

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOE J. WHITE, JR.

Petitioner,

No.: 11-0171

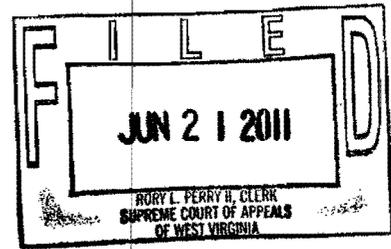
JOE MILLER, COMMISSIONER;  
WEST VIRGINIA DIVISION OF MOTOR  
VEHICLES,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Comes now the Petitioner, Joe J. White Jr., by counsel, Carter Zerbe and David Pence, and files this Petitioner's Reply Brief in response to Respondent's Brief.

II. 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. (Tr. 57)

9. Dr. White was normal standing on the roadside. (Tr. 39) Other than a slight limp, 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 that he had administered the test pursuant to NHTSA requirements. In addition, he failed to establish the scientific reliability of that test. (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), having worked ten (10) straight hours that day.

12. On the WAT test, Ofc. Lightner failed to establish what explanation or demonstration he provided to Dr. White, or how he had administered the test. 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 the hearing. (Tr. 17) No sign, publication or other media existed to advise drivers of an alternative route. (Tr. 20-21)

### III. ARGUMENT

#### A. THE FAILURE OF THE STATE TO SHOW THAT THE DUI CHECKPOINT WAS CONSTITUTIONALLY VALID.

The Commissioner fails to address the main thrust of Dr. White's argument on this issue. Assuming arguendo that the Commissioner is correct in asserting that Officer Williams' testimony covered all the important requirements that must be established for predetermined operational guidelines to pass constitutional muster---and, as pointed out in Dr. White's petition, this was, in fact, not the case--other than fearing or recognizing that the actual guidelines would impeach or discredit his testimony, what possible reason would Officer Williams have for refusing to allow White's attorney to examine the guidelines and then objecting to their admission into evidence. Moreover, if the Commissioner provided Dr. White with a fair and impartial hearing, why did the Commissioner uphold Officer Williams' objection and refuse to have the document admitted. The best evidence of the predetermined guidelines are the predetermined guidelines; not what the officer says they are. The failure of the Commissioner to explain his actions or to explain why Officer Williams' testimony is rendered not credible by his behavior is conclusive proof that the Commissioner has no answer to Dr. White' argument.

B. THE FAILURE OF THE STATE TO ESTABLISH THAT DR. WHITE'S ARREST WAS PREDICATED UPON PROBABLE CAUSE OR THAT THE REVOCATION OF HIS LICENSE WAS ESTABLISHED BY PREPONDERANCE OF EVIDENCE.

1. Failure Of The Officer To Establish That He Administered The Field Sobriety Tests Properly.

In an attempt to convince this court that Dr. White's arrest was predicated upon probable cause and that the state had proven its case by a preponderance of evidence, Respondent's Brief, Section II, is titled: "**THE FIELD SOBRIETY TESTS WERE PROPERLY ADMINISTERED TO THE PETITIONER.**" However, Respondent's argument is devoid of any evidence to establish that these tests were, in fact, administered or scored properly pursuant to the officer's training, NHTSA requirements, or any other standards. There is nothing in this section of the Commissioner's brief, or any other section for that matter, to support his bold face assertion that these tests were properly administered. The Commissioner merely repeats the officer's testimony regarding the *results* of the tests, not how they were administered. The officer's testimony also omits any evidence as to how he was trained to administer these exercises, nor does he establish that the way he administered them corresponded to the requirements of The National Highway Traffic and Safety Administration. (NHTSA).

As to underscore their importance, the Commissioner repeatedly emphasizes that the officer "explained and demonstrated" the field sobriety maneuvers to Dr. White. (Comm'r., Br, at 5, 6). If it is so important for the officer to explain and demonstrate these tests, how he explained and demonstrated these tests is critical to their validity. That explanation is absent.

The Commissioner's *pen ultimate* assertion is as follows: "Field sobriety tests are *standardized, systematic and easy to score. . . .*" (Comm'r. Br., at 7). This statement is, in effect, an admission by the Commissioner that to be valid, the tests have to be administered properly. If

these tests are standardized, if every officer in the state is trained to administered these tests the same way, and if, as previously disclosed, NHTSA states the results are not valid if not administered and scored properly, then the importance of establishing evidence showing that they were administered and scored properly is vital to the validity of the results. The logic of this conclusion is unassailable. Indeed, the failure of the Commissioner to rebut or even address Dr. White's argument, despite informing this court in bold print that he was going to do so, establishes that he has no answer to Dr. White's argument. The argument he does make is sophistry.

Ultimately, the Respondent's argument is reduced to asking this court to take pity on the officer because the, "officers appear *pro se*<sup>1</sup> at administrative hearings without the benefits of counsel to guide them through direct examination." (Comm'r. Br., at 7) This argument is a canard. The hearing examiners more than adequately represent the officers interest. In fact, under the system in place prior to the recent change, the hearings were so biased in favor of the officer that it was virtually impossible for drivers to get a fair hearing. Moreover, the Commissioner's own assertion that these tests are "easy" to administer and score belies his assertion that the officers would be unduly burdened by having to establish these test were administered and scored properly. Indeed, the Commissioner has gratuitously supplied the officer with the proper instructions by printing them on the Statement of Arresting Officer (DUI Information Form). He allows officers to review and testify from these forms at the hearing. One can hardly imagine how it could be any easier for officers to present this evidence.

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<sup>1</sup>Of course, officers no longer appear *pro se*, as the Attorney General's Office now represents the Commissioner and vigorously and effectively represent their interests.

It finally must be emphasized that the Circuit Courts of the state have repeatedly rejected the Commissioner's contention that proper administration of these tests is irrelevant to the validity of the results. In *Bias v. Cline*, C. A. # 94-AA-207, a decision that was decided by Judge McQueen and then affirmed by Judge Bloom, the Kanawha County Circuit Court held that the arresting officer lacked probable cause for the arrest because he had not administered the field sobriety tests properly. *Bias*, at 30, 31. Thus, the court dismissed the revocation of Respondent's driver's license. (Copies of the two *Bias* decisions are included herein as Petitioner's Exhibits A<sub>1</sub> and A<sub>2</sub>)

In *In re: Faykus*, Civil Action #97-AP-75-H (March 3, 1998), the Circuit Court of Raleigh County addressed the issue of the administering of field sobriety tests in connection with a driver's license revocation hearing:

"The *Barker* decision, (*State v. Barker*, 179 W. Va. 194, 366 S. E. 2d 642 [W. Va. 1988]), states that an officer cannot use the horizontal gaze nystagmus test to estimate a blood alcohol level. On the other hand, that case clearly acknowledges that once an officer has shown that he has been trained and that he has appropriately administered the test, it is admissible as evidence that the driver was driving under the influence of alcohol. Clearly a prerequisite, however, is an explanation by the Commissioner as to why she believes the test is appropriate, reliable and admissible in a particular case. Blanket recognition of field sobriety tests is not appropriate. The administration of field sobriety tests is subject to review at any time they are offered as evidence of intoxication and relied upon to support the administrative revocation of a license."

(Emphasis supplied). (A copy of *Faykus* is included in the Appendix as Petitioner's Exhibit "B.")

While Judge Spaulding in *Spurlock v. State of West Virginia*, Civil Action No. 04-C-373, did not go as far as the *Bias* or *Faykus* courts, he, nevertheless, held that the State is obligated to

establish that there was at least “substantial compliance with NHTSA guidelines which means that the arrestee was properly instructed.” *Spurlock*, at 11. (A copy of *Spurlock* is included in the Appendix as Petitioner’s Exhibit “C.”)

In *Little v. The Commissioner of the Department of Motor Vehicles*, C. A. # 06-AA-94 (2007), Judge Berger reversed Little’s driver’s license revocation because the arresting officer failed to establish that he had been trained to administer and score the results of field sobriety tests and because at least one of the tests was not administered properly. (A copy of *Little* is included in the Appendix as Exhibit Petitioner’s “D.”).

In *Eagle v. The West Virginia Department of Motor Vehicles, et. al*, C. A. # 99-AA-111 (2005), Judge Paul Zakaib reversed the revocation of the driver’s driver’s license because, “[t]he officer failed to show that the field sobriety tests were administered pursuant to the officer’s training and requirements or that he properly instructed [the driver]. . .how to perform each test.” (*Eagle*, at pg. 9). (A copy of *Eagle* is included in the Appendix as Exhibit Petitioner’s “E.”)

Courts in other jurisdictions concur. Because the results of field sobriety exercises are so closely tied to proper procedures and scoring, nearly unanimously, courts have determined that their admissibility is dependent on the arresting officer demonstrating that he was appropriately trained and experienced, and that he administered and scored these exercises properly. In *State v. Nishi*, 852 P. 2d 476 (Hawaii 1993), the arresting officer had the defendant perform three separate field sobriety tests, i.e., “(1) ‘heel-to-toe’ test; (2) ‘leg-raised’ test and (3) ‘circle back’ test.” The officer testified that the defendant had failed the heel-to-toe test because he “didn’t touch heel-to-toe for all nine steps” and ‘appeared unsteady when he did the test’ . . .” *Id.* Finally, the officer testified that defendant “bobbed back and forth and fluttered his eyelids”

when performing the arch back test. *Id.*

The Court noted that the Hawaii Supreme Court had previously observed, quoting from 1 Am. J. Crim. L. 96 (1967), that: “[f]ield sobriety tests are designed and administered to avoid the shortcoming of casual observations.” Thus, the Court determined that the trial court erred in admitting the officer’s testimony about defendant’s failure to pass the three field sobriety tests, because the State failed to establish that the arresting officer followed the correct Hawaii Police Department’s “field sobriety testing procedures.” *Id.*, at 480.

Similarly, in *Hawkins v. Georgia*, 223 Ga. App. 344, 476 S. E. 2d 803, 812 (Ga. 1996), the court held that FST’s, “must be administered properly under law enforcement guidelines.” Recently, the Georgia court explained that *Hawkins* stood for the principle that it is the state’s burden to show that the tests were administered pursuant “to law enforcement guidelines.” *State v. Tousley*, 271 Ga. App. 874, 611 S. E. 2d 139 (2005).

In *Smith v. State ex rel. Wyoming Department of Transportation*, 11P. 3d 931 (Wyo. 2000), the Supreme Court of Wyoming stated:

“In the criminal context, a significant number of courts have held that the admission of field sobriety tests, including the horizontal gaze nystagmus test, is appropriate, as long as proper foundation as to the techniques used and the officer’s training, experience, and ability to administer the test has been laid.”

*Id.* at 935.

Thus, in connection with an *administrative license hearing*, they concluded, “that if the evidence establishes the tests were properly administered by a qualified person, the foundation is sufficient for admission. . .” *Id.* With respect to probable cause, the court stated that,

“For the purpose of establishing probable cause, a law enforcement officer

may testify to the results of field sobriety tests (including the horizontal gaze nystagmus test) if it is shown that the officer had been adequately trained in the administration and assessment of these field sobriety tests, and he conducted them in substantial accordance with that training."

*Id.* (Emphasis supplied).

In *State v. Nishi, supra*, the court stated:

"Here, Officer Barroga did not merely testify that based on his perception of Defendant's lack of coordination he was of the opinion that Defendant was intoxicated. Rather, the officer's opinion testimony was that Defendant failed to pass the "heel-to-toe," "leg raised," and "arch back" tests that Defendant had undertaken to perform. A normal person may not necessarily form such an opinion if he or she had not been taught to grade the performance of the three field sobriety tests. In other words, this was a situation where foundational evidence as to Officer Barroga's knowledge of HPD's field sobriety testing procedures was necessary. The record disclosed no foundational evidence in this regard."

*Id.* at 523.

The Supreme Court of Ohio, *State v. Homan*, 732 N. E. 2d 952 (Ohio S. Ct. 2000), relying heavily on the warning in the NHTSA manual indicating that the validity of the test results were compromised if not administered properly, the court held that field sobriety exercises could not be used to establish probable cause to arrest a driver for driving under the influence when they were not administered in strict compliance with the standardized procedures. In so holding, it noted that, "[w]hen field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.*, at 955.) "The small margins of error that characterize field sobriety tests," the court said, "make strict<sup>2</sup> compliance critical." *Id.*, at 956.

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<sup>2</sup>After the *Homan* decision was published, the Ohio legislation passed a law specifying that substantial compliance with the NHTSA standards was all that was necessary.

More recently the Missouri Supreme Court upheld a lower courts determination that since the field sobriety tests were improperly administered, the results were inadmissible. *York v. Director of Revenue*, 186 S.W. 3d 267 (2006). See also, *State of Hawaii v. Adlo Truth Kehdy*, 2009 Hawaii App. LEXIS 422.

The above considerations apply with even more force to the HGN test. Recently, the Supreme Court of Illinois in *People v. McKown*, 236 Ill. 2d 278, 924 N.E.2d 941 (2010) determined that results of HGN testing may be admitted when performed according to NHTSA standards by a properly trained officer, but only for the purpose of showing that the suspect has likely consumed alcohol and may be impaired. More recently in *State v. Ingram*, 238 Ore. App. 720, 243 P.3d 488 (2010), the Oregon Court of Appeals reversed the driver's conviction because video evidence demonstrated the HGN was not administered in compliance with the officer's training and the field sobriety test manual. In *State v. Blackwell*, 408 Md. 677, 971 A. 2d 296 (2009), the Maryland Supreme Court held that since an officer's testimony about HGN results relied upon special training about the administration and scoring of the test, it was reversible error to admit its results without expert testimony and a showing that it was administered properly. In a follow up to *Homan, supra*, the Supreme Court of Ohio in *The State of Ohio v. Boczar*, 113 Ohio St. 3d 148; 2007 Ohio 1251; 863 N. E. 2d 155; (2007) held that while expert testimony was not required, the results of the HGN could not be admitted unless a proper foundation was laid showing the officer's "training and ability to administer the test and . . . the actual technique used by the officer in administering the test." 862 N. E. 2d at 160. See also, *Hawaii v. Ito*, 90 Haw. 225, 978 P. 2d 191 (Haw. App. 1999); *Schultz v. State*, 106 Md. App. 145, 664 A. 2d 60 (MD. 1995); *Young v. City of Brookhaven*, 693 So. 2d 1355 (Miss. 1997);

*State v. Superior Court*, 718 P. 2d 171 (Ariz. 1986); *State v. Cissne*, 865 P. 2d 564 (Wash. 1994); *Sides v. State*, 574 So. 2d 856 (Ala. 1990); *Dresselle v. State*, 596 So. 2d 602 (Ala. 1991); *State v. Meador*, 674 So. 2d. 826 (Fla. App. 4<sup>th</sup> Dist. 1996); *Emerson v. State*, 880 S. W. 2d 759 (Tex. Crim. App. 1994); *State v. Breitung*, 623 So. 2d 23, 25 (La. Ct. App. 1993); *People v. Berger*, 277 Mich. App. 213, 217-18, 551 N. W. 2d 421, 424 (1996).

Without any authority in support of his contention, with logic and common sense against him, and in light of his failure to counter Dr. White's argument, the Commissioner's position is untenable, and must be rejected.

Aside from the proper administration of the tests, the Respondent tries to diminish the significance of the discrepancy in the length of Dr. White's legs by emphasizing that prior to the administration of the tests, Dr. White informed the arresting officer that he was not aware of any *medical* condition that would interfere with his performance. However, as explained in Dr. White's petition for appeal, the discrepancy in the length of his legs is a lifelong condition. It's a normal part of his existence. It's a condition that has become such a natural part of his body structure that he pays it no attention. He reasonably does not consider it a medical condition. In his daily functioning it has such a diminimus impact on his coordination that he pays it no heed. Having never performed field sobriety tests before and not knowing what they entailed, he had no reason to anticipate his leg discrepancy would affect his ability to perform these maneuvers. Once he realized it had, he informed the officer. NHTSA's own studies have established the unreliabilty of the tests for individuals with leg problems. Common sense tells us that individuals whose center of gravity is off kilter would have problems. The Commissioner seems to think that the mere fact that Dr. White did not disclose his condition to the officer prior to

taking the tests is enough to discount its significance. In other words, it doesn't make any difference if, in fact, as disclosed by NHTSA, that leg problems make it difficult for individuals to perform the tests adequately, if the driver doesn't anticipate that it will, the Commissioner can ignore its impact. What kind of logic is that?

Recognizing the weakness in his position, the Commissioner argues, alternatively, that with respect to the walk-and-turn test, White's unbalance would not have caused him to start too soon, raise his arms for balance or take the incorrect number of steps. "The only criteria which may have been caused by his limp are missing heel-to-toe and stepping off the line." (Comm'r. Br., at 11) The Commissioner's assertion is without merit. First of all, White's skewed center of gravity would, of course, have caused him to raise his arms to maintain his balance. To prevent falling, individuals naturally raise their arms to steady themselves or to cushion the fall should that happen. Thus, Dr. White would have been left with two negative scores which, pursuant to NHTSA, would have been a borderline "failure." Thus, again the Commissioner's argument underscores the importance of proper administration. If the arresting officer had failed to instruct White not to start before the instructions were finished and /or failed to tell him how many steps he was supposed to take or told him the wrong number, then Dr. White shouldn't have received negative scores for these "errors." As Dr. White would have passed this test if he had only received one negative score, proper instructions are critical to the validity of the results.

## 2. Commissioner's Preponderance Of Evidence Argument

Ignoring the evidence that detracts from weight, the Commissioner makes the unadorned assertion that the admission of drinking, odor of alcohol, unsteadiness upon exiting, Dr. White's performance on three field sobriety exercises and the results of the preliminary breath test

establish sufficient evidence to revoke Dr. White's driver's license under the standard enunciated in *Albrecht v. State*, 173 W. Va. 268, 314 S. E. 2d 859, (1984). There is no question that *Albrecht* applies a very generous standard for proving driving under the influence. However, if that decision is construed as the Commissioner asks this court to do, a driver could never demonstrate that the evidence relied upon by the Commissioner to revoke his driver's license was unreliable or incompetent. The Commissioner wants the court to segregate the evidence in favor of the state and to ignore Justice Frankfurter's admonition in *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456 (1951), that evidence favorable to one party cannot be viewed in isolation. The driver's burden is hard enough as it is: How do you prove a negative? Thus, since symptoms of intoxication mirrors a variety of other causes, it is vital that the weight of countervailing evidence be considered and evaluated. Apparently recognizing the weakness of the evidence he relied upon, the Commissioner tries to gild the lily by including the PBT results as part of the preponderance of evidence proving intoxication. Even disregarding the fact that the PBT was not administered pursuant to regulatory requirements, the law as the Commissioner well knows, does not permit PBT results to be used as evidence of intoxication. Moreover, in relying so heavily on the *Albrecht* decision, the Commissioner would have this court ignore the cases after *Albrecht* such as *Muscatell* and its progenies which emphasize that the Commissioner cannot take such a myopic view of the evidence that the driver is deprived of an unbiased decision.

