

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of General Sessions

S.C. SUPREME COURT

Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-002770

The State, ~~Appellant,~~ *Respondent*

v.

Steven Hoss Walters, Jr.,Petitioner.

APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2014-002770

THE STATE,

Appellant,

vs.

STEVEN HOSS WALTERS,

Respondent.

RECORD ON APPEAL

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SATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2014-GS-46-03405

STATE OF SOUTH CAROLINA)
vs.) TRANSCRIPT OF RECORD
STEVEN HOSS WALTERS, JR.)

DECEMBER 16, 2014
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE LEE ALFORD

APPEARANCES:

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I-N-D-E-X

WITNESSES:

NO TESTIMONY TAKEN

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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1 THE COURT - Your Honor, before you we're bringing
2 the case of State vs. Steven Hoss Walters. He is charged
3 with DUI second offense under .10. The Indictment is 2014-
4 GS-46-03405. The State has one minor pre-trial motion,
5 Your Honor, and is ready to proceed. That motion is that
6 the Indictment actually says that Mr. Walters had a blood
7 alcohol concentration under .10, and the State would move
8 to have that amended to say refusal. Mr. Walters did not
9 give a breath sample. Just a matter of form, Your Honor.
10 If it's not necessary ---

11 THE COURT - Form. Form. What say you, Mr. Boyd?

12 MR. BOYD - Your Honor, at this point I'm not
13 going to object to an amendment. I think by raising it the
14 State could just re-indict and we're ready to go to trial,
15 hear the case, so but I'm not going to object to amendment
16 of the Indictment.

17 THE COURT - Well, you know, that's certainly
18 material to the Indictment, but I -- if you have no
19 objection to them amending it, I'll allow them to amend it.
20 Strike through while having a blood alcohol level of less
21 than .10?

22 MR. PORTER - Yes, Your Honor. Yes, please.
23 Amend the language to reflect refused to give a blood
24 alcohol sample.

1 THE COURT - Well, y'all do that. I'm not writing
2 the Indictment ---

3 MR. PORTER - Yes, Your Honor.

4 THE COURT - I'll strike through what's not -- but
5 you put -- you don't -- put in the language you want.

6 MR. PORTER - Your Honor, should I show the
7 language to ---

8 THE COURT - Sure, absolutely.

9 (WHEREUPON, DISCUSSION IS HELD BETWEEN COUNSEL
10 WHICH WAS NOT REPORTED.)

11 THE COURT - Has that been to the Grand Jury? I
12 guess it has if y'all are going to trial.

13 MR. PORTER - Yes, Your Honor, it has.

14 THE COURT - I started to say you could just re-do
15 it, but you don't want to ---

16 MR. PORTER - We'll just strike -- we will strike
17 any mention, Your Honor, of the -- of the sample or blood
18 alcohol concentration and just say under the influence of
19 alcohol and/or any other drug combination.

20 THE COURT - You're not going to say refused
21 breath sample. You're not putting that in here.

22 MR. BOYD - No, sir.

23 THE COURT - Striking that.

24 MR. PORTER - No, sir, Your Honor. We were going
25 to just not mention the refusal in the Indictment

1 THE COURT - All right. Okay. Anything else?

2 MR. PORTER - No, Your Honor.

3 THE COURT - Anything on behalf of the defense?

4 MR. BOYD - Your Honor, I have a pre-trial motion.

5 We discussed that motion in chambers. I've provided you a
6 written copy and we're ready to go forward on that. I
7 think the Court's going to want to view the video-tape.

8 THE COURT - You gave me a ---

9 MR. PORTER - Your Honor, the State has provided a
10 motion in response to that. I have a copy of that as well
11 if you'd like to have another copy.

12 THE COURT - He's going to get my copy off my
13 desk.

14 MR. PORTER - Here's my motion in response, Your
15 Honor. The State will proffer the officer and the video
16 and reserve any argument on the motion until after that
17 proffer, Your Honor, if it please the Court.

18 THE COURT - All right, are you ready to proceed?
19 We need to see the video?

20 MR. PORTER - Yes, Your Honor. Your Honor, for
21 the purposes of the record, my name is Daniel Porter. I
22 represent the State of South Carolina. The Defendant is
23 represented by James Boyd. Sitting with me in the case is
24 Aaron Hayes. I would like to call first Lance Corporal

1 Mike McAdams of the South Carolina Highway Patrol. We'll
2 proffer the officer first, Your Honor, if that ---

3 THE COURT - Okay.

4 MR. PORTER - --- and then proceed to show the
5 video.

6 THE COURT - Okay.

7 MIKE MCADAMS, AFTER BEING FIRST DULY SWORN,

8 TESTIFIES AS FOLLOWS -

9 DIRECT EXAMINATION

10 BY MR. PORTER -

11 Q Good afternoon, Trooper McAdams. First I'd like to
12 start, is there -- was there a video recording of your
13 arrest of Mr. Walters?

14 A Yes, there is.

15 Q Did that video start upon activation of blue lights?

16 A Yes, it did.

17 Q Did that include any field sobriety test that you
18 administered?

19 A It does include all tests.

20 Q Did it show the arrest of the subject?

21 A It does.

22 Q Did it include Miranda Rights being read upon arrest?

23 A Yes, it does.

24 Q Have you viewed a copy of that recording before the
25 trial?

1 A Yes, I have.

2 Q And how did you mark that copy?

3 A I initialed it.

4 Q Okay.

5 MR. PORTER - Your Honor, at this point we would
6 ask the defense to stipulate this is a true and accurate
7 copy. We can show the video out of the camera, but we have
8 it queued up as well.

9 MR. BOYD - I'll stipulate.

10 THE COURT - Stipulation. Okay.

11 MR. PORTER - Thank you, Your Honor.

12 Q When you're on a stop such as this one, how would you
13 characterize the environment out on the roadway?

14 A Well, one just has to be very careful about the stop
15 and performing a field sobriety test so as to do it safely
16 in a manner so no one gets struck by any on-coming traffic.

17 Q Would you characterize it as a safe environment?

18 A If it's done properly, yes.

19 Q How do you insure the safety of yourself and the
20 subject?

21 A Well, I try to keep as many lights as I can like my
22 headlights and my tail lamps and along with the blue stripe
23 lights on top. As many lights as I can helps let the
24 traffic know that I am stopped here on the shoulder.

1 Q And during this video, did you offer any field
2 sobriety tests?

3 A Yes, I did.

4 Q What test were those?

5 A The three, and they would be -- the first one was the
6 horizontal gaze nystagmus test. The second one was the
7 nine-step walk and turn test, and the third one was the
8 one-legged stand test.

9 Q Thank you. How does the environment affect the manner
10 in which you position the subject?

11 A Well, I have to position them so as to keep them
12 safely on the shoulder there and not in the path of on-
13 coming traffic, also make sure that the guard rail on the
14 right side doesn't interfere with any of the field sobriety
15 testing.

16 Q And when you offer the horizontal gaze nystagmus test,
17 how did you position Mr. Walters?

18 A I positioned him with his back towards the camera so
19 that his face was facing his vehicle.

20 Q And why would you do that?

21 A Because we're taught in training that blue lights or a
22 lot of bright lights flashing in somebody's face can
23 interfere with the horizontal gaze nystagmus test and cause
24 false positives.

1 Q And why did you leave those flashing lights on during
2 the test?

3 A It was just to have as much light as I could to alert
4 the on-coming traffic that I am stopped here and to make it
5 as safe as possible.

6 Q And for clarification, is that the -- the area of the
7 stop was on I-77 mile marker 84, I believe. Correct?

8 A That's right.

9 Q Is that a well-lit area of the highway?

10 A Not particularly well-lit, no.

11 Q How wide is the shoulder of that portion of I-77?

12 A If I had to guess I'd say somewhere between six to ten
13 feet.

14 Q Okay. Moving on to the walk and turn test that you
15 mentioned, how does the roadway environment affect the
16 manner in which you position the suspect?

17 A Well, again, I wanted to keep him as straight a line
18 as possible, that way there's no chance of him getting near
19 lane number four where traffic is, and also there's no
20 chance that he's going to run out of room and hit the guard
21 rail.

22 Q So that's why -- you position the Defendant how in
23 that situation?

24 A Pretty much directly facing my car.

1 Q How does the subject's ability to stand affect your
2 positioning of the Defendant? Stability ---

3 A Well, I also have to make sure if he were to lose his
4 balance he's not going to be in danger falling into on-
5 coming traffic.

6 Q And how would you characterize the ability of the
7 subject and this arrest on that night with respect to his
8 stability?

9 A Well, since I did see a lot of clues in the nine step
10 walk and turn test, I had to make extra careful attention
11 that he's far enough away from the traffic lane that we're
12 doing this test safely.

13 MR. PORTER - Thank you, Trooper McAdams. I
14 believe the defense has stipulated that this is a true and
15 accurate copy, Your Honor. At this point we'd like to
16 publish it to Your Honor.

17 THE COURT - You may publish.

18 MR. PORTER - Your Honor, the State moves this
19 video in as State's evidence 1.

20 THE COURT - Admitted without objection.

21 (WHEREUPON, VIDEO IS ENTERED INTO EVIDENCE AS
22 STATE'S EXHIBIT NUMBER 1.)

23 MR. PORTER - Thank you, Your Honor.)

24 (WHEREUPON, VIDEO IS PLAYED FOR THE COURT)

1 Q Trooper McAdams, is that the full version of the field
2 sobriety test that you administered on the roadside that
3 night?

4 A Yes, it is.

5 Q And we just watched you read Miranda. Correct?

6 A Yes, we just did.

7 Q And at that point he is under arrest.

8 A At that point he is.

9 Q We watched you at one point back up from the
10 Defendant's car after he was positioned in the roadway.

11 Why did you do that?

12 A Because we've been told that it's important to have
13 all nine steps captured on camera and wanted to make sure
14 none of the steps were blocked by the hood of my car.

15 Q So you made every effort to comply with what you've
16 been instructed to as the current status of law.

17 A That's right.

18 MR. PORTER - Thank you, Your Honor. Please
19 answer any questions that Mr. Boyd may have.

20 MR. BOYD - A few questions.

21 CROSS EXAMINATION

22 BY MR. BOYD -

23 Q You stated that you had him -- you turned the head to
24 his car because you'd been trained that blue lights or
25 flashing lights can cause nystagmus?

1 A They can skew the results. That's right.

2 Q Okay. And is that in your training manual?

3 A I'm not really sure at this time. I know I've been
4 told that verbally. I'm not sure if that's in the NHTSA
5 manual or not.

