

22431

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2014-CP-20-0255

**RECEIVED**

MAR 24 2016

SC Court of Appeals

The State of South Carolina.....Appellant,

v.

Kathryn Hart Dew .....Respondent.

RECORD ON APPEAL

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

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2014CP2000255

State of South Carolina	Kathryn Hart Dew
-------------------------	------------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), 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:

**ORDER DENYING APPEAL**

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)

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

Judge Code

4/17/2015

Date

**For Clerk of Court Office Use Only**

This judgment was entered on April 17, 2015, and a copy mailed first class or placed in the appropriate attorney's box on April 17, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Marcus Keith Gore Office Of General Counsel PO Box 1993  
Blythewood, SC 29016

Robert Cleland FitzSimons 1001 Beltline Blvd. Columbia,  
SC 29205

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Betty Jo Beckham*

Court Reporter

Betty Jo Beckham - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**RECEIVED**

APR 21 2015

SCDPS  
Office of General Counsel

STATE OF SOUTH CAROLINA  
COUNTY OF FAIRFIELD

) IN THE COURT OF COMMON PLEAS

State of South Carolina,

Appellant,

v.

Kathryn Hart Dew,

Respondent

2015 APR 17 11 09 AM  
FAIRFIELD COUNTY  
CLERK OF COURT  
BETTY J. BERRHAM

C.A. No.: 2014-CP 20-255

ORDER DENYING APPEAL

This matter is before the Court pursuant to an appeal by the State from the dismissal of the charge against the Respondent, Kathryn Hart Dew. Present at the hearing on this matter was Marcus K. Gore, counsel for the Appellant, and Robert C. FitzSimons, counsel for the Respondent. The dismissal was entered by Judge M. Paul Swearingen, Fairfield County Magistrate, on June 12, 2014. The appeal was heard on December 1, 2014. After review of the State's appeal, the return of the Magistrate, the transcript of record from the proceedings below, and argument of counsel, the appeal is denied.

**FACTS**

On the night of December 8, 2013, Trooper Ford of the SC Highway Patrol encountered Respondent in the median of Interstate 77 in Fairfield County; Respondent's truck was apparently stuck in the mud. Trooper Ford administered field sobriety tests to Respondent, including the walk and turn test and ultimately arrested Respondent, charging her with driving with an unlawful alcohol concentration. The dash camera in the patrol car recorded the events leading up to the arrest.

Prior to the jury being sworn, Respondent moved to have the charge dismissed based on the State's failure to comply with the mandatory video recording requirements of § 56-5-2953 (A)(1)(a)(ii) of the South Carolina Code of Laws, as amended. After reviewing the videotape of the field sobriety tests and hearing testimony from Trooper Ford, the Magistrate found that Respondent's feet were not clearly visible during her performance of the walk and turn test for several reasons. He found that the dark color of Respondent's shoes and clothing made it hard to see her feet in the night-time lighting conditions, especially against the grainy background of the recording; that in performing the test Respondent walked away from the camera, rather than

*cm*  
173

across the video frame; and that the line of recording data, automatically placed across the bottom of the screen by the camera, obscured the view of Respondent's feet. Based upon these findings, the Magistrate granted Respondent's motion. This appeal followed.

### LEGAL ANALYSIS

The provisions of S. C. Code Ann. § 56-5-2953(A) state that a person charged with driving under the influence or driving with an unlawful alcohol concentration must have their conduct at the incident site video recorded. The video recording at the site must include any field sobriety tests administered. § 56-5-2953(A)(1)(a)(ii).

The videotape in this case was not viewed by this Court. The description of the contents of the videotape is based on the return of the Magistrate. The Magistrate's findings of fact are not subject to review, only his ruling of law. While the State has argued that the quality of the videotape was "not so bad", the videotape itself was not offered as evidence before me and review of the Magistrate's order of dismissal is based solely on the facts as found by him.

The Magistrate relied on the recent Court of Appeals decision in *State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) in which the Court of Appeals held that § 56-5-2953 required a motorist's head to be visible on a recording of the Horizontal-Gaze Nystagmus test, noting that because the purpose of the recording is to create direct evidence of the arrest, if the actual test cannot be seen on the recording, the requirement is pointless. *Id.* at 543.

In the present case the state failed to properly videotape the walk and turn test. As noted above, the recording of the test failed to clearly display Respondent's feet during her performance of the test.

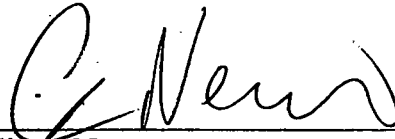
The legislative intent behind the creation of § 56-5-2953 was to create direct evidence of a DUI or DUAC arrest. *Id.* at 542. Therefore, dismissal of a DUAC charge is the appropriate remedy provided by the statute when subsection (A) is violated and the violation is not mitigated by the exceptions enumerated in subsection (B). *Id.* In the event that the arrest does not comply with the statutory scheme, the Legislature clearly intended *per se* dismissal of the charge. *Id.* at 542-43.

aw  
293

The State advances a “good faith” exception with regard to the videotaping requirement, suggesting that circumstances of the individual arrest should excuse any defects in the videotape. The Legislature has provided exceptions for noncompliance under § 56-5-2953(B) including a sworn affidavit citing non-functioning equipment, need for emergency medical treatment, and exigent circumstances. Counsel for the State suggests that any defects in the videotape should not be fatal. This suggestion is directly contradicted by both statutory and case law. The State has not provided any exception, as enumerated by the statute, for noncompliance; therefore the only remedy is dismissal of the charge.

Based on the foregoing, the appeal is dismissed.

**AND IT IS SO ORDERED.**



Clifton Newman  
Circuit Court Judge

April 9, 2015  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF FAIRFIELD

2014 AUG 15 PM 1:53  
FAIRFIELD COUNTY  
CLERK/OF COURT  
BETTY JO BECKHAM

IN THE COURT OF COMMON PLEAS

STATE

VS

KATHRYN HART DEW

MAGISTRATE'S RETURN  
OF  
CRIMINAL APPEAL

DEFENDANT'S )

The Attached Papers Comprise the Court Record Which Is Transmitted to the Circuit Court Pursuant to Section 18-3-40 Sc Code. Attached are copies of the items which are checked.

1.  Warrant / Or  Ticket. Number: G633064
2. Pretrial Motions and Responses:  
 A) Rule 5 / Brady  
 B) Motion to Exclude Evidence And/or Testimony  
 C) Other Motions.
3. Jury List and Jury Selection Record of Strikes, Cause and /or Peremptory.
4. Voir Dire of Jury.
5. Trial Transcript:  Judge's Trial Notes Typed, or  Transcript of Recording Prepared by Appellant and Certified Correct by Magistrate.
6. List of witnesses and summary of their testimony.
7. List of motions, a summary of parties' positions, and court ruling.
8. List of items offered into evidence, a summary of objections and the court's ruling.
9. List of Exhibits Admitted and Copies.
10. Jury Verdict.
12. New Trial Motion Received (Date \_\_\_\_\_ Time \_\_\_\_\_).
13. Notice of Hearing on Motion.
14. Notice of Denial of Motion.
11. Notice of Intent to Appeal.
12. Other \_\_\_\_\_

Respectfully Submitted,

  
Magistrate

CITY Winnsboro STATE SC  
August 14, 2014

STATE OF SOUTH CAROLINA )  
COUNTY OF SOUTH CAROLINA )

IN THE CIRCUIT COURT

STATE )

VS )

MAGISTRATE'S RETURN  
OF  
CRIMINAL APPEAL

KATHRYN HART DEW )

\_\_\_\_\_ )

DEFENDANT'S )  
(ADDRESS) )

This matter is on appeal from the Magistrate Court of Fairfield County,  
South Carolina, the Honorable, M. Paul Swearingen, Presiding Judge

The defendant, Kathryn Hart Dew was charged with violating  
S. C. Code Ann. § 56-5-2933 which is commonly referred to as  
Driving with an Unlawful Alcohol Concentration, on December 8, 2013

This matter was heard in a Jury trial on June 12, 2014 and the  
Notice of Appeal was filed on July 10, 2014 The proceedings were  
(check appropriate box)  recorded electronically.  recorded by a court reporter.  
 recorded in writing by the judge.

The jury list was prepared pursuant to S. C. Code Ann. (Check appropriate Box)  
 § 22-2-80. Selection of jury list for a single trial,  § 22-2-90. Selection of jury list for  
scheduled terms of jury trials, and the Defendant and the State was given an opportunity to  
exercise peremptory challenges on February 25, 2014

The State called the following witnesses:

- |          |           |
|----------|-----------|
| 1. _____ | 6. _____  |
| 2. _____ | 7. _____  |
| 3. _____ | 8. _____  |
| 4. _____ | 9. _____  |
| 5. _____ | 10. _____ |

A summary of their testimony is attached.

