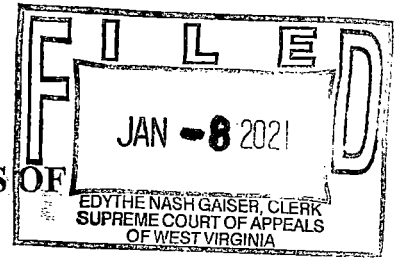


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WEST VIRGINIA



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DOCKET NO. 20-0558

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**FILE COPY**

WEST VIRGINIA STATE POLICE,

*Petitioner, Respondent Below*

v.

DEREK WALKER.,

*Respondent, Petitioner Below.*

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SUMMARY RESPONSE

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On appeal from the Circuit Court of Jefferson County  
Civil Action No. 19-AA-3  
The Honorable David M. Hammer

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COMES NOW, Respondent, Derek R. Walker, by and through his counsel, Gregory A. Bailey, Esq., and the law firm of Arnold & Bailey, PLLC and pursuant to the Rule 10 of the West Virginia Rules of Appellate Procedure files the foregoing Summary Response to the Petition for Appeal filed in this matter.

**I. Statement of Facts<sup>1</sup>**

Former Trooper Derek Walker was immediately suspended without pay and subsequently terminated as a result of his involvement in effectuating the arrest of a suspect following a high-speed pursuit that occurred on or about November 19, 2018 in Berkeley County, West Virginia. Pet Br. p. 3. A video recording of the entire incident giving rise to Trooper Walker's termination was reviewed by the hearing examiner at the grievance hearing and by the circuit court on appellate review. AR-265A

During the early morning hours of November 19, 2018, Walker and former Trooper Michael Kennedy became involved in a high-speed pursuit of a juvenile, J.H., who in the presence of Walker rear-ended a Berkeley County Deputy cruiser and then fled the scene.<sup>2</sup> AR-265A. The video depicts that J.H. fled in his vehicle on Route 11 a two-lane highway at a high rate of speed. Id. Walker testified that J.H. reached speeds up to 110 m.p.h., and the video shows that J.H. nearly crashed into oncoming vehicles two times before ultimately crashing into a utility pole which caused a large electrical explosion. Id; AR-192. Walker testified that as he and Berkeley County Deputy Merson approached J.H.'s vehicle, verbal commands were given to

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<sup>1</sup> Respondent adopts by reference and incorporates the Findings of Fact set forth in the Order Reversing the Decision of the Hearing Examiner. AR-509 – 516. Although the entire incident that led to Trooper Walker's termination is captured on dash cam video from Berkeley County Deputy Merson's cruiser, there is no recorded audio of the incident. AR-265A.

<sup>2</sup> Trooper Simmerly testified that Mr. Holben appeared to be under the influence of marijuana and was uncooperative even after the arrest, boasting that if there were not so many officers involved he could have evaded arrest and taken them himself. AR-166-167.

J.H. to exit the vehicle.<sup>3</sup> Walker stated that Deputy Merson stated twice, "Get out of the vehicle." AR-194. J.H.'s vehicle was filled with smoke from the crash and it was difficult to see inside the vehicle. AR-510 Walker testified that he was concerned for his and Deputy Merson's safety based upon the fact that he could not clearly see J.H. inside the vehicle and did not know if he had a weapon. AR-195. Walker stated that they needed to remove J.H. from his vehicle for the officers' safety after he refused to voluntarily exit the vehicle. Id.

Walker stated that J.H. had already demonstrated his unwillingness to follow lawful orders by fleeing from the officers at a high rate of speed. Id. The dash cam video depicts that Deputy Merson used his asp baton to break the driver side window. AR-265A. It was unclear whether the driver door handle of J.H.'s vehicle was operational following the crash so Walker testified that after Deputy Merson broke the window, he and Deputy Merson pulled J.H. from his vehicle through the driver side window opening. Id. J.H. ended up in the prone position on the ground and Walker immediately began to effectuate J.H.'s arrest by attempting to place handcuffs on J.H. Id.

