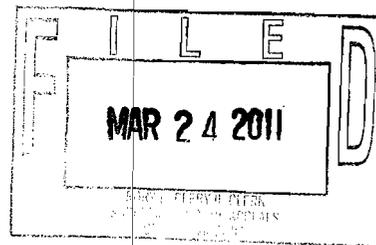


11-0171

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOE WHITE,

Petitioner,



Petition No.
Civil Action No. Below: 09-AA-59
The Honorable Paul Zakaib, Judge
(Circuit Court of Kanawha County)

THE STATE OF WEST VIRGINIA, AND
JOE MILLER, COMMISSIONER;
WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,

Respondent.

PETITIONER'S BRIEF
~~PETITION FOR APPEAL AND WRIT OF ERROR~~

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III. ASSIGNMENT OF ERROR

A. Under a preponderance of evidence standard, the Defendant committed reversible error in upholding the revocation because under a preponderance of evidence standard, Dr. White prevails.

B. By ignoring virtually all evidence in favor of Dr. White, in failing to resolve conflicting evidence and to make credibility determination, the Commissioner's decision is biased, arbitrary, and capricious and is a denial of due process of law.

IV. STATEMENT OF THE CASE

A. THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL

This proceeding is an appeal from a final order from Judge Paul Zakaib of the Circuit Court of Kanawha County filed December 13, 2010 affirming the final order of Respondent, Commissioner Joe Miller, revoking Petitioner's privilege to drive a motor vehicle in West Virginia. Both parties filed briefs before the Circuit Court.

Without ever addressing the Petitioner's challenge that the Respondent failed to take into account evidence of Petitioner's medical condition and evidence favorable to Petitioner, the lower court nonetheless concluded that sufficient evidence existed to support the revocation based on the *Albrecht* criteria. Absent from the lower court's decision is any discussion about the evidence in question or any meaningful weighing of the evidence.

The initial decision by the Respondent was affirmed by Judge Zakaib on December 13, 2010. Judge Zakaib failed to address *any* of the issues raised by Dr. White.

B. STATEMENT OF FACTS

1. At the time of this incident, Dr. White was 51 years old and had worked as a physician for over 20 years. (Transcript (hereafter "TR") 50) The day of his arrest, Dr. White had worked from 8:00 a.m. until 6:00 p.m. at his office located in CAMC hospital. (Tr. 50, 53)

2. A vehicle operated by Dr. White was stopped at a sobriety checkpoint located on the 900 Block of MacCorkle Avenue in Charleston, West Virginia at approximately 8:22 p.m. on July 6, 2007. (Tr. 10) He was not speeding, weaving or driving erratically. (Tr. 39) Officer Lightner (Hereinafter Ofc. Lightner) of the Charleston Police Department acted as the arresting officer that evening.

3. Officer Lightner filed a Statement of Arresting Officer with the West Virginia Division of Motor Vehicles (DMV) based on the arrest of Dr. White for first offense driving under the influence of alcohol on July 6, 2007. Dr. White requested an administrative hearing and informed the Commissioner in writing that he intended to challenge the legality of the checkpoint utilized in this case. A hearing was conducted at the Kanawha City DMV on April 23, 2008.

4. Ofc. Lightner initially approached Dr. White. (Tr. 26) Upon speaking with Dr. White, Ofc. Lightner testified that he observed the odor of an alcoholic beverage emanating from Dr. White's vehicle. It was not a strong or even moderate smell. (Tr. 26)

5. Dr. White had no difficulty handing over his license and registration. (Tr. 62)

6. Dr. White informed Officer Lightner that he consumed the equivalent of four(4) twelve (12) ounce servings of light beer earlier that evening. (Tr. 26, 54) The beer was consumed over a period of 1.5 hours. (Tr. 54)

7. Dr. White weighed approximately 180 pounds at that time. (Tr. 50) Pursuant to W.Va. Code §60-6-24, an individual who consumes 4 servings of alcohol over a period of 1.5 hours will not be intoxicated.

8. Dr. White has balance problems because one leg is shorter than the other. (Tr. 51) Medical records completed by his treating physician was submitted at the hearing describing his injury. (Tr. 51) He also suffers from anxiety and slight tremors when subjected to stressful situations, such as a traffic stop. (Tr. 57)

9. Dr. White was normal standing on the roadside. (Tr. 39) There was no evidence that his walking was abnormal.

10. Ofc. Lightner administered three standardized field sobriety tests that evening, the Horizontal Gaze Nystagmus Test (HGN), the Walk and Turn Test (WAT) and the One Leg Stand (OLS).

11. With regard to the HGN test, Ofc. Lightner failed to establish that he checked to ensure Dr. White's eyes tracked equally and that his pupils were equal which, according to the National Highway Traffic and Safety Administration (NHTSA), is a necessary prerequisite to administering the test. He also failed to establish the scientific reliability of that test or explain how many passes he made in each eye. (Tr. 44) Dr. White provided testimony as to other causes of nystagmus, such as caffeine, neurologic conditions, congenital conditions, physical motions, fatigue, circadium rhythms, strobe lights and other natural causes of nystagmus that are not from alcohol. (Tr. 59) Strobe lights were present in Dr. White's eyes that evening and he was fatigued. (Tr. 59)

12. On the WAT test, Ofc. Lightner failed to establish what explanation or demonstration

he provided to Dr. White. He also failed to establish compliance with the NHTSA. Because one of Dr. White's legs is shorter than the other, his balance and gait is diminished to the extent that he could not perform this test under normal conditions. (Tr. 31). He is also fifty-one years old, and established that as he has aged, his balance and coordination has greatly diminished. (Tr. 61-62).

