

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

**RECEIVED**

APR 16 2013

**SC Court of Appeals**

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**MOTION TO CERTIFY THE CASE TO  
THE SOUTH CAROLINA SUPREME COURT**

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Appellant (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

**I.**

In May of 2008, Respondent Michael J. Hilton was arrested following an investigation into an automobile and motorcycle collision that resulted in the death of the driver of the motorcycle and serious injuries to a passenger on the motorcycle. Hilton was subsequently indicted for felony driving under the influence resulting in a death and felony driving under the influence resulting in great bodily injury. Prior to trial, Hilton filed a motion seeking the exclusion of any evidence related to a breath alcohol test conducted after the collision. Following a hearing on that motion, the Honorable Benjamin H. Culbertson, circuit court judge, issued an order suppressing the breath alcohol test results after finding the breath alcohol test

was not conducted within two hours of Hilton's arrest as required by a statutory amendment to S.C. Code Ann. § 56-5-2950(a) that did not take effect until approximately nine months after Hilton was arrested.

## II.

Subsequently, the State timely filed and perfected an appeal of the circuit court judge's ruling. The Final Brief of Appellant, the Final Reply Brief of Appellant, and the Record on Appeal were filed in this case on March 26, 2013. The Final Brief of Respondent was filed in this case on April 15, 2013. The State's appeal is currently pending before the Court of Appeals.

## III.

Pursuant to S.C. Code Ann. § 14-8-210 and Rule 204, SCACR, Respondent respectfully seeks certification of this case for review by this Court. Under Rule 204, SCACR, "[c]ertification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." The State respectfully submits certification is appropriate in this case based on a need for clarification as to the correct application of the statutory amendments to S.C. Code Ann. § 56-5-2950, which constitutes a matter of significant public interest and an important legal issue.

## IV.

Primarily, the State submits Hilton's case warrants certification due to the significance of the statutory interpretation issue raised in this appeal. Through his ruling, the circuit court judge found the statutory changes to S.C. Code Ann. § 56-5-2950 were retroactively applicable based on the allegedly procedural nature of those changes despite the legislature's inclusion of a savings clause in the amending legislation.<sup>1</sup> On appeal, the State is primarily asserting the circuit

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<sup>1</sup> The portion of the Record on Appeal containing the circuit court judge's ruling has been attached to this motion as Exhibit "A." Additionally, the Final Brief of Appellant has been attached to the motion as Exhibit "B," the Final

court judge committed reversible error by improperly applying the statutory changes in a retroactive fashion because those changes were not procedural in nature and because the legislature expressly precluded retroactive application of those changes by including a savings clause in the amending legislation. Conversely, Hilton is contending the circuit court judge correctly applied the statutory changes retroactively because they were procedural in nature. Thus, the critical issue raised in this appeal involves a determination of whether the legislature intended for the statutory changes to the implied consent statute to be applied retroactively or prospectively in light of the language of the amending legislature and the nature of the statutory changes. Critically, because the issue raised in this appeal involves the proper application of a frequently-addressed statutory provision and would have a substantial impact on the application of S.C. Code Ann. § 56-5-2950, Hilton's case involves a substantial legal question and is a matter of significant public interest. Accordingly, the State submits certification is warranted in Hilton's case. See S.C. Code Ann. § 14-8-210 ("Certification is appropriate where the case involves an issue of significant public interest or a legal principle of major importance, or in other cases the court considers appropriate.").

#### V.

Furthermore, the State submits the significance of the issue to the public's interest is further magnified under the specific circumstances of Hilton's case due to the length of time that has elapsed since Hilton's arrest. Significantly, Hilton's arrest after the collision, which resulted in the death of one victim and serious bodily injuries to another victim, occurred nearly five years ago. Hilton's trial currently cannot proceed forward until the critical issue raised in this appeal has been finally resolved. For that reason, the State submits certification would be

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Brief of Respondent has been attached to the motion as Exhibit "C," and the Final Reply Brief of Appellant has been attached to the motion as Exhibit "D."

justified and appropriate in Hilton's case to best and most efficiently accommodate the public's interest in a speedy resolution of this criminal matter. See Barker v. Wingo, 407 U.S. 514, 519 (1972) (“[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.”); see also Strunk v. United States, 412 U.S. 434, 439, n. 2 (1973) (“The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges.”).

VI.

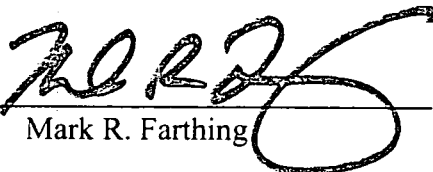
Due to the significance of the issue raised in the appeal, the need for clarification regarding the appropriate application of the statutory amendments to S.C. Code Ann. § 56-5-2950, and the public's interest in a speedy resolution of Hilton's case, the State respectfully submits this appeal merits the grant of certification and the transfer of jurisdiction to this Court.

**WHEREFORE**, Appellant prays that this Court will certify Appellant's appeal for consideration by the South Carolina Supreme Court for all purposes pursuant to S.C. Code Ann. § 14-8-210 and Rule 204, SCACR; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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April 16, 2013

**EXHIBIT "A"**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

---

**RECORD ON APPEAL**

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simulator tests were due to the simulator solution and not the DataMaster machine. Therefore, the defendant's motion to suppress the breathalyzer test results because the DataMaster machine was not functioning properly should be denied.

Next, the defendant argues that the breathalyzer test results should be suppressed because the test was not administered within two hours of the defendant's arrest.

A month prior to the defendant's arrest, Code of Laws for South Carolina 1976 §56-5-2950(A) was amended to require that the breath sample taken from a person for testing must be collected within two hours of the person's arrest. However, the amendment did not take effect until nine months after the defendant's arrest. At the time of the defendant's arrest, the two hour time limit for collecting a breath sample was not the law.

Statutes that are remedial or procedural in nature are generally held to operate retrospectively. *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000). Further, amendments relating to the admissibility of evidence are procedural in nature and apply retroactively. See *State v. Frey*, 362 S.C. 511, 608 S.E.2d 416 (S.C.App.2004). This court finds as a matter of law that the amendment to Code §56-5-2950(A) is procedural in nature and, thus, is to be applied retroactively. Therefore, the amendment to Code §56-5-2950(A) requiring that a person's breath sample be taken within two hours of the person's arrest is applicable in this case.

Pursuant to Code §56-5-2950(I), "[a] person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence." The purpose of the statute is to provide for reciprocal discovery between the State and defendant as to the time and results of alcohol and drug tests.

*State v. Bull*, 350 S.C. 58, 564 S.E.2d 351 (S.C.App. 2002). The timing of the administration of breathalyzer tests is crucial because of the ephemeral nature of blood intoxication levels. See *State v. Bull, ibid.*

In this case, the "Breath Alcohol Analysis Test Report" (BA report) issued to the defendant pursuant to Code §56-5-2950(I) indicates that the defendant was arrested on May 10, 2008 at 10:15 p.m. and that his breath sample was taken on May 11, 2008 at 12:32 a.m., more than 2 hours after the defendant's arrest. By letter dated October 3, 2011, the prosecutor in this case notified the defendant that the State was changing the time of arrest in this case to 10:40 p.m. on May 10, 2008, less than two hours prior to the taking of the defendant's breath sample.<sup>2</sup> This change in the time of arrest is based upon the prosecutor's review of the video of the defendant's breathalyzer test. However, the prosecutor was not present for the defendant's arrest, breathalyzer testing or the videoing of the defendant's testing. When the prosecutor first issued the defendant the letter that purportedly amends the BA report, she was relying upon the date and time on the recorded video without verification of its accuracy from the arresting officer or breathalyzer operator.<sup>3</sup> The prosecutor's letter dated October 3, 2011, does not include the time of testing or the test results in this case as mandated by Code §56-5-2950(I). Therefore, the prosecutor's letter dated October 3, 2011 does not constitute a "written report" as required by Code §56-5-2950(I).

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<sup>2</sup> The defendant's Motion to Suppress was originally scheduled for hearing on October 3, 2011. The prosecutor presented this letter to the defendant immediately prior to the motion hearing. Therefore, at the defendant's request, the court continued the motion hearing until October 25, 2011.

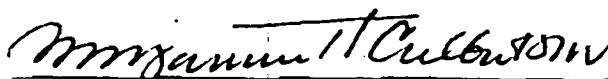
<sup>3</sup> At the motion hearing, the breathalyzer operator testified that the prosecutor's letter dated October 3, 2011, accurately reflected the date and time of arrest and that the date and time of arrest on the BA report was not correct. However, the state has never issued an amended written report. Instead, the State argues that the original BA report combined with the prosecutor's letter amending the date and time of arrest satisfies the requirements of Code §56-5-2950(I).

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

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the defendant's Motion to Suppress the breathalyzer test results in this case is GRANTED.

AND IT IS SO ORDERED.