Respondent tries to distinguish *Muscatell* from the situation herein by asserting that in *Muscatell*, unlike here, the officer's own testimony was conflicting. That is a distinction without a difference. How the fact that the Commissioner arbitrarily and capriciously favored the

testimony of the officer over Dr. White's testimony, and ignored contrary evidence that favored

Dr. White is just as invidious, if not more so, than the conflict in *Muscatell*.

Finally, in light of the above, it is worth repeating that:

1. There was no improper, erratic, or illegal driving; the primary concern in the driving under the influence prohibition.
2. Dr. White's blood alcohol level was below the legal limit.
3. His walking and standing were normal.
4. When he assumed an abnormal position, i.e., left leg immediately in front of the right, his standing was still normal.
5. Dr. White testified he was not intoxicated and his credibility was enhanced by his honest specification of the number of beers he had "earlier."
6. His legs were of unequal length skewing his center of gravity.
7. He was cooperative, honest, and forthright.
8. His speech was normal.
9. His eyes were not bloodshot or red.
10. He was alert and oriented.
11. He had no problems handling documents and giving them to the officer.
12. The smell of alcohol on his breath, a poor indication of intoxication, in any event, was neither strong, distinct or even moderate.
13. He was 51 years of age and was stopped after he had worked 10 straight hours that day.

IV. CONCLUSION

For the foregoing reasons and in light of the arbitrary and capricious nature of the Commissioner's treatment of the evidence, the decision revoking Dr. White's driver's license must be reversed.

Respectfully submitted,

JOE J. WHITE, JR.

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOE J. WHITE, JR.

Petitioner,

No.: 11-0171

JOE MILLER, COMMISSIONER;  
WEST VIRGINIA DIVISION OF MOTOR  
VEHICLES,

Respondent.

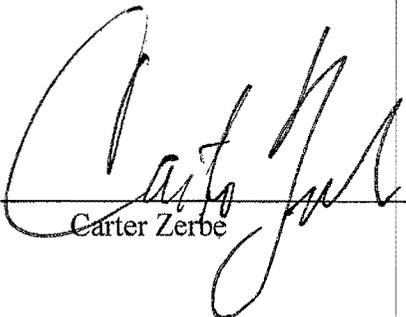
**CERTIFICATE OF SERVICE**

I, Carter Zerbe, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing PETITIONER'S REPLY BRIEF by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Joe Miller, Commissioner  
West Virginia Division of Motor Vehicles  
P. O. Box 17300  
Charleston, WV 25317

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

on this 21st day of June 2011.

  
Carter Zerbe

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SCOTT BIAS,

Petitioner,

v.

Civil Action No. 94-AA-207

JANE CLINE, Commissioner  
West Virginia Department of  
Motor Vehicles,

Respondent.

FILED  
10-03-07  
10-03-07  
10-03-07

OPINION AND FINAL ORDER

These actions are presently before the Court on appeal from three separate decisions of the Commissioner of the Division of Motor Vehicles. The petitioners are Scott Bias, Jonathan Hudnall and James Smith.<sup>1</sup> In each instance, the Commissioner found that because the petitioners were operating motor vehicles while intoxicated, their operators' licenses should be suspended in accordance with the applicable orders issued by her office.

In Mr. Bias's appeal, the Commissioner did not consider the results of the breath tests administered to the petitioner, finding that there was an inadequate foundation for admission of the test results. The Commissioner found that Mr. Bias was driving while intoxicated on the basis of other evidence, including the field sobriety tests administered by the arresting officer at the time of his arrest. In Mr. Hudnall's case, the Commissioner held that the petitioner was driving while intoxicated, basing her decision on both the secondary chemical (breath) test and other evidence,

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<sup>1</sup> Mr. Hudnall's appeal was assigned Civil Action No. 96-AA-80 and Mr. Smith's appeal was assigned Civil Action No. 96-AA-81.

including the field sobriety tests. In Mr. Smith's case, the commissioner held that he failed to submit to the designated secondary test, which resulted in an automatic revocation of his operator's license.

On appeal, the petitioners contend that the Commissioner erred in revoking their licenses on the basis of field sobriety tests. Specifically, they contend that the results of the field sobriety tests should not have been considered because, in each case, the arresting officer failed to lay a proper foundation for his testimony respecting the field sobriety tests. They contend that the National Highway Traffic Safety Administration has prescribed procedures for administering field sobriety tests that are designed to ensure that the results are reliable. The petitioners contend that in the absence of evidence that the tests were administered in accordance with methods prescribed by the NHTSA, the results of the tests are not reliable and may not be relied upon by the Commissioner in finding that they were driving while intoxicated.

I. The Reliability of the Field Sobriety Tests Approved by National Highway Traffic Safety Board.

In 1984, the National Highway Traffic Safety Administration published a document entitled *Improved Sobriety Testing*.<sup>2</sup> R. Erwin, *Defense of Drunk Driving Cases*, § 10.06 (3d ed. 1999) (hereinafter Erwin, § \_\_\_\_). This publication has been the basis of for instructional material in certain states, including West Virginia.<sup>3</sup> *Id.* The NHTSA test procedures were also described in publications

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<sup>2</sup> National Highway Traffic Safety Admin., U. S. Dept. of Trans., DOT HS-0806512, *Improved Sobriety Testing* (1984). This document is reprinted in Erwin, § 10.99[2].

<sup>3</sup> Commission--Drunk Driving Prevention, State of W. Va., *Improved Sobriety Testing: Gaze Nystagmus Test, Walk-turn Test, One-Leg Stand Test* (Jan. 1984). Erwin, § 10.06, f.n. 2.

published in 1992, specifically *DWI Detection and Standardized Field Sobriety Testing, Student Manual (NHTSA Student Manual)* and *Instructor's Manual*.<sup>4</sup> *Id.*

At the hearing involving Scott Bias, the petitioner presented the testimony of Corporal Mike Holstein of the West Virginia State Police. Corporal Holstein testified that he provided training at the West Virginia State Police Academy in the proper method of administering field sobriety tests. He authenticated a document, entitled "Concepts and Principles of the Standardized Field Sobriety Tests," which is used to train cadets and police officer candidates in the proper methods for administering field sobriety tests.<sup>5</sup> Exhibit 10. He also testified that the manual identifies the most reliable field tests used to determine whether an individual's blood alcohol content may be above .10%. According to the manual, the NHTSA determined that three tests are reliable: 1) the walk and turn test, 2) the one-leg stand test and 3) the horizontal gaze nystagmus test. Erwin, § 10.05[3].

The manual indicates that, based on tests conducted in the laboratory under controlled conditions and administered in accordance with the methods prescribed therein, the walk and turn test will allow a police officer to correctly classify a suspect's blood alcohol content as more than or less than .10% about 68% of the time. Exhibit 10, page VIII-8; National Highway Traffic Safety Admin., U. S. Dept. of Trans., DOT HS-0806512, *Improved Sobriety Testing*, *supra* at 1. The one-leg stand test will result in proper classification about 66% of the time. Exhibit 10, page VIII-11; National

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<sup>4</sup> NHTSA, Transportation Safety Inst., U S. Dept. of Transp., HS 178 R6/92, *DWI Detection and Standardized Field Sobriety Testing, Student Manual* (printed June 1992), and NHTSA, Transportation Safety Inst., U S. Dept. of Transp., HS 178 R6/92, *DWI Detection and Standardized Field Sobriety Testing, Instructor Manual*.

<sup>5</sup> The manual identified by Corporal Holstein was identified by him as the "1990 standards." It bears the notation "HS 178 R1/90," and appears to be the January 1990 version of NHTSA, Transportation Safety Inst., U S. Dept. of Transp., HS 178 R6/92, *DWI Detection and Standardized Field Sobriety Testing, Student Manual*.

Highway Traffic Safety Admin., U. S. Dept. of Trans., DOT HS-0806512, Improved Sobriety Testing, *supra* at 1. The horizontal gaze nystagmus test will result in proper classification about 77% of the time. Exhibit 10, page VIII-5; National Highway Traffic Safety Admin., U. S. Dept. of Trans., DOT HS-0806512, Improved Sobriety Testing, *supra* at 1. When the results of the walk and turn test and the horizontal gaze nystagmus tests are considered together, they will result in proper classification about 80% of the time. Exhibit 10, page VIII-9; National Highway Traffic Safety Admin., U. S. Dept. of Trans., DOT HS-0806512, Improved Sobriety Testing, *supra* at 1.<sup>6</sup> The accuracy of the field sobriety tests is such that, even when they are in the laboratory under controlled conditions and in accordance with the methods prescribed by the manual, they will be accurate only about 65-80% of the time. Stated differently, even under the best of circumstances, reliance solely on field sobriety tests would result in intoxicated individuals being classified as nonintoxicated or nonintoxicated individuals being classified as intoxicated about 20-35% of the time.

In each of the cases on appeal, the arresting officer testified that he administered the three tests determined to be reliable by the NHTSA. For each test, the manual describes the physical surroundings in which the test should be administered, if applicable; sets forth instructions that are required to be given to the suspect prior to and during administration of the test; requires that the suspect understand the instructions; establishes the procedures for performing the test and prescribes

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<sup>6</sup> Based on field evaluations by Arlington County, Virginia, and Washington, D.C. police, and the Maryland and North Carolina State Police, proper classification occurred 80% of the time for the walk and turn test, 78% of the time for the one-leg stand test, 82% of the time for the horizontal gaze nystagmus test and 83% of the time for the combined walk and turn and horizontal gaze nystagmus tests. National Highway Traffic Safety Admin., U. S. Dept. of Trans., DOT HS-0806512, Improved Sobriety Testing; *supra* at 1. However, the 1995 edition of the manual, NHTSA, Transportation Safety Inst., U. S. Dept. of Transp., No. HS 179 R10/95, *DWI Detection and Standardized Field Sobriety Testing, Student Manual*, indicates that it is the lower probability with respect to each test that is the more accurate measure. *Id.* at VIII-11.

certain actions of the officer while the suspect is performing the test, including demonstrations by the officer respecting certain aspects of the tests; establishes a method for scoring the results of each test; and emphasizes that the officer should take detailed field notes. As noted above, the police officer has the duty of showing that the results of the field sobriety tests are accurate and reliable. This can be done only by showing that the tests were administered in accordance with the methods prescribed by the manual.

## II. Necessity of Compliance With Standard Procedures

In assessing the reliability of the field sobriety tests, as set forth above, the NHTSA emphasized the importance of strict compliance with the standardized procedures for administering the tests. Specifically, the NHTSA found:

The importance of this large scale field validation study deserves to be emphasized. It was the first significant assessment of the "workability" of the standardized tests under actual enforcement conditions, and it was the first time that completely objective clues and scoring criteria had been defined for the tests. The results of the study unmistakably validated the SFSTs [standardized field sobriety tests]. But it is also necessary to emphasize one final and major point. This validation applies *only* when the tests are administered in the prescribed, standardized manner; and *only* when the standardized clues are used to assess the subject's performance; and, *only* when the standardized criteria are employed to interpret that performance. If any one of the standardized test elements is changed, the validity is compromised. (Emphasis in original.)

Transportation Safety Inst., NHTSA, U S. Dept. of Transp., HS 178 R6/92, *DWI Detection and Standardized Field Sobriety Testing*, Student Manual (printed June 1992), at p. VIII-10.<sup>7</sup> Clearly,

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<sup>7</sup> The 1995 version of the Student Manual, NHTSA, Transportation Safety Inst., U. S. Dept. of Transp., No. HS 179 R10/95, *DWI Detection and Standardized Field Sobriety Testing*, *Student Manual*, at VIII-11 to -12, uses exactly the same language as the 1992 manual. However, the language respecting validation of field sobriety tests is given greater emphasis in the 1995 manual; it is in all capital letters and bold-faced type. This indicates no less of an emphasis, if not an increased emphasis on standardized administration, standardized scoring and standardized interpretation of the tests.

the NHTSA has determined that a failure to exactly adhere to the prescribed methods only has the effect of reducing the reliability of the test results, thereby increasing a margin of error which is already in the 20-35% range.

Corporal Holstein's testimony was consistent with the NHTSA's findings. He testified that the student manual sets forth the proper methods for administering the three reliable field sobriety tests, and that he teaches his students (police officers) to administer the tests in accordance with the standardized NHTSA procedures. He testified that it is important to administer the tests in accordance with the procedures prescribed by the manual, because any failure to do so reduces their reliability. It would also render the scoring criteria prescribed by the NHTSA meaningless.

The hearing examiner characterized Corporal Holstein's testimony as follows:

During the testimony of Corporal Michael Holstein, it was pointed out that these were indeed guidelines and are not set in stone or required by law. Corporal Holstein also pointed out that these were not the only field sobriety tests that can be given, but were only recommended, and also that certain exact conditions need not be met for the arresting officer to come to the reasonable conclusion that the person performing the tests is intoxicated. It was apparent from the testimony of Corporal Holstein that the normal, healthy individual should be able to pass this testing if sober.

This completely mischaracterizes the testimony of Corporal Holstein.

First, Corporal Holstein did not testify that the field sobriety tests set forth in the NHTSA guidelines were only recommended. He testified that the NHTSA had considered and eliminated other field sobriety tests, such as reciting the alphabet and touching the nose with a finger, because they were not as reliable as the three tests prescribed. Transcript, p. 40. Second, Corporal Holstein did not testify that the guidelines prescribed by the NHTSA in administering the tests were "not set in stone or required by law." His testimony could not even be characterized as indicating that the guidelines were merely optional. In fact, Corporal Holstein testified that if the field sobriety tests

were not administered in accordance with the guidelines, the results would not be reliable and that it would be impossible to use the scoring criteria that the established by the NHTSA to determine whether there is reason to believe that a suspect's blood alcohol content is above or below .10%.

Corporal Holstein's testimony is consistent with the findings of the NHTSA in establishing the three tests and the prescribed guidelines for administration of the three tests. The hearing examiner's characterization of his testimony is clearly wrong. The hearing examiner's characterization is also clearly contrary to the NHTSA study regarding their reliability.

One state court has determined that in order to use field sobriety tests to determine whether there is probable cause to arrest a driver, they must be administered in strict compliance with the procedures prescribed by the NHTSA. In *State v. Homan*, 89 Ohio St. 3d 421, 732 N.E.2d 952 (2000), the Supreme Court of Ohio held that field sobriety tests could not be used to establish probable cause to arrest a driver for driving under the influence when they were not administered in strict compliance with the standardized procedures. In so holding, it noted that, "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *Id.* at 424, 732 N.E.2d at 955. "The small margins of error that characterize field sobriety tests make strict compliance critical." *Id.* at 425, 732 N.E.2d at 956. It further noted that experts in the area appear to agree that the reliability of field sobriety tests turns upon the degree to which police comply with the standardized testing procedures. *Id.* The Court held that, in light of the testimony of the police officer that he did not comply with standardized test procedures, the results of field sobriety tests could not be used to establish probable cause to arrest the defendant.

The NHTSA guidelines indicate that field sobriety tests are designed to be used to establish probable cause.<sup>8</sup> Judicial decisions in this state are to the contrary. However, given the purpose for which the tests were designed and their substantial margin of error when administered under ideal conditions, it stands to reason that, at the very least, strict compliance with the guidelines is necessary to keep the margin of error to a minimum. This consideration should be of paramount importance when field sobriety tests are not used merely to establish probable cause to arrest which is intended to be checked by a chemical test, but instead, are used for the purpose of proving intoxication, the ultimate issue in the case, which is not subject to being checked by a chemical test.

Based on the testimony of Corporal Holstein and consistent with the decision of the Ohio Supreme Court in *Homan* and the requirements of the NHTSA, it is abundantly clear that if the tests are not administered in accordance with the guidelines and procedures established by the NHTSA, their reliability, which is at best 80% accurate in the first place, is called into question. If field sobriety tests are going to be used to show that a driver was operating a motor vehicle while under the influence of alcohol, they must be administered in strict compliance with NHTSA guidelines.<sup>9</sup>

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<sup>8</sup> In *State v. Witte*, 251 Kan. 313, 836 P.2d 1110 (1992), the Kansas Supreme Court cited a California study described as "prosecution oriented," which stated that the purpose of the horizontal gaze nystagmus test is strictly as a field screening function, and that it should never be intended as a substitute for actual blood or breath alcohol testing. *Id.* at \_\_\_, 836 P.2d at 1120. (This lends support to the conclusion of the NHTSA that field sobriety tests should be used solely for the purpose of determining probable cause to arrest.)

<sup>9</sup> The three field sobriety tests recognized by the NHTSA are, at the present time, considered to be the most accurate, and their results are, in fact, accurate only when administered in accordance with the NHTSA guidelines. This does not mean that the field sobriety tests recognized by the NHTSA are necessarily the last word in field sobriety testing. It is possible that further testing by the NHTSA or some other person or entity may result in the recognition of other field sobriety tests which are more accurate than the ones currently recognized by the NHTSA. Neither is it meant to imply that the NHTSA or some other entity may develop new or additional procedures for administering the currently recognized field sobriety tests, which may improve the

### III. Summary of the NHTSA Guidelines for Administering and Scoring Field Sobriety Tests.

The NHTSA guidelines are set out in the administrative records of *Bias* and *Hudnall*. The guidelines explicitly set forth the methods by which the tests should be administered and how they should be scored. The Court believes it is important to summarize the methods for administering and scoring field sobriety tests.

#### A. Walk and Turn Test

##### 1. Surroundings

With respect to the Walk and Turn Test, initially, the arresting officer must ensure that the test is administered under surroundings that will ensure that the results are accurate and reliable.

Specifically, the procedures provide:

Walk and Turn requires a high, dry, level, nonslipping surface with sufficient room for the suspect to complete nine heel-to-toe steps. A straight line must be clearly visible on the surface. If no line is available, it is possible to conduct the test by directing the suspect to walk in a straight line parallel with a curb, guardrail, etc. Suspect's safety should be considered at all times.

Exhibit 10, p. VIII-8. These requirements are explicit and fairly clear. In order to prove that the tests were administered in accordance with these requirements, the officer must provide evidence that he administered the test on a high, dry, level, nonslipping surface with sufficient room for the suspect to complete nine heel-to-toe steps. He may testify himself, present the testimony of eyewitnesses, present properly authenticated photographs or videotapes, or other relevant evidence. He must also provide evidence to show that there was a straight line clearly visible on the surface which the suspect could follow in taking the test. If no straight line was clearly visible on the surface, he must provide

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accuracy of their results. However, unless and until that occurs, the currently recognized field sobriety tests must be administered in accordance with procedures designed to ensure their accuracy.

evidence that there was some other straight line available which the suspect could parallel in taking the test. It is also important for the officer to prove that the test was administered in such a manner that the suspect would not have feared for his or her safety from, for example, passing traffic or a crumbling or uneven road surface, sidewalk or berm.