13. On the OLS test, Ofc. Lightner failed to establish what explanation or demonstration he provided to Dr. White that evening. He also failed to establish compliance with the NHTSA Guidelines. Dr. White testified that his balance and gait deficiencies would prevent him from performing that test regardless of alcohol consumption.

14. Affirmative uncontradicted evidence established that the field sobriety "tests" were not administered properly, that the administration of these exercises deviated substantially from NHTSA requirements and thus, the results of these maneuvers were not valid.

15. A preliminary breath test (PBT) was administered to Dr. White that evening. The Commissioner admitted the results of that test into evidence despite testimony by the arresting officer that he only observed Dr. White for eleven minutes prior to that test in violation of applicable Department of Health requirements. (Tr. 46-47)

16. Dr. White was honest, forthright and cooperative. (Tr. 37, 57)

17. Although police vehicles present at the checkpoint had video recording devices attached, those devices were not activated. (Tr. 36)

18. Dr. White was administered a secondary chemical test of the breath. The result of that test established that his BAC was .076, below the legal limit. (Tr. 30)

19. After his arrest, Officer Lightner interviewed Dr. White. Dr. White informed

Lightner that he was *not* under the influence. He also informed the officer of his balance deficiencies.

20. Sergeant Shawn Williams (Hereinafter Sgt. Williams) of the Charleston Police Department acted as supervisor for the sobriety checkpoint that evening. (Tr. 11) Sgt. Williams and Ofc. Lightner refused to provide counsel for Petitioner with a copy of the predetermined guidelines regarding the checkpoint at the administrative hearing. (Tr. 15) Instead, only a one-page checklist of talking notes was provided to Petitioner's counsel. (Tr. 16) Despite numerous requests, the written policy, procedures and guidelines for the checkpoint were not admitted into evidence because of the State's objections. (Tr. 23, 24) Thus, Dr. White was prevented from impeaching Sgt. Williams' testimony and establishing that his testimony deviated from the guidelines. Sgt. Williams testified that he examined statistical evidence regarding the location of the checkpoint, however, he failed to bring a copy of that documentation to court. (Tr. 17) No sign, publication or other media existed to advise drivers of an alternative route. (Tr. 20-21)

C. THE COMMISSIONER'S FINAL ORDER

The Commissioner discredits Dr. White's testimony that the disparity in the length of his legs causes him balance problems and, thus, impacted his performance on the field sobriety tests solely on the grounds that Dr. White "failed to advise the Arresting Officer prior to performing the field sobriety test" of this condition. With regard to foundation, the Commissioner determines that "there are no provisions in the West Virginia Code, or in any binding legal authority, regarding any foundation that must be laid prior to the admission into evidence of the results of any field sobriety test." (Appendix (hereafter App.) 12). The Commissioner also found that there is no requirement that the tests have to be administered in any particular manner.

Id.

In admitting the results of the PBT, the Commissioner provides no discussion or analysis as to how he reconciled the arresting officer's testimony that he only observed Dr. White for eleven of the required fifteen minutes prior to administering the PBT in violation of the West Virginia Department of Health Rules and Regulations.

Despite conflicting evidence and substantial evidence establishing that Dr. White was not under the influence, the Commissioner makes no credibility determination and fails to resolve the conflicting evidence by a reasoned, articulate discussion.

The Commissioner summarily concludes that Sergeant Shawn Williams presented sufficient "evidence that all operational guidelines were followed according to the checklist and the pre-determined guidelines for the establishment of a DUI Sobriety Checkpoint" despite the State's failure and refusal to provide a copy of those guidelines to counsel for Petitioner and upon the officer's objection the Commissioner's refusal to admit the guidelines into evidence. (App. 12)

V. SUMMARY OF ARGUMENT

The preponderance of evidence clearly favors Dr. White. In addition, the Commissioner's decision is so biased, arbitrary, and capricious as to be unconscionable. Despite the fact it was the State's burden to establish that the DUI checkpoint that resulted in the stop and arrest of Dr. White met constitutional requirements, the State would not allow Dr. White's counsel to examine the guidelines. When the undersigned requested that the guidelines be admitted into evidence so Officer Williams could be cross-examined on those guidelines, the State objected and the Commissioner upheld the objection and refused their admission.

Moreover, weighed against diminimus symptoms that could possibly be attributed to the influence of alcohol such as the smell of an alcoholic beverage (not a strong, distinct or even moderate smell), “glassy” eyes, and “unsteadiness” exiting the vehicle, was evidence that Dr. White, a 51 year old Gastroenterologist with no criminal record, with one leg shorter than the other, was driving normally, was cooperative, honest and forthright, had normal speech, had normal coordination which, despite a slight limp, included normal standing and walking, was alert and oriented, had normal demeanor, did not fumble, drop, or otherwise have problems obtaining and handing his license, registration, and insurance to the arresting officer, had eyes that were not discolored or red, had a blood alcohol level below the legal limit, and who informed the officer he was not under the influence of alcohol. Arbitrarily, the Commissioner did not weigh or consider this evidence or even discuss or even mention credibility. Equally as egregious, the Commissioner irrationally and capriciously, without discussion or analyses, credits the results of field sobriety maneuvers in the face of the officer’s testimony and unchallenged statements in the officer’s training manual that people with leg problems would have difficulty performing these “tests.” Equally bad, in the face of the National Highway and Safety Administration’s (NHTSA) own statistics and the officer’s testimony that even if administered properly, the results of the walk and turn (WAT) was only 68% valid and the one-leg stand (OLS) was only 65% valid and the clear statement in the training manual that the results of *all* the field sobriety tests were not valid if not administered and scored properly, the Commissioner credits the results despite the failure of the officer to show that he administered them properly. Indeed, affirmative uncontroverted evidence established that they were not administered properly. With respect to the horizontal gaze nystagmus (HGN), the Commissioner also ignores

uncontested evidence that Dr. White was looking into the strobe lights while the test was being conducted, which also invalidates the test. The parade of bias treatment of the evidence by the Commissioner does not end here. The Commissioner relied on the officer's testimony that Dr. White "failed" the preliminary breath test despite uncontroverted evidence that the test violated the Department of Health Rules and Regulations. Finally, as noted above, the Commissioner upheld the officer's refusal to allow Dr. White to examine the predetermined checkpoint guidelines and upon the officer's objections, refused to allow these guidelines into evidence. If that doesn't raise a red flag and reveal the biased nature of this agency, what does?

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in both Rules 19 and 20 as the result is against the weight of the evidence and the issues related to the proper administration of field sobriety tests is a case of first impression and there are inconsistencies and conflicts among the decisions of lower tribunals.

VII. STANDARD OF REVIEW

Pursuant to *W. Va. Code* §29A-5-4(g) (2007) of the State Administrative Procedures Act the Appellate Court,

"... shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and

- (6) substantial evidence on the whole record; or
Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

With respect to the substantial evidence, it is significant that the more specific statute, *W. Va. Code* §17C-5A-2(I) (2007), requires the revocation to be based on a “preponderance of the evidence.” As the more specific statute takes precedent over the general statute, the decision of the Commissioner must be reversed if not supported by a preponderance of evidence, a higher standard than substantial evidence.

A preponderance of evidence simply means that if the evidence in favor of one party outweighs that of the other, “even in the slightest degree,” then that party prevails. *McCullough v. Clark*, 88 W. Va. 22, 106 S. E. 61, (1921). If the evidence in favor of the driver outweighs the evidence of the state, then the plaintiff prevails. If the evidence is equal, then the party who bares the burden of proof—in this case the state—fails. *John A. Sheppard, Adm’r. v. Peabody Ins. Co.*, 21 W. Va. 368, (W. Va. 1883). See also, *Jackson v. State Farm Mutual Automobile Ins. Co.*, 215 W. Va. 634, 600 S. E. 2d 346 (2004).

Nevertheless, while a preponderance of evidence is the applicable standard, as explained below, a classic case discussing the meaning of substantial evidence underscores the deficiency in the Commissioner’s decision. Fifty-three years ago, discussing the meaning of substantial evidence, Justice Frankfurter in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S. Ct. 456 (1951), stressed the fact that even though the evidence supporting the agency’s position was “substantial,” when considered by itself, substantial evidence could not be viewed in isolation. It meant substantial when evaluated in the context of the whole record. In other words, the weight of the countervailing evidence must be considered. *Id.*, at 462. “The substantiality of evidence,”

he says, "must take into account whatever in the record fairly detracts from its weight." *Id.*, at 464. A hearing examiner "cannot 'pick and choose' only the evidence that supports the agency's position." *Switzer v. Heckler*, 742 F. 2d 382, 385 (7th Cir. 1984) (holding that "the attempt to use only the portions favorable to [one party's] position, while ignoring other parts, is improper").

VIII. ARGUMENT

A. UNDER A PREPONDERANCE OF EVIDENCE STANDARD, DR. WHITE PREVAILS.

Momentarily leaving aside the results of the field sobriety tests which will be discussed in detail below, the only evidence produced by the State of Dr. White's alleged intoxication was the smell of an alcoholic beverage, alleged glassy eyes, his acknowledgment that he had drunk four beers earlier, and his "unsteadiness" in exiting his vehicle. Arrayed against this evidence was a breath alcohol test results of .07 *below* the legal limit, a normal, cooperative, honest, forthright demeanor, normal driving, sufficient coordination, alertness, and presence of mind to hand his license, registration, and proof of insurance to the officer without problems, normal standing and walking, normal speech, eyes that were not red or bloodshot, the absence of a flushed face or any other indication of intoxication, and finally, Dr. White's statement that he was not under the influence.

Equally important, all of the above negative evidence was either contested or rendered insignificant. For instance, Dr. White established that the odor of an alcoholic beverage has little relationship to a person's sobriety or lack thereof. Quoting from the *Attorney's Textbook of Medicine*, the West Virginia Supreme Court of Appeals has recognized that:

"[W]hat one smells on the drinker's breath are the aromatic materials which give to each type of beverage the characteristic odor, one may recognize a beer, wine, gin, or other beverage odor,

but not an alcohol breath. While alcohol rapidly disappears from the mouth after ingestion, the aromatic materials of the beverages .linger and are detectable for a relatively long time. The breath odor after drinking is therefore unrelated to the alcohol content of the blood and is a poor indicator of the alcoholic state of the individual.” (Citation omitted).

Federoff v. Rutledge, 175 W. Va. 389, 332 S. E. 2d 855, f.n. 1, at 859 (WV 1985).

(Emphasis supplied).

Note, the officer did not testify that he smelled a strong or even moderate smell but merely a smell. The distinction is memorialized by the Ohio Court of Appeals.

“The mere odor of alcohol about a driver’s person, not even characterized by such customary adjectives as “pervasive” or “strong,” may be indicia of alcohol ingestion, but is no more probable cause indication of intoxication than eating a meal is of gluttony. . .the law prohibits drunken driving, not driving after a drink.”

State v. Taylor, 444 N. E. 2d 481, 482 (Ohio App. 1981).