Walker testified that J.H. resisted Walker's attempts to handcuff him by tensing up and pulling away from Walker's grip on his wrist area. AR-196-197. Walker stated that J.H. pulled away from him and tried to roll over on his side. Id. Walker stated that J.H. twice successfully broke Walker's hold on J.H.'s wrist. Id. Walker testified that the officers repeatedly gave J.H. verbal commands to stop resisting so that Walker could successfully get handcuffs on J.H., which he ignored. Id. Walker testified that he was having difficulty securing the handcuffs on

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<sup>3</sup> Since there is no audio available, the only way to know whether verbal commands were given to exit the vehicle or to stop resisting would be through an interview of the officers which proved to be a major deficiency in the agency's decision to reverse the conclusion in their own internal investigation analysis. AR-149

J.H. because he was tensing up and because he was “posting up” (trying to get his legs underneath him). Id.

Walker used a total of two compliance strikes on J.H. in an effort to have J.H. comply with verbal commands to cease resisting efforts to handcuff him. One strike was with his foot to J.H.’s side and the second strike appears as a half-strike with Walker’s boot to J.H.’s side. AR-265A. These are the only two strikes Walker administered to J.H. during the arrest. Id. During the entire use of force, Walker was at all times trying to secure J.H.’s hands to secure handcuffs on J.H. Id. Other law enforcement officers delivered multiple compliance strikes to J.H., however, Walker was solely focused on getting handcuffs on J.H. during his arrest. Id. After Walker was finally able to secure handcuffs on J.H., he attempted to pull J.H. to his feet but lost his balance causing both he and J.H. to fall over. Id. Walker stated that J.H. tensed up when Walker was attempting to lift him off the ground which caused him to fall. AR-199

The totality of the use of force from the time J.H. was pulled from his car until the time Walker last contacted him was approximately fifty-three 53 seconds. AR-265A. Walker testified that he believed his use of force was entirely appropriate to effectuate the arrest of J.H. because he continued to resist efforts to be handcuffed and because J.H. repeatedly refused lawful commands by fleeing from officers, failing to exit the vehicle and by resisting and refusing lawful commands to stop resisting Walker’s efforts to place handcuffs on J.H. AR-208-20

Walker first informed his supervisor of the high-speed chase during the pursuit by sending a radio transmission asking the dispatcher to make contact with the officer in charge. AR 203. Walker and Sgt. Cole (the officer in charge) both testified that Walker contacted Sgt. Cole just after the use of force as Walker was leaving the scene of the arrest to report that J.H. had fled and that the officers had “tuned him up.” AR-204. Walker testified that the “tuned up”

vernacular was commonly used to indicate that the officers had to lay hands on the perpetrator during the course of the arrest. AR-515; AR-226. Sgt. Cole testified that was also his understanding of Walker's use of the term "tune up" as well. AR-27

Both Sgt. Cole and Walker were clear that after their conversation, Sgt. Cole did not instruct Walker to complete a use of force report. AR-515; AR-27. Sgt. Cole testified that any miscommunication regarding the use of force was an unintentional miscommunication. AR-515; AR-26-29. Sgt. Cole testified that based upon his experience with Walker that he does not believe that Walker was attempting to deceive him. Id. Sgt. Cole concluded that he takes equal if not more responsibility for the miscommunication between he and Walker regarding the use of force. Id. Sgt. Cole received no discipline related to this incident. AR-515. The video of the incident was in the possession custody and control of the Berkeley County Sheriff's Department. Walker did not have a copy of the dash-cam video from Deputy Merson's cruiser and testified he was unaware of the video until after the investigation commenced. There is no evidence presented that Walker did anything to conceal the dash cam video of the incident from Deputy Merson's cruiser. AR-248-263

After reviewing the video that was provided by a third party to the Superintendent, the West Virginia State Police placed Trooper Walker on immediate suspension without pay prior to performing an internal investigation or interviewing Trooper Walker. AR-467 Thereafter, an official Report of Investigation or Inquiry was performed by Lt. Smouse who concluded that Trooper Walker had not used excessive force in effectuating the arrest of the suspect. AR-260-261. The WVSP Superintendent rejected the Report of Investigation or Inquiry conclusions and terminated Trooper Walker for excessive use of force in contradiction to the findings and Investigation conducted by a senior training officer who found Trooper Walker had not used

excessive force. Id.; AR-265. The Superintendent attempted to bolster his termination decision by alleging that Trooper Walker failed to report his use of force to his superior which completely contradicts the testimony of Trooper Walker's supervisor Sgt. Cole who testified that Trooper Walker had reported the incident to him and that Trooper Walker followed his directives following his disclosure of the use of force. AR-27-30.