Benjamin H. Culbertson  
Presiding Judge

March 26, 2012

Georgetown, SC

**EXHIBIT "B"**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

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

---

THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

---

**FINAL BRIEF OF APPELLANT**

---

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## STATEMENT OF ISSUES ON APPEAL

### I.

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

### II.

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

## STATEMENT OF THE CASE

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

## STATEMENT OF FACTS

At 10:15 p.m. on the evening of May 10, 2008, Respondent Michael J. Hilton was driving on a highway in Myrtle Beach, South Carolina, when the vehicle he was driving collided with a motorcycle. (R. p. 138; pp. 291-294). Forty-four-year-old Angelo Gonzalez, the driver of the motorcycle, was killed as a result of the collision, and thirty-six-year-old Susan Reader, a passenger on the motorcycle, was seriously injured in the collision. (R. pp. 291-294). Several people witnessed Hilton's vehicle and the motorcycle collide, and law enforcement was contacted. (R. pp. 291-294).

Approximately ten minutes later, Trooper Pete Schmidt of the South Carolina Highway Patrol arrived at the scene of the collision. (R. pp. 139-140; pp. 291-294). After investigating the incident, Trooper Schmidt arrested Hilton at 10:47 p.m. (R. p. 137; pp. 143-144; p. 295). Trooper Schmidt then issued uniform traffic tickets to Hilton for failure to yield the right-of-way, felony driving under the influence resulting in a death, and felony driving under the influence resulting in great bodily injury. (R. p. 138; pp. 288-289).

Following Hilton's arrest, he was transported to the Myrtle Beach Police Department for a breath alcohol test to determine his alcohol concentration. (R. p. 6; pp. 284-287). Trooper Schmidt began the statutorily-required twenty-minute pre-test observation period at 11:39 p.m., entered the "arrest time" into the Datamaster machine as 10:15 p.m., and attempted to first conduct a simulator test at 11:54 p.m.<sup>1</sup> (R. p. 137; pp. 284-287). However, the simulator solution used by the Datamaster machine failed to

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<sup>1</sup> At the time Trooper Schmidt entered 10:15 p.m. into the Datamaster machine as the "arrest time," the standard operating procedure in Myrtle Beach was to use the time of the collision as the "arrest time." (R. pp. 137-138). Notably, the standard operating procedure in Myrtle Beach was consistent with the S.L.E.D. policy setting forth the proper procedure for the administration of an implied consent breath alcohol test, which instructed Datamaster operators to enter the "arrest or violation time in twelve hour format" when entering the "arrest time" into a Datamaster machine. (R. pp. 193-194; p. 280).

test within the proper limits three times, and the officer was unable to conduct the simulator test with that particular sample. (R. pp. 150-151; p. 220; pp. 284-287; pp. 296-297). Trooper Schmidt then replaced the simulator solution in the Datamaster machine with a new sample, and the new simulator solution tested within an appropriate range. (R. pp. 150-151; p. 220; p. 226; pp. 284-284). Thereafter, at 12:32 a.m. on May 11, 2008, Hilton submitted to the breath alcohol test, and the results showed his breath alcohol concentration was 0.15 percent. (R. p. 92; p. 151; pp. 246-247; p. 262; pp. 284-287).

Subsequently, Hilton was indicted for felony driving under the influence resulting in a death and felony driving under the influence resulting in great bodily injury. (R. pp. 298-301). Prior to trial, Hilton filed a motion seeking the exclusion of "all evidence of testing, including any and all field sobriety tests, chemical analyses and tests, including blood alcohol tests and Data Master tests, performed on the Defendant both prior and subsequent to his arrest." (R. p. 5). On October 3, 2011, the prosecutor served Hilton with a letter stating:

It has come to the attention of the State in your case that the time of arrest as indicated on the Datamaster report of 22:15 reflected the time of violation or time of incident and not the actual time of arrest. This was discovered after reviewing the written and video documentation associated with your case. Pursuant to South Carolina Code Section 56-5-2950 subsection (d) you must be informed of the actual time of arrest in writing. The actual time of arrest in your case was 22:47:54 as recorded on the roadside video.<sup>2</sup>

(R. p. 295). Thereafter, on October 25, 2011, a hearing was conducted on Hilton's motion. (R. p. 52).

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<sup>2</sup> The prosecutor provided the letter to Hilton immediately before the originally-scheduled hearing on Hilton's motion to exclude the breath alcohol test results, and the circuit court judge continued the hearing until October 25, 2011, at Hilton's request. (R. p. 3, n. 2).

During the hearing, Hilton indicated he was moving to exclude the breath alcohol test results.<sup>3</sup> (R. pp. 52-53). In arguing for the suppression of that evidence, Hilton conceded the statute in effect at the time of his arrest did not require a breath alcohol test to be conducted within two hours of arrest, but he argued the statute was amended within a year of his arrest to impose a two-hour time limit for the performance of such a test. (R. p. 58; p. 163). Hilton asserted the statutory change was procedural in nature, which he claimed meant it should be applied retroactively to his case. (R. p. 59). Furthermore, Hilton argued the letter submitted to him by the prosecutor correcting his time of arrest was not sufficient to constitute a written report as required by the implied consent statute.<sup>4</sup> (R. pp. 62-63).

In response, the prosecutor argued the statutory changes to S.C. Code Ann. § 56-5-2950 were substantive in nature and did not apply retroactively to Hilton's case based on the plain language of the savings clause included in the amending legislation. (R. pp. 36-40). The prosecutor further asserted Hilton's breath alcohol test was conducted within two hours of his arrest even if the statutory changes applied retroactively to his case. (R. pp. 40-43). For those reasons, the prosecutor argued Hilton's motion to exclude the breath alcohol test results should be denied. (R. pp. 43-44).

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

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<sup>3</sup> At the outset of the hearing, Hilton provided the circuit court judge and the prosecutor with a copy of a memorandum in support of his motion. (R. pp. 54-56).

<sup>4</sup> Additionally, Hilton asserted the particular Datamaster machine used in his case was unreliable. (R. pp. 65-66). However, the circuit court judge subsequently rejected that contention. (R. pp. 1-2).

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

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

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

(R. p. 4). The State then timely appealed the circuit court judge's ruling.

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<sup>5</sup> The circuit court judge further noted: "At the motion hearing, the breathalyzer operator testified that the prosecutor's letter dated October 3, 2011, accurately reflected the date and time of arrest and that the date and time of arrest on the BA report was not correct. However, the state has never issued an amended written report. Instead, the State argues that the original BA report combined with the prosecutor's letter amending the date and time of arrest satisfies the requirements of Code §56-5-2950(I)." (R. p. 3, n. 3).

## ARGUMENT

### I.

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

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

### STANDARD OF REVIEW

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

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

### ANALYSIS

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

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

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

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

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

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

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

#### **Savings clause**

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

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

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

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

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

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

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

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

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

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

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

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<sup>7</sup> Relying on the decision in State v. Bryant, Hilton argued to the circuit court judge that statutory amendments had previously been applied in a retroactive manner even when "a broadly-worded savings clause" was included in the amending legislation. (R. pp. 9-10). However, the statute involved in Bryant was an entirely new law that this Court determined did not repeal or amend any previously existing statutes. See Bryant, 382 S.C. at 510, 675 S.E.2d at 819 ("[S]ection 17-23-175 was an addition to the statutory scheme that deals with the prosecution and punishment of sexual offenders." (emphasis added)); see also Act No. 346, § 2, 2006 S.C. Acts & Joint Resolutions (adding Section 17-23-175 to the statutory code). Therefore, this Court found the language of the savings clause, which only applied to provisions repealing or amending an existing law, was not applicable to that statutory provision and did not prevent it from being applied in a retroactive manner. See Bryant, 382 S.C. at 510, 675 S.E.2d at 819 ("We do not believe section 17-23-175 repealed or amended any previously existing law as contemplated by the savings clause. . . . Therefore, we agree with the trial court that the savings clause did not prohibit the application of section 17-23-175 in Bryant's case."). Significantly, unlike in Bryant, the amending legislation in Hilton's case indisputably amended the previously-enacted version of Section 56-5-2950(a). See Act No. 201, § 9, 2008 S.C. Acts & Joint Resolutions (amending as opposed to enacting Section 56-5-2950(a)). Therefore, the plain language of the savings clause involved in Hilton's case clearly required the amendments to Section 56-5-2950(a) to be applied prospectively as opposed to retroactively. See Bolin, 381 S.C. at 562, 673 S.E.2d at 887 ("[B]ecause the legislature clearly and unambiguously specified the Act be applied prospectively [through the language of the savings clause], the Act cannot be applied retroactively to Bolin's case.").

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

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

App. 2011) (“[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention.”).

Based on the obvious inconsistencies between the circuit court judge’s ruling and the clear intentions of the legislature in enacting the changes to Section 56-5-2950(a), the circuit court judge’s ruling excluding the results of Hilton’s breath test should be reversed and Hilton’s case should be remanded for trial.