The consumption of four beers is mitigated by the fact that Dr. White informed the officer that he had the beer “earlier” and the fact that his blood alcohol level was below the legal limit.

Aside from being highly subjective, glassy eyes can be caused by a number of factors, none of which is alcohol. The “glassy” eyes must also be contrasted with the fact that Dr. White’s eyes were not bloodshot.

Again, unsteadiness is also highly subjective. Nevertheless, unsteadiness would be expected from a person exiting a vehicle one and one half (1-1/2) feet from the road and with one leg considerably shorter than the other. Contrast this to the fact that White was not unsteady standing or walking. More importantly, contrast this to the fact that when required to assume an

awkward, unnatural position with his left foot directly in front of the other and his arms at his side, which is the preliminary position for the WAT, Dr. White was *not* unsteady.

Finally, Dr. White testified that he was not under the influence and informed the officer that night that he was not under the influence.

This brings us to the issue of field sobriety “tests.”¹ For highly intoxicated persons, a requirement that the tests be administered properly is probably not vital, but for individuals whose blood alcohol level is marginal or below the legal limit, the proper administration of the tests is crucial to their reliability. Indeed, if the tests do not have to be administered properly or the suspect’s physical or mental status is irrelevant, why does the State spend millions of dollars training officers how to administer these tests and warn them about what factors or conditions make them unreliable; why are these tests referred to as “standardized” tests? As can be seen by the chart below, prior to the administration of the field sobriety tests, the preponderance of evidence favored Dr White.

Evidence relied on by the State ²	Evidence in favor of White
1. Smell of an alcoholic beverage.	1. No improper, erratic, or illegal driving.
2. “Unsteadiness in exiting the vehicle.	2. A blood alcohol level below the legal limit.
3. Dr. White’s acknowledgment that he had drank 4 beers earlier.	3. No abnormality in his standing or walking.

¹Tests are a misnomer and highly misleading. As noted below, they are very subjective and even if NHTSA statics are accepted or valid, which is highly problematic, they have very little scientific reliability. Indeed, they are less reliable than lie detectors.

²Even if the PBT “pass/fail” results had been admissible, pursuant to statute, the results are so unreliable they cannot be used as evidence of intoxication. The results can only be admitted for the purpose of establishing probable cause for the arrest.

4. Glassy eyes.	4. Normal, cooperative, honest, forthright demeanor and attitude. Dr. White's honesty is reflected in the fact that he could have told the officer he only had 3 beers earlier which was, in fact, the case. However, he told the officer 4 because they were 16 ounce bottles, thus, equivalent to four, 12 ounce bottles.
	5. Dr. White informed the officer that he was <i>not</i> under the influence of alcohol.
	6. He was alert and oriented.
	7. No problem finding, handling, or delivering documents requested by the officer.
	8. Normal speech.
	9. Eyes that were not red or bloodshot.

Evidence that detracts from the weight of the State's evidence.	
<u>Unsteadiness</u> : Aside from being very subjective, Dr. White's "unsteadiness" in exiting his vehicle, is readily explained by the fact his vehicle was high off the ground and he has one leg shorter than the other. In addition, he was 51 years old and had worked 10 straight hours that day. Moreover, evidence that when he had to stand in an abnormal position with his right foot directly in front and next the left--the preliminary position of the WAT, he was <i>not</i> unsteady.	
<u>Smell of alcoholic beverage</u> : Authoritative legal authority established that the mere smell of an alcoholic beverage is a "poor" indication of intoxication. Factually, the arresting officer agreed.	
<u>Glassy eyes</u> : Aside from being subjective, bloodshot or red eyes, not glassy eyes, is the most commonly recognized symptom of intoxication, Dr. White had worked 10 hours that day. He was stopped about 8:30 at night. Thus, his "glassy" eyes were more likely caused by fatigue than alcohol. Even the officer admitted that Dr. White's glassy eyes "could" be caused by fatigue. Moreover, how reasonable is it to expect that a blood alcohol level below the legal limit would cause glassy eyes. In fact, the undersigned has never been able to find any scientific evidence that glassy eyes are a symptom of intoxication. The officer's training manual does not even mention glassy eyes as a symptom.	

Breath test results: Dr. White, whose honesty cannot be questioned, testified he had 4 beers earlier and that he consumed these beers over 1-1/2 hours. Pursuant to *W. Va. Code* §60-6-24, after only one hour, his blood alcohol level would be .068. After another ½ hour, it would be .06. Thus, the breath test results were falsely elevated. Note that the intoximeter has at least a 0.01 margin of error. Consequently, his actual blood alcohol level was most likely at the .06 level.

In light of the above, if the field sobriety tests were not administered or scored properly, or if the officer failed to take into account Dr. White's physical condition, the results are not reliable evidence and the preponderance of evidence favors Dr. White.

1. The Walk and Turn

The WAT test is a divided attention test designed to determine whether an individual is sober or impaired by alcohol based on his ability to 1) balance and coordinate himself and 2) concentrate and follow instructions. The test assumes that all people are equal in ability and mental function. In this case, Dr. White is a 51 year old individual with equilibrium difficulties due to one leg being shorter than the other. He also had a heightened level of anxiety. (Tr. 50-51) The "Procedures" for the WAT require eleven separate instructions. (App. 82-83) Among others, these instructions include informing the suspect to "take nine heel to toe steps" down and back up the line, to "watch your feet at all times," to "count your steps out loud," and "once you start walking, don't stop until you have completed the test." The officer is supposed to demonstrate the various parts of the test, including the turn. He is supposed to explain the turn by telling the subject to "keep the front foot on the line, and turn by taking a series of small steps with the other foot" and then the officer is supposed to demonstrate. (App. 82).