Prior to his termination, Walker's record was clear of disciplinary issues during his seven (7) years of service until the Superintendent suspended him without pay on November 28, 2018. AR-306. Trooper Derek Walker had been employed as a West Virginia State Trooper for seven (7) years beginning his service in November 2011. AR-306. Walker testified that it his father retired as a West Virginia State Trooper at that he tested to become a State Trooper when he was twenty (20) years old and began attended the Academy when he was twenty-one (21) years old. AR-180-182 Walker has served as Trooper in the Martinsburg, WV detachment and became a K-9 officer in July of 2016. Id. Walker's primary role was in drug interdiction and that he has over 300 arrests since January 2014 and has seized over a million dollars worth of illegal drugs, guns and cash. Id. Against his unblemished record, the Superintendent placed Walker on Administrative Leave Without Pay before conducting an interview, investigation or pre-deprivation hearing with Walker. AR-267A. Trooper Walker grieved these adverse employment decisions through a Level IV hearing and appealed the hearing examiner's decision to the circuit court which reversed the hearing examiner's decision in the order that is before this Honorable Court on appeal.

## **ARGUMENT IN RESPONSE TO THE ASSIGNMENTS OF ERROR**

The crux of Petitioner's argument on appeal is that the circuit court failed to adhere to the appropriate standard of review and substituted its judgment for that of the Hearing Examiner. That assertion is simply not accurate. A review of the circuit court order reversing the hearing examiner's decision makes clear that the circuit judge properly applied the deferential standard of review in its analysis, but for the reasons clearly articulated in the circuit court's order, Judge Hammer reversed the hearing examiner's decision because in his view "it was in clear error of law, infected by plain error and clearly wrong in view of the reliable, probative and substantial evidence on the whole record." AR 525. Unlike the hearing examiner, who conducted his own independent research outside the record to support his decision, the circuit court judge considered the whole record and reversed the hearing examiner even under the deferential standard he faithfully employed to his review of the hearing examiner's decision. The circuit court committed no error and accordingly the Order Reversing the Decision of the Hearing Examiner should be affirmed.

### **I. RESPONSE TO ASSIGNMENT OF ERROR NO. 1**

#### **A. The Circuit Court Appropriately Applied the Proper Deferential Standard of Review But Rejected The Hearing Examiner's Decision Because It Was Clearly Wrong In View of The Reliable, Probative and Substantial Evidence On the Whole Record, Infected By Plain Error and in Clear Error of Law.**

Petitioner's assertion in their first assignment of error that the circuit court disregarded the hearing examiner's findings of fact and credibility determinations is not supported by a plain reading of the circuit court's Order Reversing the Hearing Examiner. The circuit court's well-reasoned decision carefully considered the findings and conclusions of the hearing examiner, but

found they were not supported by the evidence, were in clear error of law and infected by plain error.

**1. The Circuit Court Applied a Deferential Standard of Review.**

Before issuing its decision, the circuit court thoroughly outlined the proper standard of review and emphasized that it required deference to the Hearing Examiner's decision. The circuit court judge duly noted the long-standing principle in administrative appeals that a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge and recognized that a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. *Id.*, citing Syl Pt. 4, *Everett Frazier, Commissioner W.Va. Div. of Motor Vehicles v. S.P.*, 2020 WL 874286, No. 18-0785 (Feb. 18, 2020), quoting Syl Pt. 1, in part, *Cahill v. Mercer County Board of Education*, 208 W.Va. 177, 539 S.E.2d 437 (2000). The circuit court clarified, however, that as a reviewing court it does not sit to act as a mere "rubber stamp" to validate agency decisions. AR 508 (citations omitted). With due deference and mindful of its duty of appellate review, the circuit court methodically outlined the reasons for reversing the hearing examiner's order in the "Legal Analysis" section of the order on appeal. In doing so, the circuit court judge did nothing that constitutes reversible error.<sup>4</sup>

