THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge
Barbara Jo Wofford-Kanwat, Magistrate Court Judge

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Appellate Case No. 2015-002576
Circuit Case No. 2015-CP-40-03354

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Gerald J. Nagy, Appellant
v.
The State Of South Carolina, Respondent

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# FINAL BRIEF OF APPELLANT

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## I.
## INTRODUCTION

This case appeals an order of the Circuit Court in *Motion Of Appeal From Magistrates Court*, Circuit Court case no. 2015-CP-40-03354, which was filed based on a Magistrate ruling in *Uniform Traffic Ticket*, #G-144808. This specifically involves three related items. The first is a ruling on Appellants *Motion To Compel, Or Exclude, Or Dismiss In The Alternative* in #G-144808. The second is a judgment rendered in #G-144808 on June 04, 2015. The third is a judgment rendered in 2015-CP-40-03354 on November 06, 2015.

Appellant prays that this Court consider the following Issues on Appeal, and reverse:

## II.
## STATEMENT OF ISSUES ON APPEAL

1. In the initial criminal trial did the Magistrate failure to properly consider and apply all Supreme Court of The United States and Supreme Court of South Carolina rulings on evidentiary disclosure?
2. In the initial criminal trial did the Magistrate failure to properly consider and apply all applicable Rules of Court and Summary Court Benchbook?
3. Does a Magistrate have the right to ignore their own rulings pertaining to evidentiary disclosure of specific material during the conduct of a criminal trial?
4. Did the Circuit Court Judge err in upholding by failing to consider these three previous items?

## III.
## STATEMENT OF THE CASE

On November 14, 2014, Appellant was issued a moving violation. (R.p.2). On

November 24, 2014, Appellant filed a discovery motion with Respondent for items Appellant believed were material to a defense. (Rule 5, SCRCrimP / R.pp.4-7). Appellant received no response and on January 12, 2015, filed a *Motion To Compel, Or Exclude, Or Dismiss In The Alternative*. (R.pp.8-9).

Appellant was present at court on February 03, 2015, the scheduled date of the initial trial. In a pre-trial meeting Respondent was reminded of their failure to comply with discovery, Respondent agreed to postpone, and to inform the court of the agreement. Appellant was unaware of Respondents plans to do no such thing, Appellant left the premises, and was tried in absentia. Based on the disingenuous actions of Respondent and subsequent filings, Appellant was granted an Ishmael Order based on his *Motion For Retrial*. (R.pp.25-31).

Prior to trial, Respondent was allowed time in order to comply with discovery. On March 28, 2015, limited discovery material was produced by Respondent in the form of their *Reciprocal Rule 5 For Discovery And Disclosure Of Evidence*. (R.p.31). Respondent provided almost none of the requested material and failed to address almost all of the items Appellant had requested. Further, Respondents evidence disclosure form did have areas for inclusion under discovery of many of the items requested, but these items were not noted nor were they produced. As part of Respondents production process, Appellant observed it was the intent of Respondent to coerce an agreement that essentially stated Respondent had fully complied with discovery, when they had not. As part of this disclosure document, and while not properly served, Appellant agreed to comply with Respondents request for disclosure in *Appellants Notice To Court And Defendants Answer To Discovery*. (R.pp.33-34).

On June 14, 2015, prior to the commencement of the second criminal trial, oral arguments were heard on Appellants motion to compel. (R.pp.8-9). The Magistrate issued a

ruling prior to the commencement of the trial. (R.p.65). During the course of the motion hearing (R.pp.54-65), Appellant was often not allowed to fully present arguments nor fully answer questions proffered by the Magistrate, and was repeated cut off mid-argument by the Magistrate who would often then change the topic under discussion. At no point in the hearing did Respondent itemize any part of the discovery requests which they had failed to address. Additionally, when Appellant tried to address the specific items requested which were material to the defense, the Magistrate focused on only one of the items and then did not allow for a full discussion of even a single request. Essentially, the Magistrate accepted the blanket statement from Respondent that the discovery request had been fully answered with Respondents statements such as **"...I advised him of everything I have to..."** and **"...at that point in time, he was given everything he, the law required me to give to him."** (R.p.61, R.p.32). Appellant did inform the Magistrate of US v. Agurs (United States v. Agurs, 427 US 97 – 1976). The ruling failed to consider this very relevant case and only referenced Rule 5. (Rule 5, SCRCrimP). Appellant then made a request to exclude certain evidence. The relevant portion of the exchange (R.p.65):