6 Q Who told you that?

7 A I don't have a name for you. I would say that's
8 something that I hear around the highway patrol office and
9 whatnot is that you don't want to have flashing lights in
10 their eyes.

11 Q Were you taught that in any of your actual training of
12 the courses you took?

13 A As I recall at the Criminal Justice Academy they --
14 when we did simulated traffic stops, I remember as I recall
15 always having the person's back to the patrol car.

16 Q And did -- my question to you was, were you told or as
17 part of your training that the flashing lights can cause
18 nystagmus?

19 A I don't remember exactly where I've heard that. I
20 just know in my seven years on the road I've heard that
21 more than once.

22 MR. BOYD - That's all the questions I have.

23 THE COURT - Counsel let me -- go ahead if you
24 have questions ---

25 MR. PORTER - One more question.

1 RE-DIRECT EXAMINATION

2 BY MR. PORTER -

3 Q With respect to your viewing the test, does this
4 positioning offer you a better view? Is there -- does --
5 do the flashing lights interfere with your viewing the
6 Defendant's or the subjects at this point not any nystagmus
7 present?

8 A Yes, it could, because at the very least a lot of
9 flashing lights is going to make somebody squint, and if
10 they're squinting, I'm not going to have a good view of
11 the eyes, and it's going to mess with the test.

12 Q The purpose would be two-fold then, both for your
13 observation, as well as accuracy.

14 A That's right.

15 THE COURT - I wanted to see the first part of
16 this nystagmus test again. You might want to look that up.

17 MR. PORTER - Yes, Your Honor.

18 (WHEREUPON, PORTION OF VIDEO IS REPLAYED FOR THE
19 COURT.)

20 MR. PORTER - Would you like us to keep playing
21 the video, Your Honor?

22 THE COURT - No. I just wanted to see that part
23 again. Go ahead.

24 MR. PORTER - At this point the State has no
25 further questions for the witness, Your Honor.

1 MR. BOYD - No further.

2 THE COURT - Thank you, sir. You can stand down.
3 Anything further?

4 MR. PORTER - No, Your Honor.

5 THE COURT - Counsel?

6 MR. BOYD - Your Honor, my -- I'd filed --
7 previously filed a motion. The -- my position is, Your
8 Honor, that the head being facing away, you cannot see the
9 full nystagmus test, particularly there are several things
10 you can't see. One thing, according to my understanding of
11 the instructions, the object is supposed to be 12 to 15
12 inches from the person. You cannot tell when he initially
13 starts how far his finger is from the head, so that's a
14 crucial part of the test right there. You can see the
15 finger go out and -- on either side. There's a period
16 during the test where the finger disappears in front of the
17 head, and this is a relatively short test, probably last
18 only about a minute, but during that period of time I
19 counted about, approximately, six seconds in which the
20 finger couldn't be seen at all because of the head -- it
21 was at -- totally in front. It goes out a period again and
22 then disappears again in front of the head for an
23 additional period of time, which I don't think it was quite
24 as long as the first but some period of time. There are
25 periods in there in which the finger is in front of the

1 head when the finger can't be seen at other times also. I
2 submit that that does not comply with the statute in the
3 case law in Gordon that the head must be seen. It doesn't
4 show a complete test as required by the statute. That has
5 been interpreted by the Courts. Your Honor, I can also
6 make some argument about some other things concerning the
7 other tests, but that's my argument on the eye nystagmus
8 test.

9 THE COURT - All right, if you want any other
10 arguments on record.

11 MR. BOYD - Yes, sir. Your Honor, as far as the
12 walk and turn test, the -- as my client takes the walk and
13 turn test going toward the patrol car, he takes more than
14 nine steps and it does disappear after that point, however,
15 I would submit his going farther than he's supposed is part
16 of the -- it's not supposed to be part of the test, but it
17 ends up being part of the test, and you cannot see the feet
18 during that period of time. You cannot see when he turns
19 around at that time. In addition, you can -- at -- there's
20 some points that you can't tell whether his heels are
21 touching his toes, that that I submit is part of the test.
22 There is a -- I think in the walk and turn test there's two
23 basic -- two of the clues or one of them is whether the
24 person's keeping a straight line or not, and, frankly, in
25 some portions of the test he fails that part of the test.

1 He doesn't keep a straight line. That's separate and apart
2 from the clue of whether his heels are touching his toes,
3 and I submit because of positioning, one cannot see that
4 either. So I would submit that the walk and turn test also
5 fails to meet the standards of the full test.

6 THE COURT - Well, let me say this, your argument
7 on the heel to test is totally out in the blue. I -- no
8 merit to that argument whatsoever. I can clearly see the
9 officer placed him the right distance for him to do the
10 test. Now, you're out on the side of the road with a
11 little short shoulder there, you know, preferably it
12 should've been moved away from that guard rail and up where
13 there's more room, but maybe the officer didn't feel like
14 he could do that. I don't know why -- but I think if you
15 didn't have the guard rail there you might have a little
16 more room to work with, but that's all he had when he was
17 doing the test, a little a narrow shoulder there. Very
18 hard to do any of these tests and that except maybe the
19 stand -- the one-legged stand, but there's no question to
20 what he positioned him such with the camera that if he had
21 properly performed the test and gone nine steps and made
22 his turn and come back nine steps, you could've seen every
23 bit of it. Okay? That's all that matters. The fact that
24 he disobeyed the instructions and went 10, 11 and 12 steps
25 and gotten out of the -- a little bit out of the camera

1 view, that's not a violation. You see the nine. Okay?
2 And the fact that he didn't follow the instruction is not
3 something that the officer could do anything about it. It
4 is a failure to follow instruction, which is one of the
5 grounds upon which they can grade them insofar as that
6 field sobriety test. If he didn't follow the
7 instructions, that's one of the things they look for in
8 determining whether there's a, you know, a person's under
9 the influence. So there's no merit to that. He came up
10 the nine steps, he went 10, 11 and 12, he did something
11 back -- just after he got out of the camera range he did
12 something there, but then he came back up into camera range
13 and tried to do a turn and he about fell down when he tried
14 to make that turn, so he certainly didn't make that turn
15 correctly when he was turning around and come back; he lost
16 his balance and almost fell there, and so he -- then he
17 walked back. Now, I could see heel to toe. You can't see
18 in a night light with that video camera and the light that
19 you have, you cannot see the heel and toe perfectly, but
20 you could tell well enough that he was doing that pretty
21 well heel to toe fairly straight, but he fell off the line
22 a couple of times. He lost his balance and fell off the
23 line a couple of times and so -- and that's part of the
24 test and you could see all of that. Seeing him when he
25 begun, seeing -- and if he had followed instructions, he

1 certainly -- all of it would've been on the -- on the film.
2 You can't anticipate that he's going to keep on going when
3 he gets to the nine, so, you know, I don't have a problem
4 with that. I think that's properly done and I think it's
5 everything you need to see on camera is there. I can see
6 the heel to toe and I can see the line he was walking. I
7 also saw that he lost his balance a couple of times,
8 stepped off the line to get his balance, which is something
9 that they look at. I also see that he didn't follow
10 instructions of the officer, which is also something they
11 use to judge whether somebody passed the test or not,
12 whether they followed instructions, understood instructions
13 or followed them. So that part I'm not worried about. The
14 only concern I got is -- and thought he did fairly well --
15 the officer might not agree -- on the one-legged stand,
16 because people have trouble with that one anyway, but he
17 managed to get I think 13 steps. There's a lot people have
18 trouble getting 13 on one foot, so I thought he did pretty
19 good on that. He didn't -- they like for you to go about
20 30 counts, but a lot of people can't go 30 counts, but I
21 think he did pretty good with 13, because most of them I've
22 seen don't make it to 13 if they get charged, and so that
23 one's okay. The only one, the nystagmus test is the one
24 that gives me a little bit of a problem, because what I've
25 gone by is, it's interesting, the officer says he -- he

1 puts the guy's back of his head facing him, and now he's
2 facing the flashing light, the officer is, and he's looking
3 into the eyes and checking, and he says that the flashing
4 lights may affect nystagmus, that jerking of the eyes,
5 whatever. He's saying that. But yet most of the defense
6 attorneys may come in, they want the person looking
7 directly at the camera, and they -- all kind of appeals
8 have been filed saying you couldn't get a full face view of
9 the person when the test is being administered, therefore,
10 the test was invalid and the case has to be thrown out.
11 That's what they say. It's what defense attorneys say, and
12 -- but most of the ones I've seen, the officers and the -
13 stations the Defendant face to face with a proper distance
14 with a properly positioning of the Defendant and they do it
15 side-to-side. They're looking at each other in the face
16 and this from the side, so the camera's looking at them,
17 the Defendant is here and the officer is here, and the
18 camera is here, and he's looking this way, and you can see
19 every movement that the officer administering the field
20 sobriety test makes. So you can see if he's doing it
21 properly. Comes out far enough, holds it long enough,
22 comes back in, holds it enough, goes out far enough, holds
23 it long enough, you can see all those things. You can't
24 see the eyes. I told somebody I've never seen the eyes. I
25 think if you -- if you have an officer with one of these

1 lapel cameras or something, you probably could, but you --
2 with the video camera out of a police car from 20 feet away
3 or so, you're not going to be able to see the eyes even if
4 the person was looking at the camera, and so but from the
5 side you can't tell either. But at least from the side you
6 can tell that they're in a proper position, how far the
7 officer is away from the Defendant, whether he's taking his
8 hands to the proper lengths, holding it to the proper
9 amount of time and holding it back here in the proper
10 amount of time and that sort of thing, whether he runs the
11 test long enough, because if you've got that view, then
12 someone else who is viewing that would be able to testify
13 whether the officer did it right or not. Okay? That's the
14 concern I have, and I've had people come in where experts
15 testify the officer didn't hold it out here long enough,
16 that he was supposed to make more passes than he made and
17 he didn't hold it here long enough and to be able to get a
18 correct reading and that sort of thing, but if you can't
19 see the officer's hand -- okay -- the whole time, I don't
20 know how you can critic that. You have to guess at what he
21 did when he was in front of his face, and it's not -- of
22 course, the officer can testify as to what he did, but you
23 can't really -- nobody can cross examine him and say, well,
24 it looks like here you didn't hold it long enough. You

1 can't see that. Now, so that's the concern I've got in
2 this case.