## 2. Condition of the Suspect.

The manual indicates that people with certain characteristics have trouble completing the walk and turn test, even when not intoxicated. Specifically, the test criteria are not valid for people who are 60 years of age or older, or who are 50 pounds or more overweight. The test may be difficult to perform for persons who are 50 pounds or more overweight, who have injuries to their legs, who have inner ear disorders, or who cannot see out of one eye, which results in poor depth perception. The arresting officer should determine whether or not the suspect is wearing heels more than 2 inches high and, if so, should give the suspect the opportunity to remove his or her heels. The officer should present evidence to show that he attempted to determine that these factors were not present. This may be something observed by the officer or may involve questioning the suspect.

## 3. Instructions and Demonstration.

When the arresting officer intends to initiate the walk and turn test, he is required to provide both instructions and demonstrations to the suspect. The instructions and demonstrations are in two separate stages: 1) Initial positioning stage, and 2) Walking stage.

For the initial positioning stage, the officer must instruct the suspect to place his or her left foot on the line. At the time that this instruction is given, the officer must also demonstrate what is expected of the suspect by placing his or her left foot on the line. Next, the officer must instruct the suspect to place his or her right foot on the line ahead of the left foot, with the heel of the right foot

against the toe of the left foot, again demonstrating the action for the suspect. Next, the officer must instruct the suspect to remain in this position and not to begin walking until he or she is instructed to do so. The procedures require the officer to instruct the suspect to remain in that position until told to begin walking and not to begin walking until told to do so by the officer. The final instruction of the positioning stage is to ensure that the suspect understands the instructions up to that point. The officer must ask the suspect if he or she understands the instructions and ensure that the suspect indicates that he or she understands the instructions.

With respect to the walking stage of the test, the procedures require that the suspect be given certain instructions. In this portion of the test, the arresting officer must also demonstrate certain aspects of the test so that the suspect can see how to perform the test and will know what is expected of him or her. The first instruction requires the arresting officer to again tell the suspect not to begin until told to do so. The officer must then instruct the suspect to take nine (9) heel-to-toe steps down the line, turn around and take nine (9) heel-to-toe steps back up the line. After instructing the suspect as to the number of steps required, the officer is then required to demonstrate the heel-to-toe method of walking the line by showing the defendant two to three heel-to-toe steps. The officer must then tell the suspect that he or she must turn and that, while turning, he or she must keep his or her front foot on the line and take a series of small steps with the other foot. Corporal Holstein described this as a "pivot turn."<sup>10</sup> The procedures then require the arresting officer to demonstrate how to make the pivot turns in accordance with the diagram shown in the procedures. The reasons for the

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<sup>10</sup> Apparently, the front foot should be used as the pivot foot while the suspect is making the turn. This is not explicitly stated in the instructions and the diagram contained in the procedures is not a model of clarity. However, since the suspect begins with the right foot in front of the left foot and makes his or her first step with the left foot, the ninth step is made with the left foot, left foot is the front foot, on which the pivot turn is made.

demonstration with respect to this instruction are obvious, as the diagram in the manual respecting the turn is more susceptible of a demonstration than an explanation. The officer is then required to tell the suspect that, while walking, he or she is to keep his or her arms at their side, to watch his or her feet at all times<sup>11</sup> and to count aloud while walking. The suspect is required to be told that once he or she starts walking, not to stop until the test is completed. The officer is then required to ask the suspect if he or she understands the instructions and obtain the suspect's response indicating that he or she does understand the instructions. If the suspect indicates an understanding of the instructions, then the officer is to instruct the suspect to begin and to count the first step from the heel to toe position as "one".

#### 4. Interpretation and Scoring.

Once the test begins, the procedures require the arresting officer to observe the test from 3 to 4 feet away and to remain motionless while the suspect performs the test. The procedures state that if the officer stands too close or engages in excessive movement, it will make it more difficult for the suspect to perform the test, even if not intoxicated. Exhibit 10, p. VIII-8.<sup>12</sup>

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<sup>11</sup> In scoring the test, where there is no visible line on the surface and the suspect is required to walk parallel to the guardrail or some other item, it seems apparent that the officer must allow some leeway for the suspect to deviate slightly from a straight, parallel line, or must allow the suspect the opportunity to watch the line or object that he or she is attempting to parallel, rather than watching only his or her feet.

<sup>12</sup> Corporal Holstein was unaware of this standard. He also testified that there times when an officer may need to stand closer to a suspect than prescribed by the NHTSA because the suspect may be "too intoxicated or too impaired" to perform the test without hurting himself or herself. While Corporal Holstein's concern has some validity, it seems that if it is apparent that a suspect is so impaired or intoxicated that an officer can immediately recognize that the suspect may be injured, there is simply no need for the officer to administer field sobriety tests. They will merely confirm that which is already apparent to the officer.

In grading the test, the officer is required to watch for a number of behaviors that "research" indicates are most likely to be observed in a person with a blood alcohol content of .10% or more.

The clues for which the officer should look are:

- A. The suspect cannot keep his balance during the instructions. This requires the suspect to perform two functions at the same time: 1) To listen to the instructions, and 2) To maintain his or her balance. The manual indicates that it is typical that a person who is intoxicated can do only one of those things. The officer is to record this clue<sup>13</sup> only if the suspect does not maintain the heel-to-toe position throughout the instructions. The officer should not record this clue if the suspect sways or uses his or her arms for balance, so long as he or she maintains the heel-to-toe position.
- B. The suspect begins the test before the officer finishes instructing the suspect how to perform the test.<sup>14</sup>
- C. The suspect stops to steady himself or herself. Before this clue may be recorded, there must be a pause of several seconds. It is not sufficient that the suspect is merely be walking slowly.
- D. The suspect does not walk heel-to-toe. The procedures require that there must be a gap of one-half inch or more between the heel and toe with respect to any step before this clue is recorded. This clue should also be recorded if the suspect does not walk straight along the line.<sup>15</sup>
- E. The suspect steps off the line. This is to be recorded only if the suspect steps entirely off of the line.

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<sup>13</sup> The term "record this clue", as used in the manual, means that the officer should make a note of the suspect's behavior in the detailed field notes he is required to make in accordance with the procedures, as set forth below, and he is to count this indication against the suspect in scoring the test.

<sup>14</sup> If the suspect begins prior to completion of the instructions, it indicates that the suspect was not listening to the instructions. This is the reason that, while giving instructions, it is necessary for the officer to emphasize to the suspect that he or she should not begin the test prior to completion of the instructions.

<sup>15</sup> However, if the suspect is required to walk parallel to some object or a line, rather than walking on a straight line on the surface, the arresting officer should give some leeway to the subject for any slight deviation from a straight line.

- F. The suspect uses his or her arms to balance himself or herself. The procedures require that the suspect raise his or her arms more than 6 inches from his or her side before this clue may be recorded.
- G. The suspect loses his or her balance while turning. The suspect must remove his or her pivot foot from the line, while turning before the officer should record this clue. The arresting officer should also record this clue if the suspect pivots in a single movement, instead of taking several small steps.<sup>16</sup>
- H. If the suspect takes an incorrect number of steps, either more or less.
- I. The arresting officer should record the test as a complete failure if the suspect cannot complete the test. The procedures indicate that a failure should be recorded if the suspect steps off the line three times, is in danger of falling or if he cannot complete the test for other reasons. (Emphasis added.)

Exhibit 10, p. VIII-7. The manual also requires that if the suspect has any difficulty with the test, he or she should not be required to start the test over. Instead, the suspect should be told to resume the test at the point where the difficulty occurred. Exhibit 10, p. VIII-8.

The manual indicates that if a suspect exhibits two or more distinct clues on the walk and turn test or if the suspect fails to complete the test, his or her blood alcohol content should be classified at above .10%. As noted above, the manual indicates that based on these criteria, the blood alcohol will be classified correctly in about 68% of the cases. Exhibit 10, p. VIII-8.

##### 5. Field Notes.

As set forth above, the manual indicates that the arresting officer should take detailed field notes. The manual also specifies the field notes that the officer should make in administering the walk-and-turn test.

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<sup>16</sup> The fact that the manual requires the suspect to make the turn with a degree of precision and the fact that failure to do so will count against the suspect necessitates the demonstration described above.

The procedures indicate that when taking field notes with respect to walk and turn test, the officer should make notes with respect to the wind and weather conditions, the suspect's age and weight, and the suspect's footwear. Exhibit 10, p. VIII-14.

The officer should also make field notes respecting the suspect's behavior during the instruction stage of the test. Specifically, the officer should record the number of times that the suspect is unable to maintain his or her balance during the instructions, including the number of times that his or her feet break apart from the heel-to-toe position. The officer should also record the number of times he or she begins performing the test too early, i.e., prior to receiving complete instructions. If neither of these events occurs, the officer should record a "0" for both events. Exhibit 10, p. VIII-12.

In the field notes, the officer should also record the number of events that occur during the walking portion of the test. The events that the officer records should be separated into those that occur between the beginning of the test and the turn (the first nine steps), and then between the turn and the completion of the test (the first nine steps). For each of these two stages, the officer should record the number of times that each of the following events occurs: 1) the suspect stops walking; 2) the suspect loses heel-to-toe contact (as defined above); 3) the suspect steps off the line; 4) the suspect raises his or her arms (as defined above); and 5) the number of steps taken by suspect in each stage of the test. The procedures require that if the suspect raises his arms, the officer should make a note of how often and, in addition, should note when it occurred (e.g., steps 3 through 7) and include a description of unusual behavior (e.g., the suspect constantly flapped his arms to maintain his balance). The officer should also record a description of the suspect's behavior during the turn, noting the fact that the suspect correctly performed the turn if he or she actually did so. If the suspect

is unable to complete the test, the officer should describe the reason(s) the suspect failed to complete the test. Exhibit 10, p. VIII-13.

The arresting officer should also make notes with respect to other "facts, circumstances, conditions or observations" relevant to the performance of the test. Examples given in the manual include a verbal miscount in the number of steps and incriminating statements uttered by the suspect. Exhibit 10, p. VIII-14.

The manual provides a checklist which specifies the clues for which the officer should look when administering the test. The manual indicates that the officer should either note the number of times that each clue occurred, including writing a "0" when the clue did not occur, or make a note of the suspect's behavior. The manual notes that at no time should any clue be left blank on the checklist. Exhibit 10, p. VIII-13.

## B. One-Leg Stand Test

### 1. Surroundings

With respect to the One-Leg Stand Test, initially, the officer must ensure that the test is administered under surroundings that will ensure that the results are accurate and reliable. Specifically, the procedures provide:

One-Leg Stand requires a hard, dry, level, nonslippery surface. There should be adequate lighting for the suspect to have some visual frame of reference. Suspect's safety should be considered at all times.

Exhibit 10, p. VIII-11. The requirements of this section are explicit and fairly clear. In order to prove that the tests were administered in accordance with these requirements, the arresting officer must provide evidence that he administered the test on a hard, dry, level, nonslippery surface. He should also be prepared to present evidence respecting the lighting at the time that the test was

administered. He may testify himself, present the testimony of eyewitnesses, present properly authenticated photographs or videotapes, or other relevant evidence.

## 2. Condition of the Suspect.

The manual indicates that people with certain characteristics have trouble completing the one-leg stand test, even when not intoxicated. Specifically, the test criteria are not necessarily valid for people who are 60 years of age or older, or who are 50 pounds or more overweight. The test may be difficult to perform for persons who have injuries to their legs or who have inner ear disorders. The arresting officer should determine whether or not the suspect is wearing heels more than 2 inches high and, if so, should give the suspect the opportunity to remove his or her shoes.

## 3. Instructions and Demonstration.

When the officer intends to initiate the one-leg stand test, he is required to provide both instructions and demonstrations to the suspect. The instructions and demonstrations are in two separate stages: 1) Initial positioning stage, and 2) Balancing and counting stage.

For the initial positioning stage, the officer must instruct the suspect to stand with his or her feet together, with his or her arms at his or her side. At the time that the arresting officer gives this instruction, he or she must also demonstrate how the suspect is supposed to stand. Next, the officer must instruct the suspect to remain in this position and not to begin the test until instructed to do so. The final instruction of the positioning stage is to ensure that the suspect understands the instructions up to that point. The officer must ask the suspect if he or she understands the instructions and ensure that the suspect indicates that he or she understands the instructions. Exhibit 10, p. VIII-10.

With respect to the balancing and counting stage of the test, the procedures require that the suspect be given certain instructions. In this portion of the test, the officer must also demonstrate

certain aspects of the test so that the suspect can see how to perform the test and will know what is expected of him or her. The first instruction requires the officer to tell the suspect not to begin until he or she is told to do so. The officer must then instruct the suspect to stand on one leg and hold the other foot out in front. After giving this instruction to the suspect, the officer is then required to demonstrate the one-leg stance. The officer should then instruct the suspect that he or she may stand on either leg. The officer must then tell the suspect that he or she must keep his or her raised foot about 6 inches off the ground. The officer must then demonstrate how to stand with the raised foot 6 inches off the ground. The officer must then instruct the suspect that while maintaining the one-leg stance, he or she must count out loud for thirty seconds. The officer must then demonstrate how to count to thirty, as follows, "One thousand and one, one thousand and two, and so on, all the way to one thousand and thirty."<sup>17</sup> The officer must then tell the suspect to keep his or her arms at his or her side at all times, to keep watching his or her raised foot and not to hop or sway while performing the test. The officer is then required to ask the suspect if he or she understands the instructions and obtain the suspect's response indicating that he or she does understand the instructions. If the suspect indicates that he or she understands the instructions, then the officer is to instruct the suspect to begin performing the test. Exhibit 10, p. VIII-10.

#### 4. Interpretation and Scoring.

Once the test begins, the procedures require the arresting officer to observe the test from 3 feet away and to remain motionless while the suspect performs the test. Exhibit 10, p. VIII-11.

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<sup>17</sup> This is the exact language contained in the manual. Clearly, it is not necessary for the officer to use the exact language of the manual, so long as he or she adequately conveys the how the suspect is expected to perform. Similarly, it is not necessary for the suspect to use the exact language of the manual, so long as he or she substantively complies with the test.

In grading the test, the officer is required to watch for a number of behaviors that "research" indicates are most likely to be observed in a person with a blood alcohol content of .10% or more. The clues for which the officer should look, are as follows:

- A. The suspect sways while balancing during the test. This refers to swaying either back-to-front or side-to-side while maintaining the one-leg stance.
- B. The suspect uses his or her arms to balance himself or herself during the test. The manual specifies that the suspect must move his or her arms more than six inches from the side of the body before this clue should be recorded.
- C. The suspect hops while performing the test.
- D. The suspect is unable to maintain the one-leg stand position, putting his or her foot down one or more times during the 30-second count.
- E. The arresting officer should record that the suspect cannot perform the test if he or she puts his or her foot down three or more times during the 30-second count, or otherwise cannot perform the test.

Exhibit 10, pp. VIII-10 & 11. The manual also requires that if the suspect puts his or her foot down, he or she should be instructed to pick the foot up again and continue counting from the point at which his or her foot touched the ground. If the suspect counts slowly, the officer should terminate the test at 30 seconds. Exhibit 10, p. VIII-11.

The manual indicates that if a suspect exhibits two or more distinct clues on the one-leg stand test or if the suspect fails to complete the test, "there is a good chance" that his or her blood alcohol content is .10% or higher. As noted above, the manual indicates that based on these criteria, the blood alcohol will be classified correctly in about 65% of the cases. Exhibit 10, p. VIII-11.

#### 5. Field Notes.

The procedures indicate that when taking field notes with respect to one-leg stand test, the officer should make separate notes with respect to the first 10 seconds, the middle 10 seconds and

the third 10 seconds of the test. The officer should make a note of how many times each clue occurs during each 10-second interval of the test. Exhibit 10, p. VIII-14. Regardless of how many times each clue occurs, when scoring the test it only counts as one distinct clue. Exhibit 10, p. VIII-15.

### C. Horizontal Gaze Nystagmus Test

#### 1. Test Conditions.

The manual indicates that very few conditions will affect gaze nystagmus.

The test does not require special equipment. It merely requires something for the suspect to follow with his or her eyes, such as a pen or the tip of the officer's finger. The object to be followed should be held just above the level of the suspect's eyes, about 15 inches from the suspect's nose.

#### 2. Preparing the Subject for the Test.

In determining the condition of the suspect, the officer should ask the suspect whether he or she is wearing contact lenses.<sup>18</sup> If the suspect is wearing glasses, the glasses must be removed.

#### 3. Instructions and Testing.

##### a. Instructions.

The officer should inform the suspect that he or she is going to test the suspect's eyes. The suspect should be told to keep his or her head still and to follow the object, identifying the object that the subject must follow. The suspect must be told to keep focusing on the object until told to stop by the officer.

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<sup>18</sup> The manual indicates that there is only a slight chance that contacts will affect the results of the HGN test, but that it should be noted.

b. Checking the Suspect's Condition.

Initially, the officer must check the suspect's eyes for the ability to track together. This is done by moving the object smoothly across the subject's entire field of vision. The officer should determine whether the eyes track the object together, or whether one lags behind the other. If the suspect's eyes do not track together, it may indicate a medical disorder, injury or blindness.

The officer should also check to determine if the suspect's pupils are equal in size. If they are not, this might indicate that the suspect has suffered a head injury.

The manual indicates that nystagmus may be due to causes other than alcohol. Other causes include seizure medication, phencyclidine inhalants, barbiturates and other depressants. A significant disparity between the performance of the suspect's left and right eyes may indicate brain damage.

c. Test Procedures.

The officer should first test the suspect's left eye to determine if the eye follows the object smoothly. The officer should move the object from in front of the suspect's left eye to the suspect's left as far as the eye can go. It should take approximately 2 seconds to move the object from straight ahead to as far as it will go. The object of the test is to determine whether the suspect's eyes pursue smoothly, or whether there is some jerking in the pursuit. The officer should make more than one pass in order to ensure that he or she is absolutely certain about this clue. After having checked the suspect's left eye, the officer should conduct the same test with the suspect's right eye.

The officer should next check for distinct jerkiness at maximum deviation. Beginning with the left eye, the officer should hold the object in front of the eye and move it smoothly to the

suspect's left until the eye has gone as far as it can.<sup>19</sup> The officer should then have the suspect hold his or her eye in that position for two to three seconds and observe the eye for distinct jerkiness.

The officer should then test the suspect for the angle of onset of nystagmus. The officer should hold the object directly in front of the left suspect's eye and then move it to a 45-degree angle, taking approximately 4 seconds. The officer should watch the suspect's eye to determine when the subject's eye begins jerking. The officer should stop moving the object when the suspect's eye begins jerking or, if the suspect's eye does not begin jerking before the object reaches the 45-degree angle, then the officer should stop moving the object at the 45-degree angle. The angle at which the suspect's eye begins jerking is the angle of onset of nystagmus. The officer should determine whether the onset of nystagmus occurs before or after reaching a 45-degree angle.