> **GERALD NAGY:** Oh, yes Ma'am I don't have issues with that, but I would ask that anything that he not specifically present, that was specifically asked for be excluded from evidence.
>
> **JUDGE WOFFORD-KANWAT:** Ok. Well at this point I believe that uh, that motion um, would be appropriate, given the concerns, but I don't have any indicator that he is presenting any evidence that he's not disclosed to you, so if that does arise during the trial you can object at that time. Ok?

On June 14, 2015, immediately after the motion hearing, the second criminal trial commenced. In the opening testimony of Respondent, evidence that was requested under discovery (R.p.6 - speedometer certification) but not disclosed, and should have been prohibited based on the ruling of the Magistrate, was introduced. Pursuant to Rule 5, SCRCrimP along with

Appellants *Motion For Disclosure Of Evidence*, Appellant objected. The relevant portion of the exchange (R.p.66):

> **GERALD [NAGY]:** I would object to that testimony Your Honor based on his speedometer reading, if uh, if he is entering that in evidence.
>
> **JUDGE WOFFORD-KANWAT:** Ok, in response..
>
> **TROOPER OXANDABOURE:** (inaudible)
>
> **JUDGE WOFFORD-KANWAT:** No response? Ok, over ruled, go ahead.

As part of the continuing testimony Respondent then introduced evidence pertaining to RADAR evidence. Again, Appellant objected. Again, the objection was overruled. The relevant portion of the exchange (R.pp.66-68):

> **TROOPER OXANDABOURE:** [redacted] ...to initiate my radar to be able to get a reading on him because the radar doesn't work at the same speed.
>
> **GERALD NAGY:** Objection Your Honor. Uh, he has not mentioned anything about radar up to this point and I would like all of that excluded from testimony.
>
> **JUDGE WOFFORD-KANWAT:** Any response?
>
> **TROOPER OXANDABOURE:** I advised him I got him on radar in the car.
>
> **GERALD NAGY:** Your Honor, (it) was asked for specifically under the discovery agreement, or the discovery request, I received nothing about the radar, make, model, serial number, certification, service records, anything and he didn't even mention that he didn't use it or anything.
>
> **JUDGE WOFFORD-KANWAT:** Can you point exactly to that in your motion for disclosure? The make, model, serial number.
>
> **GERALD NAGY:** Yes Ma'am, uh, motion, item number 8, manufacture name, model, serial number, service record, owner's manual, operator's manual, etc. certification of traced (NIST) standard, chain or custody, making sure that he had that unit (inaudible) um, so I think that pretty much covered everything about the radar.
>
> **JUDGE WOFFORD-KANWAT:** And how is that relevant.
>
> **GERALD NAGY:** Well, he was just testifying that he allegedly confirmed my speed, he used the term, lock on 80, and I was just making a note that um, I'm not sure what

lock on 80 is but um, if it's dealing with radar um, anything dealing with radar should be excluded from evidence, Your Honor.

**JUDGE WOFFORD-KANWAT:** Ok. Do you have anything you want to add?

**TROOPER OXANDABOURE:** No. When we talked the first time, I told him I got him on my radar, (inaudible) according to the Golden Eagle II at that time. Um,

**GERALD NAGY:** Your Honor...

**TROOPER OXANDABOURE:** (inaudible)

**JUDGE WOFFORD-KANWAT:** Mr. Nagy...

**TROOPER OXANDABOURE:** Um, I believe in Rule 5 it says stuff that's in my position uh, paperwork, the manuals and stuff, we don't have that manual and stuff, that's all ....

**JUDGE WOFFORD-KANWAT:** You don't have access to that?

**TROOPER OXANDABOURE:** That's CIA. The manuals for that are at our headquarters or at our shop, I'm sorry.

**JUDGE WOFFORD-KANWAT:** Ok.

**TROOPER OXANDABOURE:** Um...

**JUDGE WOFFORD-KANWAT:** I'm looking at Rule 5 when it's information subject to disclosure um, to me I think you're arguing that documents intangible objects are (inaudible) reports, examinations or tests would be my um, impression from your argument, Mr. Nagy and I think in my reading of the statute and applying it to your Rule 5 request I don't believe that this um, one of those things that should be excluded, so I'm going to deny the motion to suppress the information in my reading of Rule 5. Go ahead.