The Defendant called the following witnesses:

- |          |           |
|----------|-----------|
| 1. _____ | 6. _____  |
| 2. _____ | 7. _____  |
| 3. _____ | 8. _____  |
| 4. _____ | 9. _____  |
| 5. _____ | 10. _____ |

A summary of their testimony is attached.

The State made the following Motions:

- |          |           |
|----------|-----------|
| 1. _____ | 6. _____  |
| 2. _____ | 7. _____  |
| 3. _____ | 8. _____  |
| 4. _____ | 9. _____  |
| 5. _____ | 10. _____ |

A summary of the State's and Defendant's position on each motion and the Court's ruling is attached.

The Defendant made the following Motions:

- |                      |           |
|----------------------|-----------|
| 1. Motion to Dismiss | 6. _____  |
| 2. _____             | 7. _____  |
| 3. _____             | 8. _____  |
| 4. _____             | 9. _____  |
| 5. _____             | 10. _____ |

A summary of the Defendant's and State's position on each motion and the Court's ruling is attached.

The State offered the following items into evidence:

- |          |           |
|----------|-----------|
| 1. _____ | 6. _____  |
| 2. _____ | 7. _____  |
| 3. _____ | 8. _____  |
| 4. _____ | 9. _____  |
| 5. _____ | 10. _____ |

The Defendant raised the following objections to the items that the State sought to introduce into evidence:

- |          |           |
|----------|-----------|
| 1. _____ | 6. _____  |
| 2. _____ | 7. _____  |
| 3. _____ | 8. _____  |
| 4. _____ | 9. _____  |
| 5. _____ | 10. _____ |

A summary of the Defendant's and State's position and the Court's ruling on the objection is attached.

The Defendant offered the following items into evidence:

- |          |           |
|----------|-----------|
| 1. _____ | 6. _____  |
| 2. _____ | 7. _____  |
| 3. _____ | 8. _____  |
| 4. _____ | 9. _____  |
| 5. _____ | 10. _____ |

The State raised the following objections to the items that the Defendant sought to introduce into evidence:

- |          |           |
|----------|-----------|
| 1. _____ | 6. _____  |
| 2. _____ | 7. _____  |
| 3. _____ | 8. _____  |
| 4. _____ | 9. _____  |
| 5. _____ | 10. _____ |

A summary of the State's and Defendant's position and the Court's ruling on the objection is attached.

The Defendant was found guilty of violating S. C. Code Ann. § \_\_\_\_\_,  
commonly known as \_\_\_\_\_ and the Court imposed  
the following sentence: \_\_\_\_\_

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STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD )

SIXTH JUDICIAL CIRCUIT

State of South Carolina, )

Case No. 2014-CP-20-255

Appellant, )

Vs. )

**MAGISTRATE'S RETURN**

Kathryn Hart Dew, )

Respondent. )

A jury trial was scheduled on the above captioned matter for July 12, 2014. Present that day in the courtroom were Trooper Christopher B. Ford of the South Carolina Highway Patrol representing the State, the Defendant, Kathryn Hart Dew, and her attorney Robert FitzSimons of the Fairfield County Bar.

Prior to bringing in the jury, and prior to the jury being sworn, the Defendant's attorney made a motion to dismiss the case based on the State's failure to comply with the video recording statute, S.C. Code Ann. §56-5-2953. The Defense argued that the video was incomplete due to the failure of the video to show the Defendant's feet as she took the walk and turn field sobriety test. He argued that the jurors would not be able to determine how well the Defendant performed the walk and turn test if her feet could not be clearly seen as she performed the test.

During arguments presented by the State and the Defense on the motion to dismiss, I viewed the incident site video. The Defense argued that due to the grainy nature of the background in the video, the fact that the incident occurred at night, and the color of the Defendant's clothing and shoes, as well as the placement of the Defendant by the Trooper which

had her walking away from the camera during the test, her feet were not clearly visible as she performed the test. Also, the data at the bottom of the video helped to obscure the Defendant's feet. The Defense also argued that the Trooper could have placed the Defendant in a position where she was walking left to right in front of the camera, as the Trooper did himself when he demonstrated the test for the Defendant, rather than walking away from the camera, so that her feet could clearly be seen. The State argued that the Defendant was placed in a position to be walking away from the camera for her safety. After viewing the video, I found that the conditions on the video and the placement of the Defendant relative to the camera did in fact prevent her feet from being seen so that the jury would be unable to determine if she was walking heel-to-toe as instructed by the Trooper.

In determining whether the defects in the video while the walk and turn test was being administered constituted an incomplete video for purposes of the videotaping statute, I relied heavily on the recent case of State v. Gordon, Op. No. 5226 (S.C. Ct. App. Filed April 23, 2014; opinion withdrawn, substituted and refiled June 11, 2014) (Shcarouse Adv. Sh. No. 23). I took the Court's holding in Gordon as standing for the proposition that the Legislature's revision of the videotaping statute has shifted the focus from the Defendant's conduct while performing the field sobriety tests to the Defendant's actual performance of the field sobriety tests. Therefore, in order to determine if the Defendant is performing the sobriety test as instructed by the officer, you must be able to clearly see the portion of the Defendant's body that is performing the test. In applying this standard to the case at hand, I found that the jury would not be able to determine from the video if the Defendant was in fact performing the walk and turn test as instructed because her feet were not clearly visible throughout the entirety of the test.

Based upon my viewing of the video, and my interpretation of the case of State v. Gordon, I found the State's video to be incomplete and therefore not in compliance with the videotaping statute. Following the line of South Carolina appeals court cases that direct that the ~~only remedy for the State's failure to comply with the videotaping statute is dismissal of the~~ case, I granted the Defendant's motion and thereby dismissed the case.



M. Paul Swearingen  
Magistrate for Fairfield County

August 14, 2014  
Winnsboro, SC

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FAIRFIELD )  
 )  
State of South Carolina, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
Kathryn Hart Dew, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

C/A # 2014-CP-20- 255

2014 JUL 10 PM 12:55  
FAIRFIELD COUNTY  
CLERK OF COURT  
BETTY JO BECKHAM

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**NOTICE OF APPEAL  
AND APPEAL**

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TO: The Honorable Michael P. Swearingen, Fairfield County Magistrate Judge, and Bob FitzSimons, Counsel for Respondent Kathryn Hart Dew

The State of South Carolina, by and through the undersigned counsel, hereby gives notice of its appeal and appeals from an order of the Honorable Michael P. Swearingen dismissing the above-referenced case. The State received notice of said order on June 12, 2014.

On December 8, 2013, Trooper Christopher B. Ford of the South Carolina Highway Patrol cited Kathryn Hart Dew for Driving With an Unlawful Alcohol Concentration in violation of S.C. Code § 56-5-2933 (Supp. 2013). At the defendant's request, the matter was scheduled for a jury trial and set by the court on June 12, 2014. On that date, the magistrate held a pre-trial hearing outside the presence of the jury; the jury was not sworn. Counsel for the defendant moved to suppress the incident site video and to dismiss the case for failure to comply with the video recording statute. The magistrate agreed and dismissed the case. This appeal followed.

The State's appeal is based on the fact that the magistrate erred as a matter of law in dismissing the case for failure to video record the incident site pursuant to § 56-5-2953 of the South Carolina Code. The relevant portion of the statute reads as follows:

(A) 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.

S.C. Code Ann. § 56-5-2953(A)(1) (Supp. 2013). The magistrate viewed the video and dismissed the case, finding that dismissal was dictated by the court of appeals recent opinion in State v. Gordon, Op. No. 5226 (S.C.Ct.App. filed April 23, 2014; opinion withdrawn, substituted, and refiled June 11, 2014) (Shearouse Adv.Sh. No. 23). This was error.

In finding he was required to dismiss the case under Gordon, the magistrate stated that although the defendant's conduct during the test was visible on the video, he could not make out the defendant's entire "performance" on the walk and turn (heel-to-toe) field sobriety test. In so concluding, he opined that Gordon stands for the proposition that compliance with the video recording statute now requires a complete showing of a defendant's "actual performance" on field sobriety tests. This interpretation goes far beyond the holding in Gordon and effectively establishes a subjective requirement that a video demonstrate the defendant's "performance" on field sobriety tests when no such language is present in Gordon or § 56-5-2953.

