).

[3] At the outset of the hearing, Hilton provided the circuit court judge and the prosecutor with a copy of a memorandum in support of his motion. (Tr. pp. 7-9).

[4] Additionally, Hilton asserted the particular Datamaster machine used in his case was unreliable. (Tr. pp. 18-19). However, the circuit court judge subsequently rejected that contention. (Order Suppressing Breath Test Results, pp. 1-2).

14). The prosecutor further asserted Hilton's breath alcohol test was conducted within two hours of his arrest even if the statutory changes applied retroactively to his case. (State's Memorandum in Opposition to Motion to Exclude Evidence, pp. 14-17). For those reasons, the prosecutor argued Hilton's motion to exclude the breath alcohol test results should be denied. (State's Memorandum in Opposition to Motion to Exclude Evidence, pp. 17-18).

After considering the arguments of counsel, the circuit court judge ultimately granted Hilton's motion to exclude the evidence. (Order Suppressing Breathalyzer Test Results, p. 4). In reaching that decision, the circuit court judge noted remedial or procedural amendments to statutes generally applied retroactively before ruling:

> This court finds as a matter of law that the amendment to Code §56-5-2950(A) is procedural in nature and, thus, is to be applied retroactively. Therefore, the amendment to Code §56-5-2950(A) requiring that a person's breath sample be taken within two hours of the person's arrest is applicable in this case.

(Order Suppressing Breathalyzer Test Results, p. 2). Based on the information contained in the breath alcohol analysis test report, the circuit court judge found Hilton's time of arrest was 10:15 a.m. and the time of the breath alcohol test was 12:32 a.m. (Order Suppressing Breathalyzer Test Results, p. 3). While acknowledging the prosecutor notified Hilton of the actual time of his arrest, the circuit court judge found the prosecutor's letter did not constitute a written report as required by S.C. Code Ann. § 56-5-2950(I) because it did not include the time of testing or the test results.[5] (Order Suppressing Breathalyzer Test Results, p. 3). The circuit court judge then ruled:

[5] The circuit court judge further noted: "At the motion hearing, the breathalyzer operator testified that the prosecutor's letter dated October 3, 2011, accurately reflected the date and time of arrest and that the date and time of arrest on the BA report was not correct. However, the state has never issued an amended written report. Instead, the State argues that the original BA report combined with the prosecutor's letter

> Because the BA report issued to the defendant pursuant to Code §56-5-2950(I) indicates that the defendant was arrested on May 10, 2008 at 10:15 p.m. and his breath sample was taken on May 11, 2008 at 12:32 a.m., more than 2 hours after the defendant's arrest, the State failed to take the defendant's breath sample for testing within two hours of his arrest as mandated by Code §56-5-2950(A). On the other hand, if the breath sample was taken within two hours of the defendant's arrest as argued by the State, then the State has failed to provide the defendant with a correct written report that includes the defendant's time of arrest, time of testing and test results as mandated by Code §56-5-2950(I). Therefore, the defendant's breathalyzer test results in this case should be suppressed and the defendant's motion granted.

(Order Suppressing Breathalyzer Test Results, p. 4). The State then timely appealed the circuit court judge's ruling.

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amending the date and time of arrest satisfies the requirements of Code §56-5-2950(I)." (Order Suppressing Breathalyzer Test Results, p. 3, n. 3).

ARGUMENT

I.

Did the circuit court judge commit an error of law by retroactively applying a statutory change to the implied consent statute and excluding the results of Hilton's breath alcohol test where the officer who conducted the test fully complied with the statutory requirements in effect at the time of Hilton's arrest and the General Assembly manifested a clear intention for its substantive changes to the implied consent statute to be applied prospectively through the inclusion of a savings clause in the amending legislation?

The circuit court judge ruled the results of a breath alcohol test conducted after Hilton was arrested should be excluded from trial because the test was not conducted within two hours of arrest as required by a statutory amendment to S.C. Code Ann. § 56-5-2950(a) that did not take effect until approximately nine months after Hilton's arrest. That ruling was clearly erroneous. Based on the plain language of the legislative act amending Section 56-5-2950(a) and its savings clause, any amendments to that statute were not retroactively applicable to cases arising before the effective date of the act. Because Hilton was arrested before the effective date of the act, his case arose before the amendments to Section 56-5-2950(a) took effect, which meant those substantive statutory changes did not apply retroactively to his case. Accordingly, as the arresting officer in Hilton's case unquestionably conducted the breath alcohol test in full compliance with the law in effect at the time of the test, the circuit court judge erred in finding the breath alcohol test results should be suppressed. The circuit court judge's ruling should be reversed, and Hilton's case should be remanded for trial.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal

for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ANALYSIS

Under the rules of statutory construction, the cardinal and overriding rule is for the courts to determine and effectuate legislative intent. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory construction are subservient to the rule that legislative intent must prevail if it can reasonably be discovered from the language employed in the statute, which must be construed in light of the statute's intended purpose. State v. Morgan, 352 S.C. 359, 365-366, 574 S.E.2d 203, 206 (Ct. App. 2002). The legislature's intent should be ascertained primarily from the plain language of the statute, and the court must apply clear and unambiguous terms of a statute according to their literal meaning. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning." Morgan, 352 S.C. at 366-367, 574 S.E.2d at 206-207. Furthermore, courts will reject a statutory interpretation which would lead to a plainly absurd result which the legislature could not have intended or which would defeat the plain legislative intent. State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 650 (Ct. App. 2008).

"It is a well-settled rule of statutory construction that absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature." Edwards v.

State Law Enforcement Div., 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011); see Boyd v. Boyd, 277 S.C. 416, 418, 289 S.E.2d 153, 154 (1982) ("In the construction of statutes there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary."). "No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt[.]" Hyder v. Jones, 271 S.C. 85, 87-88, 245 S.E.2d 123, 125 (1978).

Statutes are considered remedial in nature when they create new remedies for existing rights or enlarge the rights of persons under disability. Edwards, 395 S.C. at 579, 720 S.E.2d at 466. Statutes are considered to be procedural in nature when they set out a mode of procedure for a court to follow or prescribe a method of enforcing rights. Id. at 580, 720 S.E.2d at 466. However, regardless of whether a statute is remedial or procedural in nature, the intent of the legislature is paramount and ultimately determines whether a statute will have prospective or retroactive application. Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

At the time of Hilton's arrest, law enforcement officers in South Carolina were authorized to administer breath alcohol tests to any person arrested for driving under the influence. S.C. Code Ann. § 56-5-2950(a) (2006). Pursuant to the requirements of Section 56-5-2950(a), such testing had to be administered in accordance with S.L.E.D. policies by a properly trained and certified party after the arrested person's conduct was recorded for twenty minutes and an initial accurate simulator test was performed. Id. Significantly, Section 56-5-2950(a) did **not** require the breath alcohol test to be conducted within any particular period of time. Id. However, the testing necessarily had to be conducted within three hours because videotaping at the testing site was statutorily

required to be completed within three hours of the person's arrest unless otherwise impossible. S.C. Code Ann. § 56-5-2953(2)(a) (2006).

Approximately nine months after Hilton's arrest, a legislative act amending Section 56-5-2950(a) took effect and imposed a new requirement that any breath alcohol test conducted pursuant to the statute had to be completed within two hours of arrest. See Act No. 201, § 9, 2008 S.C. Acts & Joint Resolutions (amending "Section 56-5-2950, relating to a driver's implied consent to testing for alcohol or drugs, so as . . . to provide when breath samples must be collected under this provision . . . "); Act No. 201, § 24, 2008 S.C. Acts & Joint Resolutions ("This act takes effect at 12:00 p.m. on February 10, 2009."); S.C. Code Ann. § 56-5-2950(A) (Supp. 2009) ("A breath sample taken for testing must be collected within two hours of arrest."). Critically, in addition to the section amending Section 56-5-2950(a), the General Assembly expressly included a savings clause in the amending act to restrict the effect its amendments would have on any cases arising prior to the act's effective date.[6] Specifically, the savings clause provided:

> **Savings clause**
>
> SECTION 23. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

[6] A "savings clause" or "saving clause" is defined as: "A statutory provision exempting from coverage something that would otherwise be included." BLACK'S LAW DICTIONARY 1461 (9th ed. 2009). "A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost." Id.

Act No. 201, § 23, 2008 S.C. Acts & Joint Resolutions. Thus, based on the plain language of the savings clause, the General Assembly clearly manifested its intention for the statutory amendments enacted by the legislation to be applied prospectively and not retroactively. Cf. State v. Bolin, 381 S.C. 557, 562, 673 S.E.2d 885, 887 (Ct. App. 2009) ("By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective."); see also State v. Bryant, 382 S.C. 505, 509, 675 S.E.2d 816, 817 (Ct. App. 2009) ("Generally, a savings clause is intended to be 'a restriction in a repealing act, which is intended to save rights, pending prosecutions, penalties, etc., from the annihilation which would result from an unrestricted appeal.' " (citations omitted)).