#### 4. Interpretation and Scoring.

In scoring the horizontal gaze nystagmus test, the officer should look for three clues in each of the suspect's eyes; a total of six clues. The officer should determine if the suspect's eyes do not follow the object smoothly when it is passed quickly from in front of his or her eye to as far outside as the eye will follow. If the suspect's eye does not follow smoothly, this should count as one clue. If both eyes do not follow smoothly, it should count as two clues.

The second clue is a distinct jerking when the eye is at maximum deviation. If this occurs in one eye, it would count as one clue. If it occurs in both eyes, it counts as two clues.

The final clue for which the officer should test is the onset of nystagmus within 45 degrees. If this occurs in one eye, it would count as one clue. If it occurs in both eyes, it counts as two clues.

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<sup>19</sup> The manual indicates that at maximum deviation, the white will usually not be showing in the corner of the suspect's eye.

If between the two eyes, four or more clues appear, then there is a likelihood that the suspect has a blood alcohol content of .10% or more. Laboratory and field testing has shown that when four or more clues appear, that there is a 77% likelihood that an officer will be able to classify a suspect as "impaired."

#### 5. Field Notes.

In taking field notes with respect to the horizontal gaze nystagmus test, after asking the suspect if he or she wears contact lenses, the officer should note the answer in the field notes. The officer should also record the existence of the clues described above with respect to each of the suspect's eyes. The officer should also record other facts, circumstances, conditions or observations that may be relevant to the test. Examples described by the manual refer specifically to behavior of the suspect, such as inability to hold his or her head still, noticeable swaying and incriminating statements.

#### IV. Testimony of the Arresting Officer at the Administrative Hearings.

At an administrative hearing, the burden of proof is on the officer to show that the suspect was driving while intoxicated. If the officer cannot show the suspect's blood alcohol content by means of the chemical test designated by the law enforcement agency (blood, breath or urine) pursuant to W. Va. Code § 17C-5-4, he may testify to other facts and circumstances that would tend to prove that the suspect was driving while intoxicated. See *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). Other facts and circumstances may include the results of field sobriety tests.

In each of the actions before the commissioner, the petitioner, through counsel, objected to the admission of testimony by the arresting officers respecting administration and the results of field sobriety tests. The basis of the objections was that the arresting officers failed to lay the proper

foundation, because they failed to testify that they properly administered the field sobriety tests in accordance with NHTSA guidelines. In *Bias*, the hearing examiner admitted the results of the field sobriety tests, relying on the following language from *State v. Arsenault*, 115 N.H. 109, 336 A.2d 244 (1975):

Intoxication is a fact open to the observation of every man; and no special skill or learning is requisite to discern it . . . Untrained laymen have always been permitted to testify as to intoxication on basis of sight, smell, speech, and locomotion . . .

*Field sobriety tests are designed and administered to avoid the shortcomings of casual observation . . . Since they consist of precise body movement, a greater degree of coordination is required than routine standing or talking . . . They broaden the officer's observation of the defendant and enhance the basis and reliability of his opinion as to whether the driver's performance has been adversely affected by intoxicating liquor . . .*

. . . the opinion of the police officer as to the intoxication of the defendant, and its basis, including the field sobriety tests administered before his arrest, are competent evidence even though they bear on the main issue . . . whether the defendant was driving under the influence of intoxicating liquor.

The evidence of the field sobriety test is therefore competent and admissible. (Emphasis added.)

*Id.* at 111-12, 336 A.2d 245-46.<sup>20</sup>

At the administrative hearing, the West Virginia Rules of Evidence apply. W. Va. Code § 29A-5-2(a). W. Va. R. E. 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form

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<sup>20</sup> It should be noted that the New Hampshire court held only that the results of the tests were admissible. Nothing in the decision indicates whether the Court considered whether it was necessary to lay a proper foundation in order to admit the results of the test and, if so, what foundation was necessary. It should also be noted that *Arsenault* was decided prior to the time that the NHTSA published its finding respecting standardized field sobriety tests.

of an opinion or otherwise." Therefore, when an officer testifies as to the results of field sobriety tests, he testifies as an expert, because administration of field sobriety tests and interpretation of their results is either scientific (HGN test) or, at a minimum, technical or specialized knowledge.

W. Va. R. E. 705 provides, "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Pursuant to this rule, on direct testimony the arresting officer may testify in a conclusory manner respecting the results of the field sobriety tests. However, if properly questioned on cross-examination, the arresting officer is required to testify to the underlying facts upon which he based his decision. This includes requiring him to testify as to how he instructed the driver in the performance of the test.

In *Bias*, the hearing examiner disregarded the testimony of Corporal Holstein that while the three field sobriety tests designated by the NHTSA are reliable, they are reliable only if administered in accordance with NHTSA guidelines. As testified to by Corporal Holstein, and consistent with the NHTSA guidelines and the subsequent decision in *Homan*, the reliability of the results of field sobriety tests depends upon their proper administration. The only way that the commissioner can judge whether or not the results of field sobriety tests are reliable is to know that they were properly administered. The commissioner can only know that the tests were properly administered through the introduction of evidence to that effect. Therefore, it is necessary for the arresting officer to testify to the procedures used in administering the field sobriety tests. Nothing in *Albrecht* eliminates the

need for the arresting officer to provide complete testimony respecting the manner in which he administered the field sobriety tests.<sup>21</sup>

Nothing in *Arsenault* stands for the principle that all testimony respecting the results of field sobriety tests is to be admitted without regard to the manner in which the officer administered the tests. The italicized portion of the quotation from *Arsenault* indicates that the tests require some uniform procedure in their administration. Otherwise, the results of tests administered in a haphazard manner might be given the same weight and significance as tests that are properly administered. Identical test results may not mean the same thing if one test is properly administered and the other is not. Improper directions and demonstrations can result in a lack of the required "precise body movement" or the "greater degree of coordination [than is required for] routine standing or talking," and can render them subject to the same "shortcomings [as] casual observation." If a driver is not given full and complete instructions as to what is expected or, with respect to certain aspects of the tests, is not given demonstrations as how he or she is expected to perform, his or her performance cannot be measured against the accepted results as prescribed by the NHTSA. Instead, the results of improperly administered tests are more in the nature of casual observations by a lay person, which are not to be imbued with any special significance.

The hearing examiner indicated that the results of the field sobriety tests were the equivalent of casual observations by a layperson. In fact, the hearing examiner imbued them with the significance of the results of a scientific or specialized test. The italicized portion of the quotation from *Arsenault* makes this clear. Field sobriety tests are designed for the sole and express purpose

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<sup>21</sup> As discussed below, some behavior is so obviously the result of intoxication that it requires nothing more than the testimony of the officer, or even a lay witness, as to his observations to show that the subject was intoxicated.

of avoiding the shortcomings of casual observations. They are specific tests, the results of which are reliable when administered *exactly* as prescribed by the NHTSA. See *Homan, supra*. Only when administered in accordance with the guidelines of the NHTSA do they have the effect described in *Arsenault*, i.e., enhancement of the officer's observation of the defendant and the reliability of his opinion. *Arsenault* does not support the conclusion reached by the commissioner. For the reasons set forth above, the Court is of the opinion that the commissioner is incorrect in her conclusion that there is no need to lay a proper foundation for admission of the results of field sobriety tests.

In *Hudnall and Smith*, the commissioner held that testimony respecting the field sobriety tests would be admitted because there is no requirement that a driver submit to field sobriety tests, that there is no requirement that an officer lay a proper foundation for the admission of such testimony and that field sobriety tests are just one of several methods used to determine whether a driver is intoxicated. There is no legal or logical basis for the first and third conclusions reached by the commissioner. The fact that a driver may refuse field sobriety tests or because there are other methods available to prove intoxication does not vitiate the need for tests to be reliable, or for there to be evidence to prove that the tests are reliable. It is abundantly clear that accepted testing procedures must be followed, and that there must be evidence that they were followed. See *State v. Barker*, 179 W. Va. 194, 366 S.E.2d 642 (1988); and *State v. Clawson*, 165 W. Va. 588, 270 S.E.2d 659 (1980).

The failure of an officer to lay a proper foundation respecting proper administration of field sobriety tests does not render inadmissible all evidence respecting those tests. In *State v. Meador*, 674 So.2d 826 (Fla. Dist. Ct. App. 1996), the court considered whether the results of field sobriety tests were admissible and, if so, whether admitting the results was prejudicial to a defendant. It

distinguished between admissibility of the results of: 1) the horizontal gaze nystagmus (HGN) test, and 2) the walk-and-turn and one-legged stand, which it described as "psychomotor tests." With respect to the psychomotor tests, the Florida court held that they are admissible, but are to be accorded no more significance than other lay observations.

As in *Meador*, this Court recognizes that there is a difference between the psychomotor tests, on the one hand, and the horizontal gaze nystagmus test, on the other hand. In *Meador*, the court described the former as psychomotor tests, in which the driver is requested to perform certain tasks, and the latter as scientific evidence of a physiological phenomenon that is associated with intoxication. The psychomotor field sobriety tests are designed to test for two functions of a driver: 1) The ability to follow instructions, and 2) The ability to perform certain physical tasks. The inability of a driver to follow instructions may indicate mental impairment due to the consumption of alcohol, while the inability to perform certain physical tasks may indicate the physical impairment due to the consumption of alcohol.

a. Psychomotor Tests.

In *Meador*, the Florida District Court of Appeals determined that the results of the psychomotor tests were admissible to show that the subject was impaired due to intoxication. It noted that:

There are objective components of the field sobriety [tests] which are commonly understood and easily determined, such as whether a foot is on a line or not. . . . [E]vidence of the police officer's observations of the results of defendants performing the [field sobriety tests] should be treated no differently than testimony of lay witnesses (officers, in this case) concerning their observations about the driver's conduct and appearance. [Footnote omitted.]

The mere fact that the NHTSA studies attempted to quantify the reliability of the field sobriety tests in predicting unlawful BAC's [sic] does not convert all of the

observations of a person's performance into scientific evidence. The police officer's observations of the field sobriety exercises, other than the HGN test, should be placed in the same category as other commonly understood signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol or driving patterns.

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As long as the testimony of the officers is restricted to lay observations, we agree with the state that . . . the probative value of the psychomotor testing is not outweighed by the danger of unfair prejudice.

*Id.* at 831-32. The court then went on to hold that any attempt to attach significance to the subject's performance beyond that attributable to any other observations of the subject's conduct could be misleading. The court instructed that terms such as "test," "pass," "fail," or "points," should be avoided, because they tend to enhance the significance of what are otherwise the observations of a layperson. *Id.* at 832-33. At the other extreme, the decision in *Homan, supra*, requires that all field sobriety tests be performed in accordance with the instructions, or that evidence of their results be disregarded in its entirety.

This Court is of the opinion that the proper approach with respect to the psychomotor field sobriety tests lies somewhere between the two extremes. As noted above, the NHTSA has determined that the results of field sobriety tests are reliable only if administered exactly as prescribed by the NHTSA, and that they must be analyzed and scored in accordance with guidelines prescribed by the NHTSA. If they are administered in accordance with the NHTSA guidelines, they are entitled to more significance than mere casual observations of a layperson. However, if they are not administered in accordance with the NHTSA guidelines, they are only entitled to be treated as the casual observations of a layperson.

When an officer administers field sobriety tests, he either fully complies with the NHTSA guidelines, or he doesn't. The significance to be given the results will depend upon whether or not the officer fully complied with NHTSA guidelines. When the arresting officer testifies that he administered field sobriety tests and relies on them as a basis for his determination that the driver was intoxicated, and where the proper administration of field sobriety tests is raised by the driver, the commissioner must determine whether or not the tests were performed in conformity with the NHTSA guidelines.

Determining whether the tests were performed in accordance with NHTSA guidelines requires evidence that, with respect to each field sobriety test administered, each and every step of each field sobriety test was performed, and performed correctly. Otherwise, as noted by the NHTSA and as held in *Homan*, the results of the field sobriety tests are not valid. Because the arresting officer has the burden of proving that the driver was intoxicated, it is necessary for the officer to also present evidence to show that the field sobriety tests were administered in compliance with the NHTSA guidelines. The most likely proof is the officer's own testimony.

If the evidence presented demonstrates that the field sobriety tests were performed in accordance with the NHTSA guidelines, then it is appropriate for the arresting officer to testify to their results. It should be noted that the NHTSA guidelines do not speak in terms of a subject "passing" or "failing" a test. Instead, they speak in terms of the number of clues that the subject presents on each of the tests as indicating potential blood alcohol content above .10%. At the very least, the testimony of the arresting officer should be presented in these terms.

If the evidence demonstrates that the field sobriety tests were not administered in accordance with the NHTSA guidelines, it does not mean that all testimony respecting their administration is

inadmissible. The subject may be called upon to perform certain actions during the course of an improperly administered test, which may lead to the conclusion that he or she was intoxicated. However, it must be evidence of a nature that would make his intoxication apparent to a lay person.<sup>22</sup> On the other hand, there are certain actions required by the tests which, according to the NHTSA guidelines, may count against the subject. However, in the absence of evidence showing compliance with the NHTSA procedures, these actions should not be counted against the subject because there is no evidence to show that the subject was properly instructed and any necessary demonstrations given.<sup>23</sup> It is simply not appropriate to find that a driver has failed a field sobriety test for failure to follow instructions or to comply with technical requirements of the test, where there is no evidence that he or she was given the instructions with which he or she is supposed to comply, or was instructed as to the technical requirements. To find that a driver is intoxicated on the basis of the results of psychomotor tests, the finding must be based on evidence that the subject was properly instructed and that the officer properly analyzed and scored the tests under NHTSA guidelines.

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<sup>22</sup> For example, the officer may ask the subject to stand upright with his hands at his side, while the subject may be unable to stand at all or may have to stagger or take steps to maintain balance while attempting to stand still; or the officer may ask the subject to walk a straight line clearly marked on the sidewalk, but the subject is clearly unable to walk a straight line.

<sup>23</sup> For example, the fact that during the walk-and-turn test, the subject begins the test before the officer finishes giving him instructions or fails to make the turn in the manner prescribed by the NHTSA guidelines is not, in and of itself, evidence of intoxication. The officer must provide evidence to show that the subject was properly instructed not to begin performing the test prior to the issuance of instructions or that he demonstrated to the subject the proper method of performing the turn during the walk-and-turn test. Otherwise, he is counting clues against the subject of which the subject, even if perfectly sober, was not aware.

b. Horizontal Gaze Nystagmus Test.

In *State v. Barker*, 179 W. Va. 194, 366 S.E.2d 642 (1988), the Supreme Court held that in order for the results of the horizontal gaze nystagmus test to be admissible, there must be some evidence respecting the methodology of the test, its scientific reliability and its results. It also held that there must be evidence of whether accepted testing procedures were followed by qualified personnel in the particular case. It noted that evidence of scientific reliability should include both testimony by expert witnesses and relevant articles and scientific publications. *Id.* at 198, 366 S.E.2d at 646.<sup>24</sup>

Courts in other jurisdictions have held that the results of the horizontal gaze nystagmus test are admissible to show intoxication, provided that the police officer lays a proper foundation. In *Schultz v. State*, 106 Md. App. 145, 179-80; 664 A.2d 60, 77 (1995), the Maryland Court of Special Appeals held that the arresting officer failed to lay a proper foundation to support admission of the HGN test results. First, he failed to lay a sufficient foundation respecting his qualifications to administer the HGN test. He initially testified that he was trained to perform field sobriety tests, but did not state that he had been trained to administer the HGN test. He testified that he had administered field sobriety tests approximately 100 times, but he did not testify as to his experience in administering the HGN test. He later testified that he had been instructed at the academy how to do the test, but was not a certified instructor.

Second, he failed to lay a proper foundation respecting administration of the test. He failed to perform certain checks prior to administering the test that are designed to reduce the chances that

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<sup>24</sup> The Court also held that the results of the HGN test could only be used to show that a person was driving while under the influence of alcohol. They could not be used to estimate a driver's blood alcohol content.

nystagmus resulted from causes other than alcohol. The court noted that this was important, in light to the numerous possible causes of nystagmus.<sup>25</sup>

In *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994), the Texas Court of Criminal Appeals, after extensive analysis, determined that the results of the HGN test were reliable, and that evidence respecting the test was admissible when given by, "[O]fficers who . . . receive standardized training in its administration. When administering the HGN test, those officers must follow standardized procedures as outlined in the *DWI Detection* manual published by NHTSA." The court determined that the officer had followed the procedures outlined in the manual.

Other courts have reached the same result, but without so extensive an analysis. See *State v. Superior Court*, 149 Ariz. 269, 279, 718 P.2d 171, 181 (1986) (HGN test admissible in same manner as other field sobriety test results provided that there is a proper foundation as techniques used and the officer's ability to use it.); *State v. Breitung*, 623 So.2d 23, 25 (La. Ct. App. 1993)

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<sup>25</sup> The court listed thirty-eight possible causes of nystagmus, including:

(1) problems with the inner ear labyrinth; (2) irrigating the ears with warm or cold water under peculiar weather conditions; (3) influenza; (4) streptococcus; (5) vertigo; (6) measles; (7) syphilis; (8) arteriosclerosis; (9) muscular dystrophy; (10) multiple sclerosis; (11) Korchaff's syndrome; (12) brain hemorrhage; (13) epilepsy; (14) hypertension; (15) motion sickness; (16) sunstroke; (17) eye strain; (18) eye muscle fatigue; (19) glaucoma; (20) changes in atmospheric pressure; (21) consumption of excessive amounts of caffeine; (22) excessive exposure to nicotine; (23) aspirin; (24) circadian rhythms; (25) acute trauma to the head; (26) chronic trauma to the head; (27) some prescription drugs, tranquilizers, pain medications, anti-convulsants; (28) barbiturates; (29) disorders of the vestibular apparatus and brain stem; (30) cerebellum dysfunction; (31) heredity; (32) diet; (33) toxins; (34) exposure to solvents, PCBs, dry cleaning fumes, carbon monoxide; (34) [sic] extreme chilling; (35) eye muscle imbalance; (36) lesions; (37) continuous movement of the visual field past the eyes, i.e. looking from a moving train; (38) antihistamine use. [Cites omitted.]

(Proper foundation for admitting the HGN test has been laid when the officer shows he was trained in the procedure, certified in its administration and that the procedure was properly administered.); *People v. Berger*, 217 Mich. App. 213, 217-18, 551 N.W.2d 421, 424 (1996) (The necessary foundation is satisfied where there is evidence that the test was properly performed and that the officer administering the test was qualified to perform it.); *State v. Bresson*, 51 Ohio St. 3d 123, 129 554 N.E.2d 1330, 1336 (1990) (Results of HGN test are admissible, so long as proper foundation has been shown both as to the officer's training and ability to administer test and as to actual technique used by the officer in administering the test.).