**2. The Circuit Court Rejected the Hearing Examiner's Conclusion That the WVSP Met Their Burden of Proving Trooper Walker's Use of Force Was Objectively Unreasonable To Justify His Termination as a WVSP Trooper.**

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<sup>4</sup> A unique aspect to the appellate review of this incident is that it was captured by a dash cam video. The circuit court is well within its authority to reject findings and conclusions that are contradicted by video evidence. See *Hupp v. State Trooper Seth Cook*, 931 F.3d 307 (4<sup>th</sup> Cir. 2020)(to the extent video depicts material facts to the case, an appellate court reviews the facts as depicted in the video); see also, *Blaylock v. City of Phila.*, 504 F.3d 405, 414 (3<sup>rd</sup> Cir. 2007)(an appellate court may reject an account that is deemed demonstrably false by a video).



The West Virginia State Police (“WVSP”) bears the burden of proof in disciplinary matters.<sup>5</sup> The WVSP discharged Trooper Walker based upon allegations that he committed five (5) offenses outlined in their disciplinary rules in C.S.R. § 81-10-11.3. Notably, all five of the alleged offenses are premised upon the WVSP’s assertion that Trooper Walker used excessive force during his arrest of J.H., after he fled from Trooper Walker and several other law enforcement officers in an incredibly-dangerous high-speed chase on a windy-two-lane road. Accordingly, whether the WVSP had met their burden of proof with respect to Trooper Walker’s termination rises or falls on proof that Trooper Walker’s use of force was objectively unreasonable and excessive. The circuit court undertook an exhaustive analysis of Trooper Walker’s use of force under the objective standard set forth in *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed. 2d 443 (1989) and its progeny. AR 517-523. The United States Supreme Court in *Graham* provides: Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of “the nature and quality of the intrusion on the individual's Fourth Amendment interests’ ” against the countervailing governmental interests at stake. *Id.*, at 8, 105 S.Ct., at 1699, quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry v. Ohio*, 392 U.S., at 22–27, 88 S.Ct., at 1880–1883. Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979),

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<sup>5</sup> The West Virginia State Police promulgated rules governing the grievance procedures to be followed related to the demotion and termination of state troopers pursuant to the rule making authority set forth in W.Va. Code § 15-2-6. Those rules and procedures are contained in C.S.R. §81-10-1 *et seq.*

however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner*, 471 U.S., at 8–9, 105 S.Ct., at 1699–1700 (the question is “whether the totality of the circumstances justifie[s] a particular sort of ... seizure”)(emphasis added).

The present case is a reminder that the “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio, supra*, 392 U.S., at 20–22, 88 S.Ct., at 1879–1881. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. See *Johnson v. Glick*, 481 F.2d, at 1033. Ignoring this directive, both the WVSP and hearing examiner reviewed Trooper Walker’s conduct through the 20/20 vision of hindsight rather than the perspective of the reasonable officer on the scene.

The circuit court noted that the Graham standards were wholly consistent with the WVSP “Response to Resistance or Aggression” policy. AR – 518. In both Graham and the WVSP policy, three (3) factors are to be considered: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officer or others; and (3) whether the subject is actively resisting arrest or attempting to evade arrest by flight. *Id.* The circuit court determined that both the agency’s and the hearing examiner’s excessive force analysis which served as the basis for Trooper Walker’s termination was fatally flawed on all three (3) of the factors.

First, the circuit court ruled that the hearing examiner failed to even consider the first prong of the analysis; the severity of the crime. The circuit court noted that: “nowhere in the WVSP’s case in chief, including the testimony of Major White; the termination decision by Superintendent Cahill; in the Decision of the Hearing Examiner; or in the WVSP’s briefing in this appeal is any crime identified or its severity discussed.” AR-518. The circuit court explained that this clear error of law resulted in an analysis of Trooper Walker’s use of force being assessed in a vacuum devoid of the context in which it arose and thus violated the holding in *Graham v. Connor*. Highlighting this glaring omission, was not an act of substituting its judgment for that of the hearing examiner. On the contrary, the circuit court explained that the analysis used by the agency and the hearing examiner was in clear error of law, which is an appropriate task on appellate review under the deferential standard employed.