## II.

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

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

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

### **STANDARD OF REVIEW**

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

### **ANALYSIS**

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

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

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

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

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

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

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

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<sup>10</sup> Notably, the tickets issued to Hilton after the collision listed the time of the violation, which was the time of the collision and not the time of Hilton's arrest, as 10:15 p.m. (R. p. 138; pp. 288-289). Furthermore, the traffic collision report form and the Department of Motor Vehicles collision notice form also listed 10:15 p.m. as the time of collision and contained no reference to Hilton's arrest or the time of his arrest. (R. p. 139; pp. 290-294). However, the circuit court judge did not consider the information contained in those documents, which all had been presented to Hilton, in determining Hilton's time of arrest. (R. pp. 1-4).

<sup>11</sup> In his memorandum in support of his motion to exclude the breath alcohol test results, Hilton argued the proper time of his arrest "was at or about 10:15 p.m." because that time allegedly reflected the moment a reasonable person in his situation would have believed he or she was not free to leave the scene. (R. pp. 13-15). Hilton further argued he was under arrest the moment law enforcement officers arrived at the scene of the collision. (R. p. 14). However, neither Hilton's alleged belief he was not free to leave the scene of the collision nor the arresting officer's arrival at the scene established Hilton was under arrest. See State v. Brannon, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010) ("[T]he concepts of arrest and seizure are . . . distinguishable because each concept requires a distinct analysis. In determining whether an arrest has occurred, the focus is on the intent of the police officer and the suspect. By contrast an individual is seized under the Fourth Amendment when a reasonable person, in view of all of the circumstances of a particular case, would not believe he was free to leave." (citations omitted)). Hilton was only under arrest when he

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

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possessed the intent to submit to arrest and the arresting officer possessed the intent to arrest him. See State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860-861 (1960) ("To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained." . . . [T]here must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary." (citations omitted)). Thus, Hilton's arrest could not have occurred at 10:15 p.m. since the arresting officer was not even at the scene at that point in time. (R. pp. 139-140).

<sup>12</sup> Specifically, during the hearing, Hilton stated: "We would stipulate that this video would show a time different and would be, if you accept what you see here with the caveat that that time is a time on a video camera which is no way authenticated either. So, I mean, it's – there would be a time on the video different than 10-15, would put it within two hours. We would stipulate to that." (R. p. 143). Hilton further stipulated the time reflected in the prosecutor's letter matched the time of arrest reflected in the videotape of the arrest. (R. p. 143). Based on that stipulation, the circuit court judge determined it was unnecessary for the videotape to be introduced into evidence during the hearing. (R. pp. 143-144).

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

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

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

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

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

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

**CONCLUSION**

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

Respectfully submitted,

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March 26, 2013

**EXHIBIT "C"**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of General Sessions

Honorable Benjamin H. Culbertson, Circuit Court Judge

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Appellate Case No. 2012-211546

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THE STATE,

Appellant,

v.

MICHAEL J. HILTON,

Respondent.

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**BRIEF OF RESPONDENT**

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APR 15 2013

SC Court of Appeals

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## STATEMENT OF ISSUES ON APPEAL

### I.

Did the circuit court commit an error of law in applying a statutory amendment retroactively where the amendment was procedural and applied to evidentiary matters, and did the state fail to preserve this purported error for appellate review where the circuit court did not rule on the savings clause and Appellant did not seek a ruling on the savings clause?

### II.

Did the circuit court commit reversible error in excluding from trial the results of a breath test where there is evidence in the record supporting the circuit court's conclusion that the test was not performed within two hours of Respondent's arrest?

## STATEMENT OF THE CASE

Respondent agrees with Appellant's Statement of the Case. Respondent would add that the original hearing on Respondent's motion to exclude the breath test results was scheduled for October 3, 2011. Respondent sought and was granted a continuance of the hearing after the prosecutor produced a letter minutes before the hearing began purporting to set forth the time of Respondent's arrest. The October 3, 2011 letter and its significance are discussed in more detail below.

## STATEMENT OF FACTS

On the evening of May 10, 2008, Officer Peter Christopher Schmidt (Officer Schmidt) of the Myrtle Beach Police Department arrested Respondent and charged him with two counts of felony driving under the influence, one count resulting in death and the other resulting in great bodily injury, in violation of South Carolina Code Section 56-5-2945.<sup>1</sup> R. p. 135, lines 2-3; pp. 288-89. Following arrest, Officer Schmidt transported Respondent to the Myrtle Beach Police Department and offered him a breath test. After several failed attempts in which the DataMaster breath-test machine gave erroneous measurements of the simulator solution, Officer Schmidt changed the simulator solution and at 12:32 a.m. on May 11, 2008, the officer administered a breath test to Respondent. R. p. 149, line 13-p. 151, line 5.

After the test, Officer Schmidt provided Respondent with four "Breath Alcohol Analysis Test Reports" (BAAT Reports). R. pp. 284-87. Three of the BAAT Report evidence failed simulator tests. The fourth BAAT Report, generated after the DataMaster machine allegedly began working properly, generated a result in response to Respondent's breath sample. Each of these BAAT Reports lists Respondent's time of arrest as 10:15 p.m. on May 10, 2008. R. pp. 284-87.

On October 3, 2011, when the Respondent's motion to suppress was originally scheduled to be heard, the prosecutor provided defense counsel with a letter signed by the prosecutor. The letter purported to "amend" Respondent's time of arrest from 10:15, as stated in all four BAAT Reports, to 10:47 p.m., "as recorded on the roadside video." R. p. 295. However, the prosecutor was not present at the time of Respondent's arrest. Officer Schmidt testified he had no independent recollection of the time of arrest. R. p. 140, lines 1-3; p. 147, line 7-p. 148, line 4.

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<sup>1</sup> Contrary to Appellant's Statement of Facts, it has not been established and Respondent has not conceded that he was operating the vehicle involved in the wreck.

On April 10, 2008, one month prior to Respondent's arrest, the General Assembly amended the implied consent statute, South Carolina Code Section 56-5-2950, along with several other Code Sections. In relevant part, the amendment provided:

AN ACT . . . TO AMEND SECTION 56-5-2950, RELATING TO A DRIVER'S IMPLIED CONSENT TO TESTING FOR ALCOHOL OR DRUGS, **SO AS TO MAKE TECHNICAL CHANGES**, TO PROVIDE WHEN BREATH SAMPLES MUST BE COLLECTED UNDER THIS PROVISION, TO DELETE THE PROVISION THAT PROVIDES THAT AN OFFICER MAY NOT REQUIRE ADDITIONAL TESTS OF A PERSON UNDER CERTAIN CIRCUMSTANCES, TO DELETE THE TERM "DEPARTMENT OF PUBLIC SAFETY" AND REPLACE IT WITH THE TERM "SOUTH CAROLINA CRIMINAL JUSTICE ACADEMY", TO **REVISE THE PROVISIONS THAT PROVIDE THE PROCEDURES FOR ADMINISTERING BREATH TESTS OR OBTAINING SAMPLES**, TO REVISE THE INFORMATION THAT A PERSON CHARGED WITH VIOLATING THIS PROVISION MUST BE GIVEN, TO PROVIDE THE CIRCUMSTANCES IN WHICH A PERSON MUST PAY FOR THE COST OF TESTS PERFORMED UNDER THIS SECTION AND PROVIDE FOR THE DISBURSEMENT OF THESE MONIES, TO DELETE THE PROVISION THAT PROVIDES THAT A CERTAIN LEVEL OF ALCOHOL CONCENTRATION IS A VIOLATION OF SECTION 56-5-2933, AND TO REVISE THE CIRCUMSTANCES IN WHICH CERTAIN EVIDENCE MAY BE EXCLUDED IN A PROCEEDING THAT OCCURS UNDER THIS SECTION;

Act No. 201, 2008 S.C. Acts \_\_\_\_ (emphasis added) [hereinafter the "Act"]. Pursuant to the Act, S.C. Code § 56-5-2950(A) was amended to provide that:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. . . . A breath sample taken for testing must be collected within two hours of the arrest.

S.C. Code Ann. § 56-5-2950(A) (Supp. 2011). The Act became effective on February 9, 2009.

Section 23 of the Act contained a savings clause which provided that:

The repeal or amendment by this act of any law, whether temporary or permanent, civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter discharge, release or extinguish any penalty, forfeiture,

or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by the act must be taken or treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of any rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act No. 201, § 23, 2008 S.C. Acts \_\_\_\_.

At the hearing on his motion to suppress, Respondent argued the results of the DataMaster should not be admitted at trial because the test was not performed within two hours of his arrest, as required by the Act. He further argued the particular DataMaster machine that performed the test was inherently unreliable based on the unusually high rate of error reports generated by the machine.

Appellant argued there was no temporal requirement for the administration of a breath test, although there was a practical limit of three hours separately imposed by the videotaping statute, S.C. Code Section 56-5-2953. Appellant further argued the DataMaster machine was reliable, as evidenced by the correct reading on the simulator solution test conducted after Officer Schmidt changed the solution.