A proper foundation for admission of testimony respecting the horizontal gaze nystagmus test requires evidence of the following: 1) The scientific basis of the test; 2) The officer's qualifications to administer the test; 3) The fact that the test was administered in accordance with NHTSA guidelines; and 4) The officer's qualifications to interpret the results of the test, including his ability to attribute any nystagmus to alcohol and not to other causes.<sup>26</sup>

#### V. Failure to Address All Evidentiary Issues

The Court would note that there is a consistent deficiency in administrative decisions prepared by hearing examiners for the Division of Motor Vehicles. This Court has reviewed a number of decisions where the commissioner found that the operator drove a motor vehicle while intoxicated based on field sobriety tests or other physical behavior (as opposed to the results of chemical tests,

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<sup>26</sup> In *People v. Williams*, 5 Cal.Rptr.2d 130, 3 Cal.App.4th 1326 (5th Dist. 1992), the California Court of Appeals held that an officer can administer and observe nystagmus, but may not be qualified to attribute nystagmus to a particular cause, such as alcohol consumption. In *Schultz v. State, supra.*, the Maryland Court of Appeals noted that the cases and literature indicate that there are numerous factors that have been mentioned as a cause or possible cause of nystagmus. See f.n. 24.

which are substantially more reliable and less susceptible to subjective interpretation<sup>27</sup>), and where the operator of the motor vehicle presents evidence that he or she suffered some physical impairment that prevents adequate performance of the field sobriety tests. There are a number of decisions reviewed by this Court in which the hearing commissioner has failed to address the driver's evidence which could legitimately demonstrate that his or her failure to adequately perform the field sobriety tests may have resulted from his or her physical impairments. The commissioner's decisions routinely state that a chemical test of blood, breath or alcohol is not required, cite *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), and state the facts that tend to support a finding that the operator was driving while intoxicated. The evidence respecting physical impairments is simply not addressed in the decision.

This Court is not the only court in this state to recognize this problem with the commissioner's decisions. In *In re: Faykus*, Civil Action No. 97-AD-75-H (March 3, 1998), the Circuit Court of Raleigh County recognized this problem, stating:

The first concern to be expressed by this Court, regards the continuing inability of the Commissioner, by and through her Hearing Examiners, to follow and adhere to the minimum standards of due process as required by the statutes and the case law, relative to issues of revocation. The Commissioner in this case, as she has done in so many previous cases, relies entirely on the case of *Albrecht v. State*, [173 W. Va. 268, 314 S.E.2d 859 (1984)]. The Commissioner appears to interpret this case as warranting the revocation of a drivers license, based upon any minimal presentation of evidence by a police officer. The problem with this position is that the West Virginia Supreme Court of Appeals, in a number of subsequent cases, has refined and limited the broad power granted to the Commissioner under the *Albrecht* case. Specific reference is made to the case of *Muscatell v. Cline*, 196 W. Va. 588, 474

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<sup>27</sup> The Court would note that the NHTSA guidelines for the administration of field sobriety tests indicate that they are to be used primarily for the purposes of determining whether there is probable cause to believe that the operator of a motor vehicle is driving while intoxicated and to place the driver under arrest for the purpose of administering a chemical test to determine whether the person has a blood alcohol content in excess of the legal limit.

S.E.2d 518 [W. Va. 1996]. That case dealt with a number of issues which are relevant in this case, and include the use of field sobriety tests, reasonable, articulable, suspicions for making investigative stops of motor vehicles and conflicts in the evidence.

This Court has seen, in the last several years, a majority of cases reaching this level on Petitions for Review, wherein the Commissioner, by and through her Hearing Examiners, has declined to consider the evidence of the secondary chemical analysis of the breath because the police officers who represent themselves at these hearings, fail to meet very technical and particular foundation requirements for the introduction of the secondary chemical test of the breath. In most all of these cases, the law officers who are untrained in technical, legal presentation of evidence, are pitted against well-seasoned attorneys who, in the zealous representations of their client, make appropriate objections to technical imperfections in the presentation of certain evidence. While these problems might be remedied through the appropriate training of these officers regarding the necessary evidentiary foundation for the admission of these test results, this in (sic) nonetheless the system under which we operate. And that system is designed to grant unto individuals . . . due process.

In this case, as in so many cases in the past, the Commissioner has refused to consider the secondary chemical test of breath, and is forced to rely upon other evidence to support the administrative revocation of the license. Sustaining the objections of the petitioners in these matters regarding the admission of the scientific tests, seems to evoke, in this Court's opinion, a position by the Commissioner that she will use her discretionary powers thereafter to support revocations based on any modicum of evidence that may be presented by the police officer. This does not comport with the principles of due process and fairness.

If one reads the *Albrecht* decision, one might presume that all a police officer has to do is provide evidence that he had a reasonable, articulable suspicion to stop the vehicle, that there was evidence of drinking, and that the driver of the vehicle failed one of a number of field sobriety tests, and the revocation will so uphold. (sic) *Muscatell* clearly tells us that, "where 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 reasonable, articulate decision weighing and explaining the choices made and rendering a decision capable of review by an appellate court." (See *Muscatell*, Syllabus point 6, emphasis added.) [Emphasis in original.]

In this particular case, there is clear evidence which contradicts a presumption of a finding of intoxication. That evidence includes direct admissions by the officer, that the petitioner, Mr. Faykus, did not sway or stagger, that his speech did not appear to be slurred and that he was coherent. In addition, there was evidence that Mr. Faykus

suffered from a pre-existing physical condition that may have rendered him incapable of performing the one-legged stand and the walk-and-turn tests. Absent the availability of the secondary chemical test of the breath, this evidence is critical in terms of the respondent's contentions that he was not operating a vehicle under the influence of alcohol. The Commissioner, by and through here (sic) Hearing Examiner, cannot ignore that evidence. Where there is a conflict in the corroborating evidence upon which the Commissioner relies in affirming a revocation, she must state, on the record, why she has elected to adopt one version of a set of facts and disregard the other. Likewise, it is important for the Commissioner to address issues raised on cross-examination regarding the proper administration of the field sobriety tests. The *Barker* decision (*State vs. Barker*, 179 W. Va. 194 366 S.E.2d 642 [W. Va. 1998]) states that an officer cannot use the horizontal gaze nystagmus test to estimate a blood alcohol level. On the other hand, that case clearly acknowledges that once an officer has shown that he has been trained and that he has appropriately administered the test, it is admissible as evidence that the driver was driving under the influence of alcohol. Clearly a prerequisite, however, is an explanation by the Commissioner as to why she believes the test is appropriate, reliable and admissible in a particular case. Blanket recognition of field sobriety tests is not appropriate. The administration of field sobriety test (sic) is subject to review at any time they are offered as evidence of intoxication and relied upon to support the administrative revocation of a license.

The Circuit Court of Raleigh County remanded the case to the Department of Motor Vehicles for a reasoned and articulate decision, addressing the evidence raised by the petitioner.

In the present action, the commissioner's decisions contain many of the deficiencies that were recognized in the *Faykus* decision. For example, in the case of Mr. Bias, there was evidence that: 1) Mr. Bias was wearing cowboy boots with heels, which could affect his balance on the psychomotor tests, 2) he was given the walk and turn test on a surface which was, to some degree uneven, and 3) there was no line on the surface upon which he could walk heel to toe, and no evidence that there was a parallel line that he could use for reference, so as to walk a straight line. There was also evidence that he had taken some cold medication containing an antihistamine, which could cause or contribute to nystagmus.

## VI. The Individual Cases.

### A. Scott Bias.

In the case of Scott Bias, the arresting officer, Patrolman Jeffrey H. Ash of the Huntington Police Department, testified that he followed the pickup truck being driven by Mr. Bias along the streets of Huntington. He stated that he observed the truck cross the center line several times and that the truck slowed down and sped up in a somewhat erratic manner several times.<sup>28</sup> He stopped the truck and upon approaching the vehicle, he smelled alcohol on the breath of Mr. Bias. Officer Ash asked Mr. Bias to exit the vehicle. He testified that it was at this time that he noticed beer cans in the back of Mr. Bias's truck.

Officer Ash then administered field sobriety tests to Mr. Bias. He testified that he told Mr. Bias that he was going to administer field sobriety tests and that he "explained to Mr. Bias, . . . , how to do the test." He also testified that he demonstrated how to perform the nine heel-to-toe steps and the turn. Officer Ash testified that Mr. Bias stopped to steady himself, did not touch heel to toe, lost his balance while walking, used his arms to balance himself and lost his balance while turning.

On cross examination, counsel for Mr. Bias asked Officer Ash to testify exactly as to how he instructed Mr. Bias and administered the tests to him. Even though Officer Ash's description as to how he did so was probably the strongest foundation that was laid by any of the officers in these consolidated appeals, it was clearly insufficient. The instructions were clearly insufficient. Officer Ash did not provide evidence that the surface upon which the test was administered was flat and that

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<sup>28</sup> Mr. Bias testified that the truck slowed down and sped up because he and his passenger were attempting to see street signs so that they could determine where they were. He testified that they were both fairly unfamiliar with Huntington.

there was straight line upon which Mr. Bias could walk or use as a reference.<sup>29</sup> He did not testify that he provided certain instructions to Mr. Bias during the initial positioning stage, that he properly positioned Mr. Bias during the initial positioning stage, or that he ascertained from Mr. Bias that he understood the instructions.

With respect to the walking stage of the test, Officer Ash did not testify or provide other evidence that he properly instructed Mr. Bias how to perform certain aspects of the test, such as keeping his arms at his side while walking, and that once he began the test, not to stop until he completed it. While Officer Ash testified that he showed Mr. Bias how to walk heel-to-toe and how to turn, there is no evidence to show that he demonstrated the "pivot turn" to Mr. Bias.

There was no evidence that Officer Ash scored the test in accordance with NHTSA guidelines. He testified that he penalized Mr. Bias for not touching his heel to his toe, even though the guidelines permit a gap of up to one-half of an inch. He testified that Mr. Bias used his arms to balance himself, even though the guidelines permit this. The guidelines only permit this to be counted against a suspect if he raises his arms more than 6 inches from his side. The evidence shows not that Mr. Bias failed to perform in accordance with the NHTSA guidelines, but that he did not perform in accordance with a more stringent standard which was imposed by Officer Ash.

Officer Ash then testified that he administered the horizontal gaze nystagmus test. He presented no evidence respecting his training to administer the test or to interpret its results. His testimony with respect to administration of the test was also insufficient. He did nothing to determine whether Mr. Bias was subject to some other circumstance or condition which might have caused

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<sup>29</sup> Mr. Bias testified that the surface upon which the walk-and-turn test was uneven and that there was no straight line on the surface for him to follow. He also provided a photograph to show that the surface was uneven.

nystagmus in his eyes, as required by the NHTSA guidelines. Officer Ash also testified that there was no onset of nystagmus before 45 degrees.

Officer Ash clearly indicated that he did not understand part of the scoring of the horizontal gaze nystagmus test. He testified that the onset of nystagmus prior to 45 degrees will occur only when the subject is extremely intoxicated. The NHTSA guidelines do not indicate this. In fact, they indicate that this is a factor that should not be counted against the subject. Officer Ash clearly counted this against Mr. Bias.

Officer Ash then administered the one-legged stand test to Mr. Bias. As pointed out by Mr. Bias in his memorandum, Officer Ash reduced eleven separate, detailed instructions to approximately seven sentences. The record clearly contains insufficient evidence to demonstrate that Officer Ash instructed Mr. Bias in accordance with the NHTSA guidelines.

Officer Ash's testimony also demonstrates that he did not properly score the one-legged stand administered to Mr. Bias. He testified that Mr. Bias used his arms for balance. However, a subject may use his arms for balance, but it should only be counted against him if he moves his arms more than six inches away from his body. The only "clue" to which the officer properly testified was the fact that Mr. Bias put his foot down during the test.

The foregoing demonstrates that there was an inadequate foundation for the results of the field sobriety tests. Consequently, there was insufficient evidence of probable cause to arrest Mr. Bias, or to find that he was intoxicated.<sup>30</sup>

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<sup>30</sup> The results of the secondary chemical test, a breath test, were excluded by the hearing examiner. He found that the arresting officer failed to lay a proper foundation for introduction of the results of the breath test, because he presented no evidence that the machine used to test Mr. Bias's breath had been tested to determine whether or not it was accurate and when the last test had occurred. The Court is astounded at the number of times that it has reviewed decisions where the

B. Jonathan Hudnall.

In the case of Jonathan Hudnall, it is clear from the record that the arresting officer, Deputy D. E. Willard of the Kanawha County Sheriff's Department, did not lay a proper foundation for administration of the field sobriety tests. In his direct testimony, Deputy Willard offered no evidence with respect to his qualifications and training to administer any of the field sobriety tests. His direct testimony respecting administration of the field sobriety tests to Mr. Hudnall and his scoring of the tests was, at best, conclusory.

On cross examination, counsel for Mr. Hudnall asked Deputy Willard to describe how he administered the tests to Mr. Hudnall. In effect, counsel gave Deputy Willard the opportunity to lay the proper foundation for administration of the field sobriety tests. Deputy Willard objected on the grounds that he could not recall exactly how he administered the tests. Although this was a perfectly acceptable line of questioning, the hearing examiner sustained Deputy Willard's objection.

As a result of this sequence of events, Deputy Willard did not lay a proper foundation to show that he was qualified to administer the field sobriety tests, that he was qualified to interpret the results of the horizontal gaze nystagmus test, or that the field sobriety tests were properly administered in accordance with guidelines of the NHTSA. Consequently, the hearing examiner should not have considered the results of the field sobriety tests. A further consequence is that there was no probable cause to arrest the petitioner. There being no probable cause to arrest the petitioner, there was no basis for administration of the secondary chemical test. In the absence of the field sobriety tests and

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results of breath tests have been excluded because of the failure of an officer to lay a proper foundation, especially of this nature. It seems that the state, its counties and its municipalities would take some steps to train their officers to perform routine, clerical tasks of this nature, so as to ensure that the results of secondary chemical tests, which are the best evidence of a subject's intoxication, are not routinely excluded.

the secondary chemical test, there is no evidence to show that the Mr. Hudnall was driving while under the influence. Therefore, the order revoking his license must be reversed.

C. James Smith.

In the case of Mr. Smith, the arresting officer, Herbert L. Faber, a deputy with the Jackson County Sheriff's Department, testified that he and another deputy, Deputy Bair, followed Mr. Smith for some time before he stopped him. Deputy Faber testified that he did not observe Mr. Smith violate any law or drive erratically prior to stopping him. He stopped Mr. Smith only when he passed another vehicle that had slowed down to make a turn. In his paperwork, Deputy Faber indicated that he swerved around the vehicle and accelerated rapidly. He and Deputy Bair followed Mr. Smith for another quarter or half-mile before stopping him. During the additional time that they followed Mr. Smith, they did not observe Mr. Smith violate any law. Upon approaching Mr. Smith's vehicle, Deputy Faber smelled alcohol on Mr. Smith's breath. In his testimony, Deputy Faber admitted that the smell of alcohol on a driver's breath is merely evidence that they may have consumed alcohol, but it is not proof that the driver is intoxicated. He further admitted that at the time that he stopped Mr. Smith and smelled alcohol on his breath, he had no probable cause to believe that Mr. Smith was driving while intoxicated.

Deputy Faber then administered field sobriety tests to Mr. Smith. According to Deputy Faber, he formulated probable cause only upon administering the field sobriety tests. His direct testimony respecting administration and scoring of the field sobriety tests was perfunctory. On cross-examination, Deputy Faber was able to recall very little about his training respecting field sobriety tests. He also offered no testimony respecting his qualifications to administer said tests or to interpret their results. Deputy Faber admitted that there were other potential causes of nystagmus, and that

he could not be certain that it was intoxication that caused nystagmus in Mr. Smith. He also failed to present any evidence respecting the scientific bases underlying the horizontal gaze nystagmus test or to show its general acceptance in the relevant scientific community.

Upon being cross-examined about his administration of the horizontal gaze nystagmus test, Deputy Faber was not able to testify with any degree of specificity as to how he performed the test. The only matter on which he was able to testify with any degree of certainty was that the onset of nystagmus did not occur prior to the 45-degree angle. Only when the onset of nystagmus occurs prior to the 45-degree angle is this a clue that should be counted against the suspect. Therefore, this was an indication that Mr. Smith may not have been intoxicated.

With respect to the walk-and-turn test and one-legged stand test, Deputy Faber was asked by counsel for Mr. Smith to describe the instruction he gave Mr. Smith. His testimony respecting his instructions was so deficient that the hearing examiner could not have determined whether or not the instructions actually given were sufficient to permit Mr. Smith perform the test in accordance with NHTSA guidelines. Consequently, it was impossible for the hearing examiner to determine whether or not Deputy Faber could have properly scored Mr. Smith's performance and whether, in fact, he did so.

Deputy Faber admitted that on the one-legged stand, he did not comply with the instruction that requires the officer to stand at least three feet away from the suspect. He also testified that he was unfamiliar with factors, other than intoxication, that might cause a driver to fail the psychomotor tests.

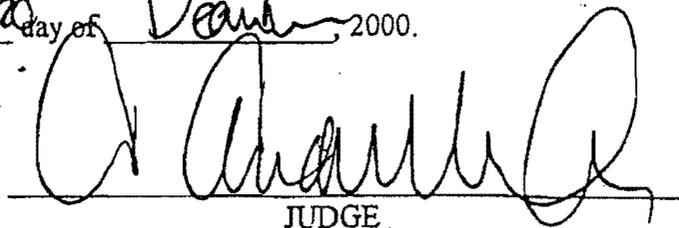
Based on the foregoing, it is apparent that Deputy Faber failed to lay a proper foundation to show that he was qualified to administer the field sobriety tests, that he was qualified to interpret the

results of the horizontal gaze nystagmus test, or that he, in fact, administered the field sobriety tests in accordance with guidelines of the NHTSA. Consequently, the hearing examiner was wrong as a matter of law in failing to exclude the results of the field sobriety tests. A further consequence is that there was no probable cause to arrest the petitioner. There being no probable cause to arrest the petitioner, there was no basis for Deputy Faber to attempt to administer the secondary chemical test to Mr. Smith. There being no probable cause to arrest Mr. Smith and no basis for administration of a secondary chemical test, his refusal to submit to the secondary chemical test cannot constitute a basis for revocation of his operator's license. Therefore, the order revoking his license must be reversed.

VII. Conclusion.

Based on the foregoing, the Court does **HEREBY ORDER** that the orders of the Commissioner of the Department of Motor Vehicles, revoking the operators' licenses of each of the petitioner in this action, Scott Bias, Jonathan Hudnall and James Smith, are reversed, and that the Commissioner of the Division of Motor Vehicles is to reinstate the licenses of each of the petitioner. The Court does **FURTHER ORDER** that this case is hereby **DISMISSED** and **STRICKEN** from the docket of this Court and that a certified copy of this Order be sent to all parties or counsel of record.

ENTER this 22<sup>nd</sup> day of December, 2000.