Admittedly, the court of appeals' opinion in Gordon shifted the focus from the statutory requirement that a defendant's conduct at the incident site be recorded to the requirement that the

video recording must “include any field sobriety tests administered.” S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii); Gordon, No. 23 Shearouse Adv.Sh. at 46 (distinguishing current version of § 56-5-2953 from earlier version analyzed in Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011)). Nothing in the opinion or statute, however, demands that the depiction of the defendant’s execution of field sobriety tests be flawless. In Gordon, the level of the defendant’s performance on the horizontal gaze nystagmus (HGN) test depicted on the video was not even addressed by the court, as the magistrate there had not made any factual findings as to whether the specific body part involved, the head, was actually visible on camera. Thus, the court of appeals remanded the case with instructions to the magistrate to make factual findings in light of its determination that, specifically for the HGN test, “the head must be visible on the recording.” Gordon, No. 23 Shearouse Adv.Sh. at 48. Here, the magistrate’s stated concern that he could not “determine with certainty whether the defendant [ ] actually completed the test” is misplaced. Significantly, in Gordon the court did not remand for a conclusion on whether there was, in fact, nystagmus present in the defendant’s eyes. Rather, the court recognized that, to meet the statutory requirement that the video “include” the field sobriety tests, you must be able to at least see the body part in question on the video. Here, the defendant’s feet are visible throughout the walk and turn (heel-to-toe) test; the video, therefore, “includes” this field sobriety test.

The purpose of § 56-5-2953 is to create direct evidence of a DUI or DUAC arrest. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011). Our supreme court has stated that by requiring such evidence, the legislature intended “strict compliance” with the provisions of § 56-5-2953. Id. at 349, 713 S.E.2d at 286. Such strictness, however, should not be viewed as an inflexible command to override common sense. See, e.g., Kordel v. United States, 335 U.S. 345, 349 (1948) (“[T]here is no canon against using common sense in reading a

criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it.”); United States v. Cook, 384 U.S. 257 (1966) (same). To the contrary, “[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). A court, therefore, should reject any interpretation leading to a result “so plainly absurd that it could not have been intended by the Legislature . . . .” Town of Mt. Pleasant, 393 S.C. at 342-43, 713 S.E.2d at 283.

Section 56-5-2953 clearly states, and Gordon confirms, that what is required is that the incident site video recording “include any field sobriety tests administered.” S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii); Gordon, No. 23 Shearouse Adv.Sh. at 46. No more and no less is commanded. The video recording in the instant case depicts each of the three field sobriety tests – HGN, walk and turn (heel-to-toe), and one-leg stand – taken by the defendant on December 8, 2013, in its entirety. Although the magistrate initially concluded the State met the statutory requirements, later he appeared to read an additional condition into the statute that would require the video recording to capture the defendant’s “performance” on each test. To this end, the magistrate undertook a review of the video recording in an effort to determine whether a jury could ascertain the defendant’s level of impairment based on the video. Such is not, however, the judicial gatekeeper role envisioned by the statute and subsequent case law. Whether the acts depicted on video convince a jury of impairment is, instead, a wholly different question from whether the video meets the statutory mandate of “includ[ing] any field sobriety tests.”

Ultimately, the magistrate found that although he could “distinguish the defendant’s conduct” during the walk and turn (heel-to-toe) test, he could not determine whether she was “actually doing the heel-to-toe [test] correctly.” Nonetheless, neither § 56-5-2953 nor Gordon

requires this level of subjective scrutiny, and the reason is obvious. Field sobriety tests are typically conducted on the side of the road in a wide range of weather and geographical conditions, not in controlled environments or under static circumstances. Under the magistrate's erroneous view of Gordon, it is doubtful that an incident site video recording could ever pass muster. Such an absurd result could not have been the intent of the legislature nor the scenario contemplated by the court of appeals. Accordingly, for the reasons set forth above, the magistrate erred in dismissing this case as a matter of law.

Wherefore, the State respectfully requests that the decision of the magistrate be reversed and that the case be remanded to the lower court for trial and for such other relief as the Court deems just and proper under the circumstances.

Respectfully submitted,



---

Catherine Fant  
Marcus K. Gore  
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Email: MarcusGore@scdps.gov  
Attorneys for Appellant

This 9<sup>th</sup> day of July, 2014  
Blythewood, South Carolina

OTHER COUNSEL OF RECORD:

Robert C. FitzSimons, Esq.  
1001 Beltline Boulevard  
Columbia, SC 29205

STATE OF SOUTH CAROLINA )

COURT OF COMMON PLEAS )

County of Fairfield )

2014-CP-20-0255 )

State of South Carolina, )

Appellant, )

vs. )

TRANSCRIPT OF RECORD )

Kathryn Hart Dew, )

Respondent. )

December 1st, 2014  
Winnsboro, South Carolina

BEFORE:

THE HONORABLE CLIFTON NEWMAN, JUDGE.

APPEARANCES:

MARCUS GORE, ESQ.  
Attorney for the Plaintiff

ROBERT FITZSIMMONS, ASSISTANT PUBLIC DEFENDER  
Attorney for the Defendant

AMINAH R. HARDY, CM  
Official Court Reporter

EXHIBITS

No.

Description

Page

(No exhibits were marked.)

P R O C E E D I N G S

1  
2 THE COURT: State's appealing. Yes, sir, Mr. Gore.

3 MR. GORE: Thank you, Your Honor. Marcus Gore on  
4 behalf of the Department of Public Safety. I appreciate  
5 you walking through there. I think the magistrate's  
6 return -- he did an excellent job in describing what  
7 happened there and I think the appeal itself also sets  
8 forth. The issue ultimately is what level of quality is  
9 required of the video, especially considering the  
10 post-Gordon light that we've seen, a recent case from the  
11 Court of Appeals.

12 THE COURT: I haven't been keeping track of this -- I  
13 don't do a lot DUI trials. I've done some, but the -- I  
14 haven't read Gordon and I've not too up-to-date on this  
15 videotaping requirement except for hearing that Todd  
16 Rutherford got a case thrown out again Ted Vick. Saw that  
17 in the paper, but beyond that, I haven't followed too much  
18 of it --

19 MR. GORE: Let me try to update you, if you don't  
20 mind. I have a copy of Gordon if that would help you.

21 THE COURT: Okay, good. Thank you.

22 MR. GORE: Sure. Your Honor, the issue in Gordon was  
23 that there's a interpretation of the DUI videotaping  
24 statute that was sort of a new wrinkle when they amended  
25 it a couple years ago, and that was that the DUI statute,

1 videotaping statute previously didn't require the field  
2 sobriety test to be recorded. When the legislation  
3 amended it six years or so ago, they added that  
4 requirement. The video had to -- and the words are  
5 "include any field sobriety test."

6 THE COURT: I also read an editorial in the newspaper  
7 attacking the result of the -- in Ted Vick's case.

8 MR. GORE: Absolutely. So the new requirement was it  
9 had to include the field sobriety test. The issue in  
10 Gordon was you had a DUI video where during the HGN  
11 case -- which is where they're looking for eye movement --  
12 the defendant's head apparently was at least not visible  
13 on the video, for some reason or another. The Court of  
14 Appeals --

15 THE COURT: This was following the HGN?

16 MR. GORE: Right. I think -- and the Court of  
17 Appeals ultimately remanded it back to the magistrate for  
18 a determination about whether or not the head was  
19 visible --

20 THE COURT: Looking to see whether Judge Short was on  
21 that case. Konduras wrote the opinion, and let's see who  
22 was in there with her on that.

23 MR. GORE: Williams and Lockemy.

24 THE COURT: Williams and Lockemy. Good friends.

25 MR. GORE: Ultimately they sent it back because the

1 Court of Appeals found that the magistrate had not made a  
2 factual finding about whether or not the head was visible.  
3 The video itself wasn't in front of them. But the big  
4 take-away from Gordon is -- at least from the defense bar  
5 is you got to show the test. What does showing the test  
6 mean? And I would concede in a situation where you cannot  
7 see the person's head, you -- and they're trying to do an  
8 HGN test, absolutely I think you got an issue there  
9 because you need to see what's going on there. You need  
10 to see the person's head.

11 What we have here -- the argument that the defense  
12 has raise in this case is in regard to the walk-and-turn  
13 test, which is the one where the defendant walks  
14 heel-to-toe. You're familiar with that. And I brought  
15 here some still shots from the video just to give you a  
16 sense of what we're looking at. The video itself -- I  
17 don't know, was it submitted with the magistrate's return?

18 THE COURT: Not that I can tell.

19 MR. GORE: I have an extra copy if you'd like to see  
20 it. The portion that we're talking about is only about  
21 two minutes long. There was no objection to any other  
22 part of the video. But these are six still shots that I  
23 took from the two-minute portion of the walk-and-turn  
24 test. This is not a situation where you're missing a body  
25 part. You can see the -- from the top of the head to the

1 bottom of the feet. There's no doubt you can see the  
2 person. Lot of times we have problems where a person's  
3 hand will go out of frame or their footstep's out of frame  
4 or something like that. That's not what happened here,  
5 though. This person can clearly be seen walking, turning  
6 around and turning around the other way.