Under the second prong of the analysis; whether the suspect posed an immediate danger to officers, the circuit court found a clear error of law because the hearing examiner concluded that force was not necessary to extricate the suspect from his vehicle without considering the danger posed to the officers on the scene. In contrast, the circuit court applied the “immediate danger” factor to its analysis. The circuit court explained that when approaching the suspect’s smoke-filled vehicle, the officers had no way of knowing if the suspect who had just sought to evade arrest by driving recklessly at speeds of over 100 m.p.h., had a gun, knife or other weapon. AR -521. The circuit noted that the suspects hands were not visible and that he was not obeying commands to exit the vehicle. The circuit court noted the significant danger the officers faced at this very moment and that it was objectively reasonable to end that initial threat by extricating the suspect from the vehicle immediately. The circuit court concluded that it was contrary to law and clearly wrong in view of the reliable, probative and substantial evidence on the whole

record to conclude that excessive force was used by Trooper Walker to remove the suspect from his vehicle.

The circuit court next analyzed the force used by Trooper Walker to subdue the suspect. The circuit court relying on the video depiction as well as the testimony of Trooper Walker concluded that the suspect was in fact resisting the efforts to Trooper Walker to handcuff the suspect. The fact that the suspect broke free of Trooper Walker's hold several times was conclusive evidence of efforts to avoid arrest and that Trooper Walker was faced with a combative suspect. The circuit court concluded that it was clearly wrong to conclude that use of force was unreasonable within the totality of circumstances based upon the evidence of the whole record. AR-523.

It should be noted that the circuit court's analysis mirrored that of the senior training officer, Lt. Smouse, who reviewed the video of the arrest as part of the agency's internal investigation and concluded that Trooper Walker's use of force was objectively reasonable. The objectively reasonable standard under the factors set forth in *Graham* is the standard our West Virginia State Troopers (including Derek Walker) are trained under and that is the prism under which their conduct should be evaluated by their supervisors. In the present case, Derek Walker was terminated for a use of force that a senior training officer who teaches the use of force standard found was not excessive. If a senior training officer with the State Police concludes such use of force was reasonable how can our WVSP troopers be expected to adhere to a different standard?

Major White and the Superintendent dissented from Lt. Smouse's conclusions with the vision of 20/20 hindsight and without consideration of vitally important factors vital to a proper excessive use of force analysis. First, Major White admittedly reviewed the video of this

incident in *slow motion* perhaps fifty (50) times to reach his conclusion. That is perhaps the very definition of 20/20 hindsight. More importantly though, Major White's dissenting opinion admittedly was without consideration of such factors such as whether the J.H. was complying with verbal commands (resisting); whether J.H. was physically resisting; the dangers a law enforcement officer in Trooper Walker's position would have perceived. All of these factors are vital to conclude whether an objectively reasonable officer would have reacted similarly in the similar or same situation. Major White, the Superintendent and the Hearing Examiner ignored them which is the basis for the circuit court's reversal of their flawed analysis.

In contrast, the circuit court's thorough objective use of force analysis makes clear that it reversed the hearing examiner's decision because the agency had not met its burden of proof and because the hearing examiner's decision was clearly wrong based upon the reliable, probative and substantial evidence on the whole record. A plain reading of the circuit court's order makes clear that the circuit court employed the appropriate deferential standard of review to the hearing examiner's decision. The fact that the circuit court entered an order reversing that decision because it was contrary to the law and clearly wrong based upon the uncontroverted evidence depicted on the video does not constitute reversible error. To the contrary, it evidences a thoughtful and correct legal analysis.