Despite the plain language of the statute and the savings clause, the circuit court judge in the case sub judice erroneously determined the statutory amendments to Section 56-5-2950(a) enacted **after** Hilton was arrested applied retroactively to Hilton's case. In reaching that determination, the circuit court judge concluded the statutory changes to Section 56-5-2950(a) were procedural in nature. Thereafter, based solely on the allegedly procedural nature of the amendments without consideration of the plain language of the amending legislation, the circuit court judge determined those statutory changes applied retroactively to Hilton's case even though they were not yet effective at the time of Hilton's arrest and subsequent breath alcohol test. The circuit court judge's ruling constituted a clear error of law and was wholly inconsistent with the plain and unambiguous language of the amending act and its savings clause.

Initially, the circuit court judge erred in determining the addition of a two-hour time limit for the administration of a breath alcohol test was simply a procedural change to the implied consent statute. By imposing the two-hour time limit, the General Assembly did **not** set out a mode of procedure for a court to follow or establish a method of enforcing rights. Thus, the amendment was not procedural in nature. Compare Wiesart v. Stewart, 379 S.C. 300, 303, 665 S.E.2d 187, 188 (Ct. App. 2008) ("Here, the 1996 amendment to § 23-3-430 is procedural in nature. As set forth above, the amendment creates a requirement that the trial court make a specific finding on the record regarding whether a person convicted of indecent exposure should register as a sex offender. The amendment does not create a new right. Instead, it sets forth a procedure for determining whether a person convicted of indecent exposure is required to register on the sex offender registry."); with Edwards, 395 S.C. at 582, 720 S.E.2d at 467 ("The amendments to section 23-3-430 do not provide a procedure for a court to follow, or prescribe a method for enforcing rights. Thus, the amendments are not procedural and cannot be applied retroactively to [Edwards'] case."). Instead, the legislature substantively changed the implied consent statute by imposing an entirely new duty and obligation on law enforcement officers regarding the administration of breath alcohol tests and by granting the right to have breath alcohol testing conducted within two hours to any person arrested for driving under the influence. Therefore, the statutory changes to Section 56-5-2950 should only have been applied prospectively based on the nature of those changes. See Edwards, 395 S.C. at 579, 720 S.E.2d at 466 ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only."); see also Jefferson Standard Life Ins. Co. v. King, 165 S.C. 219, 223, 163 S.E. 653, 654 (1932) ("The general rule is that 'statutes are not to be constructed

retrospectively, or so as to have a retroactive effect, unless it shall clearly appear that it was so intended by the Legislature.' And such construction will not be given 'unless it is required by the express words of the statute or must necessarily be implied from such words.' " (citations omitted)).

However, even assuming the circuit court judge was not wrong in concluding the statutory changes to Section 56-5-2950(a) were procedural in nature, his determination that the statutory changes applied retroactively to Hilton's case was still clearly erroneous based on the plain language of the statute and the amending act's savings clause. See Singleton v. Stokes Motors, Inc., 358 S.C. 369, 378, 595 S.E.2d 461, 466 (2004) ("[L]egislative intent is paramount in determining whether a statute has prospective or retroactive application."); Kiawah Resort Assocs. v. South Carolina Tax Comm'n, 318 S.C. 502, 504, 458 S.E.2d 542, 543 (1995) ("The intent of the Legislature determines whether a statute will have prospective or retrospective application."). Significantly, in enacting the statutory changes to Section 56-5-2950(a), the legislature included clear and unambiguous language in the savings clause stating any statutory amendments enacted by the legislation did not affect any pending criminal prosecutions arising under the earlier statutes or any rights or duties that existed under those earlier statutes unless the individual amended provisions expressly provided that they applied to pending actions. See Act No. 201, § 23, 2008 S.C. Acts & Joint Resolutions ("The repeal or amendment by the provisions of this act or any law . . . does not affect pending actions, rights, duties, or liabilities founded thereon . . . **unless the repealed or amended provision shall so expressly provide**." (emphasis added)). Critically, the amendments to Section 56-5-2950(a) did **not** contain any language, express or otherwise, providing for the retroactive application of the new two-hour time limit for the administration of a breath alcohol test

to cases arising before the time limit was enacted. See Hyder, 271 S.C. at 88, 245 S.E.2d at 125 ("Nothing specifically contained or necessarily implied in the statute overcomes the ordinary presumption of prospective application that attaches to each Act of the Legislature."). Thus, by not including any express language indicating the statutory changes to Section 56-5-2950(a) were to be applied retroactively, the legislature manifested a clear intention for the statutory changes to only apply prospectively. See Bolin, 381 S.C. at 562, 673 S.E.2d at 887 ("[B]ecause the legislature clearly and unambiguously specified the Act be applied prospectively [through the language of the savings clause], the Act cannot be applied retroactively to Bolin's case."); see also Hyder, 271 S.C. at 88, 245 S.E.2d at 125 ("It takes a clear expression of legislative purpose to justify a retroactive application.").

In reaching a contrary conclusion, the circuit court judge primarily relied upon this Court's decision in State v. Frey, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005). In Frey, this Court considered the issue of whether a statutory amendment to Section 56-5-2950 enacted after Frey was convicted applied retroactively to Frey's case on appeal. Id. at 518, 608 S.E.2d at 878. The statutory amendment to Section 56-5-2950 involved in Frey's case added a provision requiring evidence obtained in violation of the requirements of the statute to be excluded during trial if certain findings were made. Id. After considering the nature of the statutory changes and the language of the statute, this Court determined the statutory amendments were remedial in nature and were retroactively applicable. Id. at 518, n. 3, 608 S.E.2d at 878. However, critically, this Court did not address the implication of a savings clause in reaching that decision because the amending legislation involved in Frey's case did **not** contain such a provision. See Act No. 61, § 6, 2003 S.C. Acts & Joint Resolutions (amending Section

56-5-2950 but containing no savings clause). Thus, the decision in Frey did not support the circuit court judge's ruling on the retroactive applicability of the most recent amendments to Section 56-5-2950 in light of the substantial differences between the amending legislation involved in Frey, which did not have a savings clause, and the amending legislation involved in Hilton's case, which did have a savings clause.[7] See Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.' " (citations omitted)).

Based on the plain language of the savings clause contained in the amending legislation in Hilton's case, the circuit court judge reached a clearly erroneous conclusion in finding the statutory changes were retroactively applicable, and his ruling was entirely inconsistent with the requirements of the rules of statutory construction and with the prior decisions of our appellate courts. See Bolin, 381 S.C. at 562, 673 S.E.2d at 887 (finding the language of a savings clause, which was identical to the one included in the act

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[7] Relying on the decision in State v. Bryant, Hilton argued to the circuit court judge that statutory amendments had previously been applied in a retroactive manner even when "a broadly-worded savings clause" was included in the amending legislation. (Defendant's Memorandum in Support of Motion to Exclude Evidence, pp. 6-7). However, the statute involved in Bryant was an entirely new law that this Court determined did not repeal or amend any previously existing statutes. See Bryant, 382 S.C. at 510, 675 S.E.2d at 819 ("[S]ection 17-23-175 was **an addition** to the statutory scheme that deals with the prosecution and punishment of sexual offenders." (emphasis added)); see also Act No. 346, § 2, 2006 S.C. Acts & Joint Resolutions (adding Section 17-23-175 to the statutory code). Therefore, this Court found the language of the savings clause, which only applied to provisions repealing or amending an existing law, was not applicable to that statutory provision and did not prevent it from being applied in a retroactive manner. See Bryant, 382 S.C. at 510, 675 S.E.2d at 819 ("We do not believe section 17-23-175 repealed or amended any previously existing law as contemplated by the savings clause. . . . Therefore, we agree with the trial court that the savings clause did not prohibit the application of section 17-23-175 in Bryant's case."). Significantly, unlike in Bryant, the amending legislation in Hilton's case indisputably amended the previously-enacted version of Section 56-5-2950(a). See Act No. 201, § 9, 2008 S.C. Acts & Joint Resolutions (amending as opposed to enacting Section 56-5-2950(a)). Therefore, the plain language of the savings clause involved in Hilton's case clearly required the amendments to Section 56-5-2950(a) to be applied prospectively as opposed to retroactively. See Bolin, 381 S.C. at 562, 673 S.E.2d at 887 ("[B]ecause the legislature clearly and unambiguously specified the Act be applied prospectively [through the language of the savings clause], the Act cannot be applied retroactively to Bolin's case.").

amending Section 56-5-2950(a), required prospective application of the legislation); see also Murphy v. State, 392 S.C. 626, 630, n. 3, 709 S.E.2d 685, 687 (Ct. App. 2011) (recognizing a statutory amendment enacted through the same legislative act that amended Section 56-5-2950(a) was not applicable to Murphy's case because the case arose before the effective date of the act); State v. Branham, 392 S.C. 225, 228, n. 2, 708 S.E.2d 806, 808 (Ct. App. 2011) ("Section 56-5-2953 was amended effective Feb. 10, 2009. Thus, the amended statute is not applicable to Branham's March 4, 2008 arrest." (citations omitted)). The officer who conducted the breath alcohol test in Hilton's case unquestionably complied with the statutory requirements in effect at the time of the test. If permitted to stand, the circuit court judge's ruling would lead to an absurd result because competent evidence obtained from a test conducted in full compliance with the applicable law would be suppressed based on the arresting officer's purported failure to conform his conduct to a law that was not yet applicable.[8] See, e.g., Davis v. United States, 131 S. Ct. 2419, 2434 (2011) ("It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to the governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs." (citations omitted)); Cartrette v. State, 323 S.C. 15, 20, 448 S.E.2d 553, 556 (1994) ("[A] trial counsel could not be required to foresee future changes in the law."). Such a result cannot be permitted. See State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct.

[8] Notably, the amending legislation was ratified and approved in April of 2008, but the General Assembly expressly determined the act would not take effect until February 10, 2009. Act No. 201, § 24, 2008 S.C. Acts & Joint Resolutions. If the General Assembly had intended for the statutory changes to take immediate effect, it would have simply provided for the legislation to take effect contemporaneously with the passage of the act, which it has unquestionably done in the past when amending the same and similar statutory provisions. See Act No. 434, § 18, 1998 S.C. Acts & Joint Resolutions (instructing some statutory provisions in the amending legislation would become effective upon approval by the Governor and other provisions would become effective when certain conditions were met). However, the General Assembly elected not to do so in amending the statute involved in Hilton's case.

App. 2011) ("[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention."). Based on the obvious inconsistencies between the circuit court judge's ruling and the clear intentions of the legislature in enacting the changes to Section 56-5-2950(a), the circuit court judge's ruling excluding the results of Hilton's breath test should be reversed and Hilton's case should be remanded for trial.

II.

Assuming the statutory changes to the implied consent statute applied retroactively and required Hilton's breath alcohol test to be administered within two hours of his arrest, did the circuit court judge err in finding either Hilton's test was not conducted within the two-hour time limit or Hilton was not provided with a complete written report as required by the implied consent statute when Hilton's breath alcohol test was conducted within two hours of his arrest, Hilton was given a written report containing all of the information required by the implied consent statute but incorrectly listing the time of arrest, and the prosecutor provided Hilton with written notice of the correct time of arrest prior to the commencement of any proceeding where the test results were introduced as evidence?

In addition to erroneously finding the statutory changes to Section 56-5-2950(a) were retroactively applicable, the circuit court judge determined either Hilton's breath alcohol test was not conducted within two hours of his arrest based on the time listed in the breath alcohol analysis test report or the State failed to provide Hilton with a correct written report complying with the requirements of the implied consent statute if the breath alcohol test was actually conducted within two hours of Hilton's arrest. Based on those findings, the circuit court judge suppressed the results of Hilton's breath alcohol test. The circuit court judge's findings were clearly erroneous and lacked evidentiary support. Following his arrest, Hilton was provided with written notification of the time of his arrest, the time of his breath alcohol test, and the results of the test. Thereafter, prior to the commencement of any proceeding where the test results were introduced as evidence, Hilton was provided with written notification alerting him of an error in the initial written report and notifying him of the correct time of his arrest, which was less than two hours before the breath alcohol test was administered. Subsequently, during the hearing on Hilton's motion to exclude the breath alcohol test results, evidence and testimony was presented confirming Hilton's breath alcohol test was conducted within two hours of his arrest. Therefore, the State fully complied with the requirements of the

implied consent statute, and Hilton was on notice of all of the information the State intended to introduce during trial regarding the breath alcohol testing. Accordingly, the circuit court judge erred in reaching a contrary conclusion, and his findings were unsupported by the evidence. The circuit court judge's ruling excluding the results of Hilton's breath test should be reversed and Hilton's case should be remanded for trial.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. Wilson, 345 S.C. at 5, 545 S.E.2d at 829. The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). Decisions regarding the reception or exclusion of evidence will only be reversed on appeal for an abuse of discretion. Gaster, 349 S.C. at 557, 564 S.E.2d at 93. A trial judge commits an abuse of discretion when his conclusions lack evidentiary support or are controlled by an error of law. McDonald, 343 S.C. at 325, 540 S.E.2d at 467.