3 MR. PORTER - I appreciate that, Your Honor. I
4 would like to respond if you -- if you ---

5 THE COURT - Sure.

6 MR. PORTER - In this situation I would argue --
7 the State would argue that the same problem is presented if
8 you position the Defendant such that he is perpendicular to
9 -- facing perpendicular to the line sight, because the
10 logical argument then is, well, we cannot tell exactly how
11 far out he is gone, because you are looking directly into
12 the line of travel of the test, so that you are - you're
13 basically looking down a line which looks like a point.
14 You cannot see the end of that line or the beginning. All
15 you can see is that point as you're looking through, so the
16 problem is presented either way, and that I believe ---

17 THE COURT - But you can the -- you're right. The
18 argument can be presented any way, and we getting all kind
19 of arguments on appeal. I'm getting them all from
20 Magistrate's Court, City Courts. I hear them on appeal
21 during Common Plea Non-Jury. I heard four week before last
22 over there. And it's all on that kind of basis. Two of
23 them are the nystagmus test. Two of them were on the
24 datamaster room. In those cases I affirmed them all on
25 appeal, but that is an issue they're raising, but the thing

1 is, two of them are on the nystagmus -- but you could see
2 the hand throughout. Okay? You could see the hand. Now,
3 you can argue, then you can question the officer, well, how
4 far out were you here, doesn't look like -- but you can't
5 tell exactly how far out, but you can see the whole test.
6 The hands are visible the whole time and whether he's got a
7 light -- you know, holding a light and what -- they're both
8 visible the whole time. At least you can see that. Here
9 with the head blocking it out, you can't see all that, and
10 that's -- that's -- you know a part of that test, so -- and
11 that's what gives me a problem. It goes up on appeal --
12 these things are getting reserved like a heartbeat.

13 MR. PORTER - Well, Your Honor, the current -- the
14 current interpretation of whether an HGN test is
15 sufficiently recorded with respect to 56-5-2953(A) is State
16 vs. Gordon, and that test, specifically, directed the
17 Magistrate Court to make a finding that the head was
18 visible on camera. It was not a positioning of the head.
19 It was not any of that. It was, is the head visible such
20 that the subject we -- the point from which any evidence
21 comes, the head of the subject is visible on camera and it
22 can be viewed by the finder of fact at trial. In this
23 situation, Your Honor, I think from any -- from any three
24 hundred and sixty --- unless you have a three hundred and
25 sixty degree view of the Defendant at all times, there will

1 always be a ground against which to impeach the submitted -
2 - the video for saying, well, from this angle we can't see
3 this aspect; from this angle we can't see this aspect. In
4 this situation, the officer as proffered by the State has
5 given reasons that in his training and his experience he
6 positioned the Defendant in such a manner. Further, Your
7 Honor, if you saw at the very end of the video that was
8 offered, the Defendant was very unstable. It is practical
9 to place the Defendant such that the vehicle, the trooper
10 vehicle is behind the Defendant, so that if he becomes
11 unsteady he can fall onto ---

12 THE COURT - Counsel, cut that off. You know
13 better than that. That's the most ridiculous argument I've
14 ever heard.

15 MR. PORTER - I apologize, Your Honor, but my
16 original -- my point that I ---

17 THE COURT - He positioned him so he can fall on
18 the police -- come on, please. Look, I understand what
19 you're saying, what you're trying to do, but the issue is
20 he could've placed him like this -- if he'd placed him like
21 this you got no problem. This is the first time I've ever
22 heard -- as a matter of fact, I've heard defense attorneys
23 try to ask officers, isn't that blue light and all that's
24 flashing in his face, won't that affect the nystagmus, and
25 they say no. This is the first officer I've heard testify

1 that it will affect the nystagmus, and not only that, you
2 couldn't do a side-view even, where you're looking at the
3 officer and not looking straight at the lights. Here
4 you've got to look away from the lights but the officer
5 then is looking into the lights, you know, flashing lights.
6 So that's the first argument that I've heard that the
7 flashing light will affect nystagmus. First time I've
8 heard that in all of these years, and that's the first one
9 I've had where if I -- if I was looking at the back of the
10 head while they were doing the nystagmus, the first one that
11 I've seen. Okay? And so I'm not criticizing anybody. I
12 know you're -- the officer was working in a very narrow
13 area there. There's no reason why he couldn't have done it
14 at least this way. Now, I've had appeals that say in the
15 face of the -- the Defendant had to be facing the camera,
16 which would be directly into the flashing light. I don't
17 think you have to go that far. I think a side view where
18 you could see the officer doing the test is plenty. I
19 think that's sufficient, and that's the way I've ruled, but
20 where you're looking at the back of the head where you
21 can't see the whole hand, -- now, I'll be honest with you,
22 be honest with you -- and I don't mind putting this on the
23 record, because I've put it in an Order before, the Supreme
24 Court has ruled -- I don't agree with the Supreme Court on
25 that issue. My feeling is that if you can see, you know, a

1 test or if a test is not run -- done properly or you can't
2 see it all, then you should get rid of that test and go
3 with what you have and let the jury decide it on what you
4 have. The Supreme Court says no, if there's any problem
5 with any part of the -- a video, they toss the whole case;
6 I don't agree with that, and -- of course, you've got a
7 minority opinion, which includes the Chief Justice, which
8 would agree with my view of it, but we're not in the
9 majority; that's the problem and my -- kind of hoped that
10 they would maybe take another look at this and maybe look
11 at it in a different way. I don't know if they will or
12 not. Maybe all these appeals that are floating down on
13 their doorsteps might cause them to take another look at
14 it. But right now that's the law that I'm bound by, and
15 that's what I have to go by. These are statutory, statutes
16 are requirements, and unless the Defendant -- normally in a
17 statutory situation unless the Defendant can show some
18 prejudice, then the case doesn't get tossed. In a
19 constitutional violation a case can get tossed, but
20 shouldn't be, but that's the position of Chief Justice and
21 one other Justice takes, but it -- but they were in the
22 minority, and so I have to go with what they say. Now,
23 what -- anybody got a copy of Gordon so I can see exactly
24 what it said. I don't think it's going to apply this case.

25 MR. PORTER - Yes, Your Honor, I do have ---

1 THE COURT - I've got it back so -- here it is
2 right here on the computer. Let me look at it.

3 (WHEREUPON, DISCUSSION IS HELD BETWEEN THE COURT
4 AND THE LAW CLERK WHICH WAS NOT REPORTED.)

5 MR. PORTER - Your Honor, here's a copy of the
6 Sawyer if you like.

7 THE COURT - Yes, I've got them all back there in
8 a folder.

9 MR. PORTER - Would you like a copy of Sawyer?
10 Your Honor, briefly, I would like to incorporate my memo.
11 I forgot to do that at the beginning of my motion, Your
12 Honor. I apologize. I would like to incorporate that into
13 the record in response to this motion, just to -- for
14 purposes of ---

15 THE COURT - Okay.

16 MR. PORTER - Thank you, Your Honor.

17 (WHEREUPON, THERE'S A PAUSE IN THE RECORD WHILE
18 THE COURT REVIEWS CASES)

19 THE COURT - Anything else you want to say, either
20 side?

21 MR. PORTER - Judge, just for the -- to be clear,
22 Your Honor, the State -- I wanted to make sure that I had
23 expressed -- that the State feels that it's complied with
24 2953(A) that it met the requirements of State vs. Gordon
25 and that State even if the -- if the Court is inclined to

1 find that those are not, in fact, the case, then the State
2 would submit that 2953(B) under the totality of the
3 circumstances test would allow -- should allow the State to
4 proceed forward. It's -- I incorporated it in my motion,
5 Your Honor, at the end that under the totality of the
6 circumstances, Your Honor, the Defendant is not prejudiced
7 by this nystagmus test sufficiently to merit dismissal of
8 the case. The State should be allowed -- as you have
9 mentioned, the Chief Justice mentioned in the Sawyer
10 dissent that the State should be allowed to go forward with
11 the evidence that it has, the trooper's testimony, the
12 Defendant's refusal to provide a breath sample. Both of
13 those are clearly direct evidence of DUI, and at that
14 point, Your Honor, I think we have made the full amount of
15 our arguments.

16 THE COURT - Okay.

17 MR. PORTER - Thank you, Your Honor.

18 THE COURT - Anything else you want to say, Mr.
19 Boyd?

20 MR. BOYD - No, Your Honor, I think I've covered
21 everything.

22 THE COURT - This is what (B) says. I'm looking
23 at (B). It says nothing in this section may be construed
24 as prohibiting the introduction of other evidence in the
25 trial of a DUI charge. Failure by the arresting officer to

1 produce the video-tapes required by this section is not
2 alone ground for dismissal if the arresting officer submits
3 a sworn affidavit certifying that the video-tape equipment
4 at the time of the arrest -- arrest cite was in inoperable
5 condition, stating reasonable efforts had been made to
6 maintain the equipment and certifying there was no other
7 operable breath test facility available in the County, that
8 all evidence submits a sworn affidavit certifying that it
9 was physically impossible to produce the video-tape because
10 the person needed emergency medical treatment or exigent
11 circumstances existed. That's not what we have here.
12 We're don't have a missing the video-tape in this case or
13 portions of video-tape missing because of exigent
14 circumstances. We don't have it that. Subsection (B) I
15 don't think it applies to the case, and so you're back to
16 (A).

17 MR. PORTER - All right, Your Honor, further on in
18 the statute it reads: Nothing in this section prohibits
19 the Court from considering any other boundaries and for
20 failure to produce a video recording, and Your Honor, the
21 reason that I made that specific mention is, Gordon
22 specifically requires -- it addresses whether the recording
23 -- it -- whether the nystagmus test is recorded in --
24 within definition of 56-5-2953(A), so what we're talking
25 about here is whether the failure to produce the video

1 recording based upon the totality of the circumstances, so
2 in this situation the nystagmus test -- if you're inclined
3 to say that the nystagmus test was not properly recorded,
4 then that is, in fact, that it was -- we're not producing -
5 - the State is not able to produce the video. So you've
6 got ---

7 THE COURT - That's not what -- here's the
8 problem. What does Suchenski say? I've been totally in
9 disagreement with Suchenski ever since it was decided, and
10 I predicted years ago that they would -- when it was --
11 came back before the Supreme Court they'd reverse it, but
12 you know what, they didn't; they affirmed it and much to my
13 dismay. But that's their decision, not mine. And in
14 Suchenski I think you should be able to just take that -- I
15 mean before Suchenski, I think you should just be able to
16 take out that test if you don't think it was properly done
17 or shows everything it should show. You should just be
18 able to take it out and go forward with the totality of the
19 circumstance, everything else, and that's what the Chief
20 thinks, too.