**3. The Circuit Court Reversed the Hearing Examiner's Decision Independently Based on the Plain Error Doctrine Because the Hearing Examiner Went Outside the Record and Conducted His Own Research to Support His Decision.**

Trooper Walker testified that when he used the term "tune up" to report the use of force to his supervisor Sgt. Cole, it merely indicated that he had used force to subdue the suspect. AR-186. Sgt. Cole corroborated his understanding of Walker's use of that term. There was no additional testimony on the record about the meaning of the term "tuned up." That

apparently didn't sit well with the hearing examiner, so he undertook to independently find a different definition of the term using an internet search "urban dictionary.com" after the hearing closed. Incredibly, the hearing examiner then used this non-learned treatise internet definition he obtained as a basis to discredit the otherwise uncontradicted testimony of both Trooper Walker and Sgt. Cole. AR-525 The circuit court concluded that this inappropriate independent research by the hearing examiner prejudiced Trooper Walker's procedural due process rights to have notice of this source outside the record and violated the substantive due process rights because the hearing examiner used this "finding" in part on the issue of Trooper Walker's overall credibility. Id. The circuit court found this serious error independently impaired the fairness and integrity of the underlying proceeding and was an independent basis to reverse the decision by the hearing examiner in its entirety.

In conclusion, the circuit did not substitute its judgement for that of the hearing examiner and contrary to the assertions of Petitioner, the circuit court did not retry the case on appeal. Rather, the circuit court reviewed the matter under the deferential standard required and determined that the WVSP had not met its burden to justify Trooper Walker's termination and that the hearing examiner decision was in clear error of law, infected by plain error and clearly wrong in view of the reliable probative and substantial evidence on the whole record.

## **II. RESPONSE TO ASSIGNMENT OF ERROR NO. 2.**

### **The Circuit Court Did Not Commit Error By Considering J.H.'s Conduct Under the Severity of Crime Portion of the Use of Force Analysis.**

The circuit did not commit reversible error by "emphasizing" the suspect's conduct leading up to and following the arrest as alleged by Petitioner. In fact, it was the hearing examiner's failure to consider the severity of the suspect's conduct as part of the objective use of

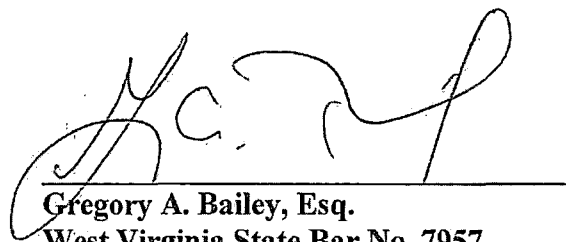
force analysis that was reversible error. As the circuit court pointed out, to ignore the severity of the crimes committed by the suspect as part of the objective use of force analysis was error. The circuit court explained the profound relevance of the suspect's conduct leading up to his arrest as part of the use of force analysis under *Graham v. Connor*. The only erroneous emphasis present in this analysis, is Petitioner's over-emphasis on what Petitioner characterizes as the "horrific crash" caused solely by J.H.'s reckless conduct. A "horrific crash" that Petitioner argues somehow rendered J.H. a non-threat to the officer's safety and ended his resistance. That notion is an erroneous emphasis without any factual basis whatsoever.

Petitioner has asserted no legal authority to establish that the circuit court's consideration of J.H.'s conduct before and after his arrest as part of the excessive force analysis constitutes reversible error.

### **Conclusion**

WHEREFORE, Respondent, Derek Walker, respectfully requests that this Court reverse affirm the circuit court Order Reversing the Hearing Examiner's Decision.

**Respondent, Derek Walker**  
**By Counsel**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA STATE POLICE,

Petitioner/Respondent Below,

v.

Docket No. 20-0558

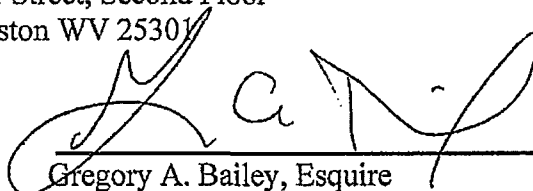
DEREK WALKER,

Respondent/Petitioner Below.

**CERTIFICATE OF SERVICE**

I, Gregory A. Bailey, counsel for Respondent/Petitioner Below, does hereby certify that I have served the *Summary Response* upon Counsel for the Petitioner/Respondent Below by U.S. Mail, first class, postage prepaid, this 8<sup>th</sup> day of January, 2021:

Anthony D. Eates, II, Deputy Attorney General  
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Gregory A. Bailey, Esquire