The circuit court found the DataMaster machine was in proper working order as indicated by the fact that the machine gave a correct reading after the simulator solution was changed and that the previous errors generated by the machine were the result of the simulator solution and not the DataMaster machine. R. pp. 1-2. However, the circuit court found the results of the DataMaster test should be excluded because the test was not administered within two hours of the Respondent's arrest. In addition, the circuit court found that Respondent was not provided with a written report setting forth the time of arrest, the time of testing, and the results of the testing, as required by South Carolina Code Section 56-5-2950(I). R. pp. 2-4. The circuit court's

order did not address Appellant's argument that the savings clause applied to prohibit retroactive application of the Act. Appellant did not make a motion asking the circuit court to specifically rule on the application of the savings clause and whether the savings clause prohibited retroactive application of the Act.

## ARGUMENT

### I.

The circuit court correctly held that the statutory amendment applied retroactively where the amendment, by its express terms, was procedural in nature and applied only to evidentiary matters and Appellant is barred from arguing that the savings clause prohibits retroactive application having failed to preserve this argument by not seeking a specific ruling on it from the circuit court.

South Carolina appellate courts have consistently held that “statutes that are remedial or procedural in nature are generally held to operate retrospectively.” S.C. Dep’t of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000). Further, amendments relating to the admissibility of evidence are procedural in nature and apply retroactively. See, e.g., State v. Frey, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004).

Here, the Act specifically provides that the changes made to the implied consent statute are “technical” and revise the “procedures for administering breath tests or obtaining samples.” In construing a statute, the Court will “presume the General Assembly is ‘aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.’” Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (quoting State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997)). A straightforward application of the principle described in Grier supports the circuit court’s conclusion. By explicitly describing the changes to the implied consent statute as “procedural” changes, the General Assembly intended those changes to be retroactively applied.

The issue before the Court in Frey, supra, is virtually indistinguishable from the issue here. In Frey, the Court of Appeals held that an amendment to Section 56-5-2950 applied retroactively to the defendant where the amendment addressed procedural, rather than

substantive, rights and where the amendment was remedial in nature. Id. The Court reached this conclusion even though the statute was amended after the conclusion of the defendant's trial.

The amendment at issue in Frey, like the amendment at issue here, dealt with the admissibility of evidence in a prosecution for driving under the influence (DUI). In Frey, Act No. 61, 2003 S.C. Acts \_\_, changed the procedural requirements for collecting human samples as evidence for chemical testing in DUI cases. Appellant attempts to distinguish Frey by maintaining the statutory amendment in Frey contained no savings clause. Appellant's Br. 15. But Appellant is wrong. Section 10 of Act No 61 provided that:

All proceedings pending and all rights and liabilities existing, acquired, or accrued at the time this act takes effect are saved. The provisions of this act apply prospectively to crimes and offenses committed on or after the effective date of this act.

Notwithstanding the savings clause, the Frey Court reasoned that "[s]ince the statutory mandate in question is inextricably connected to the accuracy and reliability of . . . blood test results, we remand to the trial court" with instructions to apply the statute **as amended**. Id. at 518, 608 S.E.2d at 878 (emphasis added). The Court further reasoned that "[b]ecause [the amendment] addresses procedural rather than substantive rights, it is remedial in nature, and therefore retroactive in its application." Id. at n.3. The Frey opinion did not discuss or even mention the savings clause. The issue turned solely on the procedural, as opposed to substantive, nature of the amendment.

Subsequent to Frey, this Court decided a similar issue in State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009), cert. denied, April 8, 2010, and again held that statutory amendments concerning the admissibility of evidence, but not making substantive changes to the charged offense, apply retroactively. Bryant considered the retroactive application of S.C. Code Section 17-23-175 (2003), a statute enacted after the defendant was criminally charged but

before his trial. The statute allowed a child sexual abuse victim's videotaped, out-of-court statements to be admissible at trial under certain circumstances. Prior to the statute's enactment, such statements were inadmissible hearsay. This Court held that the statute applied retroactively to Bryant's pending prosecution. The Court reasoned that the amendment was not penal in nature, but instead dealt with "procedural, evidentiary matters." Id. at 512, 675 S.E.2d at 820. Significantly, the statute implicated in Bryant also contained a savings clause identical to the savings clause used in the Act in this case. See Act No. 342, 2006 Acts, § 10.

The Supreme Court has also recognized that statutory amendments affecting procedural rights and determining the admissibility of evidence are to be applied retroactively. After the Court of Appeals' decision in Bryant, the Supreme Court decided State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2010). Stahlnecker dealt with the same issue addressed in Bryant: retroactive application of Section 17-23-175 allowing out-of-court statements of children to be admitted as evidence at trial. In holding that this evidence was admissible against the defendant even though the statute was enacted after he was indicted, the Court cited Bryant with approval.

In interpreting section 17-23-175, the court of appeals concluded the section was not penal in nature but rather "deals with procedural, evidentiary matters." State v. Bryant, 382 S.C. 505, 512, 675 S.E.2d 816, 820 (Ct. App. 2009). . . . The amount or type of evidence required at the time of the commission of the offense in order to convict the offender is not altered by section 17-23-175. Because section 17-23-175 merely authorizes the introduction of new evidence and does not alter substantial personal rights, it does not violate the *ex post facto* laws.

Stahlnecker, 386 S.C. at 619-20, 690 S.E.2d at 571. The Court concluded the trial court correctly determined Section 17-23-175 applied retroactively.

Similarly, the Act's amendment to Section 56-5-2950 does not affect substantive rights. It does not change the elements of any offense and it does not change the quantum of evidence needed to sustain a conviction. Nor does the amendment alter the manner in which evidence is

collected. The amendment merely establishes temporal requirements concerning the admissibility of highly ephemeral evidence by revising "the procedure for administering breath tests or obtaining samples" in order to ensure that only reliable evidence is admitted at trial. The amendment, by the clear language used therein, is the sort of procedural, evidentiary amendment to which South Carolina appellate courts have consistently given retroactive effect. Because the arresting officer did not administer Respondent's breath test within two hours of his arrest, as required by law, the test results are unreliable, inadmissible, and properly excluded by the trial court.

The adopted procedure also reflects the General Assembly's judgment that a two-hour collection procedure is necessary in order to ensure that ephemeral blood-alcohol evidence is reliable. It is presumed that "the Legislature in adopting an amendment to a statute intended to make some change in the existing law." Vernon v. Harleystville Mut. Cas. Co., 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964). "The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). The Act prescribed a time limit for the administration of breath tests relative to the time of arrest. It follows that Appellant's failure to administer the breath test within two hours of arrest materially affects the accuracy and reliability of the breath test results. To hold that this time limit does not apply in this case would defeat the remedial and procedural purposes of the Act and ignore the intent of the Legislature.

Furthermore, the statutory two-hour time limit does not go to the machine's capability to measure blood alcohol level, rather, the time limit ensures the breath sample measured by the machine is a reliable indication of the driver's blood intoxication level *at the time the driver was operating a motor vehicle*. "The timing of the administration of [blood alcohol] tests is crucial

because of the ephemeral nature of blood intoxication levels.” State v. Bull, 350 S.C. 58, 62, 564 S.E.2d 351, 354 (Ct. App. 2002). Accordingly, the breath test must not only be performed by a machine which accurately measures the blood intoxication, but it must also be performed within the statutorily-prescribed timeframe. Here, retired SLED captain Andrew Jordan, the State’s expert in DataMaster machines called to testify by the Appellant, testified that DataMaster tests should be administered “as soon as possible” relative to the time of the alleged offense. R. p. 199, lines 11-13. In recognition of these facts, the General Assembly amended the implied consent statute to provide a time limit in which samples must be collected.<sup>2</sup>

To the extent Appellant relies upon the savings clause to argue the circuit court erred, that issue is not preserved because the circuit court did not rule upon it. “For an issue to be properly preserved it has to be raised to and ruled on by the trial court.” State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). See also, State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (“In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.”).

The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments. On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

State v. Porter, 389 S.C. 27, 37-38, 698 S.E.2d 237, 242 (Ct. App. 2010). The circuit court did not rule upon Appellant’s argument that the savings clause prohibits retroactive application of

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<sup>2</sup> Prior to adoption of the Act, South Carolina law already required that breath tests be administered within two hours of arrest where an offender was to be charged with driving with an unlawful alcohol concentration. See S.C. Code Ann. §56-5-2933 (2006). The Act’s amendment brings Section 56-5-2950 in line with the General Assembly’s prior determination with respect to Section 56-5-2933.

the Act. Appellant failed to make a motion seeking a ruling on this issue and therefore it is not preserved for review by this Court.