In this case, except for the number of steps, Ofc. Lightner provided no testimony as to how he instructed Dr. White to perform the test. No instructions as to where to look, what to do

with the arms, when to stop, or how to turn were given to Dr. White. Like the HGN test, Ofc. Lightner only described the *results* of the test at the hearing, not the manner in which the test was explained and demonstrated.

To be more specific, without knowing the specified instructions the officer gave to Dr. White, the results of the walk and turn are irrelevant. For instance, the fact that Dr. White started before the instructions were completed is meaningless unless the officer specifically told Dr. White not to start until the instructions were completed. Indeed, the officer's training manual says: "*Since you specifically instructed the suspect not to start walking 'until I tell you to begin' record this clue if the suspect does not wait.*" (App. 83). (Emphasis supplied.) Similarly, the fact that White missed touching his heel to toe is meaningless unless the officer specifically told him to touch his heel to his toe.³ In addition, what is the significance of Dr. White raising his arms unless he was told not to raise his arms.⁴

Most importantly, the officer's own training manual states that "individuals with . . . leg . . . problems had difficulty performing this test." (App. 84).

Finally, while it is the State's burden to show that the test was administered properly, the record in this case demonstrates that the officer could not have administered it properly. As noted above, the walk and turn has eleven separate instructions. The officer, on the other hand, testified as follows:

³Note the subjective nature of this part of the test is exemplified by the act that the officer was not supposed to have given Dr. White a negative score for missing his heel to toe if the separation was less than a half an inch. (App. 83).

⁴Note, again the officer is only supposed to give the driver a negative score if he raises his arms more than six (6) inches. (App. 84).

“Mr. Pence: And with regards to the walk-and-turn test, Officer Lightner, how many separate instructions are there regarding the walk-and-turn test?”

Ofc. Lightner: It has several instructions, approximately *three*.”

If the test requires eleven different instructions and the officer only gave Dr. White three, how could it have been administered properly?

2. The One-Leg Stand

The same can be said for the OLS test, as the arresting officer failed to establish that he properly administered that test and, in any event, Dr. White’s medical condition rendered him a poor candidate for the test. Asking a 51 year old man, who has equilibrium problems and is nervous, to stand on one leg and count to thirty with officer’s judging nearby and then rely on that evidence to conclude that he is intoxicated defies logic.

Moreover, as was the case with the WAT, Ofc. Lightner failed to establish what instructions he provided to Dr. White or explain how he scored the test. No pass/fail testimony was offered by Ofc. Lightner. Instead, Ofc. Lightner read the results of that test into evidence, again without any explanation as to how he explained and demonstrated that test. Like the WAT test, proper administration and scoring are prerequisites to the test’s validity. For instance, the test is not supposed to last more than thirty seconds, and “. . .time is critical in this test.” (App. 86). Thus, the officer is supposed to time the test. If Dr. White put his foot down after the thirty seconds had expired, then he shouldn’t have received a negative score for doing so. As with the case with the WAT, if the officer doesn’t tell the subject to keep his arms at his side, the fact that the person raises his arms is meaningless. Finally, like the WAT, the officer’s field sobriety test manual specifically says that “individuals. . . [with] leg. . .problems. . .had difficulty

performing this test.” (App. 87). Officer Lightner agreed.

Mr. Pence: “. . .your manual even warns. . . that if a person has. . .leg injury. . .those individuals will have difficulty completing these tests even in ideal conditions:

Off. Lightner: Yes.”

(Tr. 42)

Indeed, it is only common sense that a person whose one leg is shorter than the other will be unbalanced as their center of gravity will be off kilter. This condition might only have a slight affect on a person’s normal walking and standing, but it would almost certainly, as the uncontradicted evidence establishes, make it difficult for that person to perform abnormal, awkward balancing maneuvers.

The importance of administering the tests properly is underscored by the fact that based on NHTSAs own statistics and the officer’s training, even if the WAT is administered properly, it is only 68% valid (App. 84) while the OLS is only 65% valid. (App. 86).

3. Horizontal Gaze Nystagmus

With regard to the HGN test, the only testimony offered by Ofc. Lightner was that he explained the test and that Dr. White “showed a lack of smooth pursuit in both left and right eye, distinct nystagmus at maximum deviation in both left and right eye and an onset of nystagmus prior to forty-five degrees in both left and right eye.” (Tr. 27) Ofc. Lightner never testified as to the number of passes he made in each eye, how far he held the stimulus in front of Dr. White’s face, or whether he screened for equal tracking and pupils, as required by his NHTSA training, to determine the existence of a medical condition which can invalidate the test. (App. 79).

Likewise, he never testified as to the significance of the alleged clues above, how he scored the

test, or whether Dr. White passed or failed the test. Lastly, Ofc. Lightner never established the scientific reliability of the HGN test through expert testimony as set forth in *State v. Dilliner*, 212 W. Va. 135; 569 S. E. 2d 211; 2002 W. Va. LEXIS 147.

Moreover, the inherent unreliability of that test was exposed during Dr. White's direct examination and Ofc. Lightner's cross examination. Ofc. Lightner conceded that several other causes of nystagmus aside from alcohol exists, such as fatigue, circadian rhythms, or a head injury. (Tr. 45) Dr. White established himself as an expert at the hearing based on his training, various degrees and familiarity with relevant literature on nystagmus and expounded on the subject⁵. Dr. White testified that other causes of nystagmus include caffeine, motion, neurologic conditions, strobe light, and congenital nystagmus. (Tr. 59) Dr. White also testified that he was fatigued, he was looking into the officer's strobe lights, and it was late at night, all of which could effect the validity of the test.