7 The defense's argument appeared to be that A) they  
8 had some complaints about the data here at the bottom,  
9 these numbers and letters obscuring some stuff.  
10 Unfortunately, that's the GPS that's on the officer's  
11 camera. You can't turn that off. There's nothing he can  
12 do about that. Additionally, this is a traffic stop at  
13 night. This occurred at 1:30 in the morning. It's  
14 actually out here on I-77. It's actually misting lightly  
15 during the video. Those are the circumstances that  
16 officers get stuck with on the side of the road. These  
17 are not Hollywood shots where we have three cameras that  
18 are going to catch every single thing. We're going to  
19 miss some things.

20 Given the circumstance, actually this officer  
21 produced an excellent video. You can see the entirety of  
22 the person's body. Now, some of that, I'll be honest was  
23 because Ms. Dew was cooperative. Some of the problems we  
24 have with some defendants is they fight to get off camera.  
25 That what's Mr. Vick did, if you want to know the truth.

1 But in the case here, you've got the full body is seen.

2 Now, what the magistrate did and what the --  
3 ultimately that this appeal centers on, what we think the  
4 error is is that he put a new gloss on Gordon that's not  
5 there. And that is what he says he read Gordon to mean is  
6 he needed to actually see the performance on the tape. He  
7 said he needed to see how well the defendant performed the  
8 test. Whether or not he could make a determination did  
9 she actually make the -- it's nine step forward, nine  
10 steps back, did she really make every one of those.  
11 That's not his job. That's the jury's job. If the video  
12 shows everything, the jury can watch that video and say  
13 yes, she looks like she was missing some steps or  
14 stumbling around. That's a weight issue about evidence,  
15 not admissibility.

16 There's nothing missing on this video. You can see  
17 this person walking and turning around. Now, there was  
18 some complaint that perhaps you couldn't see her feet  
19 actually hit the ground every single time. That may be  
20 the case, Your Honor, but that is an extremely high  
21 standard if they're expecting the defendant's feet to be  
22 visible for every single step. Again, we're outside, in a  
23 dark, night, middle of the interstate with a camera  
24 mounted on the front of a car. That can't be what the  
25 legislature meant. The words in the statute are "include

1 any field sobriety test administered." This video  
2 includes the test. We don't have a Gordon issue here  
3 where you can't see a body part. You can see 100 percent  
4 of this person's body. And if this person's feet step out  
5 of -- onto the ground occasionally because of the color of  
6 her pants or the color of the ground, you know, we don't  
7 have costume changes to make the defendants more visible  
8 at night. We take what we get when we get there.

9 This video, frankly, is one of the better videos I  
10 have seen considering the circumstances. Given that it  
11 was at night and you do have a little bit of issue with  
12 the weather. But ultimately, Your Honor, we think the  
13 magistrate went too far in reading a performance goal into  
14 Gordon. Gordon says nothing like that. Gordon says you  
15 need to be able to see the test itself, not the  
16 performance on the test, but the test. And there's no  
17 doubt I think after you watch this video you will see the  
18 test itself is there. The officer is standing there, the  
19 defendant is walking, she turns around and walks in the  
20 other direction. That's the test. We don't need to see  
21 the performance on the test.

22 Under that reading, you would almost -- in an HGN  
23 situation, you would need a camera that actually saw the  
24 eyeballs, that saw whether or not they were twitching. I  
25 don't know there's technology to even measure that. So if

1 that's the case, we can have never have a video that's  
2 going to show full performance of tests. There has to be  
3 room for a jury to look at it and make a determination  
4 about it. So we'd ask the magistrate be reversed on that  
5 error of law because he misread Gordon and applied a  
6 different objective into the videotape statute.

7 THE COURT: All right. Mr. Fitzsimmons.

8 MR. FITZSIMMONS: Thank you, Your Honor. I  
9 appreciate Mr. Gore's effort, but I'm convinced the reason  
10 the legislature requires the videotaping of the field  
11 sobriety test is to allow the jury to see the performance  
12 of the test. If you and I take a written essay test and  
13 videotape consisted of the backs of our heads and our  
14 hands wiggling along a piece of paper, the person grading  
15 the test would not be able to grade the test based on that  
16 video. And if the legislature did not want the jury to be  
17 able to tell what had taken place, they would have stuck  
18 to the old allowing the trooper to come in and tell us  
19 what happened.

20 What the legislature wants is the jury to be able to  
21 see the defendant's performance. Judge, I wish I had the  
22 Highway Department's budget. The Highway Department has  
23 dozens if not hundreds of cars and cameras on the road.  
24 They had the ability to set up -- remember the Highways  
25 are Dieways commercials where they actually did film a

1 trooper talking and they simulate a roadside stop? Judge,  
2 the Highway Department has the ability to set up and teach  
3 a trooper where the data lines are in the frame of the  
4 camera and say, You must put your person 12 paces or seven  
5 paces or nine paces or however many paces it is to get  
6 their feet into the actual frame and not cover it up by  
7 the writing at the bottom of the frame.

8 Judge, in the case of Mrs. Dew, the magistrate  
9 watched the tape and said, "I can see, but I can't see  
10 what's going on." And that's what the jury would need to  
11 be able to do, and that's why he dismissed this. I  
12 believe what Gordon really says, what the statute really  
13 says if you can't tell what's going on, the tape is no  
14 good. For that reason, I ask you to affirm the decision  
15 of the magistrate. Thank you, sir.

16 THE COURT: All right, sir. What do you say about  
17 it, Mr. Gore? He said you need a better tape than they're  
18 producing.

19 MR. GORE: Well, comparing this to what the  
20 commercial on TV looks like is an unfair standard. We're  
21 not going to have a video on a stop that looks like the  
22 commercial on TV. This is an officer when he arrives --  
23 this is a situation actually was a disabled vehicle in the  
24 middle of 77. He does not have the ability to decide --  
25 he has some control over where he parks his vehicle and

1 where the camera is positioned. But ultimately, where he  
2 parks his car is where he's stuck. I think one of the  
3 arguments the defendants made in front of the magistrate  
4 was, Well, he could have moved his car and repositioned it  
5 and got into a better position. And then he leaves the  
6 defendant standing beside the road by herself, someone he  
7 believes to be impaired and someone who is -- he's  
8 investigating in the middle of 77.

9       Where he parks his car is relative to the vehicle  
10 that's already there and the conditions he's given. You  
11 can tell a little bit in these photos that I've given you  
12 and it's obvious on the video, this is a narrow median.  
13 There's not a lot of room to work with. The trooper just  
14 doesn't have the ability to decide where to park the car  
15 so that he gets a perfect shot. Like I said, it's amazing  
16 to me he did get her in as much frame as he did given the  
17 limitations he has. She never steps off frame off camera.  
18 The only thing that obscures her are these lines at the  
19 bottom of the camera, which the trooper, frankly, does not  
20 have the ability to run back into his car and look at the  
21 camera, say how's that coming out, back and forth. He's  
22 got to take what he gets there.

23       Secondly, I'd just like to point out defense wants to  
24 argue that he believes the legislature must have meant the  
25 performance should be on the test, should be shown on the

1 video. That's not what the statute says. It says  
2 "include any field sobriety test," and importantly, that's  
3 not what Gordon says. Gordon is the case interpreting the  
4 new field sobriety test requirements in the statute. And  
5 it doesn't say a word about performance. It mimics the  
6 exact language in the statute. So to put those words into  
7 the statute, the Court of Appeals has not done that and  
8 the legislature itself has not done that. And that's the  
9 error here is the magistrate putting too much into what  
10 Gordon said because Gordon has not gone that far.

11 THE COURT: All right. Let me look at the statute  
12 says. Incident site and breath test site video recording.  
13 A person who violates section da-da-da must have his  
14 conduct at the incident site and the breath test site  
15 video recorded. The video recording at the incident site  
16 must not begin later than the activation of the officer's  
17 blue lights, include any field sobriety test administered,  
18 and include the arrest of the person or probable cause  
19 determination that the person violated the statute and  
20 show the person being given their Miranda rights. A  
21 refusal to take the test does not constitute disobeying a  
22 police command. 2) The video recording at the breath site  
23 must include the entire breath -- so that goes into a  
24 different thing, right, the breath test.

