THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2014-001871

City of North Charleston, ...Respondent,

v.

John Barra, ...Appellant,

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant, by and through undersigned counsel and pursuant to Rules 219 and 221, SCACR, respectfully submits this Petition for Rehearing or Rehearing *En Banc* and requests this Honorable Court rehear this matter and reconsider its opinion based upon the following arguments:

STATEMENT OF THE CASE

This appeal arises from a Municipal Court criminal conviction for driving under the influence, 1st offense. The North Charleston Municipal Court, the Honorable Thaddeus James Doughty presiding, held trial as follows: jury selection on August 20, 2013; motions on August 21, 2013; and trial on August 22, 2013. On or about August 22, 2013, a jury convicted Appellant of the criminal offense of driving under the influence.

On August 28, 2013, Appellant timely filed a notice of appeal to the circuit court. The municipal judge filed his return on September 17, 2013. On July 15, 2014, the Honorable J.C. Nicholson, Jr. heard the appeal. On July 21, 2014, Judge Nicholson issued an order denying the appeal. On August 18, 2014, Judge Nicholson denied Appellant's motion to reconsider without hearing. In an unpublished opinion filed June 8, 2016, this Court affirmed the circuit court's ruling. This petition for rehearing and rehearing *en banc* follows.

STATEMENT OF THE FACTS

On February 1, 2013, a North Charleston police officer initiated a traffic stop on Appellant and commenced an investigation to determine whether Appellant was driving under the influence. During the investigation, the officer purported to administer field sobriety tests and subsequently arrested Appellant. [R. p. 80]

At trial, before the court heard any testimony, Appellant made a pre-trial motion to suppress the FST's because the arresting officer did not comply with his training and the standards set forth by the National Highway Traffic Safety Administration ("NHTSA") in the administration of these tests. [R. p. 29] Appellant also made a pre-trial motion to dismiss based upon defects in the video recording because the video equipment's focus malfunctioned during one of the FST's. [R. p. 29] The trial judge denied both of these motions but allowed Appellant's counsel to cross-examine the arresting officer using the officer's field sobriety training manual regarding the administration and results of the field sobriety test. [R. p. 3]

ARGUMENTS

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial

court's factual findings unless they are clearly erroneous. *Id.* "In criminal appeals from magistrate . . . court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001); S.C. Code Ann. § 18-3-70 (Supp. 2013) ("The appeal [from a magistrate in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law.").

In criminal appeals from the magistrate court, the circuit court is bound by the magistrate court's findings of fact if any evidence in the record reasonably supports them. *See City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct. App. 2013). "Moreover, [q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which [an appellate court is] free to decide without any deference to the court below." *Id.*

I. THIS COURT SHOULD REHEAR THIS CASE BECAUSE ITS OPINION OVERLOOKS THE FACT THAT THE VIDEO IN THIS CASE IS DEFICIENT UNDER S.C. CODE ANN. § 56-5-2953 AND THAT THE ARRESTING OFFICER DID NOT SUBMIT AN AFFIDAVIT PROVING THAT AN EXCEPTION TO THE STATUTE EXISTS.

This Court's opinion cites to the following authorities with regarding to the issue of whether the in-car video violated S.C. Code Ann. § 56-5-2953:

> S.C. Code Ann. § 56-5-2953(A) (Supp. 2015) ("The video recording at the incident site must . . . include any field sobriety tests administered . . . ."); State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." (quoting Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007))); Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("A statute as a whole must receive practical, reasonable, and fair

> interpretation consonant with the purpose, design, and policy of lawmakers." (quoting Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006))); id. at 347, 713 S.E.2d at 285 (recognizing the purpose of section 56-5-2953 "is to create direct evidence of a DUI arrest"); State v. Taylor, 411 S.C. 294, 305, 768 S.E.2d 71, 77 (Ct. App. 2014) (noting prior cases addressing section 56-5-2953 "demonstrate the plain language of the statute does not require the video to encompass every action of the defendant, but requires video of each event listed in the statute");

The citations to *Gordon* and *Roberts* indeed support Appellant's arguments. Specifically, as argued below, evidence was lost in this case because the quality of the video was not sufficient to evaluate the clues that the arresting officer looks for when administering the one-legged stand field sobriety test. Regarding *Taylor*, while it is true that South Carolina jurisprudence does not require the video to encompass every action of the defendant, there is nothing in our jurisprudence that excuses a video of inferior quality if it does not allow a trier of fact to evaluate whether a defendant exhibits the clues that the arresting officer looks for when administering field sobriety tests.