  
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JUDGE

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SCOTT BLAS,

Petitioner,

v.

Civil Action No. 94-AA-207

JANE CLINE, Commissioner  
West Virginia Department of  
Motor Vehicles,

Respondent.

ORDER DENYING RESPONDENT'S MOTION TO  
VACATE THE COURT'S "OPINION AND FINAL ORDER"

This matter is before the Court on the respondent's motion to vacate the "Opinion and Final Order" entered by this Court on December 22, 2000. The respondent filed a memorandum addressing certain legal precedent cited by the petitioners and, to some extent, relied upon by the Court in its "Opinion and Final Order." The petitioners then filed a memorandum in response to the respondent's memorandum. Having reviewed the parties' respective memoranda, the Court is of the opinion to deny the respondent's motion to vacate its "Opinion and Final Order."

Without reiterating each and every point made in the "Opinion and Final Order," the Court is satisfied that its original decision is correct. There are several points which the Court desires to emphasize.

First, evidence respecting field sobriety tests is evidence which falls within Rule 702 of the Rules of Evidence, in that it is "scientific, technical or other specialized knowledge." Clearly, Rule 705 requires the witness to testify to underlying facts, including the foundation for his or her testimony, on cross-examination. The Administrative Procedures Act, W. Va. Code § 29A-5-1, et

seq., requires that the Rules of Evidence be followed in administrative proceedings. W. Va. Code § 29A-5-2(a). Even to the extent that § 29A-5-2(a) could be interpreted to indicate something less than strict adherence to the Rules of Evidence, they provide guidance respecting the admissibility of and weight to be given to evidence of this nature.

Second, there is some validity to the petitioners' assertion that the respondent's position is somewhat contradictory. On the one hand, the respondent contends that field sobriety tests are reliable in proving whether or not a driver is intoxicated. The literature and the testimony presented to the commissioner's hearing examiner at the Bias hearing both indicate that the testing undertaken by the National Highway Transportation Safety Administration shows that the results of the field sobriety tests are reliable<sup>1</sup> only when administered in accordance with standardized procedures, and under certain conditions. Police officers are trained to administer the tests using the standardized procedures developed by the NHTSA. They routinely offer the results as empirical and objective evidence that the driver is intoxicated.

However, when a driver seeks to ensure that results of the field sobriety tests are vested with the reliability asserted by the officer, the respondent routinely holds, and herein he contends, that there is no need for the officer to prove that field sobriety tests are administered in accordance with the standardized procedures and under the conditions which render their results reliable. He reasons that the officers' testimony respecting the results is mere lay testimony, describing certain behavior which would allow any individual to determine whether or not the driver is intoxicated. If the respondent were correct in this contention, there would be no need to establish standardized

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<sup>1</sup> As the Court noted in the "Opinion and Final Order," the field sobriety tests are at best 80% reliable, even when administered under the best of conditions.

procedures, determine the ideal conditions and train police officers to administer the field sobriety tests accordingly. If the commissioner were correct, to test for intoxication, anyone could make up a test, and administer it and interpret the results in any manner they desire.<sup>2</sup>

The commissioner also fails to address the fact that certain aspects of the field sobriety tests constitute evidence of intoxication only when considered within the context of the tests, e.g. beginning the tests before the officer completes the instructions, or incorrectly making the turn in the walk-and-turn test. This is not behavior which would necessarily allow a lay person to conclude that the driver is intoxicated. In order to demonstrate that these "clues" are indicia of intoxication, it is necessary for the officer to show the context in which they are considered. This can only be done by requiring the officer to lay a proper foundation.

He also ignores the fact that certain clues on field sobriety tests indicating intoxication may also be caused by other factors. A proper foundation would show whether the officer attempted to determine whether or not the other factors might be present.

Third, it appears that the courts from a majority of jurisdictions have concluded that field sobriety tests are reliable only when administered in accordance with the standardized procedures. In some instances, they have expressly required the officer to lay a foundation before testifying to the results of field sobriety tests. In other instances, it appears that the courts have reached the

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<sup>2</sup> Once again, the Court will emphasize that there are certain behaviors, such as the manner of driving, speech or movement, that could lead anybody, even a lay person, to conclude that an individual is intoxicated. It is safe to say that, in most instances, behavior that might allow a lay person to conclude that a driver is intoxicated could lead the arresting officer to the same conclusion without the necessity of administering field sobriety tests. However, field sobriety tests are not the casual observations of lay persons. Instead, because they are deemed to have added reliability when properly administered, they are generally given greater weight and are deemed to be more objective.

conclusion that the results of the field sobriety tests are reliable, and that this conclusion has been based on the premise that the tests were administered in accordance with the standardized procedures.

Finally, in conducting hearings respecting license revocations, the commissioner is acting in a quasi-judicial capacity. In doing so, is required to maintain absolute objectivity. Acting in part through his hearing examiners, his job is to determine whether or not licensed drivers are operating motor vehicles in West Virginia while intoxicated or while under the influence of alcohol. Certainly, he has no interest in revoking the licenses of drivers who are not driving under the influence.

The results of field sobriety tests shed light on the subject of whether or not a driver is operating a motor vehicle while under the influence. Except insofar as evidence is irrelevant, immaterial or unduly repetitious, the commissioner should want to hear and consider any and all evidence which would tend to bolster the reliability of field sobriety tests, or any other tests the officer may administer.<sup>3</sup> Laying a proper foundation for field sobriety tests is hardly irrelevant or immaterial. Unless the foundation is required of multiple witnesses, it is hardly repetitive. A proper foundation for field sobriety tests enhances the reliability of the test results and, consequently, the commissioner's decisions. In light of this, the Court would anticipate that the commissioner would welcome such

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<sup>3</sup> A far superior method for showing whether or not a driver is driving while intoxicated is the use of the secondary chemical test which, in virtually every case if not every case, is the breath test. Too often, the arresting officer comes to the administrative hearing unprepared to lay a proper foundation for admission of the breath test.

The breath test is far more reliable in determining statutory intoxication than the field sobriety tests. It tests for blood alcohol content, not factors that may result from intoxication, but which may also result from causes other than intoxication. The breath test does not involve the elements of subjectivity that are involved in field sobriety tests. Laying of a proper foundation for the breath test is far easier than laying the proper foundation for the field sobriety tests. The breath test makes it easier for the commissioner to determine whether an individual is driving while intoxicated, based on an objective standard.

evidence, regardless of whether the it points towards or away from intoxication. The Court cannot explain the vigor with which the commissioner argues against the admission of relevant, material evidence, that can only improve the accuracy of his decisions.

Accordingly, the Court does HEREBY ORDER that the respondent's motion to vacate the Court's "Opinion and Final Order," entered December 22, 2000, is denied. The Court does FURTHER ORDER that a certified copy of this Order be sent to all parties or counsel of record. The Court notes the objection and exception of the parties, insofar as their interests are adversely affected by this Order.

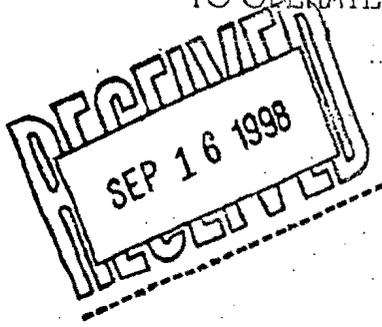
ENTERED 23rd day of April, 2001.

  
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JUDGE

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: PETITION BY MICHAEL C. FAYKUS, JR. FOR JUDICIAL  
REVIEW OF ADMINISTRATIVE DECISION MADE BY  
JANE L. CLINE, COMMISSIONER, DEPARTMENT OF  
TRANSPORTATION, DIVISION OF MOTOR VEHICLES,  
SUSPENDING THE LICENSE OF MICHAEL C. FAYKUS, JR.,  
TO OPERATE A MOTOR VEHICLE

EXHIBIT B



CIVIL ACTION NO. 97-AD-75-H  
DMV FILE NO: 193419C

OPINION ORDER

On the 24th day of February, 1998, appeared Michael C. Faykus, by and through counsel, Randy D. Hoover, and also appeared Jane L. Cline, Commissioner, by counsel, Thomas MacAulay, pursuant to a Notice of Hearing on the above-referenced Petition for Review. The Court heard argument of counsel, reviewed the entire file, including the transcript of the hearing held before the Hearing Examiner in this matter, on or about the 13th day of August, 1997, and the Court deems it appropriate to issue the following ruling:

On May 29, 1997, Trooper C.B. Payne, MDPS, arrested the petitioner, Michael C. Faykus, Jr., for driving an automobile while under the influence of alcohol on U.S. Route 19 in Raleigh County, West Virginia. After the arrest, the trooper filed an Affidavit, as required, with the Department of Motor Vehicles. Said Affidavit was filed on or about the 29th day of May, 1997.

Thereafter, Mr. Faykus' license to operate a motor vehicle in the State of West Virginia was revoked for a period of his life by letter dated June 5, 1997, which said letter noted the filing of the May 29, 1997 Affidavit, and also noted two prior

suspensions or revocations, including October 16, 1987 and November 27, 1993.

Thereafter, the petitioner, Michael C. Faykus, Jr., filed an appropriate demand for an administrative hearing, and the hearing was set originally for June 24, 1997, by order of David H. Bolyard, Director of Driver Services, which said June 24, hearing was continued and rescheduled until August 13, 1997. The demand filed by Mr. Faykus also appropriately noted that he sought to contest the secondary chemical test of breath, as used by the West Virginia State Police.

Thereafter, a hearing commenced before William F. Cox, Hearing Examiner, on August 13, 1997, at 2:45 p.m. Present at the hearing were, Mr. Cox, Hearing Examiner, Michael C. Faykus, Jr., Trooper C.B. Payne, MDPS and Randy D. Hoover, attorney for the petitioner. The Hearing Examiner undertook to receive evidence in the matter.

Thereafter, on or about September 29, 1997, the Commissioner, Jane L. Cline, issued a seven-page final order affirming the revocation of Mr. Faykus' drivers license. Thereafter, Mr. Faykus filed a Petition in the Circuit Court of Raleigh County, for review of that September 29, 1997 order.

The Court, after having heard all the evidence in the case, argument of counsel, and having reviewed the entire file, has a number of concerns as will be set forth herein.

The first concern to be expressed by this Court, regards the continuing inability of the Commissioner, by and through her Hearing Examiners, to follow and adhere to the minimum standards of due process as required by the statutes and the case law, relative to issues of revocation. The Commissioner in this case, as she

has done in so many previous cases, relies entirely on the case of Albrecht vs. State, 314 S.E. 2d, 859 W.Va. 1984. The Commissioner appears to interpret this case as warranting the revocation of a drivers license, based upon any minimal presentation of evidence by a police officer. The problem with this position is that the West Virginia Supreme Court of Appeals, in a number of subsequent cases, has refined and limited the broad power granted to the Commissioner under the Albrecht case. Specific reference is made to the case of Muscatell vs. Cline, 196 W.Va. 588, 474 S.E.2d 518 W.Va. 1996. That case dealt with a number of issues which are relevant in this case, and include the use of field sobriety tests, reasonable, articulable, suspicions for making investigative stops of motor vehicles and conflicts in the evidence.

This Court has seen, in the last several years, a majority of the cases reaching this level on Petitions for Review, wherein the Commissioner, by and through her Hearing Examiners, has declined to consider the evidence of the secondary chemical analysis of the breath because the police officers who represent themselves at these hearings, fail to meet very technical and particular foundation requirements for the introduction of the secondary chemical test of the breath. In most all of these cases, the law officers who are untrained in technical, legal presentation of evidence, are pitted against well-seasoned attorneys who, in the zealous representations of their client, make appropriate objections to technical imperfections in the presentation of certain evidence. While these problems might be remedied through the appropriate training of these officers regarding the necessary evidentiary foundation for the admission of these test results, this in

nonetheless the system under which we operate. And that system is designed to grant unto individuals, in the position of the petitioner in this case, due process.

In this case, as in so many cases in the past, the Commissioner has refused to consider the secondary chemical test of breath, and is forced to rely upon other evidence to support the administrative revocation of the license. Sustaining the objections of the petitioners in these matters regarding the admission of the scientific tests, seems to evoke, in this Court's opinion, a position by the Commissioner that she will use her discretionary powers thereafter to support revocations based on any modicum of evidence that may be presented by the police officer. This does not comport with the principles of due process and fairness.

If one reads the Albrecht decision, one might presume that all a police officer has to do is provide evidence that he had reasonable, articulable suspicion to stop the vehicle, that there was evidence of drinking, and that the driver of the vehicle failed one of a number of field sobriety tests, and the revocation will so uphold. Muscatell clearly tells us that, "where 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 reasonable, articulate decision weighing and explaining the choices made and rendering a decision capable of review by an appellate court." (See Muscatell, Syllabus point 6, emphasis added.)

In this particular case, there is clear evidence which contradicts a presumption or a finding of intoxication. That evidence includes direct admissions by the officer, that the petitioner, Mr. Faykus, did not sway or stagger, that his

speech did not appear to be slurred and that he was coherent. In addition, there was evidence that Mr. Paykus suffered from a pre-existing physical condition that may have rendered him incapable of performing the one-legged stand and the walk-and-turn tests. Absent the availability of the secondary chemical test of the breath, this evidence is critical in terms of the respondent's contentions that he was not operating a vehicle under the influence of alcohol. The Commissioner, by and through here Hearing Examiner, cannot ignore that evidence. When there is conflict in the corroborating evidence upon which the Commissioner relies in affirming a revocation, she must state, on the record, why she has elected to adopt one version of a set of facts and disregard the other. Likewise, it is important for the Commissioner to address issues raised on cross-examination regarding the proper administration of the field sobriety tests. The Barker decision (State vs. Barker, 179 W.Va. 194 366 S.E. 2d 642 W.Va. 1998) states that an officer cannot use the horizontal gaze nystagmus test to estimate a blood alcohol level. On the other hand, that case clearly acknowledges that once an officer has shown that he has been trained and that he has appropriately administered the test, it is admissible as evidence that the driver was driving under the influence of alcohol. Clearly a prerequisite, however, is an explanation by the Commissioner as to why she believes the test is appropriate, reliable and admissible in a particular case. Blanket recognition of field sobriety tests is not appropriate. The administration of field sobriety test is subject to review at any time they are offered as evidence of intoxication and relied upon to support the administrative revocation of a license.

Wherefore, having observed the deficiencies in this case, as stated above, it

is ADJUDGED, ORDERED and DECREED that the Final Order of the Commissioner, dated September 29, 1997, is set aside. This case is remanded to the Commissioner for review, by her, and for the preparation and submission of an order in conformity with the findings in this order, and also, in particular, for the issuance of an appropriate order in conformity with the case law of the State of West Virginia in general, and in particular, Muscattell vs. Cline, 474 S.E.2d 518, 196 W.Va. 588.

It is further the order of this Court that the revocation in this matter is stayed until such decision is rendered by the Commissioner and is subjected to her review. The issues having been resolved as a result of this case, this matter is DISMISSED and stricken from the docket.

The Circuit Clerk is requested to forward a copy of this order to David H. Bolyard, Director, Department of Transportation, Division of Motor Vehicles, 1800 Kanawha Boulevard East, Charleston, WV 25317-0010; Thomas MacAulay, P.O. Box 907, Beckley, WV 25802-0907; and Randy D. Hoover, P.O. Box 1321, Beckley, WV 25802-1321.

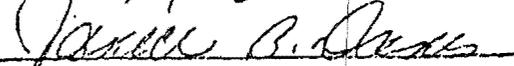
ENTER: 3-3-98

Original Signed By



JUDGE JOHN A. HUTCHISON

The foregoing is a true copy of an order entered in this office on the 3 day of March 1998



JANICE B. DAVIS, Circuit Clerk of Raleigh County, West Virginia

SEP 14 2005

15

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

Heather Spurlock,  
Petitioner,

2005 SEP -7 AM 11:28

EXHIBIT C

v.

LOWERY  
WRITTEN CLERK  
COURT

Civil Action No. 04-C-373  
O.C. Spaulding, Judge

State of West Virginia,  
WV Department of Motor Vehicles,  
Roger Pritt, Commissioner

ORDER

This matter came before the Court on or about the 8<sup>th</sup> day of August, 2005, pursuant to a *Petition for Administrative Appeal* filed by the Petitioner, Heather Spurlock, by counsel David O. Moye. The *Petition for Administrative Appeal* was filed pursuant to West Virginia Code § 29A-5-4, appealing the West Virginia Division of Motor Vehicles' *Final Order* entered the 8<sup>th</sup> day of October, 2004.

Prior to ruling in this matter, the Court reviewed the Petitioner's *Petition for Administrative Appeal*, the State's *Response to Petition for Administrative Appeal* and *Memorandum of Law* in opposition to Petitioner's petition, and Petitioner's *Response to Respondent's Memorandum of Law*, the administrative record including the West Virginia Division of Motor Vehicle's *Final Order*, and all pertinent legal authorities.

Facts

In the early morning hours of November 7, 2003, while patrolling County Route 33, in Teays Valley, Putnam County, West Virginia, Deputy D.L. Bailey of the Putnam County Sheriff's Department observed a motor vehicle driven by Heather Spurlock weaving back and forth on the highway. As a result of his

observations, Deputy Bailey initiated a stop of the vehicle. Upon approaching the vehicle, Deputy Bailey detected the odor of alcohol on the driver, Ms Spurlock. Deputy Bailey then requested that Ms. Spurlock exit the vehicle in order to perform three field sobriety tests. As she exited the vehicle, Deputy Bailey observed that the Petitioner was unsteady and swayed when standing.

Deputy Bailey subsequently administered three field sobriety tests to the Petitioner including the Horizontal Gaze Nystagmus Test, the Walk-and-Turn Test, and the One-Leg- Stand Test. Deputy Bailey testified that he properly instructed Ms. Spurlock how to perform each test, prior to requiring her to perform the tests.

During the administration of the horizontal Gaze Nystagmus Test, Deputy Bailey observed that the Petitioner's eyes exhibited a non-smooth pursuit, displayed nystagmus prior to a forty-five degree angle, and showed distinct nystagmus at maximum deviation. Similarly, while performing the One-Leg- Stand Test, the Petitioner swayed, put her foot down, used her arms for balance, and was eventually unable to complete the test. Finally, during the Walk-and-Turn Test, the Petitioner was unable to maintain her balance while listening to instructions, stopped while walking in order to steady herself, failed to walk heel to toe, and used her arms for balance.

Based upon these results, Deputy Bailey placed Ms. Spurlock under arrest for driving under the influence of alcohol and transported her to the Hurricane Police Department, then to jail.