25 3) The video recording at the incident site and the

1 breath test are admissible pursuant to the rules of  
2 evidence. Nothing in this section may be construed as  
3 prohibiting the introduction of other relevant evidence.  
4 Failure by the arresting officer to produce the video  
5 recording required by this section is not alone a ground  
6 for dismissal of any charge made pursuant to this section  
7 if the officer submits a sworn affidavit certifying that  
8 the recording equipment at the time was in an inoperable  
9 condition, stating which reasonable efforts have been made  
10 to maintain the equipment and certifying that there was no  
11 other operable facility available. Or in the alternative,  
12 submits a sworn affidavit certifying that it was  
13 physically impossible to produce the video recording  
14 because the person needed medical treatment or other  
15 exigent circumstances. In circumstances including but not  
16 limited to: roadblocks, traffic accident investigations,  
17 and citizens arrest where an officer has been made --  
18 where an arrest has been made and the video recording  
19 equipment has not been activated by blue lights.

20 Failure to produce the video recording required is  
21 not alone grounds for dismissal. However, as soon as  
22 video recording is practicable under these circumstances,  
23 the video recording must begin and conform with the  
24 provisions of this section. Nothing in this section  
25 prohibits the court from considering any valid reason for

1 the failure to produce the video recording based on the  
2 totality of the circumstances, nor do the provisions of  
3 this section prohibit a person from arguing evidence  
4 relating to the law enforcement officer's failure to  
5 produce the video recording.

6 All right. So that's it for the statute, isn't it?

7 MR. FITZSIMMONS: Judge, you might be interested in  
8 seeing what the Court said in Murphy v. State, which  
9 actually came out after the statute was amended but was  
10 interpreting previous action.

11 THE COURT: Let me read this Gordon case. Murphy  
12 came out after Gordon?

13 MR. FITZSIMMONS: No, sir. Murphy is an older case,  
14 a 2011 case. As I say, the funny thing about Murphy,  
15 statute had been changed but Murphy was interpreting the  
16 earlier statute and as a result they made reference to the  
17 amendment of the statute. And I think you'll find that  
18 instructive.

19 THE COURT: All right. Let me look at -- while I'm  
20 getting Murphy, let me look at Gordon, appeal from Oconee  
21 Judge McCaulay. State appeals the circuit court's  
22 reversal of the magistrate's conviction of Cody Gordon.  
23 Contends the circuit court erred in finding the state did  
24 not comply with the statute because Gordon's head was not  
25 visible on the required recording during one of the field

1 sobriety tests. They affirmed in part and vacated in part  
2 and remanded. They stopped Gordon at a license and  
3 registration checkpoint and gave him three tests. HGN  
4 test, the walk-and-turn test, and the one-leg stand test.  
5 After giving him the test, they charged him with DUI and  
6 the dashboard camera recorded the events. Before the  
7 trial -- prior to the trial before the magistrate, he  
8 moved to dismiss it because the failure to record the HGN  
9 test because his head was not visible. Magistrate denied  
10 the motion, finding the state properly captured the  
11 conduct on the recording. Jury found him guilty.

12 He appealed and at the hearing in circuit court -- at  
13 the hearing before the circuit court on the appeal, Gordon  
14 argued the HGN test couldn't be seen and provided black  
15 and white stills of the recording, and the circuit court  
16 granted the motion to dismiss. Found that the law  
17 required the head to be visible unless the exceptions  
18 apply. Court noted Gordon was so far out of view in front  
19 of the arresting officer's patrol car which prevented his  
20 head from being sufficiently visible. Court found the  
21 section required his head to be visible unless an  
22 exception is noted to that, and he was so far outside of  
23 view in front of the patrol car for the administration of  
24 the test and into the dark which prevented his head from  
25 being sufficiently visible.

1           The standard of review -- and that's kind of what I'm  
2 interested in here as well -- in criminal appeals from  
3 magistrate, circuit court does not conduct a de novo  
4 review but instead reviews from a preserved error raised  
5 it to by appropriate exception. The Court may either  
6 confirm the sentence appealed, reverse or modify it, or  
7 grant a new trial as the court may seem meet and  
8 conformable to law. Questions of statutory interpretation  
9 are questions of law which are subject to de novo review  
10 which are free without any deference to the court below.  
11 Circuit court is bound by the magistrate court's finding  
12 of fact if any evidence in the record reasonably support  
13 them.

14           As amended in 2009, the current version expressly  
15 requires a recording of the field sobriety test, *Murphy v.*  
16 *State*. In *Murphy*, the defendant contended the videotape  
17 of the incident site did not comply because it failed to  
18 record most of the sobriety test. Court applied the prior  
19 version of the section, which was in effect at the time of  
20 the arrest and found the plain language does not require  
21 that the recording capture a continuous, full view of the  
22 accused, or capture all field sobriety tests. Rather  
23 provided all other circumstances are met, the video only  
24 need record the accused's conduct. The burden on the  
25 statute applied in *Murphy* did not include the explicit

1 requirement that it include any field sobriety test  
2 administered as the current version does.

3 If the statute is ambiguous, the Court must construe  
4 the terms of the statute. Any ambiguity in the statute  
5 should be resolved in favor of a just, equitable, and  
6 beneficial operation of the law. The purpose of this  
7 section is to create direct evidence of DUI arrests.  
8 Dismissal of a DUI charge is an appropriate remedy  
9 provided any violation of the statute has not been  
10 mitigated by subsection B.

11 The legislature clearly intended strict compliance  
12 with the provisions of section 56-5-2953 and in turn  
13 promulgated a severe sanction for noncompliance. The  
14 Court properly found the magistrate erred in finding the  
15 recorder -- recording was only required to show the  
16 conduct of the defendant. Magistrate relied on Murphy in  
17 making that determination. Although Murphy holds that  
18 only the conduct must be recorded, Murphy is based on the  
19 prior version of the statute which did not include the  
20 specific language regarding the testing recording. The  
21 current version of the statute states that the video  
22 recording must include any field sobriety test  
23 administered. Because the purpose of the videotape is to  
24 create direct evidence of the arrest, if the actual test  
25 cannot be seen on the recording, the requirement is

1 pointless. Accordingly the circuit court directly found  
2 the head must be shown and we affirm the finding.

3       However, because the magistrate found the recording  
4 only needed to capture the conduct, it does not make any  
5 finding as to whether the entire test, including the head,  
6 was on camera. The circuit court found that Gordon's head  
7 was not sufficiently visible through the entire  
8 administration of the HGN test. But the circuit court  
9 sitting in its appellate capacity may not engage in fact  
10 finding. Because the circuit court engaged in fact  
11 finding and the magistrate never made such findings due to  
12 its misconstruction of the statute, we vacate the circuit  
13 court's finding Gordon's head was not visible and remand  
14 the case to the magistrate court. The magistrate court is  
15 to make factual findings in light of the circuit court and  
16 our determination that the test must be recorded on  
17 camera, specifically for the HGN test, the head has to be  
18 visible on the recording.

19       Okay. Before I hear from you any more, just a  
20 second. Now, we have the jurors coming in at 11 and  
21 they're probably outside, so let's deal with all those  
22 people who are supposed to be coming in rather than  
23 holding them up outside. What do you want do when they  
24 come in, Madame Clerk?

25       THE CLERK: There's nothing for them to hear, right?

1 Just get their mileage and let you tell them what  
2 happened.

3 THE COURT: We'll bring them in and give them up and  
4 update and so we need to go through the role call?

5 (A recess was taken from 10:56 to 11:32 a.m.)

6 THE COURT: So I read the case Murphy -- Gordon --  
7 Gordon told me everything that Murphy said. What else do  
8 we need to know? It's your turn, Mr. Fitzsimmons.

9 MR. FITZSIMMONS: Thank you, Your Honor. I think the  
10 confusion is in the Dew case, the magistrate did make a  
11 finding of fact, specifically that Ms. Dew's feet were not  
12 visible. And now Mr. Gore has brought the Court still  
13 photographs. His interpretation of these photograph is  
14 that Ms. Dew's feet are visible. I would differ with him  
15 on that, but it doesn't matter what we think because as  
16 you've already pointed out, the Court must abide by the  
17 magistrate's findings of fact. The Court can, of course,  
18 overturn the magistrate's ruling on matters of law, but  
19 the findings of fact I think are clear, which is that  
20 Ms. Dew's feet are not visible and, as such, law allows  
21 the magistrate -- the law dictates to the magistrate that  
22 he must exclude the tape.

23 And I think, Your Honor, that's where we are. I  
24 would point out the again import of Murphy, which is  
25 Murphy tells us that the statute was changed and tells us

1 had the statute not been changed, we would still be living  
2 with those original provisions. However, the statute was  
3 changed and was changed for a reason. And I think that  
4 reason is to allow the magistrate to throw out a tape that  
5 merely shows the administration of the test and not the  
6 defendant's performance on the test.

7 THE COURT: Is this the situation as I said earlier,  
8 I read the editorial that this is like a -- I guess a lady  
9 in The State newspaper wrote the editorial and said, "This  
10 is like a DUI lawyer's full employment bill." And is it  
11 that the statute is written so far in favor of the  
12 defendant that the law now is that unless they have a  
13 perfect DUI with everything clearly showing that the judge  
14 should throw the tape out as not complying with the law?