(A) Summary.

If a video violates the provisions of S.C. Code Ann. § 56-5-2953, then it is not automatically fatal to the prosecution's case if the officer submits the affidavit required by the statute. Specifically:

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

S.C. Code Ann. § 56-5-2953(B) (emphasis added).

Here, the video violated S.C. Code Ann. § 56-5-2953 because it becomes blurry during the administration of the FST's from the 44:27 mark until the 46:30 mark, a total of approximately 2 minutes and 3 seconds. The entire recording of the one-leg stand test is distorted, and it is impossible to evaluate Appellant's balance during this test.

However, the officer did not submit such an affidavit. The failure to submit this affidavit did not allow Appellant's counsel to evaluate the propriety of the malfunction or determine whether the violation of § 56-5-2953 was excusable. The failure to submit this affidavit is fatal to the prosecution's case.

(B) Importance of Viewing the Balance Component of the One Leg Stand.

The One Leg Stand ("OLS") is a test of balance. When administering this test, the arresting officer follows the procedures proscribed by the National Highway Traffic Safety Administration ("NHTSA"). In making his pre-trial motion to the municipal judge, and in cross-examining the arresting officer, the arguments and questions revolved around the officer's training manual. [R. pp. 29, 58]

According to the NHTSA manual, the officer looks for four clues:

1. Whether the suspect sways while balancing.
2. Whether the suspect uses arms for balance by raising them more than 6 inches from his or her sides.
3. Whether the suspect hops to maintain balance.
4. Whether the suspect puts his or her foot down one or more times during the 30-second test.

[R. p. 72, ¶ 3A – D] The officer then "grades" a suspect on performance by determining whether the suspect "shows two or more clues or fails to complete the One-Leg Stand." [R. p. 72 ¶ 3] If

a video of a suspect performing the OLS does not allow for meaningful review of these four "clues," then the video does not "include" this FST and violates § 56-5-2953.

In *State v. Gordon*, Opinion 5226 (S.C.Ct.App. filed June 11, 2014), *affirmed as modified*, Opinion 27554 (S.C.Sup.Ct. filed August 5, 2015), this Court ruled that the horizontal gaze nystagmus ("HGN") test required the head to be shown on the video to comply with S.C. Code Ann. § 56-5-2953. In *State v. Gordon*, Opinion 27554 (S.C.Sup.Ct. filed August 5, 2015), the Supreme Court upheld the portion of the opinion imposing such requirement. Specifically, the Supreme Court stated:

> The statute states that the video recording "must include any field sobriety test administered," which necessarily includes the HGN test. Considering the fact that the HGN test focuses on eye movement, common sense dictates that the head must be visible on the video. Accordingly, the circuit court's finding that the head must be visible does not amount to a hyper-technicality, but merely states the obvious. The Court of Appeals did not err in affirming this requirement.
>
> Here, the officer's administration of the HGN test is visible on the video recording. It is undisputed that Gordon's face is depicted in the video; it is axiomatic that the face is a part of the head. The officer's flashlight and arm are visible as he administers the test. Also, the officer's instructions were audible. Thus, the requirement that the head be visible on the video is met and the statutory requirement that the administration of the HGN field sobriety test be video recorded is satisfied. Therefore, the per se dismissal of the charge as discussed in Town of Mount Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011), and City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is not appropriate.
>
> Even if we assume that the video of a field sobriety test is of such poor quality that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge. Instead, the remedy would be to redact the field sobriety test from the video and exclude testimony about the test. If that remedy is applied here, there is still sufficient evidence to present this case to a jury for resolution. The evidence included the breath alcohol analysis report, video of other field sobriety tests, and Gordon's statement that he had consumed four beers.
>
> Neither Gordon nor the State would have been prejudiced by the exclusion of the HGN test video or testimony because of the alleged poor quality of the video. Since the focus of the HGN test is the movement of the eyes, the jury would not have been able to determine if Gordon passed or failed by simply looking at this video. Moreover, the viewing of a video of an HGN field sobriety test has very

> little probative value to a jury because the eyes of the motorist are rarely, if ever, seen.

Here, unlike *Gordon*, the one-leg stand ("OLS") does not focus on eye movement. The OLS's focus, as explained in Appellant's initial brief, is on **balance**, and the jury *would* have been able to determine whether Appellant passed or failed by reviewing a video of sufficient quality. The Supreme Court noted that: (1) the face, which is part of the head, was depicted in the video, (2) the officer's flashlight and arm were visible as he administered the test, and (3) the officer's instructions were audible. So, all of the things required to review the administration and performance of the video for this test were present. With the OLS, as described in Appellant's initial brief, there are four clues that the officer looks for in administering the test: (1) swaying while balancing, (2) using arms for balance by raising them more than 6 inches from his or her sides, (3) hopping to maintain balance, and (4) putting the foot down one or more times during the 30-second test. Of these four clues, it is impossible to determine whether Appellant swayed while balancing or whether he used his arms for balance. It is also very unclear whether he may have been hopping. The only of the four clues that are easy to review from the video in this case is when Appellant's foot was up or down. These factors create a completely different scenario from that in *Gordon*, and the deficient video during the OLS in this case is much more likely to conceal *exculpatory* evidence. While a prejudice analysis is not required for a 56-5-2953 dismissal, the prejudice here in inherent.

This Court should not construe the *Gordon* opinion to state that a video of poor quality does not entitle a criminal defendant to the statutory right to dismissal when the arresting officer fails to submit an affidavit explaining the deficiency. The *dicta* in *Gordon*, if applied at all, should be limited to the HGN test because while the eyes are rarely seen in an HGN video, there is no reason for a defendant's balance to be unidentifiable during the one-legged stand.

During the One Leg Stand ("OLS"), which is the relevant test to this issue, according to the NHTSA manual, the officer looks for the following clues:

A. The suspect sways while balancing. This refers to side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.

B. Uses arms for balance. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.

C. Hopping. Suspect is able to keep one foot off the ground but resorts to hopping in order to maintain balance.

D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.

[R. p. 72]

In other words, the OLS test is a **balance test**. During the incident site video, the blur that last approximately two minutes distorts the video recording and makes it impossible to evaluate Appellant's balance during the test and impossible to evaluate whether Appellant swayed while balancing or used his arms for balance. If the head needs to be seen during the HGN test, then certainly the video needs to be of sufficient quality to evaluate a suspect's balancing during the OLS.

(C) Video in Case at Hand.

The officer is required to "produce the video recording required by [Section 2953]." S.C. Code Ann. § 56-5-2953(B) (emphasis added). The video recording "required by Section 2953" must include "any field sobriety tests administered." If the video recording does not allow for review of the defendant's balance during the OLS, it violates Section 2953.

The municipal judge stated in his return that the "picture was a little out of focus for a minute, but not to the extent you could not see the administration of the tests." [R. p. 3] The municipal judge then stated: "§ 56-5-2953 requires an affidavit if an officer fails to produce a video, which is not the situation in this case. You could still see the administration of the tests at

all times." [R. p. 3] Here, the municipal judge clearly ignored the plain language of Section 2953, which requires not just any video, but a video that "includes any field sobriety tests administered." The municipal judge also focused on whether it showed the administration of the tests, not whether the test properly allowed one to review whether Appellant swayed, hopped, or used arms for balance.

The circuit court on appeal found that "even though it's blurry, you can still see the subject raising his legs on the leg raise." [R. p. 56, lines 12 – 20] However, the circuit court did not address whether the video allowed one to determine (1) whether Appellant swayed while balancing, (2) whether Appellant used arms for balance, (3) whether Appellant hopped to maintain balance, or (4) whether Appellant put his foot down during the test. Appellant raised this issue in his motion to reconsider, which the circuit court denied without hearing. [R. pp. 2, 14]

A viewing of the two-minute portion of the video (44:27 mark until the 46:30 mark) will clearly allow this Court to evaluate whether the video allows meaningful review of whether Appellant swayed or used arms for balance, which should be required for the video to comply with Section 2953. [R. DVD affixed to back cover]

(D) Law Regarding Compliance with § 56-5-2953.

"Our appellate courts have strictly construed section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011). In other words, an inexcusable violation of § 56-5-2953 results in dismissal. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007).

(E) Exceptions.

If an arresting officer is unable to submit a video that complies with § 56-5-2953, the arresting officer needs only to submit an affidavit stating that an exception applies. If the court finds the reason in this affidavit to be acceptable, the court is not required to dismiss the charge on the basis of the 2953 violation. The exceptions can come in two primary forms:

1. The officer may say that the video recording equipment at the arrest site was inoperable and state which reasonable efforts have been made to maintain the equipment in an operable condition.
2. The officer may say that it was physically impossible to produce the video because of emergency medical treatment or other exigent circumstances.

S.C. Code Ann § 56-5-2953(B).

The requirements imposed on law enforcement by § 56-5-2953 are of minimal burden, if any. In *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013), this Court reviewed the sufficiency of an affidavit submitted in a case where no video was provided. In *Humble*, the arresting officer submitted an affidavit that stated "[a]t the time of the defendant's arrest, or probable cause determination, the video equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition." Testimony from the officer at trial suggested that the police did not adequately respond to complaints concerning the equipment. The municipal judge in *Humble* dismissed the case, finding that the police department's "efforts" were not enough. After the circuit court reversed, this Court reinstated the municipal judge's decision:

> Contrary to the circuit court's reasoning, dismissal of Humble's DUI charge does not set precedent that only routine maintenance and preventative measures constitute reasonable efforts. Rather, the determination of whether reasonable efforts were made to maintain the video equipment in an operable condition is a determination to be made on a case-by-case basis. To borrow a quote from Michel de Montaigne, we find that in its most basic sense, the municipal court merely

> found "saying is one thing and doing is another." Quite simply, the statute requires reasonable efforts. The municipal court essentially found as a fact that saying something is broken while refusing to pay for a repair visit is not enough. The "reasonable efforts" language of the statute requires some "doing," and refusing to pay for repair visits evades the intent of the statute and is not "doing" enough to constitute reasonable efforts to maintain the video equipment in an operable condition. We find the limited record before us supports the decision of the municipal court and, thus, the circuit court erred in reversing the municipal court.

Humble, 402 S.C. at 620, 472 S.E.2d at 21.

Here, despite this Court clearly placing the burden on the prosecution to show what *reasonable* efforts were made to maintain the equipment, the State offered no affidavit, testimony, or other evidence regarding the condition of the video recording equipment, whether this issue has occurred in the past, or attesting to whether any reasonable efforts have been made to maintain the equipment.

Appellant is not requesting a precedent be set that any time a video is deficient, the case should result in a dismissal. Appellant is requesting that the State be held to its burden of proving the existence of an exception. The issue of whether efforts were reasonable is not reached here because there is no evidence of any efforts. Had the officer simply provided an affidavit stating that his camera had not exhibited problems in the past and stated the frequency and nature of any inspections, the trial court could have made a determination whether reasonable efforts were made to maintain the equipment.

Looking back to this Court's citation in its opinion to *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), in *Taylor*, the defendant was off-camera for a period of time while the officer repositioned his vehicle. This Court reversed the dismissal, but distinguished *Taylor* from the case at hand. Notably, this Court stated in *Taylor*:

> Although the video omitted Taylor from its view during the repositioning of Tolley's patrol vehicle, none of the field sobriety tests administered and none of the other statutory requirements occurred while she was out of the camera's view.

Taylor, 411 S.C. at 306, 768 S.E.2d at 78 (emphasis added).

Here, unlike *Taylor*, the defective portion of the video occurs during a field sobriety test. There are no exigent circumstances giving rise to an exception, and the arresting officer did not submit an affidavit even acknowledging the defect in the video resulting from the equipment's condition or stating what reasonable efforts were made to maintain it.

Accordingly, because the State did not prove any exception applies regarding the violation of § 2953, this Court should reverse the trial judge's ruling and dismiss the charge against Appellant or remand the charge for its dismissal. To the extent this Court believes that a factual finding was made by the municipal judge or the circuit judge, this Court should disregard those findings because they ignored the importance of the "balance" evaluation of the OLS and because they are clearly erroneous. Under no interpretation of the viewing of the 2-minute portion of the video can one claim that he or she can evaluate Appellant's balance or whether Appellant hopped, swayed, or used arms for balance during the test.

(F) Remedy.

Because the arresting officer did not produce a video that complies with 2953 and did not provide an affidavit giving any basis for an exception, the remedy is dismissal of the charge. *See State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755, 2014 S.C. App. LEXIS 89, 2014 WL 1614854 (S.C. Ct. App. filed Apr. 23, 2014) (reversing a magistrate's court conviction for DUI when the video tape did not appear to show the defendant's head during the administration of the HGN); *State v. Henkel*, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013) (dismissing a charge of DUI because the video did not include the first Miranda warning or either field sobriety test); *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013) (upholding a municipal judge's grant of a motion to dismiss where the police department did not use reasonable efforts to

maintain its video recording equipment); *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011) (reversing a magistrate's decision to suppress evidence due to the failure to provide a video tape of the breath test procedure and holding that dismissal was the proper remedy); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011) (affirming a circuit judge's decision to dismiss a DUI case due to a prolonged failure of a police department to equip its patrol cars with video cameras); *City of Rock Hill v. Suchenski*, 646 S.E.2d 879, 374 S.C. 12 (2007) (upholding a dismissal of a DUI charge where the video did not include the third field sobriety test administered).

II. THE LOWER COURT ERRED IN DENYING THIS APPEAL BECAUSE IT DID NOT REVIEW THE FIELD SOBRIETY TESTING PROCEDURE DEFICIENCIES RAISED BY APPELLANT BEFORE DECIDING THAT THE ISSUE IS ONE FOR A JURY.

In its opinion, this Court cites to the following authorities regarding the issue of whether the field sobriety tests should have been admitted into evidence before the jury:

> State v. Frazier, 357 S.C. 161, 165, 592 S.E.2d 621, 623 (2004) ("A trial court's admission or rejection of evidence is generally reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law."); State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004) ("This [c]ourt reviews [Rule 403, SCRE,] rulings pursuant to the abuse of discretion standard, and gives great deference to the trial [court]'s decision.").

Appellant does not contest these cases for their proposition that the admission of evidence is left to an abuse of discretion standard. However, Appellant believes this Court overlooked the fact that the judge did not weigh the evidence but instead found that the evidence was simply a question of fact for the jury. In other words, the municipal judge did not perform his role as gatekeeper.

Regarding this issue, the municipal judge's return states:

> The defendant first contends that the trial judge erred in admitting evidence of

> field sobriety tests administered to appellant where the arresting officer substantially deviated from his training while administering the field sobriety tests. The appellant goes through each test and how he asserts the officer in the case deviated from the test.
>
> The appellant's argument fails because the appellant's attorney was allowed to question the officer who testified in this case on his administration of each test using the training manual. Furthermore, whether or not the officer conducted the test properly and whether this compromised the results of the tests were factual questions for the jury. The training manual is not a statute or law.

[R. p. 3]

This ruling implies that the admission of field sobriety testing should *always* go to the jury. Similarly, the circuit judge hearing the appeal seemed to rule that field sobriety tests are automatically admissible regardless of whether the arresting officer deviates from the proscribed testing manner. [R. p. 46, line 16 – p. 48, line 5] In other words, without hearing about the alleged deficiencies in this case, the circuit judge decided that the officer's compliance is for the jury to decide.

Both the municipal judge and the circuit judge overlooked the court's role as the gatekeeper of evidence and did not consider the prejudicial nature of an incorrectly administered test. Rule 403, SCRE. Appellant asks this Court to remand this case so that the municipal judge will review the field sobriety tests prior to their admission into evidence with an eye towards whether the arresting officer strictly or substantially complied with the standardized testing procedures and to conduct a 403 prejudice analysis. Specifically, Appellant requests this Court to remand the case and direct the municipal judge to make a finding regarding whether the arresting officer strictly or substantially complied with standardized testing procedures.

South Carolina has never issued an opinion regarding the admission of field sobriety tests when the arresting officer is accused of administering them incorrectly. Probably the closest case to lend guidance is *State v. Sullivan*, 310 S.C. 311, 316, 426 S.E.2d 766 (1993). In *Sullivan*,

the South Carolina Supreme Court held "that testimony relating to the HGN test was admissible in the present case because the HGN test was used in conjunction with other field sobriety tests to establish evidence of DUI." (emphasis added). There is logic to this requirement. The NHTSA manual provides:

- HGN, by itself, was 77% accurate
- WAT, by itself, was 68% accurate
- OLS, by itself, was 65% accurate
- By combining HGN and WAT an 80% accuracy can be achieved.

[R. p. 60]

While Appellant does not concede the accuracy of these percentages, they indicate that the entity that created the "standardized field sobriety tests" finds greater utility in the tests when they are administered as a test battery and not in isolation. Our Supreme Court in *Sullivan* agreed. The next logical step is to not just require the entire test battery to be performed together, but to require the tests to be administered correctly. Ohio has taken that step.

In *State v. Homan*, 732 N.E.2d 952, 89 Ohio St.3d 421, 2000-Ohio-212 (Ohio 2000), the Ohio Supreme Court discussed the importance of requiring that a police officer strictly comply with NHTSA standards when administering a field sobriety test. In *Homan*, the Court began its discussion by stating: "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.* at 424. The Court later noted: "The small margins of error that characterize field sobriety tests make strict compliance critical." *Id.* at 425. Although the Ohio Supreme Court only required substantial compliance (1) in cases regarding an administrative regulation that required urine specimens to be refrigerated when not in transit or under examination and (2) in cases regarding Department of Health regulations in regard to breathalyzer testing being admissible at trial, the Court distinguished field sobriety testing from these scenarios and required strict compliance of the

administration of an FST. *Id.* at 425. (emphasis added).

The *Homan* Court further reasoned:

> When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable. In an extensive study, the National Highway Traffic Safety Administration[1] ("NHTSA") evaluated field sobriety tests in terms of their utility in determining whether a subject's blood-alcohol concentration is below or above the legal limit. The NHTSA concluded that field sobriety tests are an effective means of detecting legal intoxication "only when: the tests are administered in the prescribed, standardized manner[,] * * * the standardized clues are used to assess the suspect's performance[, and] * * * the standardized criteria are employed to interpret that performance." National Highway Traffic Safety Adm., U.S. Dept. of Transp., HS 178 R2/00, DWI Detection and Standardized Field Sobriety Testing, Student Manual (2000), at VIII-3. According to the NHTSA, "[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised." *Id.* Experts in the areas of drunk driving apprehension, prosecution, and defense all appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures. See *e.g.*, 1 Erwin, Defense of Drunk Driving Cases (3 Ed. 1997), Section 10.06[4]; Cohen Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.01.

The *Homan* Court went on to discuss how a small mistake by the arresting officer can affect reliability of a test:

> The small margins of error that characterize field sobriety tests make strict compliance critical. Here, for example, Trooper Worcester's failure to use the full four seconds when checking for the onset of nystagmus, while seemingly trivial, rendered the results of this test unreliable. When a police officer moves the stimulus too quickly, he or she runs the risk of going past the point of onset or missing it altogether. NHTSA Student Manual, at VIII-8.

Notably, as a result of the Supreme Court of Ohio adopting the rule requiring "strict compliance" when administering field sobriety tests, the Ohio legislature subsequently amended

[1] "The NHTSA has been a leader in the study and development of field sobriety testing policy and procedure. The NHTSA's standardized test manuals form the basis for manuals used by state law enforcement agencies across the country. Taylor, Drunk Driving Defense (5 Ed. 2000), Section 4.3.2." *Homan*, fn 4.

the statute to require only "substantial compliance" before tests may be admitted into evidence. Ohio Rev. Code 4511.194(C)(1). Here, Appellant requests this Court impose a "strict compliance" standard upon remand, or in the alternative, a "substantial compliance" standard and to require a trial judge to perform a Rule 403 prejudice analysis before allowing the evidence to be seen or heard by the jury.

Other jurisdictions have made similar rulings with regard to the horizontal gaze nystagmus ("HGN") test. While none to date have either accepted or rejected the rule of strict compliance rule set forth in *Homan* with regard to all field sobriety tests, a majority of jurisdictions have rejected admission of the horizontal gaze nystagmus test ("HGN") when the arresting officer does not properly administer the test.

"The established rule in [Montana] is that the proper evidentiary foundation for admission of the results of an HGN test is a showing that the test was properly administered by the officer, along with expert testimony demonstrating a scientific basis for the reliability of the test results." *State v. Geiser*, 2011 MT 2, ¶ 10, 359 Mont. 95, 248 P.3d 300 (emphasis added); *see also State v. Chavez-Villa*, 2012 MT 250, ¶ 15, 366 Mont. 519, 289 P.3d 113.

In *State v. O'Key*, 321 Or. 285, 322-23, 899 P.2d 663, 689 (1995), the Supreme Court of Oregon held that "subject to a foundational showing that the officer who administered the test was properly qualified, the test was administered properly, and the test results were recorded accurately, HGN test evidence is admissible in a DUII proceeding to establish that a defendant was under the influence of intoxicating liquor[47] but, under ORS 813.010(1)(a), is not admissible to prove that a defendant had a BAC of .08 percent or more."

A majority of other jurisdictions have arrived at similar conclusions. *See*, e.g., *State v. Zivcic*, 229 Wis.2d 119, 128, 598 N.W.2d 565, 570 (1999) ("[a]s long as the HGN test results are

accompanied by the testimony of a law enforcement officer who is properly trained to administer and evaluate the test," evidence is admissible); *Ballard v. State*, 955 P.2d 931, 940 (Alaska App.1998) (holding police officer may testify to results of HGN testing if government establishes officer adequately trained in administration and assessment of test); *Williams v. State*, 710 So.2d 24, 32 (Fla.App.1998) (noting "HGN test results are generally accepted as reliable and thus are admissible into evidence once a proper foundation has been laid that the test was correctly administered by a qualified [person]"); *State v. Taylor*, 694 A.2d 907 (Me.1997) (holding proper foundation for admission of HGN test is evidence that officer or administrator of test is trained in procedure and test properly administered); *People v. Berger*, 217 Mich.App. 213, 551 N.W.2d 421 (1996) (holding because HGN test satisfied Frye standard, only foundation necessary for introduction of evidence regarding HGN test is evidence that test properly performed and officer administering test qualified to perform it); *Schultz v. State*, 106 Md.App. 145, 664 A.2d 60 1995) (holding HGN results admissible in future cases without reference to Frye standard if officer properly qualified and test conducted properly); *People v. Leahy*, 8 Cal.4th 587, 882 P.2d 321, 34 Cal.Rptr.2d 663 (1994) (holding once Frye standard met in published opinion regarding HGN, prosecution not required to submit expert testimony to jury, and police officers are sufficient to testify to results of HGN tests); *State v. Hill*, 865 S.W.2d 702 (Mo.App.1993), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518 (Mo.1997) (holding when properly administered by adequately trained personnel, HGN test admissible as evidence of intoxication); *State v. Armstrong*, 561 So.2d 883 (La.App.1990) (proper foundation for admitting HGN test is showing officer trained in procedure, certified in its administration, and procedure properly administered).

For the reasons set forth in Appellant's initial brief, and with support of the other

jurisdictions that have imposed the same standard regarding the HGN test, this Court should remand this case for a new trial so that the trial judge can review the officer's administration of the field sobriety tests in a suppression hearing.

This Court should not be concerned with the fact that any given case could become more difficult to prosecute because an officer did not correctly administer the test. This Court should be concerned with the importance of a police officer following protocol before he or she can use a test to criminally convict a defendant. These tests are difficult for the average human, regardless of alcohol consumption.

As stated in the initial brief, there are numerous instances where the arresting officer did not follow his own training in administering the field sobriety tests. The municipal court judge should not have simply allowed the jury to consider this evidence but instead should have imposed a strict or substantial compliance test before allowing the tests to be seen by and testified to before the jury.

The circuit judge erred in not considering the prejudicial nature of the field sobriety tests against any probative value. *See State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013) (finding the reversible error when the lower court failed to conduct a 403 balancing test on the record when considering the admissibility of evidence of prior bad acts of the defendant). Here, it is clear from the municipal judge's return that he did not perform any such balancing test before allowing the evidence to be heard by the jury. Further, when Appellant's counsel attempted to argue this issue to the circuit judge, he was immediately instructed to move on to the next argument. [R. p. 9, lines 1 – 7]

These tests are not observations of the officer that a jury can equally appreciate, such as whether the subject was unsteady on his or her feet, was boisterous, understood questions, drove

erratically, had bloodshot eyes, or slurred words. These are objective tests that have objective results based on the observation of certain clues.

Our Supreme Court has discussed the importance of proper testing procedures in other contexts. In *State v. Parker*, 271 S.C. 159, 245 S.E.2d 904 (1978), the Court reviewed the propriety of the admission of a breathalyzer test and stated:

> The requirement of laying a foundation for the introduction of the results of chemical tests is universally recognized.
>
> 'The party offering the results of any of these chemical tests [for drunkenness] must first lay a foundation by producing expert witnesses who will explain the way in which the test is conducted, identify it as approved under the statute, and vouch for its correct administration in the particular case.' Cleary, McCormick on Evidence ((2d) ed., 1972), § 209 at p. 513. See, also, 29 Am. Jur. (2d), Evidence § 830.

Parker, 271 S.C. at 162. (emphasis added) Here, there is clear evidence that the officer did not correctly administer the tests, and the circuit judge did not consider the testing deficiencies.

The prejudicial nature of these tests is clear. The results generally come before a jury through the testimony of the arresting officer where the officer will describe in detail all of his or her training and experience, and the officer will then discuss the "clues" he observed pursuant to this training. Finally, the officer will grade a defendant as either "passing" or "failing." The probative nature arguably comes from the experimentation over time conducted by NHTSA in an attempt to classify subjects as intoxicated. To automatically allow field sobriety tests to go to the jury ignores the required 403 analysis and can allow overly prejudicial evidence to be before the jury.

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

his training, (3) the officer attempted to "fail" Appellant because Appellant did not follow the officer's instructions even though the officer did not follow the instructions in the training manual, (4) *Homan* provides sound reasoning and guidance regarding the test for admitting field sobriety tests at a DUI trial, (5) the field sobriety testing is a primary component of probable cause and jury consideration, and (6) any probative value of the field sobriety tests was compromised, this Court should remand this case for a new trial and instruct the municipal judge to assess for strict compliance with testing procedures by the arresting officer before admitting the tests into evidence. In the alternative, this Court should impose a "substantial compliance" standard. In the second alternative, the Court should instruct the municipal judge to conduct a Rule 403 prejudice analysis and consider any deficiencies of the arresting officer during the testing procedure.

CONCLUSION

This Court should dismiss the charge of driving under the influence against Appellant because the video recording of the incident site does not properly capture the One Leg Stand field sobriety test in that one cannot evaluate Appellant's balance due to the defective recording of this test. Specifically, it cannot be determined whether Appellant swayed or used arms for balance during this test, and potentially exculpatory evidence was lost. Additionally, the arresting officer did not submit any affidavit stating that the camera did not work properly at the time and that reasonable efforts have been made to keep it in good working order.

If this Court does not dismiss the charge of driving under the influence, it should remand for a new trial because the municipal judge admitted the field sobriety tests into evidence without considering the degree of compliance by the arresting officer with the testing protocol. As shown throughout this brief, the office deviated from the proper administration protocol on

numerous occasions and marked "failing" clues against Appellant for things for which the officer omitted instructions. Upon such remand, this Court should direct the municipal judge to consider whether the officer strictly complied with the procedures, or in the alternative, substantially complied. At a minimum, the municipal judge should be required to conduct a thorough 403 prejudice analysis while considering the deficiencies in the officer's administration of the tests.

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Dated:_____

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2014-001871

City of North Charleston.....Respondent,

v.

John Barra, ...Appellant,

PROOF OF SERVICE

I hereby certify that I have served the ***Petition for Rehearing or Rehearing En Banc*** on the following by Facsimile and United States Mail, postage prepaid, on June 23, 2016, addressed as follows:

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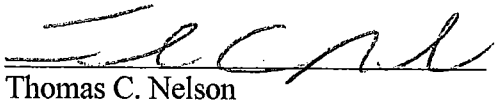

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Dated: June 23, 2016

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June 23, 2016

VIA FACSIMILE: (803): 734-1890 and U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

Re: **City of North Charleston, Respondent v. John Barra, Appellant**
Case No.: 2014-001871

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of ***Petition for Rehearing or Rehearing En Banc along with Proof of Service*** for the above-referenced matter. Please file the originals and return a clocked copy to this office in the envelope provided. Should you have any questions, please feel free to contact our office.

By copy of this letter, I am serving all counsel of record. Thank you for your attention to this matter.

With kind regards, I am,

Sincerely,

Shaunda M. Smith

Shaunda M. Smith
Paralegal

/sms
Enclosure(s): As stated

cc: Joseph Kaiser, Esquire (***via facsimile: (843) 745-1082 and U.S. Mail***)