ANALYSIS

"The primary purpose in construing a statute is to ascertain legislative intent." Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005); see Lewis v. Gaddy, 254 S.C. 66, 76, 173 S.E.2d 376, 381 (1970) ("[T]he intent of the law is its vital force, and the province of the courts is to ascertain and effectuate the valid legislative intent."). Courts primarily ascertain the legislature's intent by examining the plain language of a statute and applying the clear and unambiguous terms of the statute according to their literal meaning. Landis, 362 S.C. at 102, 606 S.E.2d at 505. In doing so, courts are prohibited from giving the statute a subtle or forced construction. See Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 177, 594 S.E.2d 511, 522 (Ct.

App. 2004) ("A subtle or forced construction of words in a statute for the purpose of expanding the operation of a statute is prohibited."). Furthermore, courts cannot supply omissions to a statute to limit or expand its operation. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Instead, courts should give a statute a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy for which the statute was enacted. City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

Pursuant to S.C. Code Ann. § 56-5-2950(d) (2006), "[a] person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence."[9] "[T]he purpose of the statute is to provide for reciprocal discovery between the State and a defendant as to the time and results of tests conducted to determine the presence of alcohol or drugs in the operator of a motor vehicle." State v. Bull, 350 S.C. 58, 62, 564 S.E.2d 351, 353 (Ct. App. 2002).

In the case at bar, Hilton was provided with a breath alcohol analysis test report after he was arrested and his breath alcohol concentration was tested and confirmed to be 0.15 percent. That report, which was in writing, correctly listed the time of Hilton's breath alcohol test and the results of the test but incorrectly listed the time of Hilton's

[9] Subsequent to Hilton's arrest, Section 56-5-2950 was amended and restructured, and Section 56-5-2950(d) was reorganized as Section 56-5-2950(I). See Act No. 201, § 9, 2008 S.C. Acts & Joint Resolutions (amending and restructuring Section 56-5-2950). However, the substance of Section 56-5-2950(d) was not altered by the legislative changes. See S.C. Code Ann. § 56-5-2950(I) (Supp. 2009) (containing identical language to former Section 56-5-2950(d)).

arrest. Subsequently, prior to the hearing on Hilton's motion to exclude the test results, the prosecutor submitted written notification to Hilton alerting him of the error contained in the original written report regarding the time of arrest and providing him with his actual time of arrest.

In suppressing the breath alcohol test results, the circuit court judge first relied solely upon the information contained in the breath alcohol analysis test report to determine the time of Hilton's arrest. Based on that report, the circuit court judge determined Hilton was arrested at 10:15 p.m. and the breath alcohol test was conducted at 12:32 a.m., which was more than two hours after Hilton was arrested.[10] However, in his order suppressing those test results, the circuit court judge acknowledged evidence was presented during the hearing establishing the information in the breath alcohol analysis test report was incorrect. In fact, the arresting officer testified he did not even arrive on the scene of the collision until approximately ten minutes after 10:15 p.m., which meant it was not possible for Hilton to have been arrested at that time.[11] Furthermore, Hilton stipulated the videotape of his arrest reflected that he was arrested at 10:47 p.m.[12]

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[10] Notably, the tickets issued to Hilton after the collision listed the time of the violation, which was the time of the collision and not the time of Hilton's arrest, as 10:15 p.m. (Tr. p. 91; Defense Exhibit "B"). Furthermore, the traffic collision report form and the Department of Motor Vehicles collision notice form also listed 10:15 p.m. as the time of collision and contained no reference to Hilton's arrest or the time of his arrest. (Tr. p. 92; Defense Exhibit "C" – Form FR-10; Defense Exhibit "D"). However, the circuit court judge did not consider the information contained in those documents, which all had been presented to Hilton, in determining Hilton's time of arrest. (Order Suppressing Breathalyzer Test Results, pp. 1-4).