21 MR. PORTER - Yes, Your Honor.

22 THE COURT - But as I say -- and the other member
23 of the dissenting team in Sawyer; however, that's not what
24 Suchenski says and it was ---

1 MR. PORTER - Yes, Your Honor. Suchenski and
2 Sawyer both refused to -- did not -- the Court did not rule
3 on the 2953(B) motion because it was not properly preserved
4 for appeal. Both opinions state that 2953(B) argument was
5 not ---

6 THE COURT - You don't have an argument under (B).
7 That's what I'm trying to tell you. There is no missing
8 tape; there is not missing audio portion; there is no
9 malfunctioning video that an affidavit says reasonable
10 efforts have been made. You don't have anything with
11 regard -- you've got the video, it just doesn't show what
12 it's -- what it should show.

13 MR. PORTER - And that's what -- that's what I am
14 alleging is the failure to produce that the statute
15 contemplates, Your Honor. The nystagmus test is not
16 properly recorded. In Gordon, the Court stated that in
17 order for the -- in order for the test to be properly
18 recorded under 2953(A) -- I admit it is a bit of a
19 legalistic argu -- a word game here on plain, but in 2953 -
20 - the Gordon states for 2953(A) for nystagmus to be
21 recorded, the head has to be visible on camera, otherwise
22 it is not recorded properly under 2953 ---

23 THE COURT - That case stands for that case.
24 That's not -- that's not this case. I mean ---

25 MR. PORTER - Well, that's ---

1 THE COURT - Whether the head is shown or not --
2 they sent it back to determine whether the head was shown
3 on video or not. We don't even know that. One of the
4 allegations was it was not shown, but that -- I think the
5 Circuit Judge made that finding. They said the Circuit
6 Judge on appeal can't make a fact finding, sent it back to
7 the Magistrate and let them make that -- they said the head
8 had to be shown, but it doesn't say just because the head
9 is shown the test is good. That's not what it says at all.
10 It does say the head has to be shown. It's shown here, but
11 in the horizontal gaze nystagmus test it's done from the
12 back of the head is what you see and you can't see -- the
13 problem is you can't see the test fully administered.

14 MR. PORTER - Your Honor, if I may quote from
15 Gordon. The Magistrate is to make factual findings in
16 light of the Circuit Court. In our determination the test
17 must be recorded on camera, specifically for the HGN test
18 the head has to be visible on the recording.

19 THE COURT - Yes.

20 MR. PORTER - So in order for ---

21 THE COURT - That's that case. That has nothing
22 to do with whether the test is being -- you can see him
23 administering the test on the tape. It has to do with the
24 head. They're saying the head wasn't visible when he was
25 doing the test, the head of the Defendant was not visible.

1 You see, you've got the same situation here. If somebody
2 that's running the test and you can see everything they're
3 doing but you can't see the head, then arguably, you know,
4 he's doing what he's supposed to do and it should come in.
5 Okay? But in that case it said you couldn't see the head
6 and can't see the officer administering the test; if you
7 can't see the head it doesn't come in.

8 MR. PORTER - And it was just part -- part of the
9 overall argument I was making in my motion that for -- the
10 HGN test can be removed, the video could go -- there are
11 other remedies available; dismissal is not the appropriate
12 remedy, Your Honor. That's all -- that's the only argument
13 I'm trying to make. I believe it's been made, Your Honor.

14 THE COURT - Well, the Chief Justice would agree
15 with it, and that was the position ---

16 MR. PORTER - I agree with her.

17 THE COURT - --- I had. I'm in agreement with her
18 as well, but you know what, it doesn't matter, because
19 that's not the law, and I've got to follow the law, and the
20 law right now is in a three to two decision is different
21 than that, but I -- I agree with you that you should be
22 able to look at the totality of the circumstances. You
23 should be able to remove a portion of a tape that doesn't
24 meet the test and go with what you do have and let -- and
25 let it be decided on that, or if the alleged violation of

1 the field sobriety video is not -- is not prejudicial to
2 the Defendant, then I still think it comes in if you can't
3 show actual prejudice. I still think it comes in. My view
4 -- but I'm not -- but I'm not the one who's -- I've got to
5 follow what the Supreme Court said, ---

6 MR. PORTER - Yes, Your Honor.

7 THE COURT - --- and that's what I've got to look
8 at. No sense for me to decide it one way and let it go up
9 and get reversed and send it back, you know, and they
10 reverse it and that's the end of it anyway, but I mean --
11 you know, my job is to follow the law and -- to the best of
12 my ability. I may misinterpret it; I don't know, but I'm
13 trying not to. Here's the thing about Suchenski, it was
14 decided by four persons. There were four persons who
15 decided Suchenski, two Circuit Judges sitting in lieu of
16 Justices on the Supreme Court, that being Judge Manning and
17 Judge Johnson who is now deceased who was a Circuit Judge
18 at that time, and then there was acting Chief Justice --
19 let's see -- Waller, Justice Moore and there was a dissent
20 by Justice Burnett, so you had -- the Court -- it's not the
21 usual make-up is what I'm trying to say, because you had
22 two Circuit Judges sitting in lieu of Justices only there,
23 including the Chief Justice when Suchenski was decided.
24 And I thought maybe when they looked at that again -- I
25 didn't really agree with that, but that was the law until

1 they changed it, and lo and behold, they had a chance to
2 change it they didn't do it. And they say, well, you know,
3 we decided Suchenski, and they've changed the law since
4 then, but they didn't put anything in the new law that
5 would overrule or change Suchenski. So therefore, they had
6 to be aware that this had been decided and it was out there
7 and they didn't make any change in the law, therefore, they
8 must agree with our interpretation in Suchenski. That's
9 what they're saying in Sawyer and these other -- so that's
10 where we are. I mean -- so, you know, I have to accept the
11 law as they hand it down. They say if any part of the
12 video-taping strictly construed against the State on this,
13 if any part of it is not -- is not -- is missing or not
14 done correctly, then you've got to throw out the whole
15 case, and that's what Suchenski says. You know, I didn't
16 think that was the law, but it's what I've got to follow,
17 and then Sawyer and two or three other cases have affirmed
18 Suchenski, so -- and the legislature hasn't changed, made
19 any change in the wording of the statute after Suchenski
20 was decided, so I mean where do you -- what can you do? I
21 mean that's where we are. That's the law. That's what I
22 have to follow. My problem is with the horizontal gaze
23 nystagmus test, I would -- if would left up to me and I
24 think the appropriate way to be to take that part of the
25 test out, go forward with everything else. Okay? And let

1 - look at the facts and rule on it that way. That's what I
2 would do. But I think under Suchenski, which is the
3 current law, I have to toss the case. I have to throw it
4 out, dismiss it, because I don't think the horizontal gaze
5 nystagmus test was properly done. I don't think you can
6 see it. I don't mean not properly done. It may very well
7 have been properly done by the officer, but you can't see
8 it being done, and I think that is a violation of the
9 video-taping statute, that you can't see the test actually
10 being administered, so on that I think the Appellate Court
11 would toss this case if it got there. And if they going to
12 toss it when it gets there, I'm going to toss it here.
13 Okay? You still can appeal and they may disagree with me,
14 and you may get to try it again. I don't know. In any
15 event, I just don't -- following the law as I have to
16 follow it, not the way I see it, but the way I have follow
17 it, I don't think that test was properly done -- I don't --
18 so that you could see the actual test being administered,
19 and I think that the test should be done in the matter that
20 you could tell -- you can see it being administered. I
21 don't say you got to see the eyes of the Defendant. I
22 affirmed two cases on appeal a couple weeks ago where the
23 officer was facing the Defendant and administered the test
24 this way, and the appeal was that you couldn't see a full
25 face view of the Defendant, therefore, it wasn't properly

1 taken, and I affirmed the lower Court on that and said, no,
2 you didn't have to show the whole face, along as long as
3 you could show the test being administered so that you
4 could tell whether it's being done right or not, that that
5 was all that was required by the statute, video-tape that
6 and have a full view of the Defendant and the officer, and
7 so that's what I ruled in those cases. I might get
8 reversed in those, who knows, but I -- but that's the ruled
9 on those. I think it's proper. And this -- what's
10 different about this case is, you've got the back of the
11 head to the camera of the Defendant; I can't see the
12 officer's hand a good bit of the time, a finger. I don't
13 know what's going on there; I can't see. You say well, --
14 you know, I can say, well, I know the officer did it right
15 because he -- I'm sure he's trained here, but you can't say
16 that, and so if somebody can't look at that and tell that
17 the test is being administered properly, then it's being --
18 not been properly video-taped, so hopefully -- everybody
19 needs to get their ducks in a row in these things. We're
20 getting way too many appeals from the lower Court. I think
21 this is okay. That facing like this with the camera here,
22 I think that's okay, but I decided two of those that said
23 it was okay. They were on appeal from lower Court. I
24 don't know whether they'll go up or not. If they go up,
25 maybe we'll get a ruling on that and we'll know whether

1 that's acceptable, but I just do not believe if I let this
2 one in -- I mean if I go forward with this one I think
3 there's a very good chance I'll be reversed, so I'm not
4 going to do that. I'm going to try to follow the law, so
5 I'm -- I don't think that test was properly done -- if
6 properly video-taped, not properly done; let me get my
7 words straight. I don't think it was properly video-taped
8 so that you could see it was properly done. Okay? And
9 because of that I'm going to dismiss the case. I don't
10 have any choice I think under the authority of Suchenski
11 that's handed down to me; by precedent I've got to follow
12 it whether I necessarily agree with it or not. So that's
13 where we are. I'm going to dismiss the case.

14 MR. PORTER - Yes, Your Honor.

15 (WHEREUPON, A DISCUSSION IS HELD BETWEEN THE
16 COURT, THE COURT REPORTER AND COUNSEL REGARDING ANY
17 EXHIBITS WHICH WAS NOT REPORTED.)

18 (WHEREUPON, DOCUMENTS MARKED AS COURT'S EXHIBIT
19 NUMBERS 1 and 2.)

20 (END OF TRANSCRIPT)

21

22

23

24

25

Steven Hoss Walters Jr.