If there remains any question about the validity of the results of the field sobriety tests were fatally tainted in this case, the following should put it to rest. With regard to validation of field sobriety test results, NHTSA states, and Ofc. Lightner agreed, that

“Validation applies only when the tests are administered in the prescribed standardized manner, the standardized clues are used to assess the suspects performance, the standardized criteria are employed to interpret that performance. If any one of the standardized field sobriety test elements is changed, the validity is compromised.”

(App. 92)

⁵ Petitioner's counsel moved for Dr. White to be accepted as an expert in nystagmus, however, the hearing examiner refused to rule on the motion and considered it “not a major issue” (Tr. 59)

B. THE COMMISSIONER'S DECISION IS ARBITRARY AND CAPRICIOUS.

Does the Commissioner analyze or discuss the evidence or make any sort of credibility determination? Absolutely not! Credibility was especially critical in this case as Dr. White told the officer he wasn't under the influence and provided both lay and expert testimony regarding the unreliability of the evidence against him. However, the Commissioner's arbitrariness extends well beyond the above factors. Look at the way the Commissioner handles critical evidence.

1. Checkpoint

The United States Supreme Court in *Michigan State Police v. Sitz*, 496 U. S. 444, 110 L. Ed. 2d 412, 110 S. Ct. 2481 (1990) recognized that a "seizure" occurs within the meaning of the Fourth Amendment of the United States Constitution when a vehicle is stopped at a checkpoint.

Our Supreme Court of Appeals later adopted the reasoning of the U. S. Supreme Court in *Carte v. Cline*, 194 W. Va. 233, 460 S. E. 2d 48 (1995). In *Carte*, the driver challenged the constitutionality of a sobriety checkpoint on the grounds that the, "failure to prove compliance with standard operating procedures invalidated his arrest and license revocation." *Id.* at 236, 51. The Court, while upholding the constitutionality of sobriety checkpoints, "when conducted within predetermined operational guidelines. . ." agreed with the driver, and held that in this case, ". . .the evidentiary record is incomplete" as there was "no basis for determining whether the State complied with the operational guidelines."⁶ *Id.* at 238, 53.

In this case, after receiving the appropriate notice, Shawn Williams, appeared at the

⁶Of course, this is exactly the situation herein. In *Carte*, in order to avoid inconvenience and hardship on law enforcement, the Court required the driver to provide prior notice that the checkpoint was being challenged so that "the appropriate law enforcement officers could present . . .evidence of compliance with standard operating procedures. . ." *Id.* at 239, 54.

hearing to testify about the checkpoint. However, Sgt. Williams failed to move the predetermined guidelines into evidence. While it is the State's burden to establish that its checkpoint procedures satisfied constitutional requirements, knowing the Respondent's propensity to reverse the burden of proof, the undersigned sought to examine the guidelines Sgt. Williams had brought to the hearing and have them admitted into evidence for impeachment and to determine if the guidelines corresponded to the officer's testimony. (Tr. 14-16, 23-25). Amazingly, the State objected to the admission of the guidelines into evidence⁷ and even more amazingly, the hearing examiner upheld the State's objection

One must question why the State would refuse to submit documents legally required to validate the checkpoint. By refusing to submit a copy of the predetermined guidelines, the State denied Petitioner an opportunity to challenge and establish that the DUI checkpoint was not operated according to those guidelines and/or to impeach Sgt. Williams. However, absent those operational guidelines, the State cannot establish that the checkpoint was conducted pursuant to the predetermined guidelines as required by *Carte*.⁸

Even if the State had properly provided White a copy and moved the operational guidelines into evidence, the State still failed to establish the necessary foundation for a DUI checkpoint. For example, the State never established what statistical evidence it relied upon to

⁷The only rational explanation for the law enforcement objection is that Officer Williams testimony was deficient. There is no rational explanation for the Commissioner's position.

⁸The irony, of course, is that if the guidelines had been admitted into evidence and they had validated Williams' testimony, then White's attorney would have helped the State prove its case.

determine the location for the checkpoint⁹. Sgt. Williams referenced that information, but failed to bring a copy of the data to the hearing. (Tr. 17) In short, there was no statistical or analytical evidence which would allow the Commissioner or this court to determine that the checkpoint location was appropriately and constitutionally selected.¹⁰

Likewise, no information was provided to the media or drivers in advance to inform citizens of an alternative route to their destination in order to avoid the checkpoint. No maps or information regarding adequate lighting of the checkpoint was offered by the State, aside from the testimony by Sgt. Williams that there was “adequate lighting” without further explanation as to the number of portable lamps, the number of street lamps, or the strength of the lamps. (Tr. 12)

Moreover, no written evidence was supplied to the Court to determine the length of the checkpoint, the delegated duties of each officer assigned to the checkpoint or the number of vehicles stopped that evening. Sgt. Williams made no reference to a post-checkpoint report to document the results of the checkpoint.

Therefore, the State’s refusal to allow a copy of the predetermined operational guidelines into evidence invalidates the checkpoint and renders the stop unconstitutional.¹¹

⁹ A Pennsylvania Court noted that “At the very least” the court said, “a person testifying that the road block location was in an area likely to be traveled by drunk drivers, must be equipped with information sufficient to specify the number of DUI-related arrests and/or accidents within the relevant time period. *Commonwealth v. Trivitt*, 650 A.2d 104 (Pa. Supr. 1994). See also *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. App. 1999)

¹⁰In *Sitz*, the U. S. Supreme Court emphasized the importance of empirical evidence showing that such stops would be effective in promoting highway safety. “Unlike *Prouse*, the court stressed, “this case [does not involve] a complete absence of empirical data. . .” Here there was a complete absence of empirical data.

¹¹In oral argument, the attorney for the Commissioner argued that even if the State had failed to prove compliance with predetermined guidelines, remand not reversal, would be the

2. The Psychomotor Tests (WAT & OLS)

The Commissioner admitted the results of the WAT and OLS test despite evidence that Dr. White has a medical condition impacting his ability to perform that test and the fact that Ofc. Lightner failed to establish that he properly explained and demonstrated that test and in the face of evidence that the tests, in fact, were *not* administered properly.

In an attempt to discredit this evidence, the Commissioner writes “The Respondent presented testimony that he has a limp, but failed to advise the Arresting Officer prior to performing the field sobriety test. The record will reflect that the Respondent voluntarily performed the test.” (App. 12) What relevancy does the fact that Dr. White failed to explain to the arresting officer about his leg condition on the roadside have¹²? His shorter leg was a lifelong condition. The officer asked him if he had a “medical condition” that would impact his ability to perform field sobriety exercises. Dr. White did not consider the discrepancy in the length of his legs a medical condition. He may have had some vague idea how field sobriety tests were performed but never having had to perform these maneuvers before, he couldn't be expected to foresee the problems his short leg would present. Indeed, he realized the problems his leg had caused and he informed the officer afterwards. Moreover, the leg condition impacted his balance

appropriate remedy. Not true! In *Carte*, the Court remanded the case because the constitutionality of checkpoints was an issue of first impression. Law enforcement was unaware of what evidence was necessary to show compliance. Now, however, law enforcement is aware, had the opportunity to show compliance, but did not through its own negligence. It would be inappropriate to allow the State two bites of the apple. To adopt the Commissioner's argument would mean that anytime the State failed to establish any of the essential elements of its case, it would be afforded the opportunity to try again, a result that would be ludicrous.

¹² Dr. White did explain his physical impairment to the arresting officer after he was taken to the Station for questioning immediately following the arrest. (Tr. 51).

and coordination, regardless of whether or not he had the presence of mind to tell the arresting officer on the roadside. The validity of the test was compromised and invalidated, yet, the Commissioner relies on Whites's failure to inform the officer that his shorter leg would effect his ability to perform a maneuver he had never performed to sustain the revocation while ignoring the statement in the officer's own training manual that, "individuals [with] leg problems had problems performing [these tests]." (App. 84, 87). Look at the implications of the Commissioner's logic: If you are not sharp enough to tell the officer about a condition that might affect your ability to perform a maneuver you have never performed before, we are going to use that evidence against you even though the officers own training manual establishes that your condition would interfere with your ability to perform the test.

Aside from dismissing the discrepancy in the length of his legs as a factor affecting Dr. White's ability to perform psychomotor maneuvers, the Commissioner rejects the results of the field sobriety tests with the unadorned assertion that there is no "binding" authority establishing that the tests have to be administered in any particular manner. (App. 12). If the officer's own testimony and his training manual is not sufficient, then what is? Moreover, at least in Kanawha County and a few other counties, there is a plethora of decisions establishing that the tests must be administered properly.

In sum, the Commissioner rubber-stamps the results of the WAT and OLS despite the factors that invalidated the results such as Dr. White's medical condition and the officer's failure to show that he administered or scored the tests properly and the fact that the evidence demonstrated they were not administered properly.

3. Horizontal Gaze Nystagmus

The Commissioner turns a blind eye to Petitioner's challenge of the HGN test and admits the test absent any discussion or analysis. No mention of Dr. White's *expert* testimony is referenced in the Final Order regarding HGN. Petitioner's challenge to lack of foundation is completely ignored. Again, the Commissioner essentially rubber-stamps the results of the HGN test without explanation. Note the following:

“Prior to administration of HGN, the eyes are checked for equal tracking (can they follow an object together) and equal pupil size. If the eyes do not track together, or if the pupils are noticeably unequal in size, the chance of medical disorders or injuries causing the nystagmus is present.”

(App. 78).

The officer failed to perform this requirement.

More importantly, as Officer Lightner administered the test, Dr. White was facing the rotating lights and other lights associated with the checkpoint. The officer's training manual states as follows:

“Examples of conditions that may interfere with suspect's performance of the Horizontal Gaze Nystagmus test:

- wind, dust, etc. irritating suspect's eyes;
- visual or other distractions impeding the test
(always face suspect away from rotating lights,
strobe lights and traffic passing in close proximity.)”

(App. 88). (Emphasis supplied).

4. Preliminary Breath Test

The uncontroverted evidence in this case establishes that Ofc. Lightner initiated contact with Dr. White at 8:22 p.m. A PBT was administered at 8:33 p.m. (Tr. 29) Therefore, the

arresting officer held Dr. White under constant observation for a period only eleven minutes.

Pursuant to §64-10-5.2(a) of the Department of Health Rules and Regulations,

“The preliminary alcohol breath analysis shall be administered after the law enforcement officer has a reasonable belief that the person has been driving while under the influence of alcohol. The law enforcement officer *shall* prohibit the person from drinking alcohol or smoking for at least fifteen minutes before conducting the test.”

(Emphasis supplied).

Despite this clear violation, the Commissioner admits the results of the PBT test anyway and relies upon those results in his Final Order. The Commissioner’s failure to follow the law, reconcile the evidence and address Petitioner’s challenges in this case highlights his extreme bias against the driver.

In light of the above, the Commissioner’s decision extends the boundaries of bias, arbitrariness, and selectivity. In *Muscatell v. Cline*, 196 W. Va. 588, 474 S. E. 2d 518 (W. Va. 1996), our Supreme Court of Appeals held that where there is a conflict in important evidence, the Commissioner must explain how that conflict was resolved.

In *Muscatell*, the arresting officer, Trooper Brown, received an anonymous tip that a vehicle driven by Muscatell might have been involved in a hit and run accident, that she might be intoxicated, and traveling toward Clarksburg from Grafton. Subsequently, Brown observed a woman driving a light blue car traveling toward Clarksburg on Route 50. Upon direct examination, the trooper testified he observed the vehicle straddle or cross the center line but upon cross examination, acknowledged that earlier he had testified that he had not observed Muscatell driving improperly.

Brown's observations of the driver were much more inculpatory than the ones the arresting officer claims he made herein. Brown noted a "strong" odor of alcohol emanating from the vehicle and Muscatell admitted to have been drinking alcoholic beverages. "He noted her eyes were red and bloodshot. . ."

Our highest court reversed and remanded the case to the Commissioner because, in its order, the Commissioner did not discuss the difference between the trooper's testimony on direct and cross examination.

"Nothing in the findings of fact of the Commissioner advises this Court why the Commissioner resolved this conflict in the testimony of the trooper in favor of the direct testimony and disregarded the cross-examination. We have no separate evaluation of the evidence by the hearing examiner who observed the demeanor of the witness on this critical issue before us. We have said, with respect to decisions of administrative agencies following from findings of fact and conclusions of law proposed by opposing parties, that the agency must rule on the issues raised by the opposing parties with sufficient clarity to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed. See, *St. Mary's Hospital v. State Health Planning and Development Agency*, 178 W. Va. 792, 364 S. E. 2d 805 (1987). . . [A] reviewing court cannot accord to agency findings the deference to which they are entitled unless such attention is given to at least the critical facts upon which the agency has acted."

Id. at 528.

Piercing to the heart of the matter, the court held that when,

"there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an

appellate court.”

Id.

This record is immersed with multiple conflicts and uncontested evidence and authority which the Commissioner simply ignored.

This case is also remarkably similar to *Choma v. West Virginia Department of Motor Vehicles*, 210 W. Va. 256; 557 S. E. 2d 310; 2001 W. Va. LEXIS 143 (2001). In that case, Choma’s license was revoked by the Commissioner based on the testimony of the arresting officer about her appearance, behavior, performance on field sobriety tests, and breath test results.¹³

After reviewing the entire record, the court agreed

“with the appellant’s contention that the Commissioner’s discussion and evaluation of the record evidence was so selective and one-sided as to rise to the level of arbitrariness and capriciousness.”

Id. at 313.

Finally, citing *Muscatell, supra*, the *Choma* court noted,

“evidence such as driving error, consumption of alcohol and poor performance on a field sobriety test may be sufficient under a preponderance standard. . . [b]ut where other evidence strongly weighs against such a finding. . . the Commissioner’s decision cannot arbitrarily disregard that contradicting evidence.”

Id. (Emphasis supplied).

In sum, the Commissioner never finds Dr. White credible or not credible, in fact, he never makes *any* credibility findings. Instead, he simply admits everything offered by the State into

¹³In *Choma*, unlike here, the breath test results were well above the legal limit.

evidence and sustains the revocation without a logical explanation or analysis. If the Commissioner does not intend to make credibility findings, weigh the evidence, or provide an explanation as to his logic and reasoning in accepting the State's version of the evidence, one must question why a hearing is conducted in the first place. The Commissioner's bias is demonstrated by the fact that all the *facts* favorable to White are arbitrarily ignored; all the *authority* favorable to Dr. White is disregarded; without explanation, the Commissioner refuses to accept Dr. White as an expert on nystagmus. The Commissioner's bias is so strong that he ignores concessions made by the officer himself, ignores the provisions of the Department and Health rules and regulations under which he is governed, which invalidates the evidence upon which he relies, ignores the unambiguous requirements and evidence in the officer's training manual which destroys the reliability of the results of the field sobriety tests, and conspires with the officer to preclude evidence that would impeach and undercut his testimony about checkpoint procedure. The Commissioner's decision is arbitrary and capricious and must be reversed.

VIII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner prays that this Honorable Court grant a stay of the revocation of Petitioner's driver's license pending final resolution of this matter and to reverse the decision of the Circuit Court of Kanawha County and the final order of Respondent Commissioner, Joe Miller, revoking Petitioner's driver's license and to order the Commissioner to immediately restore to Petitioner a valid, permanent driver's license or for

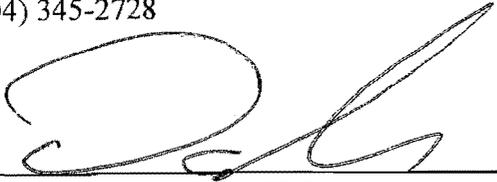
whatever alternative relief this court deems appropriate.

JOE WHITE

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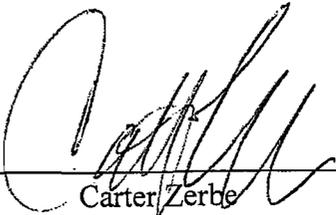
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CERTIFICATE OF SERVICE

I, Carter Zerbe, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing PETITION FOR APPEAL AND WRIT OF ERROR and APPENDIX by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Janet James, Asst. Attorney General
DMV - Office of the Attorney General
P. O. Box 17200
Charleston, WV 25317

on this 24th day of March 2011.


Carter Zerbe