[11] In his memorandum in support of his motion to exclude the breath alcohol test results, Hilton argued the proper time of his arrest "was at or about 10:15 p.m." because that time allegedly reflected the moment a reasonable person in his situation would have believed he or she was not free to leave the scene. (Defendant's Memorandum in Support of Motion to Exclude Evidence, pp. 10-12). Hilton further argued he was under arrest the moment law enforcement officers arrived at the scene of the collision. (Defendant's Memorandum in Support of Motion to Exclude Evidence, p. 11). However, neither Hilton's alleged belief he was not free to leave the scene of the collision nor the arresting officer's arrival at the scene established Hilton was under arrest. See State v. Brannon, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010) ("[T]he concepts of arrest and seizure are . . . distinguishable because each concept requires a distinct analysis. In determining whether an arrest has occurred, the focus is on the intent of the police officer and the suspect. By contrast an individual is seized under the Fourth Amendment when a

Despite the fact testimony and evidence was presented establishing the time of arrest reflected in the initial report was incorrect and despite the fact Hilton stipulated the videotape of his arrest showed he was arrested at 10:47 p.m., the circuit court judge concluded the time of Hilton's arrest was the time reflected in the breath alcohol analysis test report. That conclusion was erroneous because nothing in the plain language of the implied consent statute made the information contained in the breath alcohol analysis test report irrefutable or permanently binding on the parties. See White, 338 S.C. at 58, 525 S.E.2d at 263 ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Instead, assuming it was applicable, the amended version of the implied consent statute only required breath alcohol testing to be conducted within two hours of arrest and not within two hours of the time of arrest listed in the report. See S.C. Code Ann. § 56-5-2950(A) (Supp. 2009) ("A breath sample taken for testing must be collected within two hours of the arrest."); see also Epstein v. Coastal Timber Co., Inc., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011) ("Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced

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reasonable person, in view of all of the circumstances of a particular case, would not believe he was free to leave." (citations omitted)). Hilton was only under arrest when he possessed the intent to submit to arrest **and** the arresting officer possessed the intent to arrest him. See State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860-861 (1960) (" 'To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained.' . . . [T]here must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary." (citations omitted)). Thus, Hilton's arrest could not have occurred at 10:15 p.m. since the arresting officer was not even at the scene at that point in time. (Tr. pp. 92-93).

[12] Specifically, during the hearing, Hilton stated: "We would stipulate that this video would show a time different and would be, if you accept what you see here with the caveat that that time is a time on a video camera which is no way authenticated either. So, I mean, it's – there would be a time on the video different than 10-15, would put it within two hours. We would stipulate to that." (Tr. p. 96). Hilton further stipulated the time reflected in the prosecutor's letter matched the time of arrest reflected in the videotape of the arrest. (Tr. p. 96). Based on that stipulation, the circuit court judge determined it was unnecessary for the videotape to be introduced into evidence during the hearing. (Tr. pp. 96-97).

construction to limit or expand the statute's application."). The actual time of Hilton's arrest was a static fact that the circuit court judge was required to determine based on the evidence presented to him. The circuit court judge did not make such a determination based on the evidence and, instead, simply concluded the time of arrest reflected in the report was controlling. See State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation."). Therefore, the circuit court judge's findings regarding the time of arrest were erroneous and unsupported by the evidence.

Furthermore, the circuit court judge also found the State failed to provide Hilton with a correct written report complying with the requirements of the implied consent statute if the breath alcohol test was actually conducted within two hours of Hilton's arrest. In reaching that conclusion, the circuit court judge determined the prosecutor's letter to Hilton reflecting the correct time of arrest was not a written report as required by the implied consent statute because it did not contain all of the information required by that statute.[13] However, the statutory requirements of the implied consent statute only mandated that Hilton be provided with "a written report including the time of arrest, the time of the tests, and the results of the tests[.]" S.C. Code Ann. § 56-5-2950(d) (2006). Giving the term "report" its plain and ordinary meaning as required by the rules of

[13] Under the circuit court judge's interpretation of the statutory requirements, he appeared to conclude the prosecutor would have complied with the requirements of the implied consent statute if she had submitted an amended written report instead of issuing the letter to Hilton that supplemented and corrected the initial written report. (Order Suppressing Breath Test Results, p. 3, n. 3). Significantly, such a subtle and forced interpretation of what was required by the statute was not permitted by the rules of statutory construction. See Jacobs, 393 S.C. at 587, 713 S.E.2d at 622-623 ("When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. . . . Although it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning." (citations omitted)).