#3356

10-21-86

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Form 438
Rev. 9/10

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME Steven	MIDDLE NAME Hoss	LAST NAME Walters
STREET AND NO. Sturgis Rd	CITY Rock Hill	STATE AND ZIP CODE SC 29730
STATE LICENSED SC	DRIVER'S LICENSE NO. 101201816	CDL <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
VEH. LIC. NO. TH1444	STATE SC	MAKE OF VEH. Chevy
YEAR 83	COAL. VEH. AUTO	HAZ. MAT. NOPEL
YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT		
NAME OF TRIAL COURT General Sessions	STREET AND NO. 1675 York Hwy	
DATE OF TRIAL 10/28/14	TIME OF TRIAL 0430	CITY AND STATE AND ZIP CODE York SC 29745
VIOLATION - COURT APPEARANCE REQUIRED DUI 2nd offense		VIOLATION SECTION NO. 56-5-2930
OWNER OF VEHICLE Walters	DATE OF ARREST 7/13/14	
ADDRESS OF OWNER Rock Hill SC	DATE OF VIOLATION 7/13/14	
BAIL DEPOSITED Jail	NAME OF ARRESTING OFFICER MG McAdams	
RACE W/M	DESCRIPTION OF ACCUSED 10/27/86 5'8 1/2 151 LB	COUNTY York
DATE BAIL RECD. 20	BY	ROCKET NO. 46
CASE BEFORE MAGISTRATE <input type="checkbox"/> MUN. COURT <input type="checkbox"/>	BADGE 558	
CIRCUIT COURT <input type="checkbox"/> FAMILY COURT <input type="checkbox"/> FEDERAL COURT <input type="checkbox"/>	TIME OF VIOLATION 0530	
NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE.	WEATHER Clear	
DEFENDANT: DID NOT APPEAR <input type="checkbox"/> APPEARED <input checked="" type="checkbox"/>	MILES 84	
NOLLE PROSSD. <input type="checkbox"/> DISPOSITION GUILTY	CITY Fort Mill	
FORFEITED BOND <input type="checkbox"/> PLED: NOLO CONTENDERE <input type="checkbox"/>	Lat 35003680	
TRIAL BY: TRIAL JUDGE <input type="checkbox"/> JURY <input type="checkbox"/>	Long 80581440	
VERDICT OF TRIAL IF ANY GUILTY <input type="checkbox"/> NOT GUILTY <input type="checkbox"/>	OFFENSE CODE 99	
JAIL SUSPEND <input type="checkbox"/> FINE <input type="checkbox"/> AMT. COLLECTED <input type="checkbox"/> AMT. SUSPENDED <input type="checkbox"/>	B.A. LEVEL refuse.	
COMMITTED TO: Vehicle Searched <input checked="" type="checkbox"/> Arrest as Result of Collision <input checked="" type="checkbox"/>	DATE 11/20	
CERTIFIED CORRECT	H 018841	

TRIAL COURT COPY

DOCKET NO. 2014-GS-46- 03405

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

40

WITNESSES

SCHPMcAdams

The State of South Carolina

County of York

Defendant

COURT OF GENERAL SESSIONS

November 6, Term 2014

I hereby appear in my own proper person and plead guilty to the within indictment or to

ARREST WARRANT NUMBER

H018841

THE STATE

Defendant

vs.

Witness:

STEVEN HOSS WALTERS Jr.

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

TRUE BILL

Indictment for

DRIVING VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS

SC Code: 56-5-2930
CDR Code: 3356

VERDICT

Rebecca W. Meares
Foreperson of Grand Jury
Date: 11/6/14

Foreperson of Petit Jury
Date:

A.42

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

At a Court of General Sessions, convened on November 6, 2014, the Grand Jurors of York County present upon their oath:

DRIVING VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS

The Defendant, Steven Hoss Walters, did in York County, South Carolina, on or about July 13, 2014, drive a vehicle while under the influence of alcohol and/or any other drug or a combination of drugs and/or substances which cause impairment and while having a blood alcohol level of less than .10, to the extent that his faculties to drive are materially and appreciably impaired; such not being the first offense within a period of ten years including and immediately preceding the foregoing date, all in violation of Section 56-5-2930, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)	IN THE MAGISTRATE COURT
)	SIXTEENTH CIRCUIT COURT
COUNTY OF YORK)	
)	
State,)	Ticket No.: H018841
)	
Plaintiff,)	
)	
v.)	MOTION TO DISMISS
)	
Steven H. Walters, Jr.,)	
)	
Defendant.)	

The above named Defendant, through his undersigned attorney moves the Court to dismiss the above entitled matter. The grounds for this Motion are as follows:

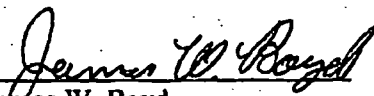
1. On July 13, 2014, the Defendant was arrested for DUI. The Defendant was given a several field sobriety test. One of the tests that were given to the Defendant was the Horizontal Gaze Nystagmus Test (HGN). During the HGN the Defendant's head is turned from the camera so that only the back of his head is visible. As a result, his face is not visible and only a partial view of the movement of the pen is shown.

2. The Defendant was also given a Walk and Turn Test. On the video the view of the Defendant's feet is blocked during the last few steps by the patrol car. During the Walk and Turn Test the Defendant is positioned such that it cannot be determined whether or not the Defendant is touching heel to toe.

South Carolina Code Annotated Section 56-5-2953(A)(1)(a)(ii) requires the incident site video to include, "include any field sobriety test administrated". The Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. In the present case the State

failed to comply with the video taping requirements with regard to the HGN and the walk and turn test. Therefore the Defendant's performance, an important part of the test was not videotaped. The remedy for non-compliance of Section 56-5-2953 is dismissal of the case. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 323, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007).

FOR ALL THE ABOVE REASONS the Defendant moves the Court to dismiss the above entitled charge.


James W. Boyd
Attorney at Law
1544 Ebenezer Road
Post Office Box 36425
Rock Hill, SC 29732
(803) 328-2600
ATTORNEY FOR DEFENDANT

Rock Hill, South Carolina
December 11, 2014

STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF GENERAL SESSIONS
) OF THE SIXTEENTH JUDICIAL CIRCUIT

) Indictment: 2014GS4603405

The State,

) **SOLICITOR'S RESPONSE TO MOTION**
) **TO DISMISS**

v.

Steven Hoss Walters Jr.

FILED
2015 APR 27 PM 4:17
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC
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The State, through the undersigned attorney, responds to the defendant's motion to dismiss as follows:

The defense filed a motion on December 11th, 2014, to dismiss the indictment against Mr. Walters for failure to comply with the video recording requirements of S.C. Code Ann. §56-5-2953. The State asserts that the video recording of Mr. Walters at the incident site complies with the current requirements under South Carolina law. The State further asserts that dismissal is not the appropriate remedy.

The current video recording statute that governs this motion includes the following language: "The video recording at the incident site must...include any field sobriety tests administered..." S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) (emphasis added). In *State v. Gordon*, the Court of Appeals interpreted what the statute requires for compliance. The court held that "...if the actual tests cannot be seen on the recording, the requirement [of videotaping] is pointless," and that a defendant's head must be shown during the HGN (horizontal gaze nystagmus) test in order for that field sobriety test to be recorded. *State v. Gordon*, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014). The court remanded the case to the magistrate court with

instructions for the magistrate to make specific findings as to whether the video recording captured the defendant's head.

Applying *Gordon* reasoning to the current case, the State has complied with the statute. The defendant states two grounds for dismissal, objecting to the recording of both the HGN and WAT (Walk and Turn) tests. This response will address both in turn.

The State asks that the court deny the motion with respect to the HGN test and find that the test was sufficiently recorded within the meaning of the statute. The video shows the defendant's head on camera. In addition, the Trooper can be seen administering the test. The video recording statute as interpreted by *Gordon* does not, and should not require the State to show the defendant's eyeballs twitching. The video recording satisfies the requirements of the statute by showing the defendant's head during the HGN test.

The State asks that the court deny the motion with respect to the WAT test and find the test was recorded within the meaning of the statute and within the interpretation of *Gordon*. The video shows the full WAT test as it is administered. All 9 steps of the WAT test are shown on camera. The defendant does walk off camera, but those steps were not part of any instruction given by Trooper McAdams. The Trooper positioned the defendant and camera such that the WAT test could be recorded in its entirety. The State should not be punished for the defendant's inability to follow instructions; especially when that inability is evidence of the defendant's materially and appreciably impaired state.

Beyond the requirements of the statute and *Gordon*, the defendant is unable to perform the WAT test in a manner in which his feet could touch heel to toe on each step. The defendant stumbles as he assumes the starting position. He crosses his steps. He places his feet out of line.

He falls well out of line during the turn. All of these events make it clear that the defendant was unable to perform the test satisfactorily. Were his performance close enough to passing that heel to toe touching was an issue, a finder of fact should take that into account when considering the sufficiency of the evidence. However, that is not the case before the court. The defendant's performance is poor enough to make it evident that he was not able to physically or mentally follow the instructions of the Trooper.

For the above reasons, the State requests that the motion to dismiss be denied because the Trooper recorded the field sobriety tests within the definition of the video recording statute and its interpretation by the *Gordon* opinion.

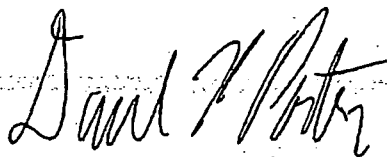
IF the court is inclined to grant the motion on any of the three grounds requested, the State argues that dismissal is not the appropriate remedy.

The Supreme Court has held that failure to produce a video recording that complies with 56-5-2953 may be a ground for dismissal if no subsection (B) exclusions apply. *City of Rock Hill v. Suchenski*, 374 S.C. 12 at 16, 646 S.E.2d 879 at 881 (2007). The *Suchenski* court held that the statute provides for dismissal of charges when the statute is *inexcusably* violated. *Id.* at 16, 881 (emphasis added). The court declined to take up whether the statute was excusably violated because the issue was not preserved for appeal. The Court reiterated that dismissal interpretation from *Suchenski* in *State v. Sawyer*, 409 S.C. 475, 763 S.E.2d 183. In *Sawyer*, the Court also declined to consider whether §56-5-2953(B) exceptions could allow a video that did not conform to the requirements of subsection (A) be admitted because the grounds were not preserved for review. *Id.*

Since this argument has not been heard by an appellate court, Chief Justice Toal's dissent in *Sawyer* is instructive. In her dissent, she opines that the video recording statute does not specify a remedy for noncompliance and that defects in the recording go to the weight rather than admissibility of the evidence. *Id.* at 483-6, 187-9. She also states that 56-5-2953(B) provides that noncompliance is not alone grounds for dismissal, and that the statute does not prohibit the State from going forward on other evidence. *Id.*

In light of the above, the State argues that the Legislature intended for 56-5-2953 to be malleable in certain situations, evidenced by the presence of subsection (B), in the discretion of the trial judge. Further, the holdings from both *Suchenski* and *Sawyer* indicate that subsection (B) could supply a reason to admit a defective video or at the very least allow the State to go forward on other evidence. Finally, Chief Justice Toal's dissent in *Sawyer* shows an appellate analysis of the full video recording statute that supports the State's position.

For these reasons, the State requests that it be allowed to go forward on other evidence should the video be found in violation of 56-5-2953.



Daniel K. Porter, Assistant Solicitor

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2014-002770

THE STATE,

Appellant,

vs.

STEVEN HOSS WALTERS, JR.,

Respondent.

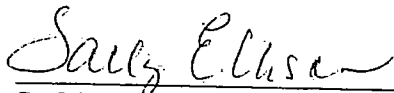
PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

James W. Boyd, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 30th day of June, 2015.



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June 30, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2014-002770

The State,

Appellant,

VS

Steven Hoss Walters, Jr.

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The circuit court erred in dismissing the State's case against Respondent when the video recording produced by the State fully complied with section 56-5-2953(A) of the South Carolina Code.
- II. The circuit court erred in finding section 56-5-2953(B) had no application in this case and in not finding, based on a totality of the circumstances, the State produced a proper video recording and the underlying case should not have been dismissed.

STATEMENT OF THE CASE

Respondent was stopped by Trooper McAdams travelling along Interstate 77. Trooper McAdams arrested Respondent for driving under the influence (DUI) second offense and issued a uniform traffic ticket. (Uniform Traffic Ticket; R. 39). The York County Grand Jury subsequently indicted Respondent for DUI on November 6, 2014. (Indictment; R. 40-41). On December 16, 2014, Respondent proceeded to trial before the Honorable Lee S. Alford.

Prior to trial, Respondent moved to dismiss the case based on an alleged violation of section 56-5-2953(A) of the South Carolina Code (Supp. 2014). The trial court dismissed the case and found no exceptions under section 56-5-2953(B) of the South Carolina Code (Supp. 2014) applied to the case. The State timely filed its Notice of Appeal on December 23, 2014. This brief follows.

ARGUMENT

- I. **The circuit court erred in dismissing the State's case against Respondent when the video recording produced by the State fully complied with section 56-5-2953(A) of the South Carolina Code.**

The court erred in finding the State failed to produce a video recording in compliance with section 56-5-2953(A) of the South Carolina Code (Supp. 2014). The State produced a video recording which began no later than the Trooper's activation of his blue lights, recorded and showed all field sobriety tests being performed, and included the Trooper reading Respondent his Miranda rights prior to his arrest. As a result, the trial court erred in finding the video failed to comply with the requirements of section 56-5-2953(A) and erred in dismissing the case.

In the instant case, Trooper McAdams activated his blue lights which activated his in-car camera. He pulled Respondent over and, after speaking with him, proceeded to administer field sobriety tests as part of a DUI investigation. The tests were conducted on the side of the interstate, at night, in a poorly lit area. As a result, Trooper McAdams left his lights on, including his flashing lights, for both safety and illumination. (T.8-10; R. 8-10). During the HGN test, Trooper McAdams positioned Respondent facing away from the flashing lights because he had been taught the flashing lights could cause false positives in the HGN test. (T.9-10; R. 9-10). The trial court found because Trooper McAdams chose to position the defendant in this manner, resulting in the Trooper's hand not being visible at all times during the test, the State failed to comply with the requirements of Section 56-5-2953(A). (T.22-25; 34-38; R.22-25; 34-38).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161. However, the statute must also be read as a whole and in harmony with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Accordingly, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Section 56-5-2953 requires:

- (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) (Supp. 2014).

The statute requires a video recording of the incident site, and in doing so, specifically provides what must be videotaped. Section 56-5-2953(A) indicates the individuals conduct at the incident site must be recorded and then provides the requirements for meeting this requirement. Specifically the recording must: 1) not begin later than the activation of the officer's blue lights; 2) include any field sobriety tests administered; and 3) 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. The clear language of the statute does not require every aspect of the HGN test to be seen so that the jury or any viewer can judge the person's performance or the Trooper's administration of the test.

The South Carolina Supreme Court has explained: "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). The video is to document the arrest, document any field sobriety tests the Trooper administered, and document the defendant's conduct during the tests. As explained, the video began before Trooper McAdams stopped Respondent's vehicle and continued uninterrupted during the administration of the field sobriety tests, the reading of Miranda, and Respondent's arrest. (Video of Incident Site). The purpose of the video is not to allow a jury to see exactly what is seen by the officer during the field sobriety tests or any other time. The purpose is not to provide the jury with the ability to assess a person's attempt to complete a field sobriety test. The video is a documentary of the actions performed by the officer and the defendant's conduct after being stopped.

Contrary to the findings of the circuit court, the plain language of the statute does not require the Trooper's hand to be visible at all times during the administration of the HGN field sobriety test, nor does it require the video to provide the viewer with the ability to assess the defendant's success or failure on the video or the officer's conduct during the test. It merely says the video recording must "include any field sobriety tests administered." S.C. Code Ann. § 56-5-2953 (A)(1)(a)(ii) (Supp. 2014). The positioning of the defendant during the test should be at the discretion of the officer and can be considered by the jury in the weight that they give the test. As long as the test is documented by the video the officer has fully complied with the video recording requirements.

As the Court of Appeals correctly found in Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), the statute does not require that the recording capture "a continuous full view of the accused." Nothing in the amended statute has changed this requirement. The plain language of the statute, even after amendment, requires nothing more than the defendant's conduct be captured during the administration of the field sobriety tests. The plain language requires the person's overall demeanor, behavior, or actions be captured on the video recording, which they were in this case.

Further, and even more important in light of the trial court's ruling dismissal was required because you could not see the Trooper's hand during the test, the statute says nothing about the officer's conduct being recorded. Section 56-5-2953(A) does not indicate in any way the jury or viewer of the video should be able to assess the conduct or performance of the officer. It requires the conduct of the person be recorded and then requires documentary evidence the field sobriety tests were performed.

The statute also does not require a recording of a particular quality, or a recording in the best possible lighting conditions, or any other such limitation. The ruling by the circuit court forces an absurd decision to be made by officers attempting to protect the public from drunk drivers. Under the circuit court's ruling, officers are better off not performing any field sobriety tests, than performing the tests and risk a dismissal because the video recording is not perfect, especially when done in less than ideal circumstances of darkness with the Trooper's lights flashing. This Court's ruling will have the effect of 1) encouraging officers to perform no field sobriety tests and turn the subsequent DUI trial into a battle of credibility with little supporting video evidence—a result which clearly defeats the legislative purpose of creating evidence of the DUI through the video; 2) requiring a professional videographer and lighting assistant travel with him so as to produce a movie perfect video recording capturing all details even in the dark of night, which of course is when a significant number of DUIs occur; or 3) allowing the jury to perform its duty in properly considering any “defects” in the video recording, especially when the defendant is unable to articulate any prejudice resulting from the “defects.” See e.g., State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) (“exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedure.”). The State submits the video in this case clearly complied with the clear, unambiguous statutory requirements of section 56-5-2953 and the third option above, allowing the jury to perform its duty of weighing the evidence, is the common sense, appropriate result.

As long as the recording includes “any field sobriety tests administered,” it is in compliance with the plain, unambiguous language of the statute, and the circuit court erred in finding otherwise. Requiring a field sobriety test to be recorded in a manner which allows a person watching the recording to make an assessment as to how well the driver-suspect performed the test or how well the officer administered the test adds requirements to the statute not found in the clear, unambiguous language. Further, the requirement places an absurd burden on those attempting to enforce the laws of the state and protect the citizens from the dangers of drunk drivers. See Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (“When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature’s language”); see also, State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) (recognizing that where a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning).

The State submits that as long as a juror can tell the arresting officer is administering the test, there is compliance with section 56-5-2953(A). Here, the video recording leaves no doubt Trooper McAdams conducted the HGN test. The video is recorded under less than perfect conditions and using less than perfect equipment, both beyond the control of the Trooper. He positioned Respondent in a manner he believed best allowed him to assess Respondent’s performance to determine whether to make an arrest for DUI. As a result, while it is clear Trooper McAdams conducted the HGN test—it can be seen and heard on the video—the recording is not perfect. This, however, is not and should not be the requirement under the statute. Certainly the legislature did

not intend to craft a video recording statute which will result in the dismissal of many night time DUIs because the video is not perfect.

In State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) (Certiorari granted)¹, this Court determined: “Because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless.” In Gordon, this Court affirmed the circuit court’s finding (on appeal from a magistrate court’s finding that the recording was only required to show the conduct of the defendant) that the head must be shown during the HGN test. Id. This Court’s opinion indicates the actual test must be seen on the video, but does not add the requirement added in this case that the jury be able to assess the officer’s administration of the test including seeing his hand move back and forth at all times and be able to judge the distance from the person’s eyes at which the officer begins the test.²

Further, it appears the circuit court acknowledges the Trooper produced a video, but believes the issue related to the content or quality of the content of the video. Any issues regarding the quality of the content of the video should go to its weight and the weight to be assigned the video by the trier of fact. See State v. Cope, 405 S.C. 317, 342 n.6, 748 S.E.2d 194, 207 n.6 (2013) (“factual discrepancies . . . go to the weight of the evidence”); State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility); Weaver v. Lentz, 348 S.C. 672, 680, 561 S.E.2d 360, 364-365 (Ct. App. 2002) (“Questions as to the accuracy of

¹ To the extent necessary, the State will move to argue against the precedent of Gordon.

² Counsel for Respondent’s argument indicated you could not tell if Trooper McAdams hands were 12-15 inches from Respondent and his hand was blocked from the camera behind Respondent’s head for approximately six seconds. (T.15; R.15). The Court accepted these arguments finding the Trooper’s hands needed to be visible the whole time. (T.23; 36; R. 23; 36).

conclusions drawn go solely to the weight of the testimony, rather than its admissibility.”); see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

This case is distinguishable from the cases of City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) or State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). In both of those cases, a significant and specifically required portion of the videotape was not produced and an affidavit was not provided. In Suchenski, the officer failed to record all of the field sobriety tests administered and the arrest of the individual as specifically required under section 56-5-2953(A). Suchenski, 374 S.C. at 18, 646 S.E.2d at 881-882. In Johnson, the officer failed to record the administration of the breath test as specifically required. Johnson, 396 S.C. at 190-191, 720 S.E.2d at 520-521.

The State has complied with section 56-5-2953 by producing a videotape with all required events documented. Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required, and the circuit court erred in dismissing the case.

Finally, the interpretation of the statute by the circuit court would lead to an absurd result.³ See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (finding courts will reject an interpretation of a statute leading to an absurd result

³ This absurdity is demonstrated in part based on the circuit court's finding a side view would be "plenty" even though he acknowledged it would also cause problems seeing the full test being administered, and "the argument can be presented any way." (T.22; 25; R. 22; 25).

clearly unintended by the legislature); State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) (“The statute must be interpreted with realistic circumstances and rationales in mind.”). A Trooper would be forced to possibly compromise a field sobriety test, compromise his or the person’s safety, or forgo a possibly valuable test because it is impossible to comply with the circuit court’s requirement that the test be visible in such a way that the jury can see all aspects of the person’s and the officer’s conduct during the test. The legislature clearly intended documented evidence showing the test was performed, not a cinematic version from all angles which allows the jury or viewer to assess all participants performance during the administration of the test.

The State produced a video in compliance with Section 56-5-2953(A) because it began with the activation of the blue lights, recorded and documented all field sobriety tests performed, and included the reading of Respondent’s Miranda rights prior to his arrest. The circuit court erred in writing new requirements into the statute and in dismissing Respondent’s case.

- II. **The circuit court erred in finding section 56-5-2953(B) had no application in this case and in not finding, based on a totality of the circumstances, the State produced a proper video recording and the underlying case should not have been dismissed.**

The trial court erred in finding section 56-5-2953(B) of the South Carolina Code could not apply to allow the case to proceed without dismissal. Section 56-5-2953(B) clearly allows the trial court to consider the totality of the circumstances in determining whether to allow a case to proceed, and the trial court committed legal error in finding he could not consider the totality of the circumstances. If the circuit court had properly considered the totality of the circumstances, the underlying case would not have been dismissed.

The State submits either the circuit court erred in finding it had the power to dismiss the case based on the language of section 56-5-2953(B) and City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), or the circuit court erred in finding the totality of the circumstances exception of the same subsection had no application in this case. Section 56-5-2953 is divided into two applicable subsections⁴. Subsection (A) sets forth the requirements for video recording at both the incident site and the breath test site. Nothing in the first section provides for dismissal, or any other remedy, for failing to produce a video or failing to produce a video of a certain quality as is at issue in the instant case.

Subsection (B) reads in pertinent part as follows:

Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. **Failure by the arresting officer to produce the video**

⁴ The statute has subsections (A) through (G). However, as it relates to the current appeal, only subsections (A) and (B) are applicable.

recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. . . .
Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances

S.C. Code Ann. § 56-5-2953(B) (Supp. 2013) (emphasis added). The only provision allowing for the dismissal of the case—Subsection (B)—also allows the court to consider “any other valid reason for the failure to produce the video recording based upon the totality of the circumstances.” Id.

As a result, the circuit court’s determination subsection (B) does not apply must be an error of law. (T.31; R. 31). Either the circuit court improperly dismissed the case because the State produced a video and no other provision outside of subsection (B) even allows for dismissal of the case, or the court should have considered the totality of the circumstances exception found in subsection (B) as requested by the State in making its determination of whether to dismiss the case.

The State submits dismissal was not proper because a video was produced.⁵ In the event this Court finds dismissal was an appropriate remedy, then the State submits the totality of the circumstances clearly favor not dismissing the case.

⁵ As discussed above, the State also submits the video clearly complied with the requirements of section 56-5-2953 and so dismissal was clearly inappropriate.

Trooper McAdams testified he stopped Respondent along a poorly lit stretch of Interstate 77. (T.10; R.10). He indicated he left his vehicle's lights on for safety reasons, to alert traffic to his presence, and to illuminate the area. (T.8; 10; 14; R. 8; 10, 14). Trooper McAdams testified he oriented Respondent with his back to the camera so the flashing lights would not affect the administration of the test by creating their own nystagmus or exacerbating the finding of nystagmus in Respondent.⁶ (T.9-10; R. 9-10). Further, he testified he did not want him facing the lights because it would likely cause Respondent to squint, making a determination of the presence of nystagmus more difficult. (T.14; R.14). The video of the incident scene clearly shows the HGN test being performed; a viewer can hear instructions and see the full test being administered. You cannot see the exact position of the officer's hand, but based on the totality of the circumstances, this should not be enough to require dismissal of the case.

⁶ Optokinetic nystagmus can be caused by the strobe effects of lights or movement of other objects across the field of vision of the person. Officers are trained not to position the person so as to possibly cause Optokinetic nystagmus. See <http://www.nhtsa.gov/people/injury/enforce/nystagmus/hgntxt.html>.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court dismissing this case for a violation of section 56-5-2953(A) and refusing to consider the totality of the circumstances under section 56-5-2953(B) should be reversed and this case remanded for trial.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

July 17, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2014-002770

The State,

Appellant,

vs.

Steven Hoss Walters, Jr.,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR and the August 14, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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July 17, 2015

STATE OF SOUTH CAROLINA

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Appeal from York County
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The State,

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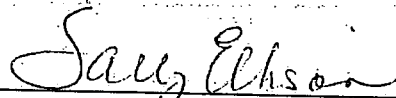
Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

James W. Boyd, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 17th day of July, 2015.



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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-002770

The State, Appellant,

v.

Steven Hoss Walters, Jr., Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN DISMISSING THE STATE'S CASE AGAINST THE RESPONDENT BECAUSE THE VIDEO RECORDING PRODUCED BY THE STATE FAILED TO COMPLY WITH §56-5-2953 OF THE SOUTH CAROLINA CODE?
2. DID THE CIRCUIT COURT ERR IN FINDING THAT §56-5-2953(B) HAD NO APPLICATION TO THIS CASE?

ARGUMENT

- I. **THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE STATE'S CASE AGAINST THE RESPONDENT BECAUSE THE VIDEO RECORDING PRODUCED BY THE STATE FAILED TO COMPLY WITH § 56-5-2953 OF THE SOUTH CAROLINA CODE.**

The issue in this case is whether the State complied with the video requirements of §56-5-2953(a) of the South Carolina Code when the video failed to include a full recording of one of the field sobriety tests. During the Horizontal Gaze Nystagmus Test (HGN) several important parts of the test were missing. It could not be determined when the Trooper started the test or how far his finger was from the head.¹ There were several periods during the test that the Trooper's finger disappeared in front of the Trooper's head.²

South Carolina Code Annotated §56-5-2953(b)(1)(ii) provides that the video recording at the incident site must, "include any field sobriety test administered". A primary rule of statutory construction is that a statute should be construed to give effect to the intent of the legislature. *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 323, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E.2d 516, 519 (Ct. App. 2001) The Court should not attempt to derive the intent of the Legislature when the statutory language is clear and unambiguous, *Town of Mt. Pleasant v. Roberts, supra*. In

¹ R. pg. 15, lines 12-13

² R. pg. 15, line 15- pg. 16, line 1

interpreting a statute a Court should give words their plain and ordinary meaning and must not resort to a forced construction that would limit or expand the statute in question. *Town of Mt. Pleasant v. Roberts, supra. State v. Johnson, supra.* Section §56-5-2953(a) does not set forth what is required in the recording of Field Sobriety Tests (FST). The Court must look to evidence of the Legislatures intent in enacting the statute. Prior to the 2009 Amendments, §56-5-2953(a)(1) only required that the conduct of the Defendant be recorded at the incident site. The Court of Appeals held in *Murphy v. State*, 392 S.C. 628, 709 S.E.2d 685 (Ct. App. 2011) that the video recording requirements of §56-5-2953 were met although the Defendant's feet could not be seen in the Walk and Turn Test. In *Murphy* the video recording at the incident site showed the Defendant from the waist upwards. The Court in *Murphy* held, "while certainly an individual's performance on such test would be part and parcel of his or her 'conduct' at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct. Therefore the recording need not display all field sobriety tests provided it captures the accused's conduct." The Court provided a footnote to that statement in the opinion, "As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) (Supp.2010) ("The video recording at the incident site must: ... include any field sobriety tests administered."). We note that the legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior version, in effect at the time of this action, did not require recording of all tests". The quote from *Murphy* shows that if a complete recording of an individual's performance on any FST test as not required under the former statute it now required under the amended statute. The 2009 amendment specifically provides for the recording of any FST. This goes beyond the former requirement of merely

recording a person's conduct. Had the Legislature only intended that there be a recording of a person doing a FST, without there being any way to determine the person's performance on the test as in *Murphy*, there would have been no need to amend the statute. It is presumed that the Legislature does not intend for amendments to be futile or meaningless. *State v. Long*, 363 S.C. 360, 610 S.E.2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008). In *State v. Gordon* 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) the Court held, "because of the purpose of the video taping is to create a direct evidence of the arrest, if the actual test cannot be seen on the recording the requirement is pointless".

In the present case the State failed to comply with the videotaping requirements of the Horizontal Gaze Nystagmus Test (HGN). The Respondent argues that the video tape recorded the Field Sobriety Test (FST) being given. Although the video camera was recording during Appellant's performance of this test, the Appellant and the Trooper were positioned in such a manner that it could not be determined whether the test was being properly administered. In the present case the trial Court made a factual finding that the HGN test was not properly videotaped so that one could see if it was properly done.³ The Court stated, "I can't see the Officer's hand a good bit of the time, a finger. I don't know what's going on there; I can't see".⁴ The Appellant argues that the interpretation of the statute by the Circuit Court would lead to an absurd result because the Trooper would be forced to possibly compromise a FST or compromise a person's safety if he did as the Court suggested. Referring to conducting the test from a side view the Court stated, "there is no reason why he couldn't have done it at least this way".⁵ This is a factual finding by the lower Court. In reviewing criminal cases the Appellate Court may review only errors of law. *State v. Henderson*, 347 S.C. 455, 556 S.E.2d 691 (2001).

³ R. Pg. 38, lines 7-8

⁴ R. Pg. 37, lines 11-13

⁵ R. Pg. 25, lines 13-14

The video recording provisions of South Carolina Code Annotated 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 323, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E.2d 516 (Ct. App. 2001). When a prosecuting agency fails to comply with the video recording provisions of §56-5-2953(a) the appropriate remedy is dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski*, supra, *State v. Johnson*, supra. In the *Town of Mt. Pleasant v. Roberts*, supra the South Carolina Supreme Court stated that the unexcused compliance with South Carolina Code Annotated 56-5-2953 mandates the dismissal of a DUI charge. In the case *Town of Mt. Pleasant v. Roberts*, supra, the Court stated, “furthermore it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of the videotaping oral confessions, the Legislature, has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest the Legislature clearly intended strict compliance with the provision of §56-5-2953 and, and in turn, promulgated a severe sanction for non-compliance.

Thus, we hold that dismissal is an appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*”.

In *Murphy v State*, 392 S.C. 628, 709 S.E.2d 685 (Ct. App. 2011) the Court held that remedy for non-compliance was §56-5-2953 is dismissal of the case, not mere suppression of the evidence.

The Circuit Court properly held that the HGN was not properly videotaped.

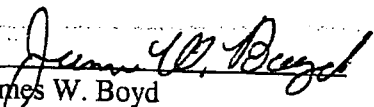
II. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT §56-5-2953(B) HAD NO APPLICATION TO THIS CASE.

Section 56-5-2953(B) provides in part, "nothing in this section prohibits the Court from considering any other valid reason for failure to produce the video recording based on the totality of the circumstance". In the present case the Court correctly ruled that Section 56-5-2953(B) did not apply because that there was not a missing video in this case. Section (B) applies when a video tape is missing or a portion is missing. The issue in the present case is the quality of the video that was produced not the failure to produce a tape. Even if the Court holds that the Court should have conducted a totality of the circumstance analysis, the Court in essence did so by making a factual finding that the Officer could have positioned the Defendant differently and properly recorded the test being conducted.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision of the Circuit Court should be affirmed.

Respectfully submitted,


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July 9 2015

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Appellant,

v.

Steven Hoss Walters, Jr., Respondent.

Appellate Case No. 2014-002770

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 5443
Heard September 8, 2016 – Filed September 28, 2016

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Assistant
Attorney General William M. Blicht, Jr., both of
Columbia; and Solicitor Kevin Scott Brackett, of York,
for Appellant.

James W. Boyd, of James W. Boyd, Attorney, of Rock
Hill, for Respondent.

LOCKEMY, C.J.: The State appeals the circuit court's dismissal of its case against Steven Hoss Walters, Jr. for driving under the influence (DUI), second offense. The State argues the circuit court erred in finding (1) the video recording of the incident site failed to comply with the requirements of section 56-5-2953(A) of the South Carolina Code (Supp. 2015) and (2) section 56-5-2953(B) of the South Carolina Code (Supp. 2015) was not applicable. We reverse and remand.

(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) (Supp. 2015).

The State asserts the video recording in this case complied with the statute because it began before Walters was stopped and continued uninterrupted during the administration of the field sobriety tests, the reading of *Miranda*,¹ and Walters' arrest. The State contends the statute does not require every aspect of the HGN test be seen in order to judge a person's performance or the officer's administration of the test. The State maintains the plain language of the statute does not require the officer's hand to be visible at all times during the administration of the HGN test, nor does it require the video to provide the viewer with the ability to assess the defendant's success or failure. The State argues as long as the recording includes "any field sobriety tests administered," it is in compliance with the plain, unambiguous language of the statute.

Walters contends he and Trooper McAdams were positioned in such a manner during the HGN test that it could not be determined whether the test was properly administered. Walters notes that prior to 2009, section 56-5-2953(A) only required the defendant's conduct be recorded at the incident site. See S.C. Code Ann § 56-5-2953(A) (2006). In 2009, the legislature amended the statute, expressly requiring the recording of field sobriety tests. See S.C. Code Ann. § 56-5-

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

The circuit court's decision is

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-002770

RECEIVED

OCT 12 2016

SC Court of Appeals

The State, Appellant,

v.

Steven Hoss Walters, Jr.,Petitioner.

PETITION FOR RE-HEARING

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The Petitioner petitions the Court on the following grounds:

The Court based its decision in the present case on *State v. Gordon*, 414 S.C. 94, 777 S.E. 2nd 376 (2015). In *Gordon* the Supreme Court held that §56-5-2953(a) is clear and unambiguous in that the provision that video recordings must include any field sobriety tests administered necessarily includes the HGN test. The Court further held that the head must be visible to comply with the recording requirements during the HGN test. In *Gordon* the Court noted that Gordon's face is depicted on the video. The Court further noted that the Officer's instructions were audible and that the Officer's flash light and arm are visible as he administered the test. Based on those findings the Court ruled that a per se dismissal of the charge was not appropriate.

In the present case, the Court held that the requirements for §56-5-2953(a) were satisfied because the Petitioner's head is visible during the entire recording of the HGN test, the Trooper's arm is visible as he administers the test and his instructions are audible. Unlike *Gordon*, the Appellant's face is not visible at all during the recording of the HGN test, only the back of the Appellant's head is visible. The Trooper's finger is unable to be seen during portions of the test. The Court notes that the Trooper's arm is visible as he administers the test but in fact the Trooper's arm disappears in front of the Appellant at various time during the test so the Trooper's arm is not visible at all times.

The Court notes that, "the statute does not require video recordings of the HGN to include views of all angles of the test". The Petitioner does not contend that all angles of the test be included, however the statute does require that the test be recorded. If portions of the test are not recorded then the requirements of the statute have not been met. The Trooper made the decision to place the Petitioner in such a position that a portion of test was not recorded. The Trooper could have easily had the Petitioner stand with his side toward the camera and the full test would have been recorded. The trial Court noted concerning the HGN test, "but most of the

ones I've seen, the officers and the – stations the Defendant face to face with proper distance with a properly positioning of the Defendant and they do it side-to-side. They're looking at each other in the face and this from the side, so the camera's looking at them, the Defendant is here and the Officer is here, and the camera is here, and he's looking this way and you can see every movement that the Officer is administering the field sobriety test makes. So you can see if he's doing properly." ¹ Referring to the present case, the trial Court noted, "That's the concern I have, and I've had people come in where experts testify that the officers didn't hold it out here long enough, that he was supposed to make more passes than he made and he didn't hold it out here long enough and to be able to get a correct reading and that sort of thing, but if you can't see the officer's hand – okay – the whole time, I don't know how you can critic that. You have to guess what he did when he was in front of his face, and it's not – of course, the Officer can testify as to what he did, but you can't really – nobody can cross examine him and say, well, it looks like here you didn't hold it long enough. You can't see that. Now, so that's the concern I have got in this case." ²

The full test was not recorded because of the position in which the Trooper place the Petitioner. The legislature intended strict compliance with §56-5-2953 and promulgated a severe sanction for non-compliance. A per se dismissal is appropriate because the test was not fully recorded.

★ As the Court noted in its decision, in 2009 the legislature amended the statute expressly requiring the recording of field sobriety tests. The importance of this explicit requirement is unquestionably to allow a jury to evaluate the test process. Field sobriety exercises are used by law enforcement as a standard and "objective" method of evaluating a person's physical and

¹ Trans. Of Record p. 20, lines 12-21

² Trans. Of Record p. 21, line 13 thru p. 22, line 2

mental ability on the roadside as part of the arrest decision. The Court in *State v. Sullivan*, 426 S.E.2d 766, 310 S.C. 311 (1992), recognized the tests only have evidentiary value if demonstrated and conducted by the officer in a way consistent with the training standards for the conduct of the exercises and the officer evaluation. The conduct of the tests by the officer is as important an evidentiary consideration as is the performance of the tests by the suspect. The Courts have consistently used a "reasonableness" standard or "reasonable man" standard in criminal law and torts, phrases or concepts that suggest the use of a hypothetical person or standard of average skill, judgement or effort to serve as a measuring stick.

Though these field sobriety exercises are often referred to as objective tests, they are unquestionably subject to an observer's interpretation or bias. Officers most often do not score the tests as their training recommends to be done in writing, along with the taking of field notes (see NHTSA Training Manual), but rather the officers simply offer their own opinion on a pass and fail basis. This degree of subjective scoring of objectively designed "tests" was not what was intended by NHTSA in the recommended use of these field tests. The video offers evidence not simply subject to the officer's rendition and interpretation of the performance of the suspect, but video offers a real time and accurate record of events which provide the jury with a complete and unambiguous view of what occurred which affords fairness to both the State and suspect.

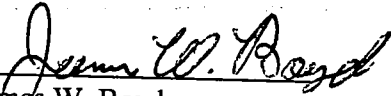
The legislative intent in requiring video of the field exercise process offers an opportunity to provide a critical tool to a jury that this court should recognize (and require) that every reasonable degree of recordation is a requirement implicit and obvious in that legislative intent. As the Court states in *Gordon*, "A statute must require a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers." The announced purpose of 56-5-2953 from *Gordon* "is to create direct evidence of a DUI arrest"- and inherently to record the probable cause for the arrest. Direct evidence can only be of value to a jury and

important to the end result if it is a complete record preserved on video which affords the jury the opportunity and ability to reasonably scrutinize and evaluate the events by reasonable recordation, thereby minimizing the jury's reliance on the officer's opinions and eliminating speculation to every degree possible.

While recognizing that not every aspect of a field exercise process may reasonably be captured on video (such as the eyes twitching in nystagmus as discussed in Gordon), this court must require that the recording permit an objective evaluation by requiring the State to take the special care to produce a reasonably complete video of the field test process as is feasible by proper positioning of the process in the camera view, including both the officer's instruction and demonstration as required by NHTSA and the suspect's performance. The officer on the roadside is uniquely in control of the suspect and camera angle in the orchestration of events and as the "director of the video. To require less than a reasonably complete record showing the officer's conduct and instructions, defeats and defies the legislative purposes which gave life to the statutory video requirement.

Conclusion

All of the above reasons the Petitioner requests that the Court grant this Petition for Re-Hearing.


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October 12, 2016

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-002770

RECEIVED

OCT 12 2016

SC Court of Appeals

The State, Appellant,

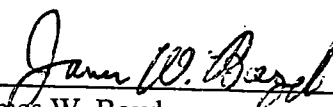
v.

Steven Hoss Walters, Jr.,Petitioner.

PROOF OF SERVICE

I, James W. Boyd, certify that I served the within Petition for Re-hearing of Petitioner on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to William M. Blich, Jr., South Carolina Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211 and to Kevin Brackett, York County Solicitor's Office, 1675-1A York Highway York, SC 29745.

I further certify that all parties required by Rule 211(a) to be served have been served. This 12 day of October, 2016.


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The South Carolina Court of Appeals

The State, Appellant,

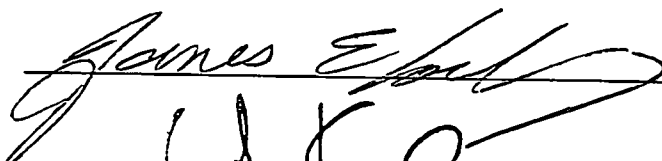
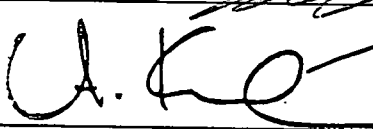
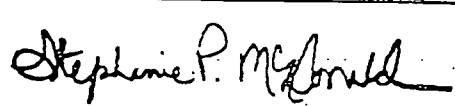
v.

Steven Hoss Walters, Jr., Respondent.

Appellate Case No. 2014-002770

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:
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James W. Boyd, Esquire
William M. Blicht, Jr., Esquire
Kevin Scott Brackett, Esquire

FILED

November 17, 2016