Respondent continued to offer testimony in reference to the RADAR evidence and upon completion, the Magistrate elicited testimony from Respondent in violation of prescribed procedures for the conduct of a trail in criminal cases. Summary Court Benchbook - Criminal Section, H. (10), Paragraph 13, states: "**During the trial, the judge should refrain from questioning the witnesses, unless the witness' response is ambiguous, in which case the judge may ask questions until the ambiguity is eliminated.**" Appellant objected and was

again overruled. The relevant portion of the exchange (R.pp.69-70):

**JUDGE WOFFORD-KANWAT:** And what's your training? What's your training for speeding?

**GERALD NAGY:** Objection Your Honor.

**TROOPER OXANDABOURE:** Uh...

**JUDGE WOFFORD-KANWAT:** Based on what grounds?

**GERALD NAGY:** I, he hasn't offered anything on that, and I don't think there's any ambiguity in what he is testified to so far.

**JUDGE WOFFORD-KANWAT:** So you're objecting to me asking that question? Is that my understanding?

**GERALD NAGY:** Yes Ma'am, and even him presenting that because again I did ask for any type training etc., other than his radar uh, training that he received in the academy um, there wouldn't be anything, I don't think, that should be included in evidence. I believe I have um, under number 6, of my motion, certifications, ongoing requirements related skills, talents , whatever um, I, I don't believe that should be included as evidence, in the trial, Your Honor, unless he brings it up at which time I will be able to cross examine him on that.

**JUDGE WOFFORD-KANWAT:** Ok, well I appreciate that objection um, magistrate rules allow for the judge in Pro Se cases, so in cases where there is not an attorney to ask questions when they are relevant. So I asked that question, I believe that was an issue, that document submitted to you um, through Rule 5 Brady and so I asked that question and I'm overruling your objection. Go ahead.

Appellant was found guilty.

On June 05, 2015, Appellant filed both a *Notice Of Intent To Appeal* and a *Motion Of Appeal From Magistrates Court*. (R.p.39, R.pp.40-41).

On July 31, 2015, the initial appeal hearing was scheduled and all parties were in attendance. The presiding Circuit Court Judge, the Honorable L. Casey Manning, began to review the paperwork for the hearing and upon discovering that the Magistrate had not yet filed a return, ordered a continuance. (R.p.3).

On August 24, 2015, the Magistrate finally filed a return. (R.pp.44-52).

On November 06, 2015, the Appeal was heard before Circuit Court, the Honorable Tanya Gee presiding. Early in the hearing, Appellant presented the basis for issues on appeal. (R.pp.76-77). This included the Brady v. US (Brady v. United States, 397 U.S. 742 - 1970), and US v. Agurs (United States v. Agurs, 427 US 97 – 1976). Joseph Berry, Esq. then presented for Respondent. The sole basis for his rebuttal was State v. Proctor (SC v. Proctor, 358 S.C. 417 – 2004). The Judge upheld.

## IV.
## ARGUMENT

1. **THE JUDGMENT OF GUILTY SHOULD BE REVERSED OR REMANDED FOR RETRIAL WITH RESTRICTIONS AS THE MAGISTRATE FAILED TO IN IT'S DUTY TO ABIDE BY APPLICABLE HIGHER COURT RULINGS.**

In US v. Agurs, SCOTUS stated in part:

> **In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.** (United States v. Agurs, 427 US 97 – 1976).

The ruling failed to consider this very relevant case and only referenced Rule 5. (Rule 5, SCRCrimP). Respondent, for all intents and purposes, simply ignored virtually all of Appellants requests for production. (R.p.32) The Magistrate aided and abetted this by

failing to allow Appellant to fully discuss items specifically requested under discovery.