statutory construction, a "report" is "[a] formal oral or written presentation of facts or a recommendation for action[.]" BLACK'S LAW DICTIONARY 1414 (9th ed. 2009). Hilton indisputably was provided with a formal written report containing a presentation of all of the facts required by the implied consent statute and also was provided with a written supplement to that report containing a correct presentation of one of the facts that was erroneously listed in the report. Significantly, Hilton received both the written report and the supplement to the written report prior to the commencement of "any trial or other proceeding in which the results of the tests are used as evidence." S.C. Code Ann. § 56-5-2950(d) (2006). Nothing further was required under the statutory provisions of the implied consent statute, and Hilton received written notification of all of the information necessary for him to be fully apprised of the evidence the State intended to introduce during trial, which was the clear legislative purpose behind the enactment of Section 56-5-2950(d). See Bull, 350 S.C. at 62, 564 S.E.2d at 353 ("[T]he purpose of the statute is to provide for reciprocal discovery between the State and a defendant as to the time and results of tests conducted to determine the presence of alcohol or drugs in the operator of a motor vehicle."); see also State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) ("The statute must be interpreted with realistic circumstances and rationales in mind, and this interpretation follows that approach."). Accordingly, the circuit court judge erred in finding the State failed to provide Hilton with a written report as required by the implied consent statute.

Assuming the circuit court judge had not been wrong in finding the amendments to Section 56-5-2950(a) applied retroactively to Hilton's case, the circuit court judge's findings regarding Hilton's time of arrest and receipt of a written report were clearly erroneous and contrary to the evidence presented to him. Hilton's breath alcohol test was

conducted within two hours of Hilton's arrest, and Hilton was provided with written documentation conveying the time of his arrest, the time of his breath alcohol test, and the results of that test prior to the commencement of any proceedings where the test results were introduced as evidence. Critically, the fact Hilton's time of arrest as reflected in the initial written report was amended prior to the commencement of any proceeding did not affect the accuracy or reliability of the test results or the fairness of the testing procedure conducted in his case. See S.C. Code Ann. § 56-5-2950(e) (2006) ("The failure to follow any of . . . the provisions of this section . . . shall result in the exclusion from evidence any tests results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure."). Accordingly, the circuit court judge's findings regarding Hilton's time of arrest and receipt of written notification of the information required by the implied consent statute were controlled by an error of law and unsupported by the evidence, and the circuit court judge erred in granting Hilton's suppression motion based on those findings. The circuit court judge's ruling excluding the results of Hilton's breath alcohol test should be reversed and Hilton's case should be remanded for trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

October 15, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-211546

THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Pursuant to Rule 209, SCACR, Appellant proposes the following to be included in the Record on Appeal:

(1) October 25, 2011, Hearing Transcript;

(2) Order Suppressing Breathalyzer Test Results, dated March 26, 2012;

(3) Motion to Exclude Evidence, dated September 23, 2011;

(4) Defendant's Memorandum in Support of Motion to Exclude Evidence, dated October 25, 2012;

(5) Defendant's Supplemental Memorandum in Support of Motion to Exclude Evidence, dated November 8, 2011;

(6) State's Memorandum in Opposition to Motion to Exclude Evidence, dated November 8, 2011;

(7) Defendant's Objections to State's Memorandum in Opposition to Motion to Exclude Evidence and Motion to Strike Factual Assertions Set Forth Therein, dated November 9, 2011;

(8) State's Exhibits "A" (Datamaster Machine Breath Records) and "C" (S.L.E.D. Policies and Procedures on Implied Consent);

(9) Defense Exhibits "A" (Breath Alcohol Analysis Test Report), "B" (Uniform Traffic Tickets), "C" (Form FR-10), "D" (S.C. Traffic Collision Report Form), "E" (Letter), and "G" (Datamaster Machine Status Records); and

(10) Indictments # 2008-GS-26-4056 and # 2008-GS-26-4057.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: ______________________
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THE STATE,

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Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Appellant and Designation of Matter on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Richard A. Harpootlian, Esquire
Richard A. Harpootlian, PA
Post Office Box 1090
Columbia, SC 29202

I further certify that all parties required by Rule to be served have been served.
This 15th day of October, 2012.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

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RECEIVED
OCT 15 2012
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 15 2012
SC Court of Appeals

October 15, 2012

Richard A. Harpootlian, Esquire
Richard A. Harpootlian, PA
Post Office Box 1090
Columbia, SC 29202

RE: State v. Michael J. Hilton – Appellate Case No. 2012-211546

Dear Mr. Harpootlian:

I am enclosing two (2) copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/erd
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Services

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