On the 27<sup>th</sup> day of April, 2004, Stanley Epling, a Department of Motor Vehicles' (hereinafter DMV) hearing examiner, conducted a hearing in this matter pursuant to Chapter 17C, Article 5A of the West Virginia Code. Deputy Bailey testified at the hearing in accordance with the above described facts. At the conclusion of the hearing, Mr. Epling found that Deputy Bailey had reasonable grounds to stop and probable cause to arrest Ms. Spurlock, and that sufficient evidence was presented to show that Ms. Spurlock drove a motor

vehicle in this State while under the influence of alcohol on November 7, 2003. Therefore, Mr. Epling recommended that the Commissioner of the West Virginia Department of Motor Vehicles conclude as a matter of law that the Respondent committed an offense described in West Virginia Code § 17C-5-2, in that Ms. Spurlock drove a motor vehicle in this state while under the influence of alcohol.

On the 8<sup>th</sup> day of October, 2004, the Commissioner adopted Mr. Epling's Findings of Fact and Conclusions of Law, and because this was Ms. Spurlock's second offense, ordered her privilege to drive a motor vehicle revoked for a period of ten years and thereafter until all obligations for reinstatement are fulfilled.

### Parties' Arguments

The Petitioner claims that her substantive rights were prejudiced because the findings and conclusions made by the Hearing Examiner and Commissioner were affected by errors of law. Specifically, she alleges that because Deputy Bailey failed to administer the field sobriety tests in strict compliance with the National Highway Traffic Safety Administration (hereinafter NHTSA), the test rendered an inaccurate result. The Petitioner contends that Deputy Bailey was required to physically demonstrate how the field sobriety tests were to be performed before she took the tests. Thus, the Petitioner requests that this Court reverse the Commissioner's *Final Order* revoking her privilege to drive a motor vehicle in this State.

The State agrees that the NHTSA guidelines require police officers to demonstrate two of the three field sobriety tests. However, the State argues that the Court should not reverse the Commissioner's decision because the police officer administered two of the three field sobriety tests in strict compliance with the procedures outlined in the NHTSA guidelines and only failed to demonstrate the third test. Furthermore, although the State concedes that the quality of the field sobriety tests rests squarely upon the administering officer following established, standardized procedure for the administration of the tests, the State

refutes the "strict compliance" standard favored by the Petitioner. Instead, the State urges this Court to adopt a "substantial compliance" standard to apply to the field sobriety tests.

### Standard of Review

'[T]his Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(a) and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.' Syllabus Point 1, in part, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

*Cobb v. West Virginia Human Rights Commission*, – S.E.2d –, WL 1604006 (W.Va., 2005).

### Discussion

West Virginia Code § 29A-5-4(g) states:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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 substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court finds that the Petitioner has failed to prove that her substantive rights have been prejudiced by any of the six (6) criteria listed in West Virginia Code § 29A-5-4. Therefore, the Court affirms the DMV's revocation of Ms. Spurlock's privilege to drive a motor vehicle in this State.

#### **The Gaze Nystagmus Test, Walk-and-Turn Test, and One-Leg-Stand Test**

The NHTSA has developed a manual entitled the *Improved Sobriety Testing* (hereinafter the manual or guidelines) in order to acquaint law enforcement officers with the three "most effective procedures for testing drivers at roadside to determine whether or not they are intoxicated." The three tests adopted by the NHTSA are the Gaze Nystagmus Test, the Walk-and-Turn Test, and the One-Leg-Stand Test.

The Gaze Nystagmus Test is a test used to measure the jerking of an intoxicated individual's eyes. The manual explains that although many people will show some jerking if the eyes move far enough to each side, if the individual is intoxicated the individual will display the following signs:

- 1) The jerking of the eyes occurs much sooner. That is, the more intoxicated a person becomes, the less he has to move his eyes to the side in order for the jerking to occur.
- 2) If you have a suspect move his eyes as far to the side as possible, you can estimate in a general way the extent of intoxication. The greater the alcohol impairment, the more distinct the nystagmus will be in the extreme gaze position.
- 3) If the suspect is intoxicated, he cannot follow a slowly moving object smoothly with his eyes.

The Gaze Nystagmus Test has been found to be 77% accurate in determining whether a suspect is drunk or sober when properly administered.

The manual provides that an officer shall give the following instructions prior to performing the Gaze Nystagmus Test:

I AM GOING TO CHECK YOUR EYES. (Request that the suspect remove glasses or hard contact lens at this time if they are being worn. Nystagmus is not influenced by how clearly the suspect can see the object he is to follow.) NOW KEEP YOUR HEAD STILL AND FOLLOW THIS (indicate what he is to follow) WITH YOUR EYES. DO NOT MOVE YOUR EYES BACK TO THE CENTER UNTIL I TELL YOU. (If suspect moves his head, use a flashlight or your free hand as a chin rest.)

In the present matter, Deputy Bailey testified that he first ordered Ms. Spurlock to stand on the cement sidewalk, facing him with her feet together and her hands by her side. He then explained the Gaze Nystagmus Test to her. Finally, using his flashlight for lighting, and his ink pen for an object, Deputy Bailey performed the Gaze Nystagmus Test on Ms. Spurlock. Deputy Bailey testified that he observed both of Ms. Spurlock's eyes, and that neither eye followed the ink pen smoothly. He found that "she had maximum nystagmus or nystagmus at maximum deviation and onset before forty-five degrees in each eye." Therefore, Deputy Bailey concluded Ms. Spurlock was intoxicated.

Secondly, Deputy Bailey required Ms. Spurlock to perform the One-Leg-Stand Test. The manual instructs the administering officer to give the suspect the following instructions prior to performing the One-Leg-Stand Test:

PLEASE STAND WITH YOUR HEELS TOGETHER AND YOUR ARMS DOWN AT YOUR SIDES, LIKE THIS. (Demonstrate how you want the suspect to stand.)

WHEN I TELL YOU TO, I WANT YOU TO RAISE ONE LEG ABOUT SIX INCHES OFF THE GROUND AND HOLD THAT POSITION. AT THE SAME TIME COUNT RAPIDLY FROM 1001 TO 1030, while watching your foot. Like this (You assume

the position, as the officer in the photograph is doing, and count aloud, "1001, 1002, 1003, etc.")

**DO YOU UNDERSTAND?** (Do not continue until the suspect indicates that he understands.)

**BEGIN BY RAISING EITHER YOUR RIGHT OR LEFT FOOT.**

(At the end of the count or after about 30 seconds, if the count is slow, tell the person to put his foot down - if necessary.)

The manual also explains how the one-leg-test is to be scored. It provides:

In scoring this test, give only one point for each item observed more than once. The maximum possible score on this test is five points.

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

2) **Uses arms for balance.** He moves his arms six or more inches from the side of his body in order to keep his balance.

3) **Hopping.** He is able to keep one foot off the ground, but resorts to hopping on the anchor foot in order to maintain balance.

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

5) **Cannot do test.** Score this item if the suspect puts his foot down three or more times during the 30-second count or otherwise demonstrates that he cannot do the test. If you score this item, give the suspect five points - the maximum for the test.

If an individual scores two or more points on the One-Leg-Stand, there is a good chance his BAC [Blood Alcohol Content] is 0.10 percent or higher. So your decision point on this test is *two*. Using that criterion, you will correctly classify about 65 percent of the people you test as to whether they are sober or intoxicated.

In the present instance, Deputy Bailey testified that he instructed Ms. Spurlock to stand on the sidewalk, legs together, and hands by her side. Deputy Bailey then instructed Ms. Spurlock on how to properly perform the One-Leg-Stand Test and asked her if she understood the instructions. She replied affirmatively.

After completing the instructions, Deputy Bailey told Ms. Spurlock "to raise one foot off the ground approximately one foot, to point her toe, to look down at her foot and count out loud, one-thousand one, one-thousand two and so on, to one-thousand and thirty, or until I told her to stop." Deputy Bailey testified that he observed Ms. Spurlock swaying while balancing, using her arms for balance more than six inches from her body, put her foot down, and was eventually unable to complete the test. Therefore, Deputy Bailey concluded that Ms. Spurlock was intoxicated.

Lastly, Deputy Bailey required Ms. Spurlock to perform the Walk-and-Turn Test. The Walk-and-Turn Test requires a subject to walk a straight line heel-to-toe for nine steps, turn around, and walk heel-to-toe back, while watching his or her feet. The manual instructs the administering officer to give the following instructions prior to beginning the test:

PLEASE PUT YOUR LEFT FOOT ON THE  
LINE AND THEN YOUR RIGHT FOOT IN FRONT  
OF IT LIKE THIS. (Demonstrate heel-to-toe position.)

(When the suspect assumes this position,  
continue with the instructions.) WHEN I TELL YOU  
TO BEGIN, TAKE NINE HEEL-TO-TOE STEPS  
DOWN THE LINE, TURN AROUND, AND TAKE  
NINE HEEL-TO-TOE STEPS BACK.

MAKE YOUR TURN BY KEEPING ONE  
FOOT ON THE LINE AND THEN USING YOUR  
OTHER FOOT TO TURN...LIKE THIS.

(Demonstrate as shown in the illustration by taking

three or four heel-to-toe steps - then turning around by pivoting your left foot on the line and taking four steps with your right foot, as shown - then resuming the heel-to-toe position. Note that this is a very easy way to turn, but the suspect must follow your instructions.

**KEEP YOUR HAND AT YOUR SIDES,  
WATCH YOUR FEET AT ALL TIMES, AND  
COUNT YOUR STEPS OUT LOUD. DO YOU  
UNDERSTAND?**

(Do not continue until the suspect indicates understanding, but at the same time do not repeat the whole set of instructions or answer the suspect's questions about how to perform the test. If the suspect does not watch his feet, remind him.)

(Once the suspect indicates understanding, say...)  
**BEGIN AND COUNT YOUR FIRST STEP FROM  
THE HEEL-TO-TOE POSITION AS "ONE."**

The Walk-and-Turn Test is to be approximately sixty-eight percent accurate in determining whether a subject is sober or drunk.

In the present instance, Deputy Bailey instructed and demonstrated to Ms. Spurlock how to perform the heel-to-toe test prior to administering the test. However, once Ms. Spurlock began the test, Deputy Bailey observed that she was unable to keep her balance while listening to the instructions, had to stop and steady herself, did not touch heel-to-toe, lost her balance and stepped off the line, and had to raise her arms more than six inches from her body for balance. Therefore, Deputy Bailey concluded that Ms. Spurlock was intoxicated.

#### Errors of Fact

The first issue for this Court's determination is whether there are any issues of material fact in dispute. The Court finds that there are. The Petitioner alleges that Deputy Bailey "admitted on the record that he explained how to perform the tests, but did not demonstrate how to conduct the testing to the Petitioner." Therefore, Deputy Bailey failed to properly perform the field sobriety tests in strict

compliance with the guidelines.

However, the Court finds this is not an entirely accurate recitation of the facts. The Court concurs that Deputy Bailey did not demonstrate the Gaze Nystagmus Test, however, the Court finds that the NHTSA guidelines do not require Deputy Bailey to demonstrate the test. Therefore, there would be no reason for Deputy Bailey to demonstrate the test. Not to mention the fact that a demonstration of the Gaze Nystagmus Test by a single officer would be physically improbable, if not impossible to perform. Thus, the Court finds that although Deputy Bailey did not demonstrate the Gaze Nystagmus Test, he did administer the test in strict compliance with the NHTSA guidelines.

Secondly, the Petitioner alleges that Deputy Bailey failed to demonstrate how to perform the Walk-and-Turn Test. The Court disagrees. The Court finds that Deputy Bailey did demonstrate the Walk-and-Turn Test prior to administering the test to the Petitioner. When questioned by Mr. Moye at the administrative hearing in this matter, Deputy Bailey testified as follows:

Q: Okay. Then the walk-and-turn?

A: Yes.

Q: Okay. Explain again what you told her and what she did.

A: Okay. That test was also performed on the sidewalk.

Q: Okay.

A: She, I had her stick her left foot in front of her right foot.

Q: Uh huh.

A: Hands by her side and instructed her not to start until I asked her to start, and to listen to the instructions. I then told her to take nine heel-to-toe steps which I demonstrated, straight down the, there was a line. You know how the walkways has like little dividing lines and curved lines and stuff, there is a line down through there. And, I actually had her stand directly to the side

of that line and had her, and you know, she was standing there balancing, of course she was swaying.

(Emphasis added).

Therefore, contrary to the Petitioner's allegations, the record reflects that Deputy Bailey testified that he did demonstrate the Walk-and-Turn Test prior to ordering the Petitioner to administer the test. The Petitioner has offered no evidence to contradict Deputy Bailey's testimony. In fact, the Petitioner states in her *Response to Respondent's Memorandum of Law* that she "does not dispute the record" made before the DMV Hearing Examiner because "there is no other evidence that is available to dispute the testimony" of Deputy Bailey. Therefore, this Court finds that Deputy Bailey did demonstrate the Walk-and-Turn Test in strict compliance with the NHTSA guidelines.

Thirdly, the Court finds that there is no evidence that Deputy Bailey demonstrated the One-Leg-Stand Test to the Petitioner. Deputy Bailey failed to testify to demonstrating the One-Leg-Stand Test. Therefore, this Court finds that although Deputy Bailey did properly instruct the Petitioner on how to perform the One-Leg-Stand Test, he failed to demonstrate the test.

In sum, the Court finds that Deputy Bailey properly instructed the Petitioner on how to perform all three field sobriety tests and properly demonstrated how to perform the Walk-and-Turn Test. Thus, because the NHTSA guidelines do not instruct an administering officer to demonstrate the Gaze Nystagmus Test, the Court concludes that Deputy Bailey strictly complied with the NHTSA guidelines for administering two of the three tests.

However, the Court further finds that Deputy Bailey did not administer the One-Leg-Stand Test in strict compliance with the guidelines because he failed to demonstrate the test. Thus, the second issue for this Court's determination is whether the DMV hearing examiner possessed sufficient evidence from the three field sobriety tests to conclude the Petitioner operated a vehicle in this State while

under the influence of alcohol.

### Substantial Compliance

The Petitioner argues that her substantive rights were prejudiced because the findings and conclusions made by the Hearing Examiner and Commissioner were affected by errors of law. Specifically, the Petitioner claims that Deputy Bailey failed to administer the above described field sobriety tests in strict compliance with the NHTSA guidelines by failing to demonstrate the tests prior to administering the tests. Therefore, the Petitioner claims the results of the tests are unreliable.

The Petitioner cites the Kanawha County Circuit Court case, *Bias v. Cline*, as the authority for her position. In *Cline*, the Kanawha County Circuit Court held that “[i]f field sobriety tests are going to be used to show that a driver was operating a motor vehicle while under the influence of alcohol, they must be administered in strict compliance with NHTSA guidelines.” In reaching this conclusion, the Kanawha County Circuit Court relied upon the Supreme Court of Ohio’s ruling in *State v. Homan*, 89 Ohio St. 3d 421, 732 N.E.2d 952 (2000). *Homan* held that “[w]hen field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable.” *Id.* at 424, 732 N.E.2d at 955.

Due to the fact that the West Virginia Supreme Court has yet to decide whether a strict compliance standard or a substantial compliance standard shall be applied to the NHTSA guidelines, this is an issue of first impression for the Court. *Cline* is a circuit court case and thus, is not controlling precedent upon this Court. Instead, it serves only as persuasive guidance on which this Court may rely.

However, after reviewing the authority upon which the *Cline* decision was decided, this Court is not persuaded. The Court finds that in deciding *Cline*, the Kanawha County Circuit Court relied largely upon the strict compliance rationale

adopted by the Ohio Supreme Court in *Homan*. However, *Homan* is no longer the controlling authority in the State of Ohio. As the Supreme Court of Ohio explained in *State v. Schmitt*, 101 Ohio St.3d 79, 82, 801 N.E.2d 446, 449 (2004):

Since our decision in *Homan*, the General Assembly has amended R.C. 4511.19. Under the amended statute, the arresting officer no longer needs to have administered field sobriety tests in strict compliance with testing standards for the test results to be admissible at trial. Instead, an officer may now testify concerning the results of a field sobriety test administered in substantial compliance with the testing standards.  
(Emphasis added).

Therefore, the authority upon which *Cline* was decided has since been replaced in favor of the substantial compliance standard. This Court concurs with the Ohio General Assembly and hereby adopts the substantial compliance standard.

The Court finds that Deputy Bailey properly instructed the Petitioner on how to perform each of the three field sobriety tests prior to administering the tests. The Court further finds that Deputy Bailey administered two of the three tests in strict compliance with the NHTSA guidelines, and administered the third test, the One-Leg-Stand Test, in substantial compliance with the NHTSA guidelines, only failing to demonstrate the test. Though the officer did not actually demonstrate the One-Leg-Stand Test, he did instruct Ms. Spurlock to stand on the sidewalk, legs together and hands by her side. He then instructed her on how to perform the test. He asked her if she understood his instructions. She replied that she understood his instructions. She then took the field sobriety test but was swaying while balancing, she had to use her arms for balance more than six inches from her body, she put her foot down and she was unable able to complete the test. There is nothing to suggest that had the officer actually demonstrated the test beforehand the result would have been any different.

Therefore, when the record of this case is viewed as a whole the Court concludes that the Petitioner's substantial rights were not prejudiced by any of the six (6) criteria listed in West Virginia Code § 29A-5-4, when Deputy Bailey failed to demonstrate to the Petitioner how to stand on one leg.

In conclusion, this Court finds that the DMV hearing examiner possessed sufficient evidence to find that the Petitioner drove a motor vehicle in this State while under the influence of alcohol in violation of West Virginia Code § 17C-5-2.

**Ruling**

Therefore for the aforementioned reasons, the Court **FINDS** and **ORDERS** that the West Virginia Department of Motor Vehicles' *Final Order* is **AFFIRMED**.

Accordingly, judgment having been granted in favor of the Respondent, this matter is **ORDERED DISMISSED** and stricken from the docket.

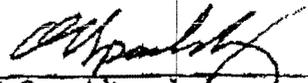
The Circuit Clerk shall distribute certified copies of this Order to the parties of record as follows:

Stephen R. Connolly, Esq.  
Assistant Prosecuting Attorney  
Putnam County Judicial Building  
3389 Winfield Road  
Winfield, WV 25213

David O. Moyer, Esq.  
P.O. Box 1074  
Hurricane, WV 25526

West Virginia Department of Transportation  
Division of Motor Vehicles  
F. Douglas Stump, Commissioner  
1800 Kanawha Blvd. East  
State Capitol Building Three  
Charleston, WV 25317

ENTER this 6th day of September, 2005.

  
O.C. Spaulding, Judge

ENTERED  
PLITNAM COUNTY CIRCUIT CLERK  
DONALD A. WRIGHT  
CIVIL ORDER BOOK  
NO. \_\_\_\_\_ PAGE \_\_\_\_\_

9-7-05  
CC. PA/MYC  
LW Dept. of Transp

RECEIVED  
JAN 26 2007

EXHIBIT D

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BY:.....

2007 JAN 24 PM 3:05

Bobby Little,

Petitioner,

C

CATHY S. GATSON, CLERK  
CIVIL ACTION NO. 06-AA-94  
CIRCUIT COURT

The Commissioner of  
the Department of Motor Vehicles;

Respondent.