2. **THE JUDGMENT OF GUILTY SHOULD BE REVERSED OR REMANDED FOR RETRIAL WITH RESTRICTIONS AS THE MAGISTRATE FAILED TO CONSIDER AND APPLY APPLICABLE RULES OF COURT, AND COURT PROCEDURES DELINEATED IN THE SUMMARY COURT BENCHBOOK.**

During the hearing on Appellants motion regarding discovery, the Magistrate simply focused on Rule 5, and then only in a very limited and overly narrow application thereof. (R.pp.8-9, R.pp.58-59, R.p.64, Rule 5, SCRCrimP). While there was an initial hearing on Appellants discovery motion, Appellant was not allowed to fully present his arguments. During the conduct of the trial, the Magistrate solicited direct testimony from Respondent in direct conflict with instructions in the Summary Court Benchbook - Criminal Section, H. (10), Paragraph 13. When Appellant objected the Magistrate justified her actions with:

> **"Ok, well I appreciate that objection um, magistrate rules allow for the judge in Pro Se cases, so in cases where there is not an attorney to ask questions when they are relevant. So I asked that question, I believe that was an issue, that document submitted to you um, through Rule 5 Brady and so I asked that question and I'm overruling your objection. Go ahead."** (R.pp.69-70).

Respondent was not Pro Se, rather the Appellant, and in ruling this way the Magistrate completely perverted the intent of the nonbiased stance required of a Judge.

3. **THE JUDGMENT OF GUILTY SHOULD BE REVERSED OR REMANDED FOR RETRIAL WITH RESTRICTIONS AS THE MAGISTRATE FAILED TO ABIDE BY HER OWN RULING PERTAINING TO DISCOVERY MATERIAL.**

At the end of the initial motion hearing, the Magistrate ruled to exclude from evidence in chief at trial any material not specifically allowed by her decision or otherwise produced. (R.p.65). During the conduct of the trail, when Appellant objected to the introduction

material that the Magistrate excluded in her own ruling, the Magistrate proceeded to overrule her own ruling.

4. **THE JUDGMENT OF GUILTY SHOULD BE REVERSED OR REMANDED FOR RETRIAL WITH RESTRICTIONS AS THE CIRCUIT COURT FAILED TO CONSIDER ANY ITEM ON APPEAL OTHER THAN RULE 5**

In her ruling, the Circuit Court Judge upheld the lower court ruling by stating in part:

**"...there was no Rule 5 or Brady violation and that the Magistrate did not make an error of law..."** (R.p.92).

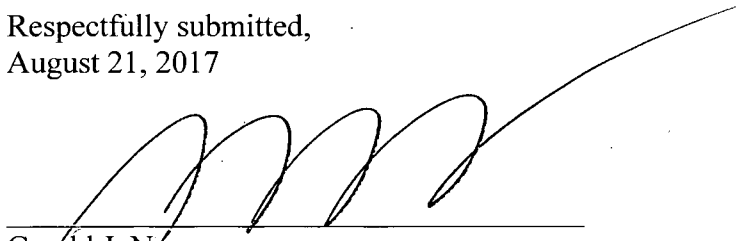
Further, while Respondent (Joseph Berry, Esq.) argued that some material was **"...far too vague, far too broad..."** (R.p.85), both Respondent and the Judge failed to consider other items material to the Appellants defense. If Respondent thinks items are too vague and broad, then Appellant believes that position should have been raised by Respondent in the original hearing. Further, in the only case that Respondent cited, State v. Proctor (SC v. Proctor, 358 S.C. 417 – 2004), at least there was evidence available.

## V.
## SUMMARY AND PRAYER

In summary, it is Appellants belief that in the Magistrate Court, the outcome seemed predetermined. The attitude of "We'll give you a fair trail, then we'll hang you" seemed to be the prevailing theme. Appellant was not allowed to fully discuss his requests and was essentially told to be quiet whenever the hearing went in a direction that might be contrary to the above quoted attitude. When some discussion was allowed concerning a very limited number of requested items, Respondent mostly stated that requested material was not available. However, during the course of the trail much so-called "not available" material was introduced and the Magistrate allowed it to be presented over the Appellants objections and in conflict with her own

ruling. This travesty was compounded with the judgment from Circuit Court. Therefore, Appellant respectfully requests that this Honorable Court reverse the original conviction from Magistrates Court, or remand for re-trial with an order disallowing any material specifically requested but not disclosed under discovery be excluded from use as evidence in chief at trail.

Respectfully submitted,
August 21, 2017



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