Even if the issue is preserved, it is without merit for the reasons set forth above. Contrary to Appellant's assertion, the Court in Frey retroactively applied amendments to the implied consent statute – the same statute in issue here – despite a savings clause. In Bryant, this Court gave retroactive application to a statute that made previously-inadmissible evidence admissible. The statute at issue in Bryant contained a savings clause that is word-for-word the same as the savings clause at issue here. In Stahlnecker, the Supreme Court adopted whole-cloth the reasoning in Bryant. The General Assembly is presumed to know the common law, including the abundance of cases holding that procedural changes apply retroactively. The General Assembly described the temporal requirement contained in the Act as a change in "procedure." It follows that the change should be applied retroactively, and the circuit court should be affirmed.<sup>3</sup>

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<sup>3</sup> Appellant cites Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) and State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) to argue that the issue of retroactive application of the Act has already been decided adversely to Respondent. However, neither of those cases analyzes or discusses retroactive application of the Act. It appears the issue was not raised in those cases.

## II.

**The circuit court did not err in excluding the results of the breath test where there is evidence in the record that the test was not performed within two hours of Respondent's arrest.**

There is ample evidence in the record to support the circuit court's conclusion that the DataMaster test was not administered within two hours of Respondent's arrest and, therefore, the ruling should be affirmed.

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973)). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by *any* evidence. Id. The findings of the circuit court are binding on the reviewing court unless unsupported by the evidence or clearly wrong, or controlled by an error of law. State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997) (citing State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994)).

Here, after applying clear precedent of this Court and the Supreme Court to determine the procedural change in the implied consent statute applied retroactively, the circuit court found the breath test was not conducted within two hours and excluded the evidence from trial. There is overwhelming evidence to support this factual determination and the Court of Appeals should affirm the circuit court.

As set forth above, during the motion hearing on October 3, 2011, the prosecutor provided Respondent a letter purporting to change the time of arrest from 10:15 p.m., as evidenced by the BAAT Reports, to 10:47 p.m. Respondent objected to Appellant's post-hoc attempt to change the arrest time on the basis that the prosecutor's letter was provided only minutes before the hearing began, was inadmissible to alter the time of arrest indicated in the BAAT Reports, and was also inadmissible hearsay. Due to the belated nature of the letter's production to Respondent, the circuit court continued the October 3 hearing.

Subsequently, at the October 25 hearing, Respondent introduced four BAAT Reports.<sup>4</sup> R. pp. 284-87. Each of these BAAT Reports indicates the "arrest time" as 22:15, or 10:15 p.m. Officer Schmidt testified that he had no independent recollection of the arrest time. R. p. 140, lines 1-3; p. 147, lines 7-10. The fourth BAAT Report indicates that the "subject sample" was taken at 00:32 (12:32 a.m. the day after the arrest). R. p. 287.

The only evidence presented to the circuit court that indicated an arrest time other than 10:15 p.m. was a letter dated October 3, 2011 and signed by the prosecutor. R. p. 295. The prosecutor's letter contradicts the four BAAT Reports and purports to establish the time of Respondent's arrest as "22:47:54" (10:47 p.m.). According to the letter, this is the time "recorded on the roadside video." R. p. 295. There is no factual dispute that the prosecutor was not present at the arrest scene and has no personal knowledge of the Respondent's time of arrest. R. p. 148, line 24-p. 149, line 9. Furthermore, the Appellant introduced no evidence to establish, or even suggest, that the clock appearing on the "roadside video" was synchronized with the clock on the DataMaster machine. R. p. 155, lines 14-22. Officer Schmidt testified he could not change the

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<sup>4</sup> The first three BAAT Reports were generated after failed simulator tests and copies provided to the Respondent. The fourth BAAT Report was generated after Respondent submitted a breath sample.

clock on the video camera and he never checked the clock for accuracy. R. p. 155, lines 5-6; lines 21-22.

There is abundant, competent evidence to support the circuit court's ruling that the breath test was not administered within two hours of arrest. The only contrary "evidence" is the prosecutor's October 3 letter. This letter is admittedly not based on her firsthand knowledge but relies on the roadside video timestamp as the basis for its determination of Respondent's time of arrest. Officer Schmidt, the custodian of that video, could not vouch for the accuracy of the time depicted in the video, had no independent recollection of the time of arrest, and could not say that the time on the video and the time on the DataMaster report were the same. R. p. 155, lines 12-22. Therefore, the circuit court correctly held that the October 3 letter is not admissible for the purpose of establishing the time of arrest or for any other evidentiary purpose.

As an additional basis for excluding the results of the breath test, the circuit court found the Appellant never provided Respondent with a written report that complied with the requirements of Section 56-5-2950(I) and indicating the breath test was performed within two hours of the time of arrest. R. p. 4. Section 56-5-2950(I) requires the arresting law enforcement officer to provide the defendant charged with driving under the influence "a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence."<sup>5</sup> While the statute does not specify the precise form this report should take, argument and statements of counsel, like the prosecutor's October 3 letter, are not evidence. See, e.g., S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003). Officer Schmidt did, however, testify

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<sup>5</sup> At the time of the Respondent's arrest, this provision was codified at Section 56-5-2950(d). When the statute was amended by the Act, effective on February 9, 2009, the written report requirement was re-codified in subsection (I) with no change in the language used.

that he provided Respondent with “breath alcohol analyst test report” which set forth the date of arrest and the time of the arrest as 22:15 (i.e. 10:15 p.m.). R. p. 147, line 15-p. 148, line 4; p. 148, lines 17-23.

The circuit court properly concluded that the prosecutor’s October 3, 2011, letter does not establish or alter Respondent’s time of arrest and nor does it constitute a “written report” for the purpose of Section 56-5-2950(I). The letter purports to set forth the time of arrest only; but the written report required by subsection (I) must also set forth the time of the tests, and the results of the tests. The prosecutor’s letter contains neither the time nor the results of the test. Further, the prosecutor’s letter is not based on first-hand knowledge but appears to be based solely on the timestamp in the videotape produced by officers at the accident scene. The timestamp depicted in the videotape is hearsay: an out-of-court statement that Appellant now attempts to rely upon for the truth of the matter stated. As such, the timestamp and the prosecutor’s letter based thereon do not change the time of arrest set forth in the BAAT Reports. The letter would not be admissible under Rule 802, SCRE, or any rule of evidence. Moreover, the letter is essentially argument or a statement of counsel for the State. As such, it is not admissible as substantive evidence. See S.C. Dep’t of Transp. v. Thompson, *supra* (argument by counsel is not evidence).

The only writing that complies with the plain requirements of Section 56-5-2950(I) is the fourth BAAT Report provided to Respondent by Officer Schmidt on the night of the arrest. That document contains all of the information prescribed by Section 56-5-2950(I): the time of arrest, the time of the test, and the results of the test. The prosecutor’s letter is not competent evidence of anything and the circuit court correctly declined to consider it in reaching its conclusion.

The evidence supports the circuit court's conclusion that the Appellant failed to provide the Respondent with a written report as required by Section 56-5-2950(I), other than the BAAT Report. R. p. 287. The BAAT report is the only written report that complies with Section 56-5-2950(I), and it indicates the time of arrest was more than two hours prior to the administration of the breath test. Because this conclusion is supported by the evidence, it should be affirmed.

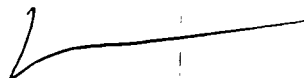
### CONCLUSION

In enacting the statutory amendments to the implied consent law, the General Assembly described the changes as "technical" changes to "procedure." The amendment was adopted prior to Respondent's arrest, but did not become effective until afterwards. However, our appellate courts have consistently applied procedural changes retroactively. To the extent the Appellant argues retroactive application is foreclosed by the savings clause, this issue is not properly before the Court because it was not ruled upon by the trial court. Regardless, the savings clause argument fails on its merits. This Court gave retroactive application to an amendment to the procedures for collecting blood samples in DUI cases in Frey despite the fact that the amending act contained a broadly-worded savings clause. Moreover, both this Court and the Supreme Court gave retroactive application to statutory changes concerning the nature of admissible evidence where the amending legislation contained a savings clause *identical* to the one used in the Act. See Bryant and Stahlnecker, *supra*. The Court should adhere to this precedent and affirm the circuit court's retroactive application in this case.

Finally, there is ample evidence to support the circuit court's conclusions that the breath test was not administered to Respondent within two hours and that Respondent was not provided with a written notice of certain facts as required by §56-5-2950(I), apart from the BAAT Report

indicating the Appellant did not meet the two-hour time limit. Because there is evidence to support the circuit court's factual conclusions, the Court should affirm on these issues as well.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

April 15, 2013

**EXHIBIT "D"**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

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**FINAL REPLY BRIEF OF APPELLANT**

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**II. Assuming the statutory changes to the implied consent statute applied retroactively and required Hilton’s breath alcohol test to be administered within two hours of his arrest, the circuit court judge erred in finding either Hilton’s test was not conducted within the two-hour time limit or Hilton was not provided with a complete written report as required by the implied consent statute because the evidence and testimony presented during the suppression hearing, including the testimony of the arresting officer confirming he was not present at the scene of the collision at the time the circuit court judge determined the officer arrested Hilton, established Hilton’s breath alcohol test was conducted within two hours of his arrest and further established Hilton was provided with written notice of the correct time of arrest, the time of the breath alcohol test, and the results of that test prior to the commencement of any proceeding in which the test results were introduced as evidence. .... 13**

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## ARGUMENT IN REPLY

### I.

The circuit court judge committed reversible error by retroactively applying the statutory changes to the implied consent statute and excluding the results of Hilton's breath alcohol test because the changes to the statute were substantive in nature as opposed to procedural in nature and because the savings clause included in the amending legislation expressly prohibited retroactive application of the statutory changes. Furthermore, the issue regarding the applicability of the savings clause was properly preserved for appellate review because it was specifically and timely raised by the prosecutor and ruled upon by the circuit court judge, which was all that was necessary to preserve the issue for appellate review.

In his appellate brief, Respondent Michael J. Hilton asserts the circuit court judge correctly determined the statutory amendments to S.C. Code Ann. § 56-5-2950 were retroactively applicable to Hilton's case despite the fact those amendments took effect several months after Hilton's arrest. In support of that contention, Hilton maintains the statutory amendments were procedural in nature, which he argues meant they had to be applied retroactively regardless of the legislature's inclusion of a savings clause in the amending legislation to expressly limit the effect the amendments would have on pending cases. Hilton further contends the State failed to preserve for appellate review any argument regarding the applicability of the savings clause because the circuit court judge allegedly did not rule on that argument in granting Hilton's motion to suppress the breath alcohol test results. Initially, the issue regarding the applicability of the savings clause was properly preserved for appellate review because it was specifically and timely raised by the State and ruled upon by the circuit court judge. Furthermore, contrary to Hilton's contentions, the circuit court judge erred in determining the statutory amendments to Section 56-5-2950 applied retroactively because those amendments were substantive in nature and because the savings clause included in the amending legislation specifically precluded retroactive application of the statutory changes. Accordingly, the circuit court

judge's decision to suppress the breath alcohol test results was erroneous and should be reversed, and Hilton's case should be remanded for trial.

**A. Preservation of the State's Argument Regarding the Applicability of the Savings Clause**

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

However, once an issue has been raised to and ruled upon by the trial judge, "[a] party is not required to harass the trial judge with repetitive objections when an intelligible one has been made." Long v. Norris & Assocs., Ltd., 342 S.C. 561, 578, 538 S.E.2d 5, 14 (Ct. App. 2010). Significantly, a party in a criminal case is only required to raise an objection and receive an adverse ruling before that party can properly appeal the ruling without raising any further objections to the matter. See State v. Wilson, 389 S.C. 579, 584, 698 S.E.2d 862, 864 (Ct. App. 2010) ("[W]hen an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error." (italics in original)). "So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon [the losing

party] to harass the judge by parading the issue before him again.’ ” State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995).

In the case sub judice, Hilton contends the State failed to preserve for appellate review its arguments regarding the applicability of the statutory savings clause because Hilton maintains the circuit court judge did not expressly rule upon the savings clause in his order suppressing the breath alcohol test results and the State did not make a motion following the issuance of the ruling seeking to have that matter expressly addressed in the circuit court judge’s order. Contrary to Hilton’s contentions, the issue regarding the applicability of the savings clause was properly preserved for appellate review because it was specifically and timely raised by the State and ruled upon by the circuit court judge, which was all that was necessary to preserve the issue pursuant to South Carolina’s issue preservation rules.

Notably, in arguing against Hilton’s motion seeking suppression of the breath alcohol test results, the prosecutor asserted to the circuit court judge that the statutory changes to Section 56-5-2950 were substantive in nature and did not apply retroactively to Hilton’s case based on the plain language of the savings clause included in the amending legislation. (R. pp. 36-40). Subsequently, after considering the arguments raised by the prosecutor along with those raised by defense counsel, the circuit court judge granted Hilton’s motion to suppress the breath alcohol test results after finding the changes to Section 56-5-2950 were procedural in nature, which he concluded required retroactive application of those changes. (R. p. 2; p. 4).

Thus, in Hilton’s case, the prosecutor raised the arguments currently being raised on appeal to the circuit court judge, and the circuit court judge rejected those arguments by granting the motion to suppress the breath alcohol test results. Cf. State v. Brown, 389

S.C. 473, 480, n. 1, 698 S.E.2d 811, 815 (Ct. App. 2010) (“Trial counsel asked the trial court to suppress the evidence, and the trial court denied this request. The issue was raised to and ruled upon by the trial court and is properly before this court.”), rev’d on other grounds, 401 S.C. 82, 736 S.E.2d 263 (2012). Once the issue was raised to and ruled upon by the circuit court judge, the prosecutor was not required to repeat her previous arguments to the circuit court judge or to take any further steps in order to preserve the issue for appellate review. See Wilson, 389 S.C. at 584, 698 S.E.2d at 864 (“[W]hen an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error.” (italics in original)); see also Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 493 (Ct. App. 2007) (“Hardaway admits in its brief that Hall raised the ice issue below. However, Hardaway argues the master **failed to address these specific arguments in its order**. In fact, the master reviewed the evidence and the arguments of both parties and determined that Hardaway was entitled to charge for ice based on the first contract and the fax between the parties. Because Hall raised the issue of whether Hardaway was entitled to charge for ice and the master determined Hardaway was entitled to do so, the issue was raised to and ruled upon by the master. Accordingly, the issue is preserved for appellate review.” (emphasis added)). Accordingly, because the issue and arguments that the State is raising on appeal were raised to and ruled upon by the circuit court judge, the issue was properly preserved for appellate review and should be addressed on appeal.

**B. Substantive Nature of the Statutory Changes to S.C. Code Ann. § 56-5-2950 and the Significance of the Legislature’s Inclusion of a Savings Clause in the Amending Legislation**

When construing a statutory provision, “[r]etroactivity is not favored in the law.” Bowen v. Georgetow Univ. Hosp., 488 U.S. 204, 208 (1988). Courts will **not** apply statutes retroactively unless the result “is so clearly compelled as to leave **no room for reasonable doubt[.]**” Hyder v. Jones, 271 S.C. 85, 87-88, 245 S.E.2d 123, 125 (1978) (emphasis added). “It takes a clear expression of legislative purpose to justify a retroactive application.” Id. at 88, 245 S.E.2d at 125.

Pursuant to the rules of statutory construction and absent a specific provision or clear legislative intent to the contrary, statutes are construed to apply prospectively as opposed to retroactively unless the statutes are remedial or procedural in nature. Edwards v. State Law Enforcement Div., 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). Statutes are considered to be remedial in nature when they create new remedies for existing rights or enlarge the rights of persons under disability. Id. Likewise, statutes are considered to be procedural in nature when they set out a mode of procedure **for a court to follow** or prescribe a method of enforcing rights. Id. at 580, 720 S.E.2d at 466; see BLACK’S LAW DICTIONARY 1323 (9th ed. 2009) (defining “procedural law” as “[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves” (emphasis added)). Conversely, statutes are considered to be substantive in nature when they create, define, and regulate the rights, duties, and powers of parties. See BLACK’S LAW DICTIONARY 1567 (9th ed. 2009) (defining “substantive law” as “[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of the parties”). Importantly though, regardless of whether a statute is remedial, procedural, or substantive in nature, the intent of the legislature is

paramount and ultimately determines whether a statute will have prospective or retroactive application. Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

In the case at bar, Hilton contends the circuit court judge correctly determined the statutory amendments to Section 56-5-2950 were retroactively applicable to his case despite the fact those amendments took effect several months after his arrest and despite the fact the legislature expressly included a savings clause in the amending legislation. In support of that contention, Hilton argues the statutory changes should have been applied retroactively because they were procedural in nature and, just as the circuit court judge did, primarily relies on this Court's decision in State v. Frey, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005). However, due to key distinctions between the statutory changes involved in Frey and those involved in Hilton's case, the decision in Frey does not support the circuit court judge's ruling and does not establish the statutory changes to Section 56-5-2950 enacted after Hilton's arrest were retroactively applicable to his case.

Looking to the decision in Frey, Frey sought the suppression of his blood alcohol test results on the basis that his blood sample was not drawn by a qualified individual as mandated by the applicable provisions of the implied consent statute. Id. at 515, 608 S.E.2d at 877. Importantly, at both the time Frey's blood sample was collected and at the time Frey's case was considered on appeal, the versions of Section 56-5-2950 in effect at each time required blood samples in driving under the influence cases to be drawn by licensed physicians, registered nurses, or other trained medical personnel. See S.C. Code Ann. § 56-5-2950(a) (Supp. 2003) ("Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples

in a licensed medical facility.”); S.C. Code Ann. § 56-5-2950(a) (Supp. 2001) (“Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility.”). However, at the time of Frey’s arrest, Section 56-5-2950 did not contain a provision specifically outlining the procedure for a court to follow in the event the provisions of the statute were not followed. S.C. Code Ann. § 56-5-2950 (Supp. 2001) (containing no provision addressing what a reviewing court should do in response to a violation of the statute’s provisions). Such a provision was only added to Section 56-5-2950 subsequent to Frey’s trial and conviction through an amendment to the statute. See S.C. Code Ann. § 56-5-2950(e) (Supp. 2003) (“The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any test results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure.”). Pursuant to the amended version of the statute, evidence collected in violation of the mandates of the statute was inadmissible if the trial judge found the violation affected the accuracy or reliability of the test results or the fairness of the testing procedure.<sup>1</sup> S.C. Code Ann. § 56-5-2950(e) (Supp. 2003).

On appeal, Frey challenged the admission of his blood test results based on an alleged violation of the provision of Section 56-5-2950 requiring blood samples to be drawn by qualified medical personnel, and the State responded by arguing Frey’s blood sample was drawn in compliance with that provision and, even if it was not, suppression

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<sup>1</sup> Notably, in suppressing the results of Hilton’s breath alcohol test, the circuit judge in Hilton’s case did not make any finding that the arresting officer’s alleged failure to administer the breath alcohol test within two hours of Hilton’s arrest affected the accuracy or reliability of the test results or the fairness of the testing procedure as required by Section 56-5-2950. (R. pp. 1-4).

of the evidence was not warranted without a finding of prejudice because the version of the statute in effect at the time of Frey's arrest was silent in regards to the effect of statutory noncompliance on the admissibility of evidence. Frey, 362 S.C. at 517-518, 608 S.E.2d at 877-878. After considering the issue, this Court rejected the State's contentions and determined the State had not satisfied the requirements of Section 56-5-2950 in regards to proving the blood sample was drawn by a qualified individual. Id. at 517, 608 S.E.2d at 877-878. Furthermore, this Court concluded a prejudice finding was required before the evidence could be suppressed while also determining the statutory changes to Section 56-5-2950 providing for the court to suppress evidence collected in violation of the statute where prejudice resulted were remedial in nature and were retroactively applicable. Id. at 518, n. 3, 608 S.E.2d at 878. As a result, this Court remanded the matter to the trial court to determine whether the State's noncompliance with the provisions of Section 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure. Id. at 519, 608 S.E.2d at 879.

Comparing the statutory changes involved in Frey to those involved in Hilton's case, the relevant statutory change addressed in Frey established a remedy for a violation of the established procedure for the collection of a blood sample in a driving under the influence case and outlined a procedure for the court to follow in the event a violation occurred without altering the actual collection procedure law enforcement officers and medical personnel were required to follow in collecting a blood sample. Thus, because the changes dealt with remedies and procedures **for the court to follow**, those statutory changes were remedial in nature and could properly be applied in a retroactive fashion. See Edwards, 395 S.C. at 579, 720 S.E.2d at 466 ("A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability."); see

also BLACK'S LAW DICTIONARY 1323 (9th ed. 2009) (defining "procedural law" as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves"). Conversely, unlike the changes in Frey, the statutory changes involved in Hilton's case were substantive in nature because they materially altered the established procedure for the performance of a breath alcohol test, creating a new duty and obligation on law enforcement officers regarding the administration of breath alcohol tests and granting the new right to have breath alcohol testing conducted within two hours to suspects in driving under the influence cases.<sup>2</sup> See Edwards, 395 S.C. at 579, 720 S.E.2d at 466 ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only."); see also BLACK'S LAW DICTIONARY 1323 (9th ed. 2009) (defining "procedural law" as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves" (emphasis added)); see, e.g., State v. Huntley, 349 S.C. 1, 4-5, 562 S.E.2d 472, 473-474 (2002) (characterizing an amendment that changed the simulator solution test level and its corresponding range of accuracy in regards to breath alcohol tests, increased the alcohol inference level, and increased the alcoholic concentration level at which a person must enroll in a safety program and at which an insurance penalty may be imposed as "substantive changes" to the legislation). As a result, the substantive statutory changes in Hilton's case, which did not alter any procedure for the court to

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<sup>2</sup> In arguing the statutory changes to Section 56-5-2950 were procedural in nature, Hilton contends the changes did not "alter the manner in which evidence is collected." (Resp. Br. pp. 9-10). However, during the hearing before the circuit court judge, defense counsel acknowledged the statutory changes did change the manner in which breath alcohol tests were conducted, asserting: "The statute, I think we both can agree, at the time that Mr. Hilton was arrested did not require a breathalyzer test to be had within two hours of arrest. Within the year of his arrest it was changed to require a breathalyzer test within two years - within two hours of the arrest, and if not, if it was not within two hours the results were inadmissible." (R. p. 58) (emphasis added).

follow but, instead, created new substantive duties, obligations, and rights for law enforcement officers and individuals arrested for driving under the influence, should not have been applied retroactively, and the circuit court judge committed reversible error in relying on the decision in Frey to rule otherwise. Cf. Edwards, 395 S.C. at 582, 720 S.E.2d at 467 (“The amendments to section 23-3-430 do not provide a procedure for a court to follow, or prescribe a method for enforcing rights. Thus, the amendments are not procedural and cannot be applied retroactively to [Edwards’] case.”).

Furthermore, in addition to arguing the statutory changes were retroactively applicable because they were procedural in nature, Hilton contends the legislature’s inclusion of a savings clause in the amending legislation did not preclude retroactive application of the statutory changes. In support of that argument, Hilton notes the amending legislation involved in Frey had a savings clause but the statutory changes were still applied in a retroactive fashion.<sup>3</sup> However, despite the fact this Court found the remedial statutory changes in Frey applied retroactively, this Court did not consider the significance of the savings clause in reaching its decision and did not address or mention the savings clause in its opinion. Thus, because this Court did not address the savings clause as part of its analysis, the decision in Frey does not stand for the proposition that procedural or remedial changes apply retroactively even in situations where the plain language of a savings clause would prohibit retroactive application. See Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) (“It is, of course,

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<sup>3</sup> In the Brief of Appellant, counsel for the State mistakenly and erroneously asserted the amending legislation in Frey did not contain a savings clause after overlooking that particular provision. Contrary to that original assertion, the amending legislation specifically included a savings clause stating: “All proceedings pending and all rights and liabilities existing, acquired, or accrued at the time this act takes effect are saved. The provisions of this act apply prospectively to crimes and offenses committed on or after the effective date of this act.” Act No. 61, § 10, 2003 S.C. Acts & Joint Resolutions.

settled law that ‘a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.’ ” (citations omitted)).

In further support of his argument that the legislature’s inclusion of a savings clause had no impact on the retroactive application of the procedural statutory changes to Section 56-5-2950 involved in his case, Hilton contends the statute involved in State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009), was applied retroactively despite the fact the legislative act enacting that statute contained an identical savings clause. However, in reaching its decision in Bryant, this Court did not find the statute at issue in Bryant’s case was retroactively applicable merely because it was procedural in nature but, instead, specifically considered the significance of the enacting legislation’s savings clause before holding the statute was retroactively applicable.<sup>4</sup> Id. at 510, 675 S.E.2d at 819. Significantly, this Court only determined the statute could be applied retroactively after determining the savings clause included in the enacting legislation expressly **did not apply** to the newly-enacted statute in Bryant’s case based on the fact the language of the savings clause only addressed statutory changes repealing or amending existing laws. Id. Therefore, this Court’s decision in Bryant establishes the circuit court judge erred by ignoring the plain language of the amending legislation’s savings clause instead of supporting the circuit court judge’s decision to apply the statutory changes to Section 56-5-2950 retroactively to Hilton’s case.

Despite Hilton’s contentions to the contrary, the legislature manifested its clear intention for the substantive statutory changes to Section 56-5-2950 to be applied

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<sup>4</sup> Similar to the statutory changes in Frey and unlike the statutory changes in Hilton’s case, the statute involved in Bryant was procedural in nature because it outlined a procedure **for the court to follow** by allowing for the admission of otherwise inadmissible evidence in the event a trial judge determined certain conditions were met. See Bryant, 382 S.C. at 510, 675 S.E.2d at 819 (recognizing the enactment of S.C. Code Ann. § 17-23-175, which the court found to be retroactively applicable, “provid[ed] a mechanism for admitting out-of-court statements by a child victim of sexual abuse”).

prospectively and not retroactively through the inclusion of the savings clause in the amending legislation. See Act No. 201, § 23, 2008 S.C. Acts & Joint Resolutions (“The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.”); see also State v. Bolin, 381 S.C. 557, 562, 673 S.E.2d 885, 887 (Ct. App. 2009) (“By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective.”). Accordingly, the circuit court judge committed reversible error in finding those statutory changes were procedural in nature and were retroactively applicable to Hilton’s case. See Bolin, 381 S.C. at 562, 673 S.E.2d at 887 (finding the language of a savings clause, which was identical to the one included in the act amending Section 56-5-2950(a), required prospective application of the legislation). For the foregoing reasons coupled with the reasons articulated in the Brief of Appellant, the circuit court judge’s ruling excluding the results of Hilton’s breath alcohol test should be reversed and Hilton’s case should be remanded for trial.

## II.

**Assuming the statutory changes to the implied consent statute applied retroactively and required Hilton's breath alcohol test to be administered within two hours of his arrest, the circuit court judge erred in finding either Hilton's test was not conducted within the two-hour time limit or Hilton was not provided with a complete written report as required by the implied consent statute because the evidence and testimony presented during the suppression hearing, including the testimony of the arresting officer confirming he was not present at the scene of the collision at the time the circuit court judge determined the officer arrested Hilton, established Hilton's breath alcohol test was conducted within two hours of his arrest and further established Hilton was provided with written notice of the correct time of arrest, the time of the breath alcohol test, and the results of that test prior to the commencement of any proceeding in which the test results were introduced as evidence.**

In his appellate brief, Hilton asserts the circuit court judge correctly excluded the results of the breath alcohol test results after determining the breath alcohol test was not conducted within two hours of Hilton's arrest and alternatively finding Hilton was not provided with a proper written report conveying the time of the arrest, the time of the breath alcohol test, and the results of that test as required by the implied consent statute. In support of that contention, Hilton maintains overwhelming evidence was presented during the hearing on the suppression motion supporting the circuit court judge's determination that the breath alcohol test was not conducted within two hours of Hilton's arrest. Additionally, Hilton contends the circuit court judge correctly determined the prosecutor's letter provided to Hilton prior to the suppression hearing did not constitute a written report as required by the mandates of the implied consent statute. To the contrary, the circuit court judge's determination in regards to the time of arrest was clearly erroneous because the evidence presented during the suppression hearing, including the testimony of the arresting officer confirming he was not present at the scene of the collision at the time the circuit court judge concluded the officer arrested Hilton, clearly established Hilton's breath alcohol test was administered within two hours of the

time of his arrest. Furthermore, the circuit court judge erred in determining the letter provided by Hilton prior to the suppression hearing did not constitute a written report because the letter coupled with the initial report provided to Hilton put Hilton on notice of all the information required to be provided to him by the implied consent statute. Accordingly, the circuit court judge's decision to suppress the breath alcohol test results was erroneous and should be reversed, and Hilton's case should be remanded for trial.

Pursuant to S.C. Code Ann. § 56-5-2950(d) (2006), "[a] person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence." However, aside from requiring the written report to be provided to the defendant prior to any trial or other proceeding in which the test results are used as evidence, Section 56-5-2950(d) does not contain any restrictions on how the written report is prepared, who prepares the written report, how the information contained within the written report is organized, or what information is used to prepare the written report. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Significantly, the sole purpose of the statute is for the defendant to be notified of the timing and results of the testing used to determine whether alcohol or drugs were present in the defendant's system. See State v. Bull, 350 S.C. 58, 62, 564 S.E.2d 351, 353 (Ct. App. 2002) ("[T]he purpose of the statute is to provide for reciprocal discovery between the State and a defendant as to the time and results of tests conducted to determine the presence of alcohol or drugs in the operator of a motor vehicle.").

In Hilton's case, Hilton contends the circuit court judge's determination that Hilton's breath alcohol test was not conducted within two hours of his arrest was supported by overwhelming evidence and should be affirmed. In support of that contention, Hilton argues the only evidence establishing the breath alcohol test was conducted within two hours of his arrest was the prosecutor's letter, which he maintains was inadmissible hearsay. To the contrary, substantial evidence was presented during the hearing establishing Hilton's breath alcohol test was conducted within two hours of his arrest and the time reflected as the time of arrest in the initial breath alcohol test report was incorrect.

Turning to the evidence presented during the hearing, Trooper Pete Schmidt, who was the arresting officer in Hilton's case, testified he entered the "time of arrest" into the Datamaster machine as 10:15 p.m. based on the operating policy of the Myrtle Beach Police Department at the time, which dictated officers enter the collision time as the time of arrest when conducting a breath alcohol test instead of entering the actual arrest time. (R. pp. 137-138). Most significantly, Trooper Schmidt further stated he was not present at the scene of the collision when it occurred but, instead, arrived within ten minutes of the collision. (R. p. 140). Furthermore, in addition to the officer's testimony establishing that the time of arrest could not have been 10:15 p.m., Hilton stipulated the videotape of his arrest reflected that he was arrested at 10:47 p.m. (R. p. 143). Thus, as Trooper Schmidt's testimony established the officer was not even on the scene at 10:15 p.m., the testimony and evidence presented during the hearing unquestionably established the circuit court judge's determinations regarding the time of Hilton's arrest were erroneous considering the arresting officer was not even present at the scene at the time the circuit court judge concluded he arrested Hilton.

Recognizing that the testimony and evidence presented during the hearing established Hilton was not actually arrested at 10:15 p.m. but, instead, was arrested less than two hours before the breath alcohol test was administered, the circuit court judge acknowledged in his order that Trooper Schmidt's testimony established the time of arrest listed in the initial written report was incorrect. (R. p. 3, n. 3). However, after affirmatively acknowledging the testimony of the officer who performed the breath alcohol test on Hilton confirmed the test was actually performed within two hours of Hilton's arrest, the circuit court judge concluded the breath alcohol test was performed at the time listed in the initial report based on his apparent assumption that the information contained in the initial written report was binding on the court. (R. pp. 3-4). Because the circuit court judge made his determination of the time of arrest based solely on the contradicted and unsupported information contained in the initial written report and not on the evidence presented to him during the hearing, the circuit court judge's ruling was not supported by the evidence and should be reversed.

Furthermore, in addition to arguing the circuit court judge's determination of the time of arrest was supported by overwhelming evidence, Hilton contends the circuit court judge also correctly determined the prosecutor's letter did not constitute a "written report" pursuant to the requirements of Section 56-5-2950. In support of that argument, Hilton contends the information contained in the prosecutor's letter is inadmissible hearsay while also noting the letter did not contain the time or results of the breath alcohol test. Initially, the provisions of Section 56-5-2950 neither require a written report prepared pursuant to the statute to contain only the first-hand recollections of the person who arrested the defendant or administered the breath alcohol test nor prohibit the inclusion of hearsay information in the written report. As a result, nothing in the

provision of Section 56-5-2950 prohibited the prosecutor from correcting the information listed in the initial written report and providing it to Hilton in writing prior to the commencement of Hilton's trial. See White, 338 S.C. at 58, 525 S.E.2d at 263 ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Furthermore, by receiving the initial written report along with the correct time of arrest through the prosecutor's written letter, Hilton was provided with written notice of all of the information necessary for him to be fully apprised of the evidence the State intended to introduce during trial, which was the clear legislative purpose behind the enactment of Section 56-5-2950(d). See Bull, 350 S.C. at 62, 564 S.E.2d at 353 ("[T]he purpose of the statute is to provide for reciprocal discovery between the State and a defendant as to the time and results of tests conducted to determine the presence of alcohol or drugs in the operator of a motor vehicle."). Accordingly, the circuit court judge erred in finding the State failed to provide Hilton with a written report as required by the implied consent statute.

Prior to the commencement of "any trial or other proceeding in which the results of the tests [were] used as evidence[,]" Hilton was provided with a written report and a supplement to the written report notifying him of the correct time of his arrest, the time of the breath alcohol test, and the results of that test. S.C. Code Ann. § 56-5-2950(d) (2006). Thereafter, during the suppression hearing, evidence and testimony was presented establishing Hilton's breath alcohol test was conducted within two hours of his arrest. Assuming the circuit court judge had not been wrong in finding the amendments to Section 56-5-2950 applied retroactively to Hilton's case, the circuit court judge's findings regarding Hilton's time of arrest and receipt of a written report were clearly

erroneous and contrary to the evidence presented to him. For the foregoing reasons coupled with the reasons articulated in the Brief of Appellant, the circuit court judge's ruling excluding the results of Hilton's breath alcohol test should be reversed and Hilton's case should be remanded for trial.

**CONCLUSION**

For all the foregoing reasons coupled with arguments articulated in the Brief of Appellant, it is respectfully submitted that the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

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BY:

  
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ATTORNEYS FOR APPELLANT

March 26, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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RECEIVED

APR 16 2013

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

SC Court of Appeals

THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

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**PROOF OF SERVICE**

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I, Ellen R. DuBois, certify that I have served the within Motion to Certify the Case to the South Carolina Supreme Court on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Richard A. Harpootlian, Esquire  
Graham L. Newman, Esquire  
M. David Scott, Esquire  
Richard A. Harpootlian, PA  
Post Office Box 1090  
Columbia, SC 29202

I further certify that all parties required by Rule to be served have been served.  
This 16th day of April, 2013.

*Ellen R. DuBois*

ELLEN R. DuBOIS  
Legal Assistant

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ALAN WILSON  
ATTORNEY GENERAL

April 16, 2013

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

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

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Motion to Certify the Case to the South Carolina Supreme Court, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing  
Assistant Attorney General  
Bar Number 76901

MRF/  
Enclosures

cc: ~~Honorable Jenny A. Kitchings~~  
Richard A. Harpootlian, Esquire  
Graham L. Newman, Esquire  
M. David Scott, Esquire  
Victim Services

**RECEIVED**

APR 16 2013

**SC Court of Appeals**