15 MR. FITZSIMMONS: Your Honor, I was talking with  
16 Mr. Maxwell about it, completely unrelated matter  
17 regarding Miranda and the exclusionary rule, and what I  
18 said to Mr. Maxwell is the exclusionary rule is a harsh  
19 rule. And the purpose of the harshness of the rule is to  
20 tell the people who hold all the cards, law enforcement,  
21 that they must abide by the law. And that is what this  
22 is. The statute says if you didn't do it right, you got  
23 to go away. You can't go back and do it again. You can't  
24 say we did the best under the circumstance. What does  
25 Yoda say? There is no try. There is only do. And that's

1 what the Highway Department, state trooper, the DOT -- I  
2 was telling Mr. Gore I can't remember the name of the  
3 agency, and I apologize. But Trooper Ford must do. He  
4 can't simply say "I tried." And this is an example of A  
5 for effort and F for compliance.

6 THE COURT: And the -- so the dividing line  
7 between -- the magistrate watched the video and he ruled  
8 on it as a suppression motion.

9 MR. FITZSIMMONS: Yeah.

10 THE COURT: So there was no trial.

11 MR. FITZSIMMONS: There was no trial.

12 THE COURT: He ruled on the suppression motion and he  
13 goes on to explain in the order his view of the law and  
14 all. So what am I reviewing here? His findings of fact  
15 or his conclusion of law?

16 MR. FITZSIMMONS: Your Honor, I believe you can only  
17 review his conclusions of the law. And you can remand it  
18 to him if he failed to make a finding of fact, which is  
19 what happened in Gordon. That is, in Gordon the  
20 magistrate did not specifically find and the circuit court  
21 did find that the head was not visible. But in this case,  
22 the magistrate did find that the feet were not visible.  
23 All you got to do is take Gordon, substitute "feet" for  
24 "head." Substitute "walk-and-turn" for horizontal gaze  
25 nystagmus, and you've got this case.

1           And Judge, again Mr. Gore said, "We can't videotape  
2 everything. We can't show everything." The walk-and-turn  
3 test is nine steps, turn, and nine steps back. If they  
4 can't record 18 steps, why did they spend all that money  
5 on that expensive camera?

6           THE COURT: Well, he said it was raining, it was  
7 nighttime, it was this, it was that.

8           MR. FITZSIMMONS: It was this, it was that, it was we  
9 tried, Judge, but "we tried" is not the standard. The  
10 standard is you have to show the test and you have to show  
11 the person's performance of the test. If that is not what  
12 the law is supposed to require, why did they change the  
13 law? That is where Murphy comes in. Murphy says we  
14 changed the law and now it's time to comply with the new  
15 law.

16           Judge, for the trooper to say, "I can't measure that.  
17 I can't calculate that," he rides around all day in a car.  
18 He is probably a foot and a half wide and maybe at most a  
19 foot and a half deep. But he knows exactly how far away  
20 the forward fenders and the rear fenders of his car are.  
21 And he parks that car knowing because he's driven that  
22 car, knows from experience how far away the front of his  
23 car and the back of his car, the same way he knows how far  
24 away his headlights will shine. He can learn how far away  
25 to place a defendant so that the frame between the numbers

1 on the top and the numbers on the bottom frames that  
2 person. And he's got to learn to do that, and once he's  
3 learned to do that, he can do it all day and all night  
4 long, rain or shine.

5 THE COURT: Mr. Gore?

6 MR. GORE: Let me address the first issue about the  
7 fact versus the law issue to make sure we're clear on  
8 that. You've read the standard review in Gordon. I don't  
9 have any reason to dispute that. But I think the  
10 magistrate's finding, he has made an error of law because  
11 it's his reading of Gordon. And the way I read the  
12 magistrate's return and listening to the audio I think  
13 colors some of this. I wasn't there, but I've heard the  
14 audio from the hearing, from the motion itself. The  
15 magistrate says at one point, "I can see her feet," but he  
16 says, "I don't think the jury can see how she performs on  
17 the test," and that's what he says in the return,  
18 actually, if you read that. He says, "After reviewing the  
19 video, I found the conditions on the video and the  
20 placement of the defendant relative to the camera did, in  
21 fact, prevent her feet from being seen, so that the jury  
22 would be able to determine if she was walking heel to toe  
23 as instructed by the trooper."

24 I think -- and again, this goes back the point I made  
25 earlier about -- I think the judge stepped into the jury's

1 shoes and said, "I don't think the jury would be able to  
2 read this video in such and such a way." That's not his  
3 role. His role according to Gordon is: Are the body  
4 parts on the camera, yes or no? And I don't -- frankly,  
5 I'll tell you, I don't know his return says that one way  
6 or the other, whether they were. So maybe the answer is  
7 you need to remand this for him to tell us: Can you see  
8 the body parts on the camera? That's the Gordon solution.

9 So I think there is absolutely a question of law  
10 about his interpretation of Gordon, and then secondly, I  
11 don't know that he's made the factual finding that we  
12 need. I think he's made a factual finding whether or not  
13 he thinks the jury could read these videos. But I don't  
14 think he actually has made that finding himself, at least  
15 not in the return. I think if you listen to the audio  
16 from the hearing, it's there, but I think you're bound by  
17 the return. So the return says what it says.

18 Secondly, I'd like to point out that the videotaping  
19 statute -- you read through part of it and I think is  
20 important -- the videotaping statute contains the  
21 affidavit exception. Says the trooper can -- officer can  
22 produce an affidavit explaining why he doesn't have a  
23 video. Well, we don't have an affidavit here. We'll  
24 concede that. But first of all, I don't think need one.  
25 I think we've done what we need to. But secondly, there's

1 a important section at the end of subsection B in 29-53,  
2 and it says nothing herein -- and I'm not going to quote  
3 this exactly -- but totality of the circumstances can  
4 still be used by the judge to determine if a video is in  
5 compliance. And I think this is a clear case of the  
6 weather is not the best, the lighting conditions aren't  
7 the best. The GPS numbers are not exactly where they need  
8 to be. I mean, we're talking about them being off by  
9 6 inches having moved. That is exactly the circumstance I  
10 think the legislature was envisioning with the totality of  
11 the circumstances to say your video is going to not be  
12 perfect. There's no way setting up a camera in front of  
13 the car you're going to catch every single thing every  
14 possible way. And so under the totality of the  
15 circumstances you don't need an affidavit for that.  
16 That's just a general finding. I think that under that  
17 standard, this video passes muster.

18 THE COURT: So if the magistrate says under the  
19 totality of the circumstances because the -- he cannot  
20 determine -- he said under the totality of the  
21 circumstances, the statute is not complied with because he  
22 could not see whether the defendant was, in fact,  
23 performing the test because he couldn't see her feet and  
24 he couldn't see her feet and therefore the purpose of it  
25 would be for the jury to see the feet. Because the jury

1 couldn't see the feet, he's going to suppress it. But his  
2 determination of the -- she was -- he could not determine  
3 if she was performing the test because he couldn't see her  
4 feet, is that a finding of fact or conclusion of law? I  
5 mean, how does that fit in with my ability to review what  
6 the magistrate did?

7 MR. GORE: The statement you just made is what he  
8 said. Exactly what he said. And the mistake there he  
9 made there is looking for performance on the test. He is  
10 looking for the defendant's performance on the test.  
11 Gordon does not require performance to be visible, so for  
12 him to say, "I could not see performance," that is a  
13 finding of fact, but that's the wrong fact to look for.  
14 The fact to look for is: Does the video include the test?  
15 That's all that Gordon says it needs to do. And if that's  
16 the finding of fact we need from him that he did not make  
17 in the return. He went beyond Gordon and found an  
18 additional finding of fact that reaches beyond Gordon that  
19 is a ultimately a conclusion of law that drives him to  
20 find a fact he didn't need to find, if that makes sense.

21 MR. FITZSIMMONS: Judge, Mr. Gore has wandered around  
22 an awful lot to avoid the obvious: The videotape is  
23 flawed. The judge found the videotape to be flawed. The  
24 judge said the jury can't see it, which means nobody can  
25 see it. And --

1 THE COURT: So if the magistrate says the videotape  
2 is flawed, can I reverse his conclusion that the videotape  
3 is flawed, or am I to look at his analysis of this case?

4 MR. FITZSIMMONS: Your Honor, that's where Mr. Gore  
5 is trying to lead you. You don't even need to go there.  
6 It's just simple enough. The judge says the tape is  
7 flawed. That is a fact. That's not a conclusion of law.  
8 That is a fact. And as such, you apply the law to the  
9 fact that's been found. And the law says if the tape is  
10 flawed, throw it out. And to call that a conclusion of  
11 law is to twist things around unnecessarily. As I said,  
12 Mr. Gore would love for you to think that way, but you  
13 don't need to.

14 Let me tell you, Your Honor, if I might, what Judge  
15 Hayes said in a case that came out actually prior to  
16 Gordon, and it's interesting Judge Hayes would seem to me  
17 viewed pretty much what Gordon was going to say because he  
18 knew the law. He says, "The obvious import of the above  
19 quote from Murphy v. State is that if a complete recording  
20 of a person's performance of any field sobriety test was  
21 not required in the former statute, it is now required  
22 under the amended statute, 2009. The amendment  
23 specifically provides for recording of any field sobriety  
24 test, which goes beyond the former requirement of merely  
25 recordings a person's conduct. Had the general assembly

1 only intended that there be a recording of a person doing  
2 the field sobriety test without there being any way to  
3 determine that person's performance on the test as in  
4 Murphy, there would be no need to amend the statute. It  
5 must be presumed the general assembly did not intend a  
6 futile or meaningless act by enacting the 2009 amendment.  
7 To put it plainly, there is no sense in conducting field  
8 sobriety test if the finder of fact cannot see the results  
9 of such test."

10 Judge Swearingen, the magistrate, said the jury can't  
11 see the results; therefore, throw it out.

12 THE COURT: And you're quoting -- what were you just  
13 reading? From Judge Hayes, you said.

14 MR. FITZSIMMONS: Yes, sir, this is Judge Hayes'  
15 order in State versus Lorusso out of York County in  
16 September of last year.

17 THE COURT: He threw one out too?

18 MR. FITZSIMMONS: Yes, sir.

19 THE COURT: Judge Hayes?

20 MR. FITZSIMMONS: Yes, sir.

21 THE COURT: Was that appealed?

22 MR. FITZSIMMONS: I don't think so, Your Honor. I  
23 think it went any further than that.

24 THE COURT: Okay. How about it, Mr. Gore? What's  
25 your last word on it?

1 MR. GORE: Well, my last word on it is that the video  
2 does include the field sobriety test. I think that the  
3 magistrate overreached by looking for this performance on  
4 it, and I guess I would go back to -- I guess the thing  
5 that keeps sticking in my mind is think about the HGN test  
6 and what the eyes are doing. If the standard is that we  
7 have to see the performance of the test, I have never seen  
8 a DUI video that showed the eyes twitching. It does not  
9 exist. And if that's case, if that's the ruling today,  
10 then we might as well quit recording anything because --

11 THE COURT: Maybe they didn't have to get the eyes  
12 twitching since they couldn't see the head.

13 MR. GORE: You might be right. You may be right.  
14 But if that's --

15 THE COURT: Of course, the next thing is well, do you  
16 have to not only see the head, but do you need to see the  
17 eyes twitching, since that's the purpose, which means  
18 should they an extra camera have recording the person's  
19 eyes moving back and forth?

20 MR. GORE: That's the standard they're trying to  
21 articulate. If you have to see performance, don't you  
22 have to see the eyes twitching? Because you can't tell  
23 anything about what somebody's eyes are doing in an HGN  
24 test without seeing the eyes. So I think it's absolutely  
25 an overreach to say we need to see every single foot

1 hitting the ground every single time, every twitch of the  
2 eye. That is just an overreach of the statute. The  
3 statute has that totality of the circumstances provision  
4 built into it for exactly these types of circumstances  
5 where the video is -- and, again, this is not an -- he  
6 says A for effort; F for compliance. This is a B+,  
7 probably. This video is very, very close to showing  
8 everything it needs to show.

9 THE COURT: I'm always concerned on all of these  
10 magistrate appeals -- and once again as to what is it I'm  
11 supposed to do in hearing an appeal from an magistrate.  
12 Since I don't review the evidence and the magistrate is  
13 the judge with a lot of discretion who is supposed to make  
14 those -- the decisions in these kinds of cases. And so at  
15 what point do they cross the line for me to review his --  
16 whatever he reviewed and say he was wrong? Is that what  
17 you're asking me to do? If he looked at the video and  
18 says, "This video isn't good enough because I can't see  
19 her feet. I can't -- so therefore the video doesn't  
20 comply with the statute, and I'm suppressing the  
21 evidence," am I then supposed to look at the evidence and  
22 say, "I can see her feet. I disagree with him, so I'm  
23 going to reverse him." How do you draw the line in these  
24 things so that you don't have too many judges deciding the  
25 same thing?

1 MR. GORE: Absolutely. I understand that, Your  
2 Honor. I think the simplest solution I would say in this  
3 case is to do what they did in Gordon. If you agree with  
4 me that Gordon does not require performance to be shown on  
5 the video -- and I'm going to assume that for the purpose  
6 of this, and you can tell me I'm wrong. But if you agree  
7 with me that case does not stand for that proposition,  
8 then this magistrate used an incorrect standard of law to  
9 evaluate this and the question he has not answered for us  
10 is: Does this video show what Gordon does require, and  
11 that is nothing more than the test themselves are  
12 included. Not the performance on the test, but the test.  
13 And if that is your conclusion, than it should be remanded  
14 for him for a factual determination of that. And we may  
15 lose that again if he ultimately finds that. But if he  
16 finds that performance is not required, then he needs to  
17 look at that question for us.

18 THE COURT: How about this part of Gordon says: By  
19 requiring a law enforcement agency to videotape a DUI  
20 arrest, the legislature clearly intended strict compliance  
21 with the provisions of section 56-52-953 and in turn,  
22 promulgated a severe sanction for noncompliance. So then  
23 our question is: Do we have compliance? Magistrate says  
24 no because he couldn't see the feet, so therefore he  
25 couldn't tell whether or not she passed the test or

1 didn't. Is that what I'm being asked to second-guess  
2 whether or not there's compliance with the statute?

3 MR. GORE: You're being asked -- yes, sir, because  
4 you're being asked if there's compliance with the statute  
5 under the Gordon standard as interpreted by the  
6 magistrate. And if his interpretation of the statute is  
7 wrong, or of Gordon is wrong, that is absolutely is an  
8 error you can correct.

9 THE COURT: Says, "However, because the magistrate  
10 found the recording only needed to capture the conduct, it  
11 did not make a finding as to whether the entire test,  
12 including the head, was on the camera." That's where the  
13 circuit judge went on and said, "I find his head wasn't on  
14 camera, so I'm reversing." He said he went too far  
15 because he can't make that -- he's not a fact finder. He  
16 can only remand. So if I were to remand this to the  
17 magistrate, what would I ask him to decide?

18 MR. GORE: You would ask him to decide whether or not  
19 the field sobriety test, specifically the walk-and-turn  
20 test, is included on this video without any consideration  
21 of whether or not the performance of that test is  
22 included. That is not a requirement.

23 THE COURT: Has he already decided that by saying,  
24 "Well, I see the test but not the complete test because I  
25 can't see the feet, and that's the purpose of the feet.

1 What's the name of this test?

2 MR. GORE: Walk-and-turn.

3 THE COURT: Walk-and-turn. You have to see the feet  
4 to determine whether she passed the test.

5 MR. GORE: That's the performance element, not the  
6 actual test itself. It's a fine line. I'm not denying  
7 it.

8 THE COURT: Go ahead, Mr. Fitzsimmons. You were on  
9 the winning side the first time. Let's see what you say  
10 about it this time.

11 MR. FITZSIMMONS: Your Honor, I worked for a man who  
12 said, "I have heard from you sufficiently. Don't argue  
13 yourself out of winning." Judge, I'm confident Judge  
14 Swearingen made a finding of fact and that the  
15 videotape --

16 THE COURT: Is he a longtime, well-respected judge or  
17 a newcomer who nobody knows?

18 MR. FITZSIMMONS: He is closely related to one of our  
19 deputies. He's a --

20 THE COURT: He's not in here, is he?

21 MR. FITZSIMMONS: He's a member of the bar. He's --  
22 has been a magistrate for a number of years. He practiced  
23 law now I think for 10, 12 years. I would say he's a  
24 well-respected judge and I think as I say, he has  
25 relatives in law enforcement. I think he's generally

1 sympathetic to the plight of law enforcement. I think in  
2 this case, he ruled correctly. Law enforcement did not  
3 comply with the statute. I think that is a finding of  
4 fact.

5 THE COURT: How can you really comply with this  
6 statute? That's Mr. Gore's thing. That's just -- the  
7 defense has made it impossible for all of the -- every  
8 time they try to tighten up the DUI statute, it seems like  
9 the roadblocks seem to make the entire effort futile.

10 MR. FITZSIMMONS: Judge, there are two things going  
11 on when you say "tighten up the statute." On the one  
12 hand --

13 THE COURT: The people who cry against too much  
14 drinking and driving, they want the law made more severe.  
15 But every time it comes up before the legislature you get  
16 all these little things like the one you're now arguing  
17 that makes it impossible to prove the case.

18 MR. FITZSIMMONS: Well, they do want the law made  
19 more severe. Their idea of tightening up the statute is  
20 to go around with a tow truck and anybody who looks a  
21 little bit shady, tow his car away and don't give it back.  
22 On the other hand, the actual statute itself has to be  
23 tightened up in favor of both sides. What we're doing  
24 now, Your Honor, is we're relying on technology where we  
25 used to rely on a roadside decision made by a trooper or a

1 deputy. We no longer have to rely on an opinion of a  
2 trooper or deputy. We have the ability to show those  
3 things to the jury and let the jury make that decision,  
4 except when they fail to bring to the table the proper  
5 evidence required by statute that the jury should be  
6 allowed to see.

7 THE COURT: So you got -- need to have the entire  
8 test and all aspect of it on video?

9 MR. FITZSIMMONS: I think that's what the statute  
10 says, Your Honor.

11 THE COURT: That's what this judge said in the case.

12 MR. FITZSIMMONS: I believe so.

13 THE COURT: And if he's wrong, then he's wrong as  
14 a -- as to a matter that I cannot review because he's  
15 wrong on the facts, not the law.

16 MR. FITZSIMMONS: I believe that's correct, Your  
17 Honor.

18 THE COURT: All right. All right. As I said, I  
19 don't do too many of these and just reading it in the  
20 paper last week not knowing I'd show up here and y'all  
21 would give me one to review. But I'll let it all simmer  
22 and then see who I agree with and read -- see what else do  
23 I need to read? Have y'all given me everything to read?

24 MR. FITZSIMMONS: I think we've given you enough,  
25 Judge. We don't want to burden you.

1 MR. GORE: Gordon is the case. If you read Gordon,  
2 then honestly that is the case. I will -- Gordon --  
3 Supreme Court said accepted cert on Gordon last week, so  
4 we haven't heard the end of Gordon yet.

5 MR. FITZSIMMONS: And Judge, I can give you this  
6 Lorusso order which is only advisory. That's what Judge  
7 Hayes wrote.

8 THE COURT: He's one of my good friends. He's been  
9 doing it a long time.

10 MR. GORE: Your Honor, for the record, I would object  
11 to any consideration of the order since it's obviously not  
12 binding on --

13 THE COURT: I know it's not binding, but I like to  
14 see what other people have to say about things. I won't  
15 rely on it. I'll look at it.

16 MR. GORE: I understand.

17 (Whereupon, the proceedings were concluded.)  
18  
19  
20  
21  
22  
23  
24  
25



Compact disc of court audio of June 12, 2014 hearing before the Honorable Michael P. Swearingen, Magistrate Judge for Fairfield County



# SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME MIDDLE NAME LAST NAME

Kathryn Hart Dew

STREET AND NO CITY STATE ZIP CODE

215 Day Brook Dr Kennersville NC

STATE LICENSED DRIVER'S LICENSE NO CDL DRI LIC CLASS

NC 3839609  YES  NO C

VEH LIC NO STATE MAKE OF VEH YEAR COMB VEH AUTO HAZ MT MOPED MTRCYCL OTHER

AMV344 NC Ford 98  HAZ MT  MOPED  MTRCYCL  OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT STREET AND NO

Traffic Court 115 B S Congress St

DATE OF TRIAL TIME OF TRIAL CITY STATE ZIP CODE

19 2014 2pm Wynonah SC 29180

VIOLATION - COURT APPEARANCE REQUIRED YES NO VIOLATION SECTION NO

DUAC 56-5-2933

OWNER OF VEHICLE DATE OF ARREST

Dew 12/8/2013

ADDRESS OF OWNER DATE OF VIOLATION

Kennersville NC 12/8/2013

BAIL DEPOSITED NAME OF ARRESTING OFFICER RANK

3011 C. B. Ford TFC

DESCRIPTION OF ACCUSED COUNTY NUMBER

W/F 9/6/65 Fairfield 20

DATE BAIL REC'D BY BADGE TROOP

20 T101 4

CASE BEFORE MAGISTRATE MUN COURT CIRCUIT COURT FAMILY COURT FEDERAL COURT

MAGISTRATE  MUN COURT  CIRCUIT COURT  FAMILY COURT  FEDERAL COURT

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE TIME OF VIOLATION WEATHER

0026 0026 CLR

DEFENDANT DID NOT APPEAR APPEARED

DID NOT APPEAR  APPEARED

NOLLE PROSSED FORFEITED BOND DISPOSITION

NOLLE PROSSED  FORFEITED BOND  GUILTY  PLED NOLO CONTENDERE

TRIAL BY TRIAL JUDGE JURY

TRIAL JUDGE  JURY

VERDICT OF TRIAL IF ANY DATE OF TRIAL IF ANY

GUILTY  NOT GUILTY 6/12/14

JAIL SUSPEND FINE AMT COLLECTED AMT SUSPENDED

JAIL  SUSPEND  FINE  AMT COLLECTED  AMT SUSPENDED

COMMITTED TO Vehicle Searched Arrest as Result of Collision

NO NO

CERTIFIED CORRECT DATE

P Swain 6/12/14

OFFENSE CODE B.A LEVEL

99 .12%

G 633064

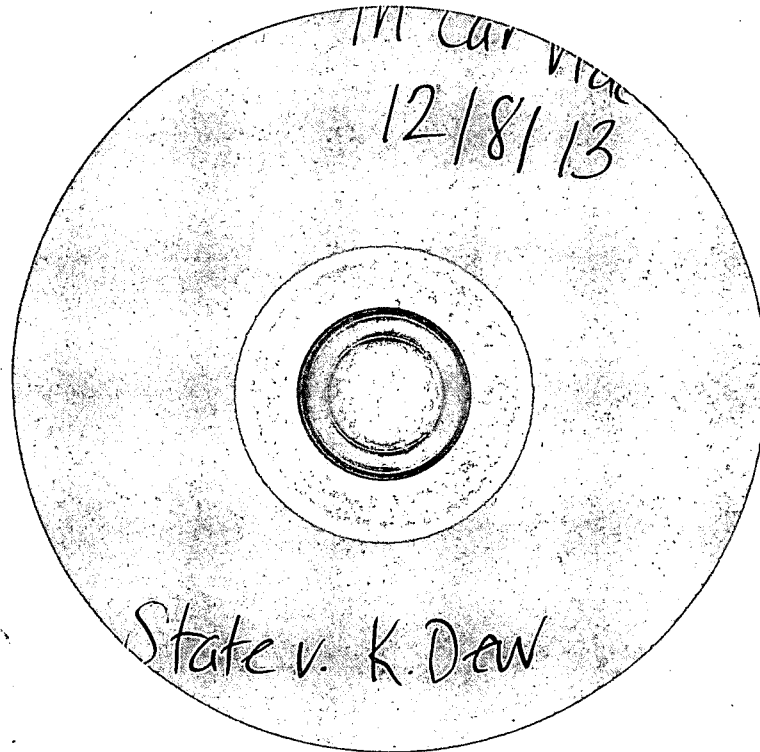
DRIVER'S RECORD COPY

2/2/13

DOCKET NO



Video of Roadside Stop dated December 8, 2013



THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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**MAR 24 2016**

**SC Court of Appeals**

Case No. 2014-CP-20-0255

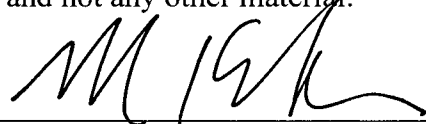
The State.....Appellant,

v.

Kathryn H. Dew.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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Date: March 7, 2016



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March 23, 2016

**RECEIVED**  
MAR 24 2016  
SC Court of Appeals

The Honorable Jenny Abbott Kitchings, Esq.  
Clerk  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201


Re: State of South Carolina v. Kathryn H. Dew  
Appellate Case No. 2015-001093

Dear Ms. Kitchings:

Please find enclosed the following documents for filing with the Court in the above-referenced matter: (1) sixteen copies of Appellant's Final Brief, (2) sixteen copies of Appellant's Final Reply Brief, (3) sixteen copies of the Record on Appeal, (4) Appellant's Proof of Service on Respondent of the Final Briefs, and (5) Appellant's Certificate of Compliance with Rule 211(b), SCACR.

In addition, please clock in the copies enclosed for return to me in the envelope provided.

Sincerely,

  
Monishia L. Davis  
Paralegal

cc: Robert FitzSimons, Esq.  
Ross Burton, Esq.

/mld  
Enclosures