FINAL ORDER

Bobby Little and his counsel Carter Zerby come before this court appealing the revocation of Little's driver's license. Janet James represents the Commissioner of the Department of Motor Vehicles. After careful consideration, this Court reverses the decision bellow.

**Facts and Procedural History**

On October 22, 2005, Deputy Tyson G. Mitchell observed a motorcycle being driven unsteadily. The motorcycle then passed two vehicles while in a no passing zone. Based on these observations, Deputy Mitchell initiated a traffic stop. Upon approaching the motorcycle, Deputy Mitchell detected a strong odor of an alcoholic beverage on the driver's breath. Consequently, Deputy Mitchell ordered the driver, Little, to dismount and perform several field sobriety tests.

Deputy Mitchell administered the horizontal gaze nystagmus test, the walk and turn test, and the one-leg-stand test. He testified that Little failed all three tests. Therefore, Deputy Mitchell arrested Little and transported him to the Putnam County Sheriff's Department to administer a secondary chemical test of the breath. However, after three attempts, Little was unable to provide a sufficient breath sample. Upon Little's request, he was transported to Putnam General Hospital

where he submitted to a secondary chemical test of the blood.

At the hearing before the Administrative Law Judge, the blood test was not admitted into evidence because Deputy Mitchell failed to subpoena a witness who could establish that the secondary chemical test was administered in accordance with state law. Nevertheless, the Administrative Law Judge revoked Little's license for a period of one year.

The revocation was based on Deputy Mitchell's testimony that Little drove erratically, smelled of alcohol, and failed the field sobriety tests. However, Deputy Mitchell did not testify to receiving training in administering or assessing results of sobriety tests. Further, although Deputy Mitchell and Little testified that Little performed the test on his injured left foot, the Administrative Law Judge found, as a matter of fact, that Little performed the one-leg-stand test on his uninjured right foot.

#### **Standard of Review**

The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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 substantial evidence on the whole record; or
  - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
- (h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one, article six of this chapter.

W. Va. Code, § 29A-5-4(g)

### Applicable Law

“If the commissioner finds by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol . . . the commissioner shall revoke the person’s license . . .” *W. Va. Code, 17C-5A-2(i)*. “Where there is evidence reflecting that a driver operated a motor vehicle upon the public streets or highways, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of a driver’s license for driving while under the influence of alcohol.” *Albrecht v. State*, 314 S.E. 2d 859, 865 (W.Va. 1984).

### Analysis

Although evidence of Little’s intoxication was adduced, the evidence does not constitute a preponderance of the evidence. Rather, the evidence of intoxication is minimal. Much of the evidence relates to Little’s failure of the field sobriety tests. However, Deputy Mitchell never testified to his training in, or knowledge of, field sobriety tests. Furthermore, the Administrative Law Judge’s finding, regarding which foot Little performed the one-leg-stand test on, is clearly wrong. Therefore, the results of the field sobriety test are inadmissible.

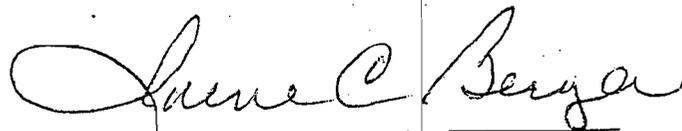
Without the results of the field sobriety test, the only evidence of Little’s intoxication is his erratic driving and the smell of alcohol. Under the preponderance of the evidence standard, this is insufficient to “warrant the administrative revocation of a driver’s license for driving while under the influence of alcohol.” *Id.*

Accordingly, this Court **ORDERS** the Commissioner’s decision **REVERSED**. This Court **FURTHER ORDERS** that a certified copy of this FINAL ORDER be sent to the following addresses: Carter Zerbe, P.O. Box 3667, Charleston, WV 25336; and Janet James, Office of the

Attorney General, State Capitol Complex, Bldg. 1, Room W435, 1900 Kanawha Boulevard, East,  
Charleston, WV 25305.

**IT IS SO ORDERED.**

ENTERED on the 24<sup>th</sup> day of January, 2007.



JUDGE IRENE C. BERGER

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24<sup>th</sup>  
DAY OF January 2007  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

EXHIBIT E

FILED

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CATHY S. GAYTON CLERK  
KANAWHA CTY. CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CORPORAL ERIC L. EAGLE

Petitioner

V.

CIVIL ACTION NO.: 99-AA-111

THE WEST VIRGINIA DEPARTMENT OF MOTOR  
VEHICLES and JOE E. MILLER AS COMMISSIONER  
OF THE WEST VIRGINIA DEPARTMENT OF MOTOR  
VEHICLES

Respondents.

FINAL ORDER

This matter is before the Court upon the Petition of Corporal Eric L. Eagle of the Charleston Police Department. Corporal Eagle is appealing the June 25, 1999, Final Order of the Commissioner of the West Virginia Department of Motor Vehicles (hereinafter DMV). The DMV Order reversed a prior order of revocation against respondent Gavin Houge's privilege to drive a motor vehicle.

The petitioner and the respondent Gavin Houge have submitted briefs in support of their respective positions. The DMV having received notice of the court's briefing schedule, did not file a brief in this matter. On October 11, 2001, the court heard oral argument from counsel for the petitioner and counsel for the respondent, Gavin Houge.

Now, based upon the matters of record, arguments of counsel and for good cause shown, the Court does hereby make the following findings and conclusions:

FINDINGS OF FACT

1. On the night of May 29<sup>th</sup> and the early morning of May 30<sup>th</sup>, 1998, the Charleston Police Department was conducting a sobriety checkpoint in the 600 Block of Kanawha Boulevard East near Court Street in Charleston, West Virginia.

*Handwritten signature*

2. Sergeant John Tabaretti, the Highway Safety Director for the Charleston Police Department, was in charge of setting up and administering the sobriety checkpoint.

3. The specific site was selected because it was an area with a higher rate of DUI arrests and there was a problem with pedestrian crashes in the area.

Prior to May 29, 1998, Sergeant Tabaretti sent notification to the Kanawha County Prosecutor and the Charleston media notifying them of the checkpoint operation and date of the checkpoint.

4. Prior to May 29, 1998, Sergeant Tabaretti inspected the area where the checkpoint was to be set up to insure that the area would be safe for both the officers and the traveling public. During that inspection he identified an adequate amount of street lighting in the vicinity.

5. The location on Kanawha Boulevard where the checkpoint was established is a four lane road with sufficient space for police vehicles and support vehicles.

6. Prior to beginning the checkpoint operations on May 29, 1998, Sergeant Tabaretti issued a memorandum to each of the thirteen officers assigned to work the checkpoint. The memorandum outlined the appropriate procedures for work at the checkpoint.

7. Prior to beginning checkpoint operations on May 29, 1998, Sergeant Tabaretti conducted a roll call of all officers involved and advised each officer of appropriate procedures for the checkpoint.

8. The officers were instructed to contact each and every vehicle passing through the checkpoint.

9. The officers were advised to make general inquiries of the driver for the purpose of determining indications of intoxication.

10. The officers were advised that if no impairment was detected and no other violation existed the motorist was to be released very quickly.

11. If driver impairment was detected, the driver was to be removed from the vehicle, and escorted to a designated testing area for administration of field sobriety tests and/or a preliminary breath test if appropriate.

12. Large signs indicating an upcoming sobriety checkpoint were placed in advance of the entrance to the checkpoint were placed on Kanawha Boulevard.

13. Motorists had the opportunity to turn off Kanawha Boulevard prior to entering the checkpoint.

14. In addition to the available street lighting, the checkpoint area was illuminated by marked police cruisers with flashing blue lights.

15. The site was marked with barricades, traffic cones, and signs directing drivers through the checkpoint.

16. The officers were wearing reflective safety vests and had flashlights.

17. At approximately 12:55 a.m. on May 30, 1998, Gavin Houge's vehicle entered the checkpoint.

18. His vehicle was approached by Cpl. Eric Eagle who identified himself and requested that Mr. Houge produce his driver's license.

19. Cpl. Eagle then asked Mr. Houge where he was coming from and what he did for a living.

20. Cpl. Eagle noted that Mr. Houge had slurred speech and there was a strong odor of alcoholic beverage being emitted from the interior of the vehicle.

21. Mr. Houge admitted to Cpl. Eagle that he had been drinking.

22. Cpl. Eagle then asked Mr. Houge to exit his vehicle to perform field sobriety tests.

23. Cpl. Eagle noticed that Mr. Houge was unsteady and slow exiting the vehicle.

24. Three field sobriety tests were administered to Mr. Houge. They were the walk and turn test, the one leg stand and the horizontal gaze nystagmus test.

25. Mr. Houge failed each of the field sobriety tests. Mr. Houge lost his balance while turning and walking during the walk and turn test. He swayed while performing one leg stand and had to put his foot down prior to completion of the test. During the horizontal gaze nystagmus test, each eye showed distinct nystagmus at maximum deviation and both eyes did not follow the light smoothly.

26. Following the field sobriety tests, Cpl Eagle administered a preliminary breath test. Mr. Houge failed the preliminary breath test and was placed under arrest for DUI.

27. Mr. Houge was then taken to the "Batmobile" which was parked at the scene. He was provided with the West Virginia Implied Consent Statement which he signed.

28. Cpl. Eagle observed Mr. Houge for twenty (20) minutes and then administered the intoxilyzer test at 1:23 a.m.

29. The intoxilyzers results indicated a blood alcohol level of .138.

30. Cpl. Eagle is an approved secondary breath analysis operator. The intoxilyzer used to test Mr. Houge passed the accuracy inspection test run in accordance with § 7-2 of the Department of Health Methods and Standards for chemical tests for intoxication, Legislative rule 16-1 series 10. In accordance with Department of Health Regulations, the intoxilyzer used to test Mr. Houge was subjected to simulator tests that demonstrated the device was operating within acceptable ranges.

31. Following Cpl. Eagle's arrest of Gavin Houge, a Statement of the Arresting Officer certifying that the officer had reasonable grounds to believe that Mr. Houge was driving a motor vehicle while under the influence of alcohol was transmitted to the DMV.

32. The DMV issued an Order of Revocation dated June 5, 1998. That Order revoked Mr. Houge's drivers license for a period of six months.

33. In accordance with the DMV appeal process, Mr. Houge requested a license revocation hearing in accordance with the provisions of § 17C-5A-1 et. seq. On May 5, 1999, and May 27, 1999, the DMV, by hearing examiner, conducted a licence revocation hearing.

34. All of the matters set forth above were contained in the DMV's record of the license revocation proceeding.

35. On June 25, 1999, the DMV issued it Final Order. The Final Order reversed the Order of Revocation previously entered against the respondent's privilege to drive a motor vehicle.

36. The DMV Final Order contains the following Findings of Fact:

... 2) the state failed to offer any evidence concerning any alternate checkpoints if the primary site became unsafe or to congested with traffic.

3) the state did not establish that there were any sobriety checkpoint warning signs placed on any side streets leading into the checkpoint site.

4) the state did not offer any testimony of placement and utilization of safety equipment and individual assignments of the police officers involved.

5) the testimony offered by the state was unclear of any alternate route selection from motorist who wished to avoid the sobriety checkpoint site.

6) the state failed to offer any testimony placement of officers designated to pursue vehicles avoiding the sobriety checkpoint.

37. The DMV Final Order indicated that Mr. Houge's challenges to the sobriety checkpoint and secondary chemical test were sustained under the guidelines of *Carte v. Cline*.

38. The sole Conclusion of Law was that "the state failed to present sufficient evidence to prove the respondent drove a motor vehicle in the state while under the influence of alcohol thus violating W. Va. Code § 17C-5A-2."

#### CONCLUSIONS OF LAW

1. In accordance with West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4(g) this 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 . . . (3) made upon unlawful procedures; or (4) affected by other error of law; or (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

An administrative decision may be reversed as "clearly wrong or arbitrary or capricious" if the administrative agency used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered explanation that ran counter to the evidence before the (agency) or offered one that is so implausible that it could not be ascribed to a difference in view or the product of (agency) expertise. *In re Queen*, 196 W. Va. 442, 473 S. E. 2d 483, 487 (1996).

2. On appeal of an administrative order, questions of law are reviewed *de novo*. *Carte v. Cline* 200 W. Va. 162, 488 S. E. 2d 437, 440 (1997).

3. When an individual requests a hearing following an Order of Revocation from the DMV, "the principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances, or drugs, or did drive a motor vehicle while having an alcohol concentration in the persons blood of ten hundredths of one percent or more, by weight, . . . ." W. Va. Code § 17C-5A-2(d).

The evidentiary standard of proof for an administrative revocation is proof by a preponderance of the evidence. Syllabus Pt. 2, *Albrecht v. State*, 173 W.Va. 263, 314 S. E. 2d 859, (1984).

4. "A person who wishes to challenge official compliance with and adherence to sobriety checkpoint operational guidelines shall give written notice of that intent to the Commissioner of Motor Vehicles prior to the administrative revocation hearing . . ." Syllabus Pt. 2, *Carte v. Cline*, 194 W.Va. 233, 460 S. E. 2d 48 (1995). In the case at hand, Mr. Houge timely filed a challenge to the sobriety checkpoint and testimony was presented regarding the operation of the checkpoint at issue.

5. "Sobriety checkpoint roadblocks are constitutional when conducted within predetermined operational guidelines which minimize the intrusion on the individual and mitigate the discretion vested in police officers at the scene." Syllabus Pt. 1, *Carte v. Cline*, 194 W. Va. 460 S. E. 2d (1995).

Accordingly, the first prong in the analysis must be whether there were predetermined guidelines that minimized intrusion on the individual. In this instance, Sgt. Tabaretti of the Charleston Police Department testified extensively regarding the procedures used at the checkpoint.

The check point was conducted at a predetermined sight for a predetermined amount of time. Advance notice of the existence of the checkpoint was provided to the county prosecutor and the local media. Signs advising motorist of the upcoming checkpoint were placed on the road. The checkpoint was highly visible because of the street lighting, flashing blue police lights, and other traffic devices that were used. These measures provided ample advance notice to motorists and reduced or eliminated any unnecessary fear of being stopped by an unknown individual.

Prior to beginning the checkpoint operations, the officers assigned to the checkpoint were advised both in writing and verbally by Sgt. Tabaretti that vehicles passing through the checkpoint were to be stopped only long enough to make some general inquiries and to visually observe the driver for indications of impairment. If no impairment was detected and no other violation was observed, the vehicle and driver were released immediately. Any intrusion upon individual drivers was very brief and limited. Accordingly, there was ample evidence to support a finding that the first prong of the *Carte v. Cline* analysis was satisfied.

6. The second prong of the test set forth in *Carte v. Cline* is that there must be guidelines and procedures that mitigate the discretion vested in the police officers at the scene. In this instance, the police officers had no discretion in the initial stop. Each vehicle entering the checkpoint was stopped. The only discretion vested in the officer was whether or not the officer observed symptoms of impairment warranting additional testing. However, that type of discretion is no different in a checkpoint situation than it is with any other traffic stop. Thus, the second part of the analysis was satisfied.

7. It is clear from the review of the findings contained in the DMV Final Order that it was under the erroneous impression that a sobriety checkpoint must comply with the operating procedures that were reviewed by the Court in *Carte v. Cline*. However, the West Virginia Supreme Court of Appeals did not hold that all checkpoints must be conducted using the specific procedures set forth in that case. Those were merely the procedures that had been used by the West Virginia State Police and were at issue in that case.

8. Rather, the clear statement of the Court was that sobriety checkpoints were constitutional if conducted within predetermined guidelines that minimized intrusion on the individual and mitigate the discretion vested in the police officers. To the extent that the Final Order of the DMV

holds otherwise, it is based upon an error of law.

9. After reviewing the appropriateness of the sobriety checkpoint, the next inquiry is whether Mr. Houge operated the motor vehicle while under the influence of alcohol. "Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syllabus Pt. 2, *Albrecht v. State*, 173 W.Va. 263, 314 S.E.2d 859 (1984).

In the *Albrecht* case a State Trooper investigating a traffic accident found Albrecht inside a vehicle that had left the roadway. The Trooper noticed that Albrecht had difficulty getting out of the van, staggered, and was unable to stand without assistance. The Trooper noted that the interior of the van smelled of alcohol. Further, Albrecht admitted he had consumed two or three 12 ounce bottles of beer prior to the accident. On the basis of those facts, the West Virginia Supreme Court of Appeals affirmed the administrative revocation of Albrecht's drivers' license.

In the instant matter, although Cpl. Eagle testified that Mr. Houge had slurred speech, that there was a strong odor of an alcoholic beverage being emitted from the interior of his vehicle, that he was unsteady and slow getting out of his vehicle, and that Mr. Houge voluntarily told him he had consumed beer, the officer failed to lay the proper foundation for the admission of the results of the field sobriety tests in this case. The officer failed to show that the field sobriety tests were administered pursuant to the officer's training and requirements or that he properly instructed Mr. Houge on how to perform each test. In addition, the Commissioner found the results of the secondary chemical test inadmissible in this case. Therefore, this Court is

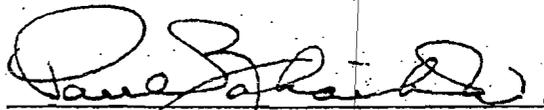
compelled to find that the State has failed to present sufficient evidence to prove Mr. Houge drove a motor vehicle in this State while under the influence of alcohol thus violating W.Va. Code § 17C-5A-2.

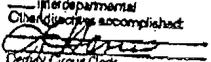
Now therefore, based upon the foregoing findings and conclusions, this Court hereby **ORDERS** that the Final Order of the Commissioner of the West Virginia Division of Motor Vehicles dated June 25, 1999, is **REVERSED IN PART AND AFFIRMED IN PART**. The sobriety checkpoint in this case was constitutional and conducted within predetermined operational guidelines which minimized the intrusion on the individual and mitigated the discretion vested in the police officers at the scene. However, the State failed to prove Mr. Houge operated a motor vehicle in this State while under the influence of alcohol in violation of W.Va. Code § 17-C-5A-2.

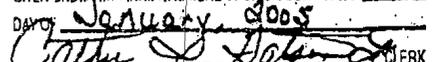
The objections and exceptions of all parties aggrieved by this Opinion and Final Order are noted and preserved.

It is **FURTHER ORDERED** that a certified copy of this Final Order be sent to all parties and counsel of record, and this case is dismissed and stricken from the open docket of the Court.

Enter this 13<sup>th</sup> day of January, 2005.

  
PAUL ZAKAIB, JR., CIRCUIT JUDGE

Date: 1-13-05  
Certified copies sent to:  
 counsel of record K.B.W.C.2  
 parties  
 other  
(please indicate)  
By:  
 certified/let class mail  
 fax  
 hand delivery  
 interdepartmental  
 other (describe accomplishment)  
  
Clerk Circuit Court

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13<sup>th</sup>  
DAY OF January, 2005  
  
CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA