

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge

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SC Court of Appeals

Appellate Case No. 2023-001148

Breyonna Jeter Respondent,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety Appellants.

Of Whom The South Carolina Department of Motor Vehicles is Appellant.

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Breyonna Shaquelle Jeter,

Appellant,

v.

South Carolina Department of Motor
Vehicles and South Carolina Department of
Public Safety,

Respondents.

Docket No. 22-ALJ-21-0333-AP

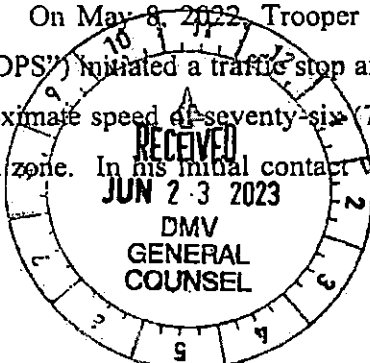
ORDER

STATEMENT OF THE CASE

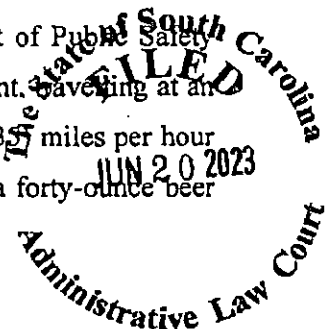
This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed by Breyonna Shaquelle Jeter (Appellant) on September 15, 2022. The Appellant seeks review of a Final Order and Decision issued by the South Carolina Office of Motor Vehicle Hearings (OMVH) following an administrative hearing held pursuant to sections 56-5-2950 to -2951 of the South Carolina Annotated Code (2018 & Supp. 2022). In the September 15, 2022 decision, the OMVH Hearing Officer sustained the suspension of the Appellant's driver's license or privilege upon finding that Appellant refused to submit to a breathalyzer after being advised of her implied consent rights. The case was assigned on September 22, 2022. On appeal, Appellant argues that the OMVH Hearing Officer erred by finding and concluding that the Appellant refused, or constructively refused, to submit adequate or sufficient breath sample that could be tested. The Court has jurisdiction to hear this matter pursuant to decision 1-23-660(D) of the South Carolina Code (Supp. 2021). Upon review of the record, the parties' briefs and the law, the Hearing Officer's Final Order and Decision of August 17, 2022, is reversed.

BACKGROUND

On May 8, 2022, Trooper Horton of the South Carolina Department of Public Safety ("SCDPS") initiated a traffic stop after observing a vehicle driven by Appellant, traveling at an approximate speed of seventy-six (76) miles per hour in a posted thirty-five (35) miles per hour speed zone. In his initial contact with Appellant, Trooper Horton observed a forty-ounce beer



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0002

container in the center console that was three quarters full and that appeared to be fresh. He also observed Appellant was wearing an orange wristband like those distributed at a local bar, and that Appellant's eyes were bloodshot, her speech was slurred, and there was a strong odor of alcohol coming from the vehicle. Trooper Horton asked Appellant to step out of the vehicle at which time he could smell alcohol emanating from her person; Appellant admitted that she was consuming alcohol at a bar as well as at a friend's house. Trooper Horton proceeded with the standardized field sobriety tests and, based upon his observations of Appellant and other indications of intoxication, arrested Appellant for driving under the influence (DUI).

Appellant was transported to the Spartanburg County Detention Center where she was placed in a breath analysis room. Trooper Horton initiated and advised Appellant that a video recording system was activated. Trooper Horton orally advised Appellant of her implied consent rights, with a written copy also provided. Appellant agreed to submit to a breath test using the DataMaster machine. Trooper Horton instructed Appellant on how to provide an adequate breath sample, advising Appellant to take a long deep breath and breathe into the machine's mouthpiece until told to stop. He further advised Appellant that an intermittent tone was indication that an adequate breath sample was not being provided whereas "a long steady tone is what we're listening for, and that [Appellant] [] would be able to hear that tone if she was blowing properly." (R. 28:8-14). Appellant acknowledged her understanding. Trooper Horton acknowledged that Appellant did not delay the start of the test nor interfere with his advisement of her rights and warnings. (R. 40:3-18). Following the required twenty-minute observation period, Trooper Horton passed the DataMaster to Appellant to begin the test.

During the hearing, Trooper Horton indicated that during the two-minute testing period Appellant "bl[e]w in, at times she would stop, at times she would breathe in and exhale again and again." (R. 28:17-20). He further opined that Appellant attempted to delay the administration of the breath test because most people are able to complete the test in less than two minutes. (R. 39:3-9, 16-18). Accordingly, Trooper Horton indicated to the machine that Appellant refused the test. He confirmed that after explaining to Appellant that a refusal had been recorded, Appellant challenged him, stating several times that **she did take the test and she did not refuse to take the test.** (Emphasis added).

ISSUE ON APPEAL

Did the OMVH Hearing Officer correctly sustain the suspension of Appellant's driving privileges upon finding that Appellant constructively refused a breath test as provided for by S.C. Code Ann. §56-5-2950.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. S.C. Code Ann. § 1-23-600 (2005 & Supp. 2022). The OMVH is regarded as an "agency" under the Administrative Procedures Act (APA), thus providing the ALC jurisdiction over appeals of OMVH decisions. S.C. Code Ann. §§ 1-23-310(2) and -660(D) (2005 & Supp. 2022); *S.C. Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 341, 675 S.E.2d 756, 758 (Ct. App. 2009) ("[t]he DMVH [subsequently renamed OMVH] is an agency under the [APA].").

When acting in its appellate capacity, the Court's review is generally limited to the Record on Appeal. S.C. Code Ann. §§ 1-23-310(2) and 1-23-380; *see also*, *Byerly Hosp. v. South Carolina State Health & Human Services Finance Com'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). Subsection 1-23-380(5) of the South Carolina Code (Supp. 2022) provides the standard of review to be utilized by appellate bodies when reviewing agency decisions. *See* § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380). Pursuant to this standard:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5).

An appeal from an action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 212, 394 S.E.2d

842 (1990). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Public Service Com'n of South Carolina*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010); *Bilton v. Best Western Royal Motor Lodge*, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing *Kearse v. State Health & Human Services Fin. Com'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Resources Conservation Com'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995); *Bilton*, 282 S.C. at 641, 321 S.E.2d at 68 (citing *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981)). "A reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark*, 276 S.C. at 136, 276 S.E.2d at 307 (1981)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. *Waters*, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

In reaching the conclusion that Appellant "constructively refused" to submit to a breath test, the OMVH Hearing Officer reasoned that the unacceptable breath test was rendered by Appellant's failure to comply with Trooper Horton's instructions. The OMVH Hearing Officer noted that, unlike the driver in *Chisolm v. S.C. Dep't of Motor Vehicles*, Appellant did not produce a steady tone on the DataMaster, demonstrated a lack of effort to "try any harder to take deep breaths as instructed, nor make an affirmative request to retake the test. 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). Substantial evidence does not support the OMVH Hearing Officer's determination, thus, the agency decision must be reversed. See *Pines Ass'n for Prot. Of Wildlife Inc.*, *supra*.

Section 56-5-2950(A) (2018) provides:

A person who drives a motor vehicle in this State is **considered to have given consent** to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. ... The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies.

(Emphasis added); *cf. Town of Mount Pleasant v Shaw*, 315 S.C. 111, 432 S.E.2d 450 (1993) (purpose of breathalyzer advisory is to inform driver of serious consequences of refusal).

Subsection 56-5-2950(B)(1) goes on to provide that:

No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court; ...

While not required, a driver's refusal to submit to a breath test will result in suspension of a driver's license *See* § 56-5-2951. Refusal is not defined by statute, but rather must be determined by the facts and circumstances of each case. SLED Policy 8.12.5(F)(4) informs, however, that a refusal can occur when:

- a. The subject expresses a refusal to take the test after being advised of his/her implied consent rights.
- b. The subject refuses to cooperate or interferes with the administration of the test.

c. The subject acts unruly while the test is being administered. This includes the entire process from the time the subject encounters the operator until the test is complete.

d. The subject delays the administration of the test. The test operator is not required to wait until an attorney or other individual arrives at the test site.

e. The subject does not cooperate in the checking of his/her mouth. This includes, but is not limited to, failure to open mouth, failure to accurately answer questions about foreign material and/or dental work, and failure to remove foreign material and/or removable dental work.

f. The subject ingests prohibited substances during the observation period. This prohibition includes smoking during the observation period.

g. The subject intentionally regurgitates or refuses to rinse out his/her mouth after unintentional regurgitation.

h. The subject refuses to answer or incorrectly answers biographical information required by the operator. The operator, may at his/her discretion, test a subject without complete biographical information, as long as the operator has sufficient information to identify the subject.

i. The subject does not attempt to blow, pretends to blow, or does not blow an adequate sample, as determined by the instrument. Any subject will be able to provide an adequate sample, as determined by the instrument.

j. The subject intentionally causes the instrument to have an error or failure.

SLED Policy 8.12.5(L); *see also*, *Chisolm*, 402 S.C. at 598, 741 S.E.2d at 45. (SLED authorized to make policies and provisions to effectuate the implied consent statute). SLED Policy further provides:

If an acceptable breath sample is not provided in two minutes, the instrument will display "Did the subject refuse?" When question is prompted, press the touch-screen icon, "Yes" or "No." If "Yes" is answered, the instrument will print "REFUSED" by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. This is considered a completed test and signature lines

will be printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An "INCOMPLETE SUBJECT TEST" reading, by itself, is not a refusal situation. (A "NO" should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.) In the event of an "INCOMPLETE SUBJECT TEST", the breath test sequence may be repeated, except the advisement process is not required to be repeated. This is not a completed test and no signature lines will be printed.

(Emphasis added). The OMVH carries the burden of proof to show that the driver refused to take the breath test. *Chisolm, supra; S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. at 149, 705 S.E.2d at 431.

When, as is the case here, a driver submits to a breath test but produces an unacceptable breath sample, the inquiry shifts to whether the driver was at fault for the unacceptable test; thus amounting to constructive refusal. Here, substantial evidence does not support that Appellant constructively refused the breath test. The testimony unequivocally reveals that Appellant not only submitted to the breath test but actively blew into the DataMaster in an effort to produce an adequate breath sample. There is no evidence that Appellant acted unruly, no evidence that she delayed the administration of the test, no indication that she did not cooperate in the checking of her mouth, no evidence of her having ingested prohibited substances during the observation period nor intentionally regurgitated, no evidence that Appellant refused to answer or incorrectly answer biographical information, nor evidence of Appellant intentionally causing the instrument to have an error or failure. In fact, Trooper Horton acknowledged that Appellant willfully submitted to the test without having delayed its administration.¹ And while the inadequate sample may have been a result of Appellant's intermitted breathing there is no evidence that she acted willful to thwart the administration of the breath test. On direct, Appellant reiterated that it was her intention to give a breath sample. She stated that she kept "blowing, kept blowing, kept blowing, tried to get a little like harder or stronger. ... [[Trooper Horton] didn't tell me I was doing it, like, wrong

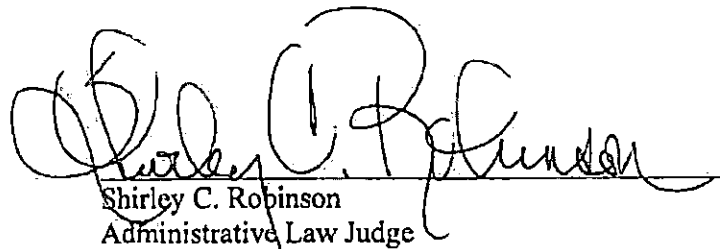
¹ The Court notes that Trooper Horton's testimony suggests that the sole basis for his recording of a refusal was that notwithstanding her attempt, most people are able to complete the breath test in less than two minutes. Trooper Horton's opinion is certainly unreasonable as what would otherwise be the logic of allotting two minutes for the administration of the test. Moreover, SLED policies are subservient to subsection 56-5-2951(A). As such, without other evidence suggesting a refusal, the amount of time it takes a driver to complete a breath test is not determinative as to whether a constructive refusal has occurred.

... I thought I was doing it correctly the whole time." (R. 55:25-56:7). Appellant's testimony is further corroborated by the video recording which shows that during the two-minute administration of the breath test, Appellant produced nine steady tones, ranging in length from two to thirteen seconds. Trooper Horton did not instruct Appellant how long the steady tone must last but rather only that a steady tone was indication that she was properly completing the test correctly. *Id.* at 606, 741 S.E.2d at 50. Moreover, similar to Chisolm's request to take a second breath test, Appellant's immediate challenge to Trooper Horton's advisement that a refusal was recorded, provides further evidence that Appellant did not refuse the test. *Id.*

ORDER

IT IS HEREBY ORDERED that the Order and Decision of the Office of Motor Vehicle's Hearing Officer sustaining the Department of Motor Vehicles' suspension of the Appellant's driver's license and privileges is **REVERSED**.

AND IT IS SO ORDERED.


Shirley C. Robinson
Administrative Law Judge

June 20, 2023
Columbia, South Carolina



CERTIFICATE OF SERVICE

I, Shanice Hagood, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in black ink, appearing to read "Shanice Hagood", is written over a horizontal line.

Shanice Hagood
Judicial Law Clerk

June 20, 2023
Columbia, South Carolina



**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT
ALJ DOCKET NO: 22-ALJ-21-0333-AP**

**APPEAL FROM SOUTH CAROLINA
OFFICE OF MOTOR VEHICLES HEARINGS
OMVH DOCKET NO: 22-OMVH-01-2294-CC**

SAMUEL L. JOHNSON, OMVH HEARING OFFICER

BREYONNA SHAQUELLE JETER APPELLANT

VS

**SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES
AND SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY.....RESPONDENT**

Of Whom South Carolina Department of Motor Vehicles is the Respondent

**BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES**

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**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT**

Breyonna Shaquelle Jeter,

Appellant,

v.

South Carolina Department of Motor Vehicles
and South Carolina Department of Public Safety,

Respondents.

Docket No. 22-ALJ-21-0333-AP
SCDL No. 104168506

**BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT
OF MOTOR VEHICLES**

This matter comes before the Administrative Law Court pursuant to the appeal of Breyonna Shaquelle Jeter, who seeks review of the August 17, 2022, *Final Order & Decision* from the Office of Motor Vehicle Hearings (OMVH) sustaining the Appellant's implied consent suspension. The Respondent South Carolina Department of Motor Vehicles (SCDMV) seeks to have the OMVH *Final Order & Decision* affirmed and the suspension remain.

STATEMENT OF THE ISSUE ON APPEAL

- I. DOES SUBSTANTIAL EVIDENCE SUPPORT THE OMVH HEARING OFFICER'S FACTUAL FINDING THAT APPELLANT REFUSED TO PROVIDE AN ADEQUATE BREATH SAMPLE AS MEASURED BY THE DATAMASTER DMT MACHINE?

STATEMENT OF THE CASE

On May 8, 2022, at approximately 4:18 a.m., Trooper Horton of the South Carolina Department of Public Safety (hereinafter "SCDPS") was on routine patrol and was sitting stationary on US 176. R. p. 9, lines 19-22. Trooper Horton observed a vehicle speeding on US176 which is a 35 miles per hour posted speed limit. R. p. 10, lines 3-10. Trooper Horton estimated a speed of approximately 75 miles per hour. R. p. 10, lines 10-11. Trooper Horton

utilized his speed measurement device and confirmed the vehicle was traveling at a speed of 76 miles per hour in a 35 mile per hour posted speed limit zone. R. p. 10, lines 11-22. Trooper Horton initiated a traffic stop and noticed the vehicle continue to speed. R. p. 11, lines 11-14. The vehicle abruptly changed lanes and traveled a slight distance before stopping at a gas station. R. 11, lines 17-21.

There were two occupants in the vehicle and Appellant was the driver. R. p. 11, line 25; R. p. 12, lines 1-8. Upon making contact with Appellant, Trooper Horton observed a 40-ounce beer in the center console that was three quarters full, fresh, and cold. R. 13, lines 10-15. Trooper Horton also observed Appellant wearing an orange wristband consistent with those distributed at a local bar called Twerkerz. R. p. 13, lines 17-25. Trooper Horton further observed that Appellant's eyes were bloodshot, glassy, glossy, and watery, observed that Appellant's speech was slurred and slow, was slow to respond or reply, if at all. R. p. 14, lines 1-7. Trooper Horton noticed a very strong odor of alcohol coming from the vehicle and asked Appellant to step out of the vehicle. R. p. 14, lines 7-11. Once Appellant was out of the vehicle, Trooper Horton could smell alcohol on Appellant's person. R. p. 15, lines 7-11. Appellant admitted consuming alcohol at the bar, drinking at a friend's house, and that she was on her way to her aunt's house. R. p. 15, lines 14-19.

Trooper Horton asked Appellant to participate in standardized field sobriety tests ("SFSTs"), which Appellant agreed. R. p. 15, lines 21-24. Based on his observations of Appellant's driving, behavior once stopped, and other indicators of intoxication, Trooper Horton arrested Appellant for driving under the influence. R. p. 22, lines 11-14.

Following her arrest, Appellant was transported to the Spartanburg County Detention for a DataMaster DMT test. R. p. 24, lines 11-12. Trooper Horton provided a printed copy of the

Advisement of Implied Consent Rights to Appellant and read those rights out loud to Appellant. R. p. 25, lines 11-22. The reading of the Advisement of Implied Consent Rights was captured on video recording in the breath testing room. R. p. 25, lines 5-10. Trooper Horton instructed the Appellant that a long steady tone by the DataMaster machine is what is needed to indicate a proper sample and that there would be an intermittent beep that would break up if the sample was not sufficient. R. pg. 28, lines 8-16.

When it was time for a breath sample to be provided, Appellant attempted for approximately two minutes to submit to the breath tests, at times she would blow in, at times she would stop, at times she would breathe in and exhale again, but failed to ever produce a steady tone, which would indicate that breath was being blown into the machine. R. p. 28, lines 5-20. The DataMaster machine timed out and asked on the display if Appellant had refused the test which Trooper Horton indicated yes. R. p. 28, lines 21-24. At that time, Appellant had officially refused to submit to the breath sample. R. p. 29, lines 9-12. Trooper Horton presented Appellant with a copy of the test results to sign and advised her that she officially refused the test. R. 29, lines 18-23. Appellant then confronted Trooper Horton saying several times that she did take the test and she did not refuse to take the test. R. p. 29, line 23 – R. p. 30, line 1. Appellant then refused to sign the test results. R. p. 30, lines 8-10.

Upon refusing to submit to a breath sample, Appellant was found to be in violation of S.C. Code Ann. § 56-5-2950, and Trooper Horton issued a Notice of Suspension form pursuant to S.C. Code Ann. § 56-5-2951. R. p. 31, lines 18-24. Appellant timely requested a contested case hearing which was held with the OMVH, after notice to the parties, on August 15, 2022. R. p. 6-72. After reviewing the record and considering all the evidence, the OMVH hearing officer

issued an order affirming the suspension of the Appellant's driving license or driving privileges.
R. p. 74-79.

The Appellant then timely filed this appeal. R. p. 40-59.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code §1-23-380.

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

[Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.

We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*. In *Lark*, our Supreme Court quoted *Consolo v. Federal Maritime Commission*, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also, Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC*,

supra; *Hamm v. American Telephone & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES SUPPORT THE OMVH HEARING OFFICER'S FACTUAL FINDING THAT APPELLANT REFUSED TO PROVIDE AN ADEQUATE BREATH SAMPLE AS MEASURED BY THE DATAMASTER DMT MACHINE.

Appellant argues that her case is similar to *Chisolm v. S.C. Dept. of Motor Vehicles*, 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). In the *Chisolm* case, the court discussed the DataMaster and how the machine makes a steady tone when a person is blowing into the machine properly. *Chisolm*, 402 S.C. at 595 and at 601. Further, the DataMaster machine beeps during intermittent breathing or when a person is not breathing into the machine properly. *Chisolm*, 402 S.C. at 601 (citing *Quick v. Comm., Dep't of Transp., Bureau of Driver Licensing*, 915 A.2d 1268, 1270 (Pa.Comm.w.Ct.2007)). The *Chisolm* Court noted that other jurisdictions have upheld the suspension of a driver's license based on the subject's refusal to submit to a

breath test when the driver failed to produce a steady tone into the breath instrument. *Chisolm*, 402 S.C. at 601. In the *Chisolm* case, a review of the breath testing room video showed that Chisolm produced a steady tone, indicating that Chisolm was blowing into the machine, for approximately 1 minute and 53 seconds of the two-minute time period in which she could provide a breath sample. *Chisolm*, 402 S.C. at 595 and 606. Further, there was no evidence submitted in the *Chisolm* case that indicated Chisolm tried to fake or thwart the test. *Id.* Additionally, the officer offered to allow Chisolm another opportunity to take the test, Chisolm agreed, however the officer indicated that the machine would not allow another test to be performed. *Id.*

In this case, Trooper Horton instructed the Appellant that a long steady tone by the DataMaster machine is what is needed to indicate a proper sample and that there would be an intermittent beep that would break up if the sample was not sufficient. R. pg. 28, lines 8-16. Trooper Horton testified in reference to the Appellant giving a sample that “at times she would blow in, at times she would stop, at times she would breathe in and exhale again and again. R. pg. 28 lines 18-20. After listening to the testimony of Trooper Horton and watching video evidence submitted during the hearing, the OMVH Hearing Officer made the following factual determinations in the *Final Order and Decision*:

“During the two minutes given for the test, Respondent breathed into the machine intermittently and took breaths in, but she did not provide an adequate breath sample and the machine timed out. Respondent began blowing into the machine at approximately 31:10 on the video (Respondent’s Exhibit 1) and produced a steady tone until approximately 31:14. The machine then resumed beeping for approximately fifteen seconds (until 31:29). Respondent then produced another steady tone for approximately five seconds (until 31:37). There was then beeping for the next approximately thirteen seconds (until 31:50). There was then a steady tone for approximately twelve seconds (until 32:02). The beep lasted one second, and then a steady tone resumed for approximately thirteen seconds (until 32:16). A beep then lasted one second, and then a steady tone resumed for approximately six seconds (until 32:32). Beeping then resumed for approximately ten seconds (until 32:42). A steady tone then resumed for

approximately two seconds (until 32:44). A steady tone then resumed for another approximately two seconds after a second of beeping (until 32:47). The machine then beeped for the remainder of the test which was approximately fourteen seconds (until 33:01). Respondent did not appear to ever take a deep breath into the machine as instructed and did not produce a sufficient sample." R. p. 83-84.

Appellant cited *Chisolm* at the OMVH as a reason the suspension should be rescinded. The OMVH hearing officer compared the facts of this case to those in *Chisolm* and found this case to be distinguishable in upholding the suspension and SCDMV agrees with this determination. R. pg. 89-90.

Unlike *Chisolm*, there is substantial evidence in this record that demonstrates Appellant did not ever take a deep breath in the machine and thus a refusal was properly entered per SLED Policy guidelines. It appears that the Appellant never produced a steady tone, indicating a proper sample, for more than 12 seconds. This is significantly distinguishable from the *Chisolm* case in which there was a steady tone for 1 minute and 53 seconds of the two-minute waiting period. Also, the court in *Chisolm* found that the officer being willing to administer another test, even though eventually unsuccessful in doing so, to be a large factor in deciding the officer abused his discretion since it appears the officer believed there was a sufficient sample given the first time even though not read by the DataMaster. However, in this case, Trooper Horton immediately indicated that the test would be counted as a refusal in accordance with SLED Policy. As Appellant discusses in page 18 of their Appellant Brief, Trooper Horton had discretion as to whether to enter a "Yes" or "No" to the question "Did the subject refuse" based on the actions of the Appellant during the two-minute test period. As noted by both the OMVH Hearing Officer and Appellant in her Brief, SLED Policy 8.12.5(L)(2)(f)(vii) provides:

If an acceptable breath sample is not provided in two minutes, the instrument will display "Did the subject refuse?" When question is prompted, press the touch-screen icon, "Yes" or "No." If "Yes" is answered, the instrument will print "REFUSED" by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. This is considered a completed test and signature lines

will be printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An "INCOMPLETE SUBJECT TEST" reading, by itself, is not a refusal situation. (A "NO" should *only* be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.) In the event of an "INCOMPLETE SUBJECT TEST", the breath test sequence may be repeated, except the advisement process is not required to be repeated. This is not a completed test and no signature lines will be printed.

(emphasis added). As already set forth above, because the Appellant failed to ever produce a steady tone from the DataMaster, Trooper Horton followed SLED policy by selecting "YES" when the DataMaster machine asked him "Did the subject refuse." In fact, given the facts in this case, a selection of "NO" to this inquiry would have violated SLED policy because Trooper Horton did in fact believe let to an improper sample being given. Thus, there is no evidence Trooper Horton abused his discretion in choosing "Yes" to answer that the question "Did the subject refuse."

For the reasons set forth above, substantial evidence was submitted into evidence to support the OMVH Hearing Officer's finding that Appellant refused to provide a breath sample. Additionally, the OMVH *Final Order and Decision* is clearly not without evidentiary support or arbitrary and capricious as a matter of law.

CONCLUSION

Based upon the foregoing arguments, the Respondent SCDMV respectfully requests that the *Final Order and Decision* be affirmed and the suspension remain.

[Signature on the following page]

Respectfully submitted,



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December 16, 2022
Blythewood, South Carolina

**THE STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT**

Breyonna Shaquelle Jeter,

Appellant,

v.

South Carolina Department of Motor Vehicles
and South Carolina Department of Public Safety

Respondents.

Docket No. 22-ALJ-21-0333-AP
SCDL No. 104168506

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 16, 2022, I mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing Brief of Respondent to the following:

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December 16, 2022
Blythewood, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Breyonna Shaquella Jeter,

Appellant,

VS.

South Carolina Department
of Motor Vehicles,

Respondent.

Docket No. 22-ALJ-21-0333-AP

BRIEF OF THE APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. DID THE HEARING OFFICER FOR THE OFFICE OF MOTOR VEHICLE HEARINGS ERR IN CONCLUDING THAT THE APPELLANT REFUSED OR CONSTRUCTIVELY REFUSED TO TAKE A BREATH TEST AS PROVIDED FOR BY S.C. CODE ANN. §56-5-2950?

STATEMENT OF THE CASE

On May 8, 2022, Trooper Jesse Horton, of the South Carolina Department of Public Safety, arrested the Appellant, Breyonna Shaquelle Jeter, for Driving Under the Influence. Immediately following the Appellant's arrest, she was transported to the Spartanburg County Detention Center, where Trooper Horton offered the Appellant a breath test. Trooper Horton advised the Appellant of her implied consent rights, both verbally and in writing as provided for by S.C. Code Ann. §56-5-2950. Following a twenty-minute waiting period, the Appellant was given the opportunity to submit a breath sample. During the two-minute time period in which a person may submit a sample, the Appellant blew several times into the breath test tube connected to the breath test machine. The breath test machine, apparently, did not receive a sufficient breath sample. At this juncture, Trooper Horton entered on the Datamaster that the Appellant had refused to take the breath test. When Trooper Horton advised the Appellant of the refusal, the Appellant contested that she had actually refused to take the breath test. Another breath test was not offered to the Appellant.

Trooper Horton issued a "Notice of Suspension" to the Appellant. Thereafter, the Appellant timely requested a contested case hearing with the Office of Motor Vehicle Hearings (OMVH) pursuant to S.C. Code Ann. §56-5-2951, to challenge the suspension of her driving privileges.

On August 15, 2022, a contested case hearing was held as provided for by S.C. Code Ann. §56-5-2951. At the contested case hearing, Trooper Horton testified to the facts and circumstances surrounding the arrest of the Appellant, and the offering of the breath test to the Appellant. The Appellant testified on her behalf, and testified that she had earnestly attempted to submit an adequate breath sample. A video recording of the breath test procedure was admitted into evidence during the hearing.

Following the contested case hearing, the Hearing Officer issued a "Final Order and Decision" on August 17, 2022, finding that the Appellant had constructively refused to submit an adequate breath sample, and upholding the suspension of the Appellant.

Thereafter, the Appellant appealed the Hearing Officer's decision to the Administrative Law Court (ALC) stating in the "Notice of Appeal" that the Hearing Officer erred by finding and concluding that the Appellant refused, or constructively refused, to submit an adequate or sufficient breath sample that could be tested.

STANDARD OF REVIEW

The Office of Motor Vehicle Hearings (OMVH) is authorized by law to hear contested cases arising from the Department of Motor Vehicles. S.C. Code Ann. §1-23-660(Supp. 2021). Accordingly, the OMVH is an agency under the Administrative Procedures Act ("APA"). S.C. Code Ann. §1-23-310(2)(Supp. 2021). As such, the APA's standard of review governs appeals from the decisions of the OMVH. S.C. Code Ann. §1-23-380 (Supp. 2021). The provisions of Section 1-23-380(5)(Supp. 2021), read:

The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency. *Chisolm v. South Carolina Department of Motor Vehicles*, 402 S.C. 593, 741 S.E.2d 42, 44 (Ct.App. 2013).

On appeal to this Court, the Appellant asserts that the OMVH Hearing Officer's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and/or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ARGUMENT

1. THE HEARING OFFICER FOR THE OFFICE OF MOTOR VEHICLE HEARINGS ERRED IN CONCLUDING THAT THE APPELLANT REFUSED, OR CONSTRUCTIVELY REFUSED, TO TAKE A BREATH TEST AS PROVIDED FOR BY S.C. CODE ANN. §56-5-2950.

A. Statement of Applicable Law

Pursuant to the provisions of S.C. Code Ann. §56-5-2950 (Supp. 2021), a person arrested in South Carolina for Driving Under the Influence has given their consent to the chemical testing of the person's breath, blood or urine for the purpose of determining the presence of alcohol and/or drugs. When a person refuses to submit to a chemical test, the driving privileges of such person are immediately suspended. S.C. Code Ann. §56-5-2951 (Supp. 2021). A person who has their driving privileges suspended for refusing to submit to testing may request a contested case hearing to challenge the suspension. S.C. Code Ann. §56-5-2951. In those cases where a driver has refused to submit to a breath test, the contested case hearing is limited to three simple issues, which are, whether the driver:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950...

S.C. Code Ann. §56-5-2951 (F) (Supp. 2021).

In this appeal, the only issue raised by the Appellant is whether the Appellant refused to submit to a breath test pursuant to Section 56-5-2950.

In a section 56-5-2951 contested case hearing, the burden of proof is borne by the arresting officer and the Department of Motor Vehicles. S.C. Code Ann. §56-5-2951(F) (Supp. 2022).

What May Constitute a Refusal

The provisions of sections 56-5-2950 and 56-5-2951 both reference the refusal of a person to submit to testing, however, neither statute defines or states what may constitute a refusal. *Chisolm v. South Carolina Department of Motor Vehicles*, 402 S.C. 593, 741 S.E.2d 42, 46 (Ct.App. 2013). As to what may constitute a refusal is addressed in SLED Policy No. 8.12.5 (F)(4), last revised January 18, 2019, which reads:

4. A refusal to submit to a breath test can occur in any of the following ways:

a. The subject expresses a refusal to take the test after being advised of his/her implied consent rights.

b. The subject refuses to cooperate or interferes with the administration of the test;

c. The subject acts unruly while the test is being administered. This includes the entire process from the time the subject encounters the operator until the test is complete.

d. The subject delays the administration of the test. The test operator is not required to wait until an attorney or other individual arrives at the test site.

e. The subject does not cooperate in the checking of his/her mouth. This includes, but is not limited to, failure to open mouth, failure to accurately answer the question about foreign material and/or dental work, and failure to remove foreign material and/or removable dental work.

f. The subject ingests prohibited substances during the observation period. This prohibition includes smoking during the observation period; and

g. The subject intentionally regurgitates or refuses to rinse out his/her mouth after unintentional regurgitation.

h. The subject refuses to answer or incorrectly answers biographical information required by the operator. The operator, may at his/her discretion, test a subject without complete biographical information, as long as the operator has sufficient information to identify the subject.

i. The subject does not attempt to blow, pretends to blow, or does not blow an adequate sample, as determined by the instrument. Any subject will be able to provide an adequate sample, as determined by the instrument; and

j. The subject intentionally causes the instrument to have an error or failure.

At issue in this case, are the provisions of SLED Policy No. 8.12.5 (F) (4) (i), which state that a refusal to submit to a breath test can occur when the "subject does not attempt to blow, pretends to blow, or does not blow an adequate sample, as determined by the instrument..." Although the breath test device, (which in this case is the DataMaster), will indicate a possible inadequate breath sample, the last word on whether a person has refused the breath test is left to the discretion of the test operator. SLED Policy

No. 8.12.5 (L) (2) (f) (vii), provides:

If an acceptable breath sample is not provided in two minutes, the instrument will display, "Did the subject refuse?" When question is prompted, press the touch screen icon, "Yes" or "No". If "Yes" is answered, the instrument will print "REFUSED" by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An "INCOMPLETE SUBJECT TEST" reading, by itself is not a refusal situation. (A "NO" should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.)...

"Thus, the failure of a driver to supply a registerable breath sample does not automatically result in a refusal, as the officer has discretion to determine whether there was a refusal and has the option to conduct a second breath test." *Chisolm v. South Carolina Department of Motor Vehicles*, 402 S.C. 593, 741 S.E.2d 42, 47 (Ct.App. 2013).

That a person fails to submit an adequate sample, as determined by the instrument, and then entered by the test operator, does not end the inquiry as to whether a refusal has occurred, as was made evident in *Chisolm v. South Carolina Department of Motor Vehicles*, *supra*.

In *Chisolm v. South Carolina Department of Motor Vehicles*, *supra*, the subject, Krystal Chisolm (Chisolm), was offered a breath test, and blew into the DataMaster for approximately one minute and fifty-three seconds. Although there was a steady tone while Chisolm was blowing into the machine, meaning air was going into the instrument, the DataMaster did not "read" the sample. There was no evidence that the DataMaster's failure to register Chisolm's breath sample resulted from her own fault by faking or thwarting the test, being uncooperative, acting unruly, delaying the administration on the test, ingesting prohibited substances during the observation period, failing to cooperate with the officer's instructions, or behaving in any manner that would amount to a refusal. The officer then offered Chisolm another opportunity to take the test, which Chisolm agreed to, however, the machine would not allow for another test. The officer treated the failure to register a sample as a refusal, and suspended Chisolm's driving privileges. Thereafter, Chisolm requested an administrative hearing, and the suspension was upheld. Chisolm then appealed to the Administrative Law Court (ALC), and the suspension ruling was affirmed. On appeal, the Court of Appeals reversed the ruling of the ALC, noting that the suspension was not wilful, and that SLED policies and procedures include a specific protocol for when the instrument does not register the breath sample. See SLED Policies

& Procedures §8-12-5(L)(2)(f)(vii). Based on the facts and circumstances of the case, the officer's decision to enter a refusal, in light of his own testimony, was arbitrary and capricious, and the State failed to meet its burden of producing evidence to support the officer's determination of refusal. Accordingly, Chisolm should not have been placed under suspension for refusing to take the breath test. In reaching its decision, the Court of Appeals noted that the appellate courts of South Carolina had not been presented with the question of whether a driver's inability to provide a registerable breath sample may result in a refusal. (It appears that the *Chisolm* decision is the only reported case to date in South Carolina addressing this issue.) In its decision, the Court of Appeals cited the case of *Bomba v. Com., Dep't of Transp., Bureau of Driver Licensing*, 28 A.3d 946, 948 (Pa. Commw.Ct.2011), which is noteworthy because it mirrors the facts of the Appellant's case, and is quoted here as it was reported in the *Chisolm* opinion:

In *Bomba*, the officer administering the breath test, Officer Lawniczak, testified that the subject, Heather Bomba, "attempted to give one breath sample" that "was insufficient." *Id.* According to Officer Lawniczak, the breathalyzer machine "allows a two-minute window to provide an adequate breath sample; if an adequate breath sample is not provided within the two-minute timeframe, the machine prompts the operator to report whether a refusal has occurred." *Id.* (emphasis added).

Officer Lawniczak testified he instructed Bomba to "blow with one steady breath until . . . told to stop." *Id.* However, Officer Lawniczak explained Bomba gave "a series of short breath, not one continuous breath." *Id.* After two minutes had elapsed, the breathalyzer instrument prompted the officer to report whether there had been a refusal, and Officer Lawniczak pressed the "yes" button. *Id.* Officer Lawniczak admitted that Bomba "may have asked to retake the breath test," but the officer stated that she is only required to give one test. *Id.* As a result, Bomba's license was suspended. *Id.* 947. Bomba appealed and the trial court reversed her license revocation, finding Bomba's "initial, unequivocal and unqualified consent to the breath test, her subsequent inability to perform it properly, despite attempting to do so and her immediate request to retake the breath test, do not amount to a refusal under these circumstances." *Id.* at 949.

On appeal, the appellate court affirmed the determination that Bomba did not refuse the breath test and reinstated her license. *Id.*, at 951. The court reasoned that Bomba "made one attempt to provide a breath sample. When it was not successful, she immediately asked to try again. PennDOT offered no evidence that [Bomba] was attempting to delay the testing process or was intentionally producing an inadequate sample." *Id.* at 950. Furthermore, in upholding the trial court's determination that Bomba did not refuse the breath test, the court explained:

Refusal cases are highly fact-sensitive. The crucial, determinative factor we glean from the cases is whether Penn DOT's evidence shows that the licensee deliberately tried to delay or undermine the testing process. Such evidence was simply not present in this case. Rather, the evidence showed, and the trial court found, that [Bomba] made a good faith, but

unsuccessful, attempt to provide a breath sample and immediately requested to attempt the test a second time.

Id. at 951.

Chisolm v. South Carolina Department of Motor Vehicles, 402 S.C. 593, 741 S.E.2d 42, 49 (Ct.App. 2013).

In reading the *Chisolm* opinion, as well as the *Bomba* case and other cases referenced in the *Chisolm* opinion, central to the issue of deciding if a refusal had occurred was the willfulness of the person in submitting an inadequate sample.

B. Statement of Applicable Facts

In the matter before this Court, the sole issue is whether the Appellant refused the breath test by failing to submit an adequate breath sample. The facts surrounding the breath test cannot be disputed, as the entire breath test procedure was video recorded. The crucial part of the video recording, which is relevant to the issue before the Court, begins at 29:18, (using the video counter time), with Trooper Horton stating the following to the Appellant:

Trooper Horton: Now if you're going to take this test in just a few moments I'm going to take this mouthpiece that has never been touched by human hands out of this bag and place it at the end of this tube, and place that tube through that hole right there and reach about this far into that room. If you're going to take this test and provide a sample you take a deep breath as big as you can and exhale into this mouthpiece. Do not spit, flick your tongue, cover that mouthpiece end, don't put

the whole thing in your mount, just about half-way, and do not suck into this mouthpiece as you're taking this test. So one long breath in, one long breath out. Once you start to take the test, breath out until I ask you to stop. If you have to start over this machine will beep intermittently, because you are not providing a sample. As long as its got a long steady tone you are providing a sample, that's what we want to hear. Do you know how to take the test if you are going to take it?

Appellant: [Silently nods yes.]

Trooper Horton: If you are not going to take the test, once I put the tube in there, or either say out loud I'm not taking it or just step back, go sit down, but don't breathe in or around or touch the tube if you decide you're not going to take the test, okay? Do you understand how to take the test, or how not to take the test?

Appellant: [Silently nods yes.]

Trooper Horton: Do you have any questions?

Appellant: [Silently nods no.]

Trooper Horton: Okay. In just a moment or two I'll take this mouthpiece out as I instructed to you and explained to you, and I will place the tube in the hole, okay.

Trooper Horton: Are you ready?

Appellant: [Silently nods yes.]

Trooper Horton: Okay. Okay, the machine is ready for the sample, okay. There you go.

At 31:02, the DataMaster begins beeping. During the two-minute period in which a sample may be submitted, the Appellant blew into tube connected to the DataMaster nine (9) times. Notably, between 31:57 and 32:26, the Appellant took three (3) successive deep breaths and blew into the test tube. At the conclusion of the two-minute testing period, the following exchange occurred between Trooper Horton and the Appellant:

Trooper Horton: Okay, thank you for that...tube. Okay, do you remember when I explained to you how to take the test?

Appellant: Umhum [Affirmative response]

Trooper Horton: And I asked you to stop, once I told you to stop breathing. And I told you that if the machine is beeping, you're not providing an air sample. Okay, it has to be a long steady tone, that's what we talked about. Okay, so you have refused to take this test, because you did not follow the instructions, and I asked you, did you understand the instructions before anything...

Appellant: I was doing it long and steady though, sir.

Trooper Horton: You have to provide a sample enough for this machine to analyze and you did not.

Appellant; I was doing it though [inaudible] I kept breathing...

Trooper Horton: As much as it was beeping and I know you heard the beep because I explained that to you.

Appellant: I was breathing...

Trooper Horton: I can't sit here and tell you go, go, go, that would be totally wrong, okay, I had to explain it to you, and you said you understood.

Appellant: I did, I was, I kept breathing, until you told took..

Trooper Horton: I never told you to stop.

Appellant: I did not stop until you got it from me just now.

Trooper Horton: Yeah, that's because the machine was finished with the, with the the time limit, okay.

Appellant: I was still breathing, I didn't stop. I can't stop breathing for like two whole minutes.

Trooper Horton: Alright, you didn't have to not breath out for two whole minutes, you just had to breath one deep breath in and one deep breath out. You did not follow that instruction because you kept stopping and starting over. Remember, I even explained don't stop and start over. Remember, I even explained that.

Appellant: I know you explained it to me I was breathing out, I cannot control the fact that it didn't pick it up.

Trooper Horton: While at this time the machine is printing out two copies of your test results which will show refused, okay. I'm going to sign your copy and ask you to sign for a copy for me.

Appellant: But I didn't refuse to take the test, I was taking the test.

Trooper Horton: When you don't follow the instructions, that is a refusal.

Appellant: But sir, I was following the instructions, I was breathing out like you told me to. I can't breathe out for such a long period of time.

C. Applying the Facts to The Law

The case of *Chisolm v. South Carolina Department of Motor Vehicles* makes clear that the failure of a person to submit an adequate breath sample for breath testing is not conclusive as to whether or not the person has refused to submit a breath sample. Rather, the facts surrounding the breath test, and specifically the conduct of the person being tested, must be examined. As noted above in the discussion of the applicable law, the question as to whether a person has refused a breath test is highly fact intensive, with the crucial, determinative fact being the deliberate conduct of the person being tested. Accordingly, central to any inquiry regarding a person's refusal, is the intent of the person being tested to submit, or not submit, to a breath test.

As noted above, what transpired during the breath testing of the Appellant cannot be disputed. What is disputed is whether the Appellant willfully, deliberately or intentionally refused to submit a breath test.

As a beginning point, it must be noted that while the instructions given by Trooper Horton may seem direct enough to officers, lawyers and judges familiar with the breath testing process, for a person completely unfamiliar with the testing process and the Datamaster machine, there is ample room for

misunderstanding. Trooper Horton instructed the Appellant to take "one long breath in, one long breath out". What is a sufficiently "long" breath or "deep" breath may differ from person-to-person, such that a person may need to be told to take a "longer" or "deeper" breath to submit an adequate sample. Furthermore, in Trooper Horton's instructions, he stated to the Appellant, "So one long breath in, one long breath out. Once you start to take the test, breath out until I ask you to stop. If you have to start over this machine will beep intermittently, because you are not providing a sample." This statement suggests that one long sample would be sufficient. Trooper Horton did not clearly explain that if one long sample was not sufficient, that then the machine would begin beeping "intermittently," and that then the Appellant would have to perhaps breath deeper and blow longer a second time, or more, to submit an adequate sample. Similarly, when a person hears the steady tone being emitted from the DataMaster, as the person is blowing into the machine, a person could reasonably assume that this would be a confirmation that the breath sample being submitted is adequate. Again, a person completely unfamiliar with the test would not know how long of a steady tone would be required, which would be long enough for an adequate sample to be submitted. In the absence of any correction or further instruction by the test operator, there is no way for the novice test subject to know

whether or not he or she is correctly performing the test. While Trooper Horton testified that he never advises a breath test subject that a breath test is not being performed correctly, such a practice should not be held to the detriment of the person who is earnestly attempting to submit an adequate breath sample, yet fails to do so. Moreover, it must be stated that SLED Policies are silent on the question as to whether a test operator should, or should not, advise a person during the breath test that the person is not correctly or sufficiently providing a breath sample. In practice, this seems to be left to the discretion of the individual test operator.

From the breath test video recording, it is evident that the Appellant intended to take the breath test. There is no evidence that the Appellant was uncooperative or unruly, or that she attempted in any way to delay, fake or thwart the test by feigning or pretending to blow into the DataMaster. Although the OMVH Hearing Officer stated in his "Final Order and Decision" that the Appellant "was uncooperative by failing to follow Trooper Horton's instructions," there is a distinction and difference in the SLED Policy between the person that is being "uncooperative" by being unruly, refusing to answer questions, refusing to submit to a mouth checks, and intentionally obstructing the testing process, and the person who simply fails to submit an adequate breath sample.

In this case, the Appellant wanted to take the breath test to avoid the suspension of her driving privileges, which would negatively impact upon her ability to perform her required duties in the Army. ROA p. 49, l. 23 through p. 50, l. 10. The Appellant testified she had never been arrested with driving under the influence, and had never been offered a breath test. ROA p. 49, l. 17-22. Perhaps most importantly, the Appellant testified that she blew into the DataMaster, and that she thought she was correctly submitting a breath sample. ROA p. 50, l. 23 through p. 51, l. 3. The Appellant further testified that in the absence of any correction by Trooper Horton that she thought that she was correctly performing the test. ROA p. 51, l. 3-7. Lastly, at the conclusion of the breath test, when the Appellant was told she had "refused" the test, she protested the conclusion by Trooper Horton that she had refused to take the test.

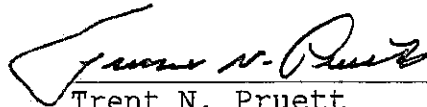
As a final matter, the well written "Final Order and Decision" of the OMVH Hearing Officer notes that as a matter of public policy allowing persons, such as the Appellant, to submit inadequate breath samples in order to avoid the suspension consequences of a refusal would create an avenue for drivers to circumvent the law. ROA, p. 92, Footnote No. 2. First, it is highly unlikely that the future pool of persons to be arrested for driving under the influence would have the training, expertise and know-how to blow

just enough air, but too much air, into a Datamaster machine to not submit an adequate breath sample, while carefully pretending to submit a sample. Second, this concern addresses the very heart of the issue raised by the Appellant in her case, and that is that the intent of the person being tested must be determined, and that it what should control the final determination as to whether there was a refusal. That determination must be made by a case-by-case analysis. Third, in terms of public policy, it should be of far greater concern that the person that is earnestly attempting to submit a breath sample, such as the Appellant, is not lumped together with those persons that expressly, unequivocally, and oftentimes obnoxiously, refuse to submit to testing. Surely, this is not what the General Assembly or the Court of Appeals in *Chisolm* intended.

CONCLUSION

That based upon the above argument and the applicable law, the Final Order and Decision of the Hearing Officer should be reversed, and the suspension of the Appellant rescinded.

Respectfully submitted,



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S.C. Bar No. 4585
Pruett & Cook Law Firm
202 North Petty Street
Gaffney, South Carolina 29340
Telephone No.: (864) 488-0120
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Attorney for the Appellant

November 16, 2022

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

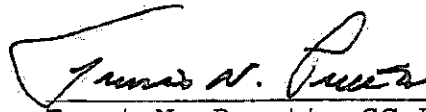
Breyonna Shaquella Jeter,	)	Docket No. 22-ALJ-21-0333-AP
	)	
Appellant,	)	
	)	
vs.	)	
	)	PROOF OF SERVICE
South Carolina Department	)	
of Motor Vehicles,	)	
	)	
Respondent.	)	
_____	)	

I certify that I have served the "Brief of the Appellant" by depositing an original and a copy in the United States Mail, first class postage prepaid, on November 16, 2022, addressed and sent to each of the following person:

Honorable Shirley Robinson, Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Jana E. Shealy, Clerk
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Brandy A. Duncan, Esq.
Office of General Counsel
S.C. Department of Motor Vehicles
P.O. Box 1498
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Attorney for the Appellant

November 16, 2022

**STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS**

Breyonna Shaquella Jeter,
Appellant,

vs.

South Carolina Department of Motor
Vehicles,

Respondent.

Docket No. 22-ALJ-21-0333-AP

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA

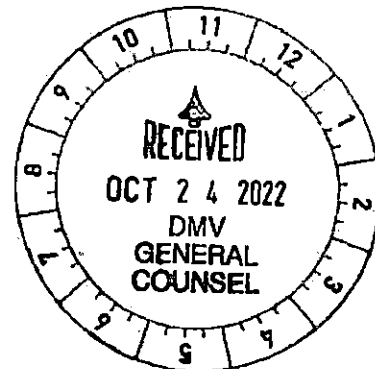
In The Administrative Law Court

APPEAL FROM
SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS

Samuel Jackson, Hearing Officer

Brandy A. Duncan
Office of General Counsel
P.O. Box 1498
Blythewood, South Carolina
(803) 896-9937
Attorney for Respondent

Trent N. Pruett, Esquire
202 North Petty Street
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864-488-0120
Attorney for Appellant



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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
OFFICE OF MOTOR VEHICLE HEARINGS**

RALPH K. ANDERSON, III
Director



(803) 734-3201
FAX (803) 734-3200
WWW.SCOMVH.NET

October 20, 2022

Jana Shealy, Clerk
SC Administrative Law Court
1205 Pendleton Street, Ste 224
Columbia, SC 29201

Re: S.C. Dept of Motor Vehicles
vs
Breyonna Shaquella Jeter
DL/Customer 104168506

Dear Ms. Shealy:

In compliance with Section 1-23-380 (d) of the 1976 Code of Laws of South Carolina, please find enclosed a certified copy of the record for the Judge's review. Please file in the appropriate case file. This is a petition for judicial review of the administrative decision, which was filed in the South Carolina Administrative Law Court.

If we can be of any further assistance, please advise.

Sincerely,


Yolanda P. Williams
Administrative Coordinator, OMVH

Cc: Trent N. Pruett Esquire
Brandy A. Duncan, SCDMV General Counsel

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Breyonna Shaquelle Jeter,

Appellant,

vs.

South Carolina Department of Motor Vehicles
and South Carolina Department of Public
Safety,

Respondents.

**NOTICE OF ASSIGNMENT
(Appeal)**

DOCKET NO. 22-ALJ-21-0333-AP

NOTICE IS GIVEN that a notice of appeal seeking review of a decision of the Office of Motor Vehicle Hearings was filed with the Court. In accordance with S.C. Code Ann. § 1-23-570 (2005), the Honorable Shirley C. Robinson, Administrative Law Judge, has been assigned to preside in this appeal. The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550. Pursuant to SCALC Rule 4A, all future filings must be filed directly with the above assigned Judge and shall include the docket number.

FURTHER, NOTICE IS GIVEN that the parties are required to meet the following deadlines, unless otherwise ordered by the assigned Administrative Law Judge:

Record on Appeal	Due within forty-five (45) days of the date of this Notice
Appellant's Brief	Due within thirty (30) days after the Record on Appeal is filed
Respondent's Brief	Due within thirty (30) days after the Appellant's Brief is filed
Reply Brief	Due within ten (10) days after the Respondent's Brief is filed

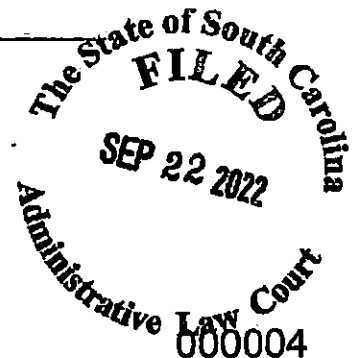
The parties are directed to the relevant provisions of the Rules of Procedure regarding these deadlines and other requirements applicable to the appeal process. Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net.

This the twenty-second day of September 2022.

Ralph King Anderson, III
Chief Administrative Law Judge

By:

Jana E. Shealy
Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201



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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Breyonna S. Jeter
22-OMVH-01-2294-CC,
Appellant,

vs.

South Carolina Department of Motor
Vehicles,
Respondent.

**NOTICE OF REQUEST FOR
TRANSCRIPT**

The above case was heard by a SC OMVH Hearing Officer and has been appealed to the Administrative Law Court. The appeal has been assigned to an Administrative Law Judge of the South Carolina Administrative Law Court, III. Pursuant to ALC Rule 35, the Appellant has requested the transcript. Please prepare the Transcript and forward the invoice to the Appellant at the following address:

Trent N. Pruett.
Attorney at Law
202 North Petty Street
Gaffney, SC 29340
864-488-0120

By the signature below, Creel Court Reporting Service signs and receipts for the original tape of the proceeding in order to prepare the transcript. As soon as the transcript is completed, the original tape and transcript will be delivered back to the SC OMVH. A certified copy of the transcript will then be filed with the Administrative Law Court.

Larry Duboss
Representative of Creel Court Reporting

9/21/22
Date

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
22-OMVH-01-2294-CC

South Carolina Department of)
Public Safety and South)
Carolina Department of Motor)
Vehicles,)
)
 Petitioners,)
)
vs.)
)
Breyonna Shaquelle Jeter,)
)
 Respondent.)
_____)

HEARING

Monday, August 15th, 2022

This contested case hearing for the Office of
Motor Vehicle Hearings, was held before the Honorable
Samuel Johnson, Hearing Officer, in Greer, South
Carolina, on the 15th day of August, 2022.



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APPEARANCES**Hearing Officer:****The Honorable Samuel Johnson****Trent Pruett, Esquire****Pruett and Cook Law Firm****202 N Petty Street****Gaffney, South Carolina 29340****864-488-0120****Attorney for the Respondent****Master Trooper Jesse N. Horton****Present for the Petitioner****INDEX****OPENING REMARKS:**

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OPENING REMARKS BY THE HEARING OFFICER:

HEARING OFFICER: All right. We're now on the record. This is case number 22-OMVH-01-2294-CC in the matter of the South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles, Petitioners, versus Breyonna Shaquella Jeter, Respondent. Again, I'm Samuel Johnson, I've been appointed by the Chief Judge of the Administrative Law Court to preside at this hearing on behalf of the South Carolina Office of Motor Vehicle Hearings. We are here in Greer, South Carolina. It's August the 15th, 2022. And present on behalf of Petitioners is Trooper Jessie Horton. And Respondent is present together with her attorney Trent Pruett. All right, Trooper Horton, please raise your right hand. Do you solemnly swear or affirm the testimony you're about to provide will be the truth, the whole truth, and nothing but the truth so help you God?

TROOPER HORTON: I do.

HEARING OFFICER All right. Go ahead.

TROOPER HORTON - DIRECT TESTIMONY FOR THE PETITIONER:

TROOPER HORTON: Hey, Your Honor, I'm Master Trooper



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0055

1 Jesse N. Horton with the SCDPS, South Carolina
2 Department of Public Safety. I am in position
3 and work as a State Trooper for the South
4 Carolina Highway Patrol. My station area is
5 Spartanburg County, South Carolina. I am
6 certified in DataMaster operation, as well as
7 SFSTs, where I can make arrests for driving
8 under the influence of alcohol. I am also SMD,
9 which is speed measurement device, certified.
10 I do have both of those certificates here
11 today. Eventually I'll offer those into
12 evidence so you can see those. And for the
13 record, I would like to state that any
14 paperwork that I would offer today as direct
15 evidence, I do have the originals on hand as
16 well. I understand we can provide copies for
17 today's proceedings. So I have the copies and
18 the originals on hand to both enter in, in a
19 little bit. So May the 8th, 2022, at
20 approximately 4:18 in the morning, I was on a
21 routine patrol and I was sitting stationary on
22 US 176, commonly known as Asheville Highway
23 near Commerce Point Boulevard, located in
24 Spartanburg, South Carolina. I was sitting
25 there stationary facing eastbound, tracking



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1 east or west traffic for speed at that
2 particular time. Traffic being very light, I
3 noticed that I could see headlights from a
4 distance, and I saw what appeared to be a sedan
5 coming down a hill towards me traveling west on
6 US 176 -- correction, Commerce Point Boulevard.
7 There was only one vehicle at that time. And in
8 my mind, I estimated that vehicle to be
9 speeding. The posted speed limit in this area
10 is 35 miles per hour. I estimated in my head
11 at approximately 75 miles per hour before I
12 utilized my speed measurement device. That
13 speed measurement device was functioning
14 properly before, during, and after my
15 (inaudible), through calibration and knowledge
16 of how to use the instrument. So the
17 instrument was functioning properly at the time
18 I decided to use it. I confirmed my suspicion
19 and realized that the vehicle that I was
20 looking at was traveling at a speed of 76 miles
21 per hour in a 35 mile per hour posted speed
22 limit zone. So I initiated a traffic stop by
23 driving through approximately 12 feet of grass,
24 and was able to proceed westbound. When the
25 vehicle passed me, I beeped my horn. When I



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1 got 90 degrees to the vehicle in an attempt to
2 at least let the vehicle driver know that hey,
3 you know, I'm probably coming for you or
4 whatever she might have determined, but I did
5 beep my horn as I turned around on this car.
6 I noticed it was a dark colored gray Nissan
7 vehicle, and that was the only vehicle in my
8 radar sight, as well as visually before,
9 during, and after the stop. There was no other
10 traffic on this road at this time but myself
11 and this Nissan. So I decided to initiate a
12 traffic stop, caught up with the vehicle before
13 Springfield Road on Asheville Highway, and I
14 noticed that the vehicle continued to speed
15 even though I gave that audible warning coming
16 through the median with headlights on and
17 everything. The vehicle abruptly changed lanes
18 to the right and then to a little bit of a
19 distance to finally stop. It was a slow
20 response to finally pull over, and the vehicle
21 did turn into a gas station in Springfield Road
22 and US 176. So I set up my traffic stop for
23 calling it in properly, with the tag and
24 everything, and I exited my vehicle to approach
25 the driver. I noticed there were two occupants



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1 this side of the vehicle, two African American
2 females. The driver is present here today by
3 appearance, and she's sitting -- the second
4 person over to my right. At that time, I
5 noticed as I was looking at this driver ---

6 **HEARING OFFICER** I'll let the record that's
7 referring to the Respondent in this case,
8 Breyonna Shaquelle Jeter. Go ahead.

9 **TROOPER HORTON:** I noticed that the driver seemed to
10 be concentrating on something other than me,
11 because at the time she had not even looked up
12 at me as I was standing there for some period
13 of time. I eventually noticed that she did
14 recognize that I was standing there, and I
15 asked her to produce her driver's license along
16 with the other paperwork for the vehicle. It
17 took her a considerable amount of time because
18 she could not remember where he license was
19 apparently. She was looking in the console,
20 looking around -- a little odd to me, maybe in
21 the dash area, the floorboard, next to her,
22 around the seat and all that kind of stuff.
23 Eventually she realized that her license was in
24 her front left pocket, and she was able to
25 produce that license. And after looking at



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0059

1 that license, I found her name to be Breyonna
2 Shaquelle Jeter, and she is present here today,
3 second person in this room sitting to my right.
4 So I recognize her as the driver from that
5 night. I introduced myself to Ms. Jeter and
6 explained to her why I had her stopped. I told
7 her that she was speeding in excess of the
8 posted speed limit at 76 miles per hour in a 35
9 zone. Before we got -- or before I asked her
10 to step from the vehicle for anything, I
11 noticed that she had a rather large beer in her
12 center console. This was a 40 oz. Loco 14% by
13 volume alcohol beer, and after I looked at it
14 later, it was approximately three quarters of
15 the way full. The can was fresh and cold. So
16 I noted that she had alcohol in the vehicle.
17 I also noticed on one of her wrists that she
18 had an orange wristband, indicative to me of
19 some kind of place where you had to have a
20 wristband to identify yourself for some reason.
21 After talking with her a little bit later, it
22 was determined she had had that wristband so
23 she could consume alcohol at a place called
24 Twerkerz, a local bar located in Spartanburg at
25 some location. I got to speaking and looking



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0060

1 at Ms. Jeter, I noticed that her eyes were
2 extremely bloodshot, glassy, glossy, and
3 watery. I noticed that her speech at times was
4 slurred, was slow, and I noticed also that she
5 took a while to respond to either questions or
6 asking her to get stuff. She was very slow to
7 respond or reply, if she did at all. I did
8 notice a very strong odor of alcoholic beverage
9 coming from the car at that time. So
10 eventually, and shortly after, I asked her to
11 step from the vehicle so that I could talk with
12 her a little bit about the alcohol smell and
13 the observances that I just mentioned. So we
14 exited the vehicle and I began to ask her a few
15 questions. I asked her if she considered
16 herself healthy, if she was seeing a doctor or
17 dentist or anything to kind of prescribe
18 medications, did she have any broken bones in
19 her body whatsoever at that time or ever. She
20 stated that she considered herself healthy, no
21 broken bones then or ever, and she was not
22 seeing any doctor or dentist to have prescribed
23 medications. She did advise me that she was in
24 the National Guard, eventually the Army and
25 told me that she would rather have a warning



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1 several times instead of making any charges to
2 her whatsoever because she would get in a lot
3 of trouble with the Army. I asked her -- after
4 I told her that she was being videotaped and
5 recorded, and pointed out the fact of where my
6 video camera was. She understood she was being
7 video taped and recorded at that time. I asked
8 her about her consuming any kind of alcohol,
9 because now while we were standing outside of
10 her vehicle, I could obviously smell it on her
11 person. There were no visible spills on her
12 body as far as wet clothing goes, or on her
13 skin of anything that looked like or smelled
14 like alcohol that had been spilled on her. She
15 did admit to drinking some alcohol at this bar.
16 At first she was talking about drinking at a
17 friend's house, she drank a cran-grape
18 alcoholic drink, and then she was on the way to
19 her aunt's house, some place in Inman,
20 Campobello, north or west of where we presently
21 were. So after speaking with her, I asked her
22 if she would not mind to attempt to the best of
23 her ability three standardized field sobriety
24 tests. She agreed to try those tests. So I
25 asked her did she normally wear contacts or



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1 glasses, at first she said no. And then she
2 said well I do wear contacts because when she
3 said no, I noticed on her driver's license back
4 that it had a restriction for corrective
5 lenses. She said that she was not required to
6 wear them, but when I pointed that out, she
7 said oh, yes, I do wear contacts and I have
8 them in now. I asked them were they hard or
9 soft, she said they were soft. So we were
10 allowed, according to my training, to leave her
11 contacts in. And so at this time, Your Honor,
12 if I could enter in just for evidence purposes,
13 I do have my DUI Detection SFST Practitioner
14 certified, I guess diploma if you want to call
15 it that, and I'd like to display this to the
16 Petitioner's here if they want to look at it.

17 **MR. PRUETT:** No objection to admission of it into
18 evidence, Judge.

19 **TROOPER HORTON:** And you'll see that it's in date.
20 We have to renew our certifications every two
21 years.

22 **HEARING OFFICER** Okay. I'm gonna ---

23 **TROOPER HORTON:** And so ---

24 **HEARING OFFICER** --- this is a copy of the DUI
25 Detection SFST Practitioner Certification, I'll



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1 mark this as Petitioner's Exhibit 1, and this
2 will be without objection. All right, go
3 ahead.

4 (Petitioners' Exhibit Number 1 was marked for
5 identification purposes and entered into the record.)

6 TROOPER HORTON: And also I'd like to enter in my
7 speed measurement device operator certificate
8 as well, which states that I was certified at
9 that time to operate my radar unit.

10 MR. PRUETT: No objection.

11 HEARING OFFICER All right, this is a copy of the
12 speed measuring device operator certification.

13 I'll mark as Petitioner's Exhibit 2. And
14 that's admitted without objection. All right.

15 (Petitioners' Exhibit Number 2 was marked for
16 identification purposes and entered into the record.)

17 TROOPER HORTON: Okay, so once we determined that
18 she was wearing contacts and we could leave
19 them in, I did ask her to stand with her feet
20 (inaudible), her hands by her side as well, in
21 anticipation to examine her eyes. Once I
22 looked at her eyes, I noticed -- other than
23 being bloodshot, watery, glassy, and glossy,
24 that she did not exhibit resting nystagmus.
25 Her pupils were equal sized. She lacked smooth



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0064

1 pursuit. She did exhibit equal tracking with
2 both eyes. As I moved a stimulus, which was an
3 ink pen, that she said she could clearly see.
4 I asked her to stand in that position before I
5 gave her any further instructions, she
6 understood that, and -- and did that. So as I
7 moved the pen in front of her face, as I
8 instructed her that I would do, I noticed that
9 she had distinct and sustained nystagmus at
10 maximum deviation in both eyes. I also noted
11 that she exhibited nystagmus prior to 45
12 degrees in both eyes. She did lack vertical
13 gaze nystagmus. So that was the HGN test. The
14 next test would be the walk and turn test that
15 I explained to her, and she stated that she
16 understood the instructions eventually. I
17 asked her because I noticed she had some flip
18 flops or sandals, if she preferred to take
19 those sandals and flip flops off before she
20 would try any of these tests. But prior to
21 that, she offered herself if she could take a
22 walking test before I could even get to the HGN
23 test. I told her no, we're nowhere near that.
24 I don't know how she knew that I was gonna even
25 ask her that. But she did note that eventually



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1 I was gonna ask her to walk. So during this
2 test, she advised that she would rather take
3 off her sandals or flip flops, and so I allowed
4 her to do that and set them to her left. So
5 she was standing there, I asked her to place
6 her left foot behind her right foot and touch
7 the other toe with her hands by her side, and
8 to stand in that position until I gave her
9 further instructions. She stated she
10 understood that instruction, however at times
11 she did not stay in that position, and I
12 noticed she would swing and use her arms for
13 balance at that time. So I explained and
14 demonstrated the test to her as touch heels to
15 toe, you take nine steps toward my patrol car
16 in a straight line as possible. Told her, look
17 at your feet while she was counting out loud
18 and to turn around with a small series of steps
19 and return back to the basic position that she
20 started in facing the other direction of course
21 at the end. I also instructed her not to end
22 the test until she was completed. So during
23 the test when it was her time and after I had
24 -- I had explained it and demonstrated the test
25 to her, which she stated she understood the



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1 instructions, it was her time to actually
2 perform the test. So during her counting and
3 stepping, I noted a few things. She was using
4 her arms for balance, she would swing. She
5 stepped off the line. She did not ever touch
6 heel to toe, and at times she took large gaping
7 steps, I guess to whatever because I did not
8 instruct her to do anything like that. So I
9 noted that she turned around to her right, and
10 then she started to return back to her
11 position, which again, the second nine steps
12 she still never touched heel to toe and she
13 stepped off the line, was not straight, took
14 rather large steps, she swayed and used her
15 arms for balance. So she completed that test,
16 she did not perform as I instructed her, but
17 she finished it. The last test I would ask her
18 and did ask her to perform was called a one-
19 legged stand test. And this test I explained
20 it to her, but first asked her to stand with
21 her feet together and her arms by her side. I
22 noticed that she was clenching her hips for
23 balance with her arms. I asked her to unclench
24 and attempt to relax her arms, which she did.
25 I asked her to stand in that position until I



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1 gave her further instructions, and she stated
2 she understood that portion of the test after
3 that point. So when it came time for her to
4 perform the test, I had already demonstrated it
5 and showed her exactly what I wanted her to do,
6 which was to elevate her foot approximately six
7 inches off the ground parallel to the ground,
8 with the toe pointed to the ground. Whichever
9 foot she chose to raise and elevate, but to
10 keep her hands by her side and both legs
11 straight. I instructed her on how to look at
12 her foot and to count in the manner one
13 thousand one, one thousand two, so on and so
14 forth. I demonstrated all that to her and she
15 understood that. When it was time for her to
16 take the test, she decided once again to leave
17 her sandals or flip flops off, which is no
18 problem to me at that time, and just for the
19 record the pavement was flat, level, debris
20 free, hole free, crack free. There were no
21 obstructions or debris on this pavement that
22 she was taking these balance tests on and
23 walking tests. And also it was about 66
24 degrees on a clear night, and no visible
25 inclement weather at all. So when she began to



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1 lift her left foot to start the test, after she
2 stated she understood the instructions. She
3 swayed, she used her arms for balance, she put
4 her foot down multiple times. I don't remember
5 exactly how many, but multiple. She made it to
6 count 22 eventually because I asked her do not
7 stop until I asked her to stop. So after she
8 kept putting her foot down, we went for 30
9 seconds, as I was timing it with a stopwatch.
10 So after that test, I allowed her to put back
11 on her sandals and I explained to her, and the
12 time of arrest was 04:36. At that time I
13 arrested her for driving under the influence of
14 alcohol, and I started to explain this to her.
15 She began multiple times to ask me just for a
16 warning, and I told her that I could not give
17 her a warning for a DUI whatsoever, and I
18 certainly wasn't gonna give her a warning for
19 76 miles per hour in a 35 mile per hour speed
20 limit zone. So I placed handcuffs on her, I
21 double locked those handcuffs and explained it
22 to her, because they were not tight enough on
23 her. I did a visual inspection because she's
24 a female and I did not want to put my hands on
25 her whatsoever in a searching parameter. So I



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1 took a chance and decided visually that she did
2 not have any weapons on her. I decided to
3 place her in the right front of my patrol car,
4 and I placed a seatbelt on her properly. I
5 turned the video camera around during her
6 sitting in the car before we did any walk and
7 turn tests and balance tests, I did reposition
8 my patrol car to get a better view of all those
9 tests. Once I placed her in the car, I asked
10 her do not get up. I told her not to get up,
11 do not try to get out of the handcuffs, do not
12 move around, and do not touch anything. Very
13 clearly. At one point she reached around from
14 her back because she is a petite female, she
15 could do that rather easily, I could not. But
16 she actually rolled down her window, and I
17 specifically told her do not touch anything,
18 but she did not listen. So I knew at that time
19 her memory skills or whatever were very slow.
20 As I was -- as I put her in the car, she knew
21 once again that she was still being video taped
22 and recorded inside the car. Other things that
23 I noticed about Ms. Jeter is that she would
24 become very emotional at times. I saw anger,
25 I saw extreme sadness, she cried several times.



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1 I noticed that she was very lethargic, and at
2 one point during our interaction -- tol- --
3 total interaction, she actually fell asleep for
4 some amount of time, a considerable amount of
5 time. I'll explain that in just a little bit.
6 So at this time I called for a tow truck to
7 come and get the vehicle, and I began to catch
8 up a little bit on my paperwork as we were
9 waiting for that vehicle. Once the tow truck
10 driver arrived and was able to take the
11 vehicle, I began to transport Ms. Jeter to the
12 Spartanburg County Detention Center properly.
13 I called out the mileage and the location, and
14 that I was on the way to dispatch to the jail.
15 We arrived at the jail and I had already told
16 Ms. Jeter that once we got into the jail, I was
17 going to take those handcuffs off or have them
18 removed, and then place her into an observation
19 room. She continued to ask me, and I continued
20 to affirm, could she use the bathroom? She
21 said she really had to go, extremely badly, and
22 I kept telling her that yes, once we get in
23 there, if you still have to go I will make
24 arrangements for you to use the restroom. So
25 once we got in and the handcuffs were removed



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1 by the Spartanburg County Detention County
2 Center staff and she was allowed to use the
3 restroom. She spent a few minutes using the
4 restroom, then I placed her into a BAC
5 observation room. As soon as we got into the
6 room, I turned the video taping recording
7 system on, as required by SLED and State -- or
8 and law. So I turned the video camera on and
9 I advised Ms. Jeter that she was once again
10 being video taped and recorded inside the jail.
11 I told her that she was under arrest for
12 driving under the influence and the reason we
13 were at jail was to take a breath test or for
14 her to submit a breath test. I advised her not
15 to put anything in her mouth after I read her
16 implied consent rights to her. I gave her
17 immediately her copy of her implied consent
18 rights, and after I read them to her in their
19 entirety, she said that she understood her
20 rights pertaining to me requesting for this
21 breath sample, and she actually signed for my
22 copy of the implied consent rights. At this
23 time, as I stated, I do have the originals with
24 me, but I would like to submit the implied
25 consent rights, which she did sign, on -- on



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1 May the 8th at approximately 5:47 in the
2 morning.

3 **MR. PRUETT:** No objection.

4 **HEARING OFFICER** All right. A copy of the
5 advisement of implied consent rights form, I'll
6 mark this as Petitioner's Exhibit 3, and it's
7 admitted without objection.

8 **(Petitioners' Exhibit Number 3 was marked for**
9 **identification purposes and entered into the record.)**

10 **TROOPER HORTON:** I asked Ms. Jeter not to put
11 anything in her mouth with regard to her
12 fingers, fingernails, clothes, skin, papers,
13 anything like that, or money because she did
14 have a -- an amount of dollar bills that she
15 had previously been using that night or with
16 her. And I don't know how much money was
17 there, I never touched the money basically, I
18 just handed it to her. That was my extent of
19 touching it. So while we were in that room, I
20 actually noted that she counted -- or appeared
21 to be counting that money and then she put it
22 away. She stated that she understood not to
23 put anything in her mouth. I asked her to open
24 her mouth and to lift her tongue, tilt her head
25 back so I could see inside her mouth, and she



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1 understood by affirming that she should not put
2 anything in her mouth during this 20 minute
3 observation period. I told her the reason for
4 the 20 minutes was stated by law, that we had
5 to do that. So at the end of the 20 minutes
6 and prior to that, I explained lengthy and
7 thoroughly how to take or not to take this
8 breath test that she was being asked to look
9 for. She stated that she understood completely
10 how to take or not to take the test. And
11 basically I instructed her to take the deepest
12 breath that she possibly could. When it was
13 time for her to take the test, to blow into the
14 mouthpiece through a tube that would spin
15 through the hole to her side of the room, and
16 I asked her not to spit or flick her tongue or
17 suck in on the mouth piece and not to put the
18 mouth piece all the way in her mouth. She
19 understood all that. At the end of the 20
20 minute observation period, I instructed her
21 that it was time to -- for her to submit to the
22 breath test. She gave every indication
23 verbally that she was going to submit to the
24 breath test. Now I told her do not stop
25 breathing until I told her to stop breathing or



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1 exhale. I also explained to her, basically how
2 not to take the test if she wanted to not take
3 it, and to step away or not to touch the tubing
4 or anything like that. She did understand
5 exactly all of that. So when it came time for
6 her to take the test, I also had to explain to
7 her that if you hear this machine beeping,
8 which is the breathalyzer, if you hear it
9 beeping while you're trying to provide us air
10 sample at all, and in an intermittent tone, you
11 are not providing an air sample. I told her a
12 long steady tone is what we're listening for,
13 and that she would be able to hear that tone if
14 she was blowing properly. But that tone would
15 start to break up and beep intermittently if
16 she were not providing a sample. So after
17 approximately two minutes of her attempting to
18 submit to the breath test, at times she would
19 blow in, at times she would stop, at times she
20 would breathe in and exhale again and again.
21 It took her a little over two minutes before
22 the machine timed out, basically, and asked me
23 on the display if the subject had refused this
24 test, which I indicated yes. Now this test
25 performs a series of standardized internal



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1 tests before, during, and after. And as I've
2 already submitted my certificate to operate the
3 machine properly, which my certification was up
4 to date and valid, this machine was functioning
5 properly before, during, and after the test.
6 And it is explained in that format on this
7 South Carolina Law Enforcement (Inaudible)
8 Breath Alcohol Analysis Test Report for driving
9 under the influence. So at this time at
10 approximately 6:17 with 50 seconds, a.m. on May
11 the 8th, she officially refused to submit to
12 the breath sample. So once the test was over
13 and I initiated -- or indicated to the machine
14 that the subject had refused, which was Ms.
15 Jeter, the printer printed out two identical
16 test results. The first one that I signed and
17 documented my name on it at approximately 6:20
18 a.m. on May the 8th, and I passed her her copy
19 through the little hole as I previously had
20 done with the implied consent rights. Now once
21 I told her that she officially refused the test
22 after explaining to her in her implied consent
23 what would happen, she began to confront me
24 with the test result by simply saying several
25 times that she did take the test and she did



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1 not refuse to take the test. So I asked her
2 was she gonna sign for my copy of the test
3 result, and I explained to her that if she did
4 not sign it, that I would write refuse to sign
5 with my initials, JNH, in the place where the
6 subject would normally sign her signature. So
7 in this case she continued to confront me about
8 refusing to take the test. I gave her a couple
9 of opportunities again to sign for her result,
10 and she did not. So I wrote down refused to
11 sign and my initials, JNH, after I had already
12 gave her the test result. So at this time I
13 would like to enter in the results of that
14 breath test for the Court. I do have a copy as
15 well as the original.

16 **MR. PRUETT:** Well we've already submitted, Your
17 Honor, Respondent's Exhibit Number 1, it's the
18 same item. Do you need a duplicate copy, or I
19 could ---

20 **HEARING OFFICER** I'll tell you ---

21 **MR. PRUETT:** --- withdraw mine just after his ---

22 **HEARING OFFICER** Yeah, let's just do that.

23 **MR. PRUETT:** Okay.

24 **HEARING OFFICER** Because technically I'd only marked
25 it for Exhibit -- for Exhibit Purposes -- or



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1 for identification purposes because we hadn't
2 started the hearing yet.

3 **MR. PRUETT:** Yes, sir.

4 **HEARING OFFICER** So I'll tell you what we'll do.
5 Let me just -- I'm just gonna mark out ---

6 **MR. PRUETT:** Okay.

7 **HEARING OFFICER** I'll take -- I'll take this, it's
8 the same thing.

9 **MR. PRUETT:** We have no, obviously no objection to
10 admission of the test results as offered by the
11 detective.

12 **HEARING OFFICER** Okay. And this -- again is breath
13 alcohol analysis test report, I'll mark as
14 Petitioner's Exhibit 4, and this will be
15 without objection. All right.

16 (Petitioners' Exhibit Number 4 was marked for
17 identification purposes and entered into the record.)

18 **TROOPER HORTON:** Okay, so once she refused to sign
19 that paperwork, I explained to her later and
20 reminded her that her license would be
21 suspended effective immediately for six months,
22 and I had a paper that I would give her later
23 as a notice of suspension for refusing to
24 submit to this breath test. She understood
25 that, and I also explained to her that at a



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1 later time that I would produce to her an
2 actual driving under the influence summons,
3 which I did produce both of those to her. At
4 this time, I'd like to enter into evidence, as
5 a copy, which I have the original, of her
6 Department of Motor Vehicle Notice of
7 Suspension, which we already know you have, or
8 otherwise we would not be here today.

9 MR. PRUETT: I have no objection (inaudible).

10 HEARING OFFICER Notice of Suspension, marked as
11 Petitioner's Exhibit 5, submitted without
12 objection.

13 (Petitioners' Exhibit Number 5 was marked for
14 identification purposes and entered into the record.)

15 TROOPER HORTON: So the official time stamp on her
16 breath analysis report result was 06:17 a.m.
17 and 50 seconds, At 06:21 a.m. and 49 seconds,
18 at that time I turned the videotape off; after
19 I asked Ms. Jeter if she had any other
20 questions before I did that and she stated no.
21 And at this time, if we need to see it, which
22 I'm not entering it into evidence because it is
23 readily available and I think Counsel already
24 has a copy, but I do actually have a copy of
25 the entire test observation process. So if



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1 nobody needs to see it then that's fine, but if
2 we do need to see it, it is readily available.

3 **MR. PRUETT:** I'm going to offer later, Judge, just
4 for informational purposes, just to -- just ---

5 **HEARING OFFICER** The same thing?

6 **MR. PRUETT:** The same related to the actual breath
7 sample being submitted.

8 **HEARING OFFICER** Okay.

9 **TROOPER HORTON:** So just for the record, I know it's
10 a lengthy thing, but the subject ID is 16B- --
11 bravo -- F- -- fox trot -- 9D- -- delta -- 69A-
12 -- alpha, the number 1 [16BF9D69A1]. The
13 subject password is 67184. It pertains
14 specifically to this case, has the 20 minute
15 observation, including everything. So from
16 05:44 a.m. on May the 8th until 06:21 and a few
17 seconds on May the 8th was this entire
18 observation period. So once I issued -- or I
19 turned the videotape off, I issued her the
20 summons for driving under the influence, as
21 well as her notice of suspension from the
22 Department of Motor Vehicles. At this time,
23 Your Honor, I released her to the Spartanburg
24 County Detention Center and that concluded our
25 interaction until today, or my interaction



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1 until today with Ms. Jeter.

2 **HEARING OFFICER** All right.

3 **TROOPER HORTON:** I have nothing further at this
4 time, Your Honor.

5 **HEARING OFFICER** Questions, Mr. Pruett?

6 **TROOPER HORTON - CROSS EXAMINATION BY MR. PRUETT:**

7 **MR. PRUETT:** Just a few. Field sobriety testing,
8 when you instructed Ms. Jeter in reference to
9 the walk-and-turn test, was she specifically
10 instructed to actually touch heal-to-toe or
11 just to walk heal-to-toe?

12 **TROOPER HORTON:** I instructed her to touch heal-to-
13 toe for every step.

14 **MR. PRUETT:** And on the one-legged stand, you
15 testified that she put her foot down multiple
16 times throughout the test.

17 **TROOPER HORTON:** Correct.

18 **MR. PRUETT:** Well what do you consider multiple?
19 How would you define that word?

20 **TROOPER HORTON:** In this instance, at least 10 or
21 more.

22 **MR. PRUETT:** And are you sure about that as you are
23 about the rest of your testimony today?

24 **TROOPER HORTON:** That is to the best of my
25 recollection.



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1 MR. PRUETT: Well that's what I'm saying, how
2 certain are you that you're testifying
3 correctly this morning?

4 TROOPER HORTON: Well if you're asking to see the
5 video, I brought that with me. And I know you
6 already had the rule file, so you've seen it as
7 well. I'd be happy to show you exactly what I
8 was referring to if you think you need to see
9 it.

10 MR. PRUETT: On multiple times, 10 or more?

11 TROOPER HORTON: I'm not going to say exactly 10,
12 but multiple times to me it just means multiple
13 times. I don't know if it was 10, but if we
14 need to look at it specifically I'll get a
15 count.

16 MR. PRUETT: Well I'm just asking, I'm going back to
17 your recollection of events you testified to,
18 you said multiple times ---

19 TROOPER HORTON: Yeah, I didn't say 10 at the time.
20 I'll take back 10 and say just multiple times
21 and leave it at that ---

22 MR. PRUETT: Okay.

23 TROOPER HORTON: --- on my side without actually
24 counting ---

25 MR. PRUETT: Here's what I'm saying, Trooper.



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1 Multiple is like when someone says I've had a
2 few, I've had many. I mean, do you always say
3 well how much is that, so I'm asking the same
4 question. You say multiple times ---

5 **TROOPER HORTON:** Well let's look at it.

6 **MR. PRUETT:** Your Honor, I'm not asking to look at
7 it, I'm asking what your memory is that you
8 testified to.

9 **TROOPER HORTON:** I'm -- I'm not going to go by
10 memory, Sir. I'm just going to look it up if
11 you need for me to give you an exact number, I
12 can do that right here, right now.

13 **MR. PRUETT:** All right.

14 **TROOPER HORTON:** Or if you can accept multiple,
15 because I'm not going to give an exact number
16 here today. But I will if we go to trial.

17 **HEARING OFFICER** Well all I'll say is, is that if
18 you're gonna pull up the video to refresh your
19 recollection, I'll step off the record just to
20 save time on my recording and let you do that.
21 But it's up to y'all.

22 **MR. PRUETT:** (Inaudible) refreshing his recollection
23 so he can correctly testify. He can call it up
24 in just a minute.

25 **HEARING OFFICER** All right, well let me just step



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1 off the record. I'll resume once the video
2 footage is pulled up, thank you.

3 (Off the Record)

4 HEARING OFFICER All right, we're back on the
5 record. I believe Trooper Horton -- are you
6 gonna pull up the video, are you pulling it up
7 now?

8 TROOPER HORTON: I had it readily available, it just
9 ---

10 MR. PRUETT: Go ahead and let him watch it.

11 TROOPER HORTON: --- (inaudible) Judge ---

12 HEARING OFFICER Okay. Then go ahead and watch it.

13 MR. PRUETT: Yeah.

14 TROOPER HORTON: So you need to see it, Your Honor?

15 HEARING OFFICER No.

16 MR. PRUETT: I've seen it. That is your -- you're
17 using it to refresh your recollection.

18 HEARING OFFICER And Mr. Pruett's there, so if he's,
19 you know, has an objection to the number after
20 you see it, then I'll watch it. But otherwise
21 I'll assume that no objection means it's
22 accurate.

23 (Video is played)

24 HEARING OFFICER And just for the record, the --
25 Trooper Horton is now watching the video of the



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1 SFST, specifically the one-legged stand portion
2 to determine how many times the Respondent put
3 her foot down.

4 TROOPER HORTON: Okay. So here we go, Your Honor,
5 I'm just going to count as I see it. I want to
6 show you then. Okay.

7 MR. PRUETT: Judge, I'm gonna withdraw the question
8 and we can move on.

9 HEARING OFFICER Okay.

10 TROOPER HORTON: Can we just ---

11 MR. PRUETT: I ---

12 HEARING OFFICER I'm just going to find that it was
13 multiple times and I'm just gonna leave it at
14 that.

15 MR. PRUETT: Okay, Your Honor. Moving on to what
16 the crux of the matter before the Court this
17 morning is the -- Ms. Jeter's refusal to submit
18 and (inaudible) a breath sample. With respect
19 to that, first of all, did Ms. Jeter comply
20 with her instructions to not put anything in
21 her mouth after you conducted a mouth check?

22 TROOPER HORTON: Yes.

23 MR. PRUETT: All right. And did she ever indicate
24 at any point prior to or even during the test
25 in time that she was going to refuse to take



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1 the test?

2 TROOPER HORTON: Not that I recall.

3 MR. PRUETT: All right. And did she in any way
4 attempt to delay the testing process before or
5 during the test?

6 TROOPER HORTON: I believe she did, because most
7 people that I've arrested for DUI do not take
8 anywhere near two minutes to complete a test
9 (inaudible).

10 MR. PRUETT: My question is, for example, was she
11 trying to continue to ask you questions when
12 the test had began as some people do?

13 TROOPER HORTON: No, she didn't ask me any questions
14 because she said she understood everything.

15 MR. PRUETT: Okay. And so essentially what I'm
16 asking is, when you placed the tube through the
17 hole -- and the Spartanburg County setup is
18 you're in one room and separated by a glass
19 partition window and she's seated in the other
20 room, correct?

21 TROOPER HORTON: Correct.

22 MR. PRUETT: And there's an aperture or an opening
23 there by which you passed the implied consent
24 advisement, other paperwork and when the
25 appropriate time comes the tube itself,



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1 correct?

2 TROOPER HORTON: Correct.

3 MR. PRUETT: And my question is, when she was handed
4 the tube through the window, she didn't
5 hesitate or pause before she at least put her
6 mouth to the mouthpiece, correct?

7 TROOPER HORTON: No considerable amount of time, no.

8 MR. PRUETT: All right. So in any way, did she
9 obstruct your ability to advise her of her
10 implied consent rights or warnings?

11 TROOPER HORTON: No.

12 MR. PRUETT: And did she obstruct in any way the
13 actual taking of the test by knocking away the
14 mouth piece or ignoring you during the testing
15 period?

16 TROOPER HORTON: Specifically, no, but she did
17 obstruct the test eventually by taking so long
18 to try.

19 MR. PRUETT: Well that's my next question. Your
20 instructions were, I'm quoting, one long breath
21 in, one long breath out.

22 TROOPER HORTON: Basically, once she breathed in,
23 breathed it out. And I -- I asked her not to
24 stop breathing in general, so I asked her ---

25 MR. PRUETT: All right, well we're going to watch



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1 the video in the moment, but your exact words
2 were take one long breath in, one long breath
3 out?

4 TROOPER HORTON: Yes.

5 MR. PRUETT: All right. And how long should it take
6 a person to submit a adequate or sufficient
7 breath sample?

8 TROOPER HORTON: It depends on how fast they
9 breathe, how hard they breathe, if they don't
10 make any delays. I have seen people complete
11 their sample portion in 10 to 15 seconds.

12 MR. PRUETT: And others?

13 TROOPER HORTON: She's been the longest ever.

14 MR. PRUETT: Was she?

15 TROOPER HORTON: So I did not know the longest
16 because I don't count, I just know she's been
17 the longest ever.

18 MR. PRUETT: Let me ask you this, you -- you've been
19 -- you didn't testify, I don't think, about how
20 long you've been with the Highway Patrol?

21 TROOPER HORTON: No, but thirteen years
22 approximately.

23 MR. PRUETT: Thirteen years? And prior to that, did
24 you have any experience in law enforcement?

25 TROOPER HORTON: No.



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1 MR. PRUETT: All right. And so in 13 years, I
2 imagine you've made numerous DUI arrests?

3 TROOPER HORTON: I'm approaching now probably 600,
4 yes.

5 MR. PRUETT: 600. And so with 600 arrests, in your
6 experience, prior to Ms. Jeter, I'll qualify by
7 saying that. Prior to Ms. Jeter, what is your
8 recollection for the longest it took an
9 individual to submit an adequate or sufficient
10 breath sample.

11 TROOPER HORTON: I don't remember any times
12 specifically, but I just know she's the
13 longest. She stuck out that much.

14 MR. PRUETT: All right. Well we're gonna watch the
15 video, but I guess my question was you say one
16 long breath in and one long breath out, if a
17 person were to do that for themselves and still
18 not have an adequate sample, what would you do
19 at that point?

20 TROOPER HORTON: If they did what?

21 MR. PRUETT: If a person were to follow that
22 direction that you gave, one long breath in,
23 one long breath out, and they were to do so and
24 not produce an adequate sample, what, if
25 anything, would you do at that point?



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1 **TROOPER HORTON:** Well during the instructional phase,
2 I probably already told her, if you stopped,
3 take a deep breath or another breath and
4 continue to breathe until you supply that
5 adequate sample ---

6 **MR. PRUETT:** All right.

7 **TROOPER HORTON:** --- but in this case, when she
8 stopped breathing, off and on, off and on, I
9 don't know how many times, multiple times
10 again. But in general, if you -- if a person
11 does not supply an adequate sample in a time
12 frame, with all the beeping and everything
13 going on, as she did not, then I would write
14 them up, generally, for a refusal as well.

15 **MR. PRUETT:** All right. So to follow up on that, if
16 you see an individual that at least appears to
17 be taking one breath in, one breath out, and
18 not submitting an adequate sample, would you
19 give them any instruction or during that two
20 minute time period in which the breath sample
21 to be submitted, or just remain silent?

22 **TROOPER HORTON:** I remained silent, but because she,
23 in this case, had already exhibited knowledge
24 and comprehension of the entire process. So
25 there would be no need, it's an individual case



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1 by case, instructional phase and talking and
2 everything. And so there was no need to
3 continue to harp on her about how to take this
4 test.

5 MR. PRUETT: Well I'm asking you this specifically,
6 do you ever do that?

7 TROOPER HORTON: No.

8 MR. PRUETT: You never do that?

9 TROOPER HORTON: No, sir.

10 MR. PRUETT: And so if you see an individual that
11 takes a breath in and a breath out, if there's
12 not a sufficient or adequate sample, you
13 wouldn't say look, you need to take a deeper
14 breath, blow harder, you would not do that?

15 TROOPER HORTON: Well let me back ---

16 MR. PRUETT: You do not do that?

17 TROOPER HORTON: Let me back up, because you're
18 saying an adequate sample. I don't know what
19 an adequate sample is in general to any normal
20 person. All I know is how to instruct the
21 person as I did, so there's no such thing in my
22 mind because I don't know the actual volume or
23 liter of air that you have to have. And I did
24 not know that that day and I still don't know
25 that. I'm not required to. But Ms. Jeter



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1 explained that she understood how to submit to
2 the sample or not. And she did not listen to
3 instructions at all and therefore did not
4 provide an adequate sample. So for her, she
5 did not provide the adequate sample that you're
6 referring to. But in general, I'm not gonna
7 egg or harass anymore because I don't want to
8 interrupt the testing process to make a fair
9 test to that individual, as I did not her case.

10 **MR. PRUETT:** So the answer to my question was, you
11 do not speak up during the test process if you
12 see a person trying to but not submitting a,
13 according to SLED policy, a sufficient sample
14 to be tested?

15 **TROOPER HORTON:** No, I don't. I don't ---

16 **MR. PRUETT:** Okay.

17 **TROOPER HORTON:** --- interrupt the testing process
18 at all, like that. No.

19 **MR. PRUETT:** All right. As you've already stated,
20 we'll watch momentarily, Ms. Jeter objected to
21 your conclusion, right or wrong, she objected
22 to your conclusion that she had intentionally
23 refused to take the test?

24 **TROOPER HORTON:** Well it wasn't a conclusion, it was
25 a fact.



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1 MR. PRUETT: I said right or wrong, she objected to
2 your conclusion that she had refused.

3 TROOPER HORTON: Correct.

4 MR. PRUETT: All right. Your Honor, at this point I
5 would offer -- it's already in evidence, but
6 just for viewing, that segment, just of the
7 video, relating to her submitting ---

8 HEARING OFFICER Well, technically it's not and we
9 actually have to -- and but it works out
10 because we actually need to change the
11 numbering on it anyways since Respondent's 1
12 became Petitioners' ---

13 MR. PRUETT: Right.

14 HEARING OFFICER 5 or whatever -- 4. So the video
15 footage will now be Respondent's Exhibit 1 and
16 you're offering that now?

17 MR. PRUETT: Yes, sir.

18 HEARING OFFICER Okay. Any objection, Trooper?

19 TROOPER HORTON: Is he referring just to the
20 observation period and nothing before, during,
21 or after?

22 MR. PRUETT: I'm -- what I'm offering into evidence
23 as part of our case is the instructions given
24 by the trooper at 29 minutes into the test
25 process. Instructions given, and then you have



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1 Ms. Jeter, however you want to characterize it,
2 attempting to submit or submitting a breath
3 sample and then her reaction to the trooper ---

4 **HEARING OFFICER** I'll tell you what, can you get the
5 test footage up to where you want to start it,
6 and then that way I can ---

7 **MR. PRUETT:** Okay.

8 **HEARING OFFICER** --- point out what portions
9 specifically we're looking at?

10 **MR. PRUETT:** Right. It begins 20- min -- the
11 counter I am using, Your Honor, is the counter
12 on the bottom of the screen.

13 **HEARING OFFICER** All right.

14 **MR. PRUETT:** And it begins at 29 minutes, and I've
15 kind of rounded that off.

16 **HEARING OFFICER** Okay.

17 **MR. PRUETT:** And it runs through about 36 minutes,
18 Judge.

19 **HEARING OFFICER** Okay.

20 **MR. PRUETT:** So it's a period of approximately seven
21 minutes.

22 **HEARING OFFICER** Seven minutes.

23 **MR. PRUETT:** And we don't need to watch it, but
24 that's what I'm relying upon and that's what my
25 questioning of Trooper Horton has been



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1 predicated upon is that seven minutes.

2 **HEARING OFFICER** Okay. Trooper, any objection to
3 the -- to that portion of the video being
4 admitted as Respondent's Exhibit 1?

5 **TROOPER HORTON:** Your Honor, I'm prepared with the
6 exact times and seconds of everything that I've
7 talked about as far as that test goes, and I
8 would like for him to be very specific on the
9 times and exactly what he's referring to.

10 **HEARING OFFICER** Well I think he just did, minutes
11 29 through minute 36. And that's ---

12 **TROOPER HORTON:** Okay. Well mine's dated with like
13 the actual physical time for that one, mine's
14 from 05:44 to 06:17

15 **MR. PRUETT:** Oh (inaudible).

16 **TROOPER HORTON:** So he's talking about 29 minutes
17 into ---

18 **MR. PRUETT:** Yes.

19 **HEARING OFFICER** Okay. So go to ---

20 **TROOPER HORTON:** So let's make ---

21 **HEARING OFFICER** --- go to 29 and see what -- how
22 that corresponds with his ---

23 **MR. PRUETT:** Yeah.

24 **TROOPER HORTON:** So that would be 53:03, 06:13, give
25 or take?



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1 MR. PRUETT: 29, it's ---
2 TROOPER HORTON: 6:13
3 MR. PRUETT: --- it's 06:13:40 ---
4 HEARING OFFICER p.m.?
5 TROOPER HORTON: a.m.
6 HEARING OFFICER Oh, a.m., a.m. 06:13 ---
7 TROOPER HORTON: That sounds about right for 29
8 minutes. Yeah, no objections.
9 HEARING OFFICER And then we'll just say seven
10 minutes passed that, so it's just 06:20 a.m.
11 MR. PRUETT: That would be approximately correct.
12 Yes, sir.
13 HEARING OFFICER Right. All right, no objection?
14 All right, so that's -- Respondent's Exhibit 1
15 is admitted without objection.
16 (Respondent's Exhibit Number 1 was marked for
17 identification purposes and entered into the record.)
18 MR. PRUETT: And you're just gonna watch that at
19 your leisure? Okay.
20 HEARING OFFICER Yeah, unless y'all really want me
21 to watch it here ---
22 MR. PRUETT: No.
23 HEARING OFFICER --- but I'm gonna be watching it
24 again anyway while I write the order -- while
25 I write the order, so.



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1 MR. PRUETT: Okay. I'm not gonna play it though.

2 TROOPER HORTON: Oh, you're not?

3 MR. PRUETT: No, he said he ---

4 HEARING OFFICER Unless you -- unless you want to
5 play it. But I mean if -- I'm gonna watch it
6 again ---

7 TROOPER HORTON: Well what's he -- what's he trying
8 to show is what I'm asking I guess.

9 HEARING OFFICER He's just showing what was done
10 during the hearing test to -- for me to
11 determine whether or not it was a ref- -- a
12 refusal or not.

13 TROOPER HORTON: So you'll look at that ---

14 HEARING OFFICER And see whether I ---

15 TROOPER HORTON: But you're not gonna agree with it
16 right now or not, you're gonna do that later?

17 HEARING OFFICER I'm gonna make a decision on that.
18 That is the decision.

19 TROOPER HORTON: All right. Okay.

20 HEARING OFFICER No, I'll make that in the order.

21 TROOPER HORTON: Okay. Sounds good.

22 HEARING OFFICER Okay, so -- all right, so I think
23 we're fine with that not being played now, I
24 will watch it later of course. Anything else
25 or any other questions, Trooper Horton?



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1 TROOPER HORTON: No.

2 MR. PRUETT: No. No cross -- he's already rested
3 his case, I was gonna have Ms. Jeter just
4 briefly testify, Judge.

5 HEARING OFFICER Okay. All right. Well I was -- I
6 was asking if you had any more cross
7 examination questions.

8 MR. PRUETT: No, sir. No, sir.

9 HEARING OFFICER Any other testimony, Trooper Horton,
10 based on questions you asked?

11 TROOPER HORTON: Just based on what he's trying to
12 show you, at 06:21.11, which I don't know how
13 many -- you know, that's obviously -- let's
14 see, that's, 16, 26, 36 -- about 37 minutes
15 total in -- in that room. 06:21.11, that's
16 when she refused to sign for her test result
17 after the result came out at 06:20, so if you
18 want to make a note of that, that way you can
19 skip kind of around, get you exactly there, but
20 I have nothing else on that.

21 HEARING OFFICER So I should watch it up until 06:21
22 a.m.?

23 TROOPER HORTON: Yeah, basically because that's when
24 pretty much within 30 seconds after that I
25 turned the entire ---



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1 HEARING OFFICER Which that would be ---
2 TROOPER HORTON: --- video off.
3 HEARING OFFICER --- up to 37 at the bottom. That's
4 fine ---
5 TROOPER HORTON: Correct.
6 HEARING OFFICER --- it's not -- I don't think it's
7 gonna matter.
8 MR. PRUETT: I don't have no objection to the Court
9 watching the entire video, I'm just trying to
10 narrow down what I believe the issue is before
11 the Court and ---
12 HEARING OFFICER Yeah.
13 MR. PRUETT: --- it showing that not Ms. Jeter
14 refused to take the test.
15 HEARING OFFICER Yeah, I don't think there's -- and
16 there's nothing contested I think up to that
17 point anyway ---
18 MR. PRUETT: Okay.
19 HEARING OFFICER --- so I probably will not look at
20 the video up to that point just for the sake of
21 expedience.
22 MR. PRUETT: You know and I will say this, having
23 heard the testimony of Trooper Horton, the only
24 issue we're contesting at this juncture is
25 whether or not Ms. Jeter actually refused to



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1 submit ---

2 **HEARING OFFICER** Right. This is a question of
3 whether it's a constructive refusal or not.
4 That's the issue.

5 **MR. PRUETT:** Correct. That's correct.

6 **HEARING OFFICER** All right. I don't know if --
7 Trooper Horton, did you -- other than that, did
8 you have any other -- anything else to add in
9 resp- -- in response to questions you've been
10 asked?

11 **TROOPER HORTON:** No, not at this time, Your Honor.

12 **HEARING OFFICER** Okay. All right. So, Ms. Jeter's
13 going to testify?

14 **MR. PRUETT:** Briefly, yes, sir.

15 **HEARING OFFICER** Okay. All right. Ms. Jeter,
16 please raise your right hand. Do you solemnly
17 swear or affirm that the testimony you're about
18 to provide will be the truth, the whole truth,
19 and nothing but the truth, so help you God?

20 **MS. JETER:** I do.

21 **HEARING OFFICER** All right, can you state your name
22 again for the record?

23 **MS. JETER:** Breyonna Shaquella Jeter.

24 **HEARING OFFICER** All right. Go ahead.

25 **MS. JETER - DIRECT EXAMINATION BY MR. PRUETT:**



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1 MR. PRUETT: Ms. Jeter, you have a very soft voice,
2 so you need to speak up so we can hear the
3 recording, okay?

4 HEARING OFFICER Yeah, just gotta be able to hear
5 the -- have this recorded.

6 MR. PRUETT: And, Ms. Jeter, you live in Union,
7 South Carolina, is that correct?

8 MS. JETER: Yes.

9 MR. PRUETT: And do you recall being arrested back
10 in May of this year?

11 MS. JETER: Yes.

12 MR. PRUETT: All right. And do you recall being
13 taken to jail?

14 MS. JETER: Yes.

15 MR. PRUETT: And offered a breath test?

16 MS. JETER: Yes.

17 MR. PRUETT: Ms. Jeter, have you ever been arrested
18 for driving under the influence before?

19 MS. JETER: I haven't.

20 MR. PRUETT: Have you ever been offered a breath
21 test or anything like that before?

22 MS. JETER: No.

23 MR. PRUETT: All right. And I believe the trooper
24 justified that during the time period that you
25 were being arrested, you mentioned the fact



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1 that you were in the Army, the (inaudible),
2 correct?

3 **MS. JETER:** Yes.

4 **MR. PRUETT:** And are you required as part of your
5 military occupational specialty to drive a
6 vehicle?

7 **MS. JETER:** I am.

8 **MR. PRUETT:** So it's important for you to be able to
9 maintain your driving privileges?

10 **MS. JETER:** Yes.

11 **MR. PRUETT:** Now, having never done this before.
12 Did you think that you understood the
13 directions that were given to you by Trooper
14 Horton about how to blow into the machine?

15 **MS. JETER:** Yes.

16 **MR. PRUETT:** And when the time came for you to give
17 a breath sample, was it your intention to give
18 a breath sample?

19 **MS. JETER:** Yes.

20 **MR. PRUETT:** And when you actually began blowing
21 into the tube, or at the very beginning --
22 yeah, two minutes, how did you blow at first?

23 **MS. JETER:** I breathed. I took a breath in, I
24 breathed out. I guess it wasn't like strong
25 enough or anything, so I just kept blowing,



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1 kept blowing, kept blowing, tried to get a
2 little like harder, or stronger. Kept blowing,
3 blowing, blowing. He didn't tell me I was
4 doing it, like, wrong or anything or just
5 breathing harder or that it wasn't taking, so
6 I thought I was doing it correctly the whole
7 time.

8 **MR. PRUETT:** And did you have difficulty at certain
9 points maintaining your breath, catching your
10 breath?

11 **MS. JETER:** Yes.

12 **MR. PRUETT:** Why was that?

13 **MS. JETER:** Because I was blowing for so long.
14 Nobody can just blow for two whole minutes.
15 Like I would stop, catch a breath, and continue
16 to blow as hard as I could.

17 **MR. PRUETT:** All right. And was your -- was it your
18 intention to -- to try to trick the machine and
19 refuse ---

20 **MS. JETER:** No.

21 **MR. PRUETT:** --- a breath test?

22 **MS. JETER:** No.

23 **MR. PRUETT:** And once the breath test was over and
24 you were told by the trooper that he was
25 refusing -- he was writing you up as having



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1 refused the test, what was your reaction or
2 response?

3 MS. JETER: I was telling him that I was trying
4 because I wouldn't want a refusal because I
5 need to like take it to maintain my license or
6 whatever. And I asked could I take it over.
7 (Inaudible) take it over, he said I had refused
8 even though I, to my knowledge, I was doing it
9 correctly. It didn't take.

10 MR. PRUETT: All right. And he's already testified
11 that you agree, you refused to sign the form
12 agreeing that you had refused, is that correct?

13 MS. JETER: Yes.

14 MR. PRUETT: Okay. Your Honor, that's all I have
15 for Ms. Jeter.

16 HEARING OFFICER All right. Any questions, Trooper,
17 for Ms. Jeter?

18 TROOPER HORTON: Yes, Your Honor.

19 HEARING OFFICER All right.

20 MS. JETER - CROSS EXAMINATION BY TROOPER HORTON:

21 TROOPER HORTON: Okay. Ms. Jeter, when did you get
22 your license the first time in the State of
23 South Carolina or the United States in general?

24 MS. JETER: You said when did I get my license?

25 TROOPER HORTON: Yeah, when did you get your license



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1 after your permit, about how long ago?

2 MS. JETER: A few years ago ---

3 HEARING OFFICER You have to speak up, Hun.

4 MS. JETER: It was a few years ago, I can't remember
5 what year it was. Maybe 2018, 2019. I don't
6 know.

7 TROOPER HORTON: How many times did it take you to
8 get your license test after, you know, you have
9 to take a test after beginner permit time,
10 where is that -- how long -- how many times did
11 it take you to get your license?

12 MS. JETER: One.

13 TROOPER HORTON: One time? So do you remember
14 studying really hard before you took your
15 permit test and really hard before you took the
16 actual driving test? Were you like really
17 ready for it, you studied a really long time
18 and hard time to do it?

19 MS. JETER: Yes.

20 TROOPER HORTON: Do you remember all that? Most
21 people do their first time obviously. So do
22 you not ever remember when you read through the
23 manual, looked online or talked to people or
24 anything like that, that if you got arrested
25 for a DUI in the State of South Carolina, based



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1 on your statements that you just said you
2 studied really hard for, do you ever remember
3 reading about what happens and what you should
4 do as a responsible driver if you ever get
5 stopped or arrested for driving under the
6 influence of alcohol? Do you remember what
7 that manual or your training said before you
8 took your test?

9 MS. JETER: For the DUI?

10 TROOPER HORTON: Yes, what -- what do you remember
11 about reading DUI in that manual or anything
12 other than that you might have used to study
13 for that important test which you said you
14 studied really hard for?

15 MS. JETER: I -- that was years ago.

16 TROOPER HORTON: You don't remember anything?

17 MS. JETER: That was ---

18 TROOPER HORTON: You don't remember anything about
19 if you got stopped or arrested for DUI ---

20 MS. JETER: What are you trying to ask -- what ---

21 TROOPER HORTON: Because -- because you -- you're
22 trying to state that, you know, at certain
23 times you weren't aware of this, weren't aware
24 of that. But I just want -- wanted to know how
25 much do you remember from all that hard



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1 studying? (Inaudible) if you got stopped for
2 a DUI, you gotta submit to the test properly.

3 MS. JETER: I did submit to the test.

4 TROOPER HORTON: No, that's not what I'm asking you.
5 How much study time out of the -- how much of
6 the study time you put into it, how much of
7 that do you remember about DUI in general?

8 MS. JETER: It was years ago, like ---

9 TROOPER HORTON: Well you said a few years, but you
10 ---

11 MS. JETER: I -- it was ---

12 TROOPER HORTON: --- definitely remember -- I bet
13 you remember everything about the test. Where
14 you were, what you did wrong, what you did
15 right, who was there.

16 HEARING OFFICER Let's stick to que- --

17 MR. PRUETT: I'm gonna object ---

18 MS. JETER: I ---

19 MR. PRUETT: --- at this point.

20 HEARING OFFICER Yeah, I ---

21 TROOPER HORTON: So how much do you remember about
22 that DUI before you took that test?

23 MS. JETER: I don't understand what this got to do
24 with anything.

25 HEARING OFFICER Well if it helps, and, Mr. Pruett,



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1 can correct me if I'm wrong, but citizens are
2 charged with knowledge of the law, okay? So I
3 think that settles that, so let's move on.

4 **TROOPER HORTON:** Okay. When I instructed you how to
5 take this test, did you tell me you understood
6 everything that I told you before you even
7 tried?

8 **MS. JETER:** I did.

9 **TROOPER HORTON:** You did? Okay. So do you remember
10 me telling you to take as deep a breath as you
11 can and breathe it out one time after you've
12 taken out that test and not to stop breathing
13 until I asked you to stop?

14 **MS. JETER:** Yes.

15 **TROOPER HORTON:** Okay. So why did you just tell
16 everybody that you had to stop multiple times,
17 because that's not what I instructed you.

18 **MS. JETER:** To catch my -- can you breathe out for
19 two whole minutes? I don't know anyone that
20 can. I'm not trying to (inaudible) ---

21 **TROOPER HORTON:** Right but normally it doesn't take
22 that long. That's what I'm trying to state.

23 **MS. JETER:** But I didn't know how long it's supposed
24 to take. And I ---

25 **TROOPER HORTON:** Oh, you didn't?



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1 MS. JETER: --- was just breathing. How am I
2 supposed to know? Like I didn't know ---
3 TROOPER HORTON: What -- what do you remember ---
4 MS. JETER: --- two minutes was too long.
5 TROOPER HORTON: Okay.
6 MS. JETER: I did not know that.
7 TROOPER HORTON: Okay. What do you remember me
8 telling about the tone you would hear and what
9 would happen to that tone if you were not
10 providing a proper air sample? What do you
11 remember me telling you about that?
12 MS. JETER: You just said it was mostly like it
13 would be beeping if it wasn't proper ---
14 TROOPER HORTON: Okay. If it wasn't proper. So
15 during this test it's obvious you can hear the
16 beeping, so you knew you were not giving a
17 proper air sample, correct?
18 MS. JETER: In the video it eventually stopped and
19 it was a long tone. Like, if want, go watch
20 the videos, in the video that I was breathing
21 properly and it was not doing the beeping for
22 a long period of time, so I don't know why it
23 didn't read it during that time.
24 TROOPER HORTON: Because you weren't breathing,
25 that's what the machine's designed to do.



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1 That's why I explained it to you that way.
2 Okay. Why did you -- why are you telling this
3 Court in this proceeding that you asked me to
4 retake this test when that's clearly not
5 evident on the video that I was ---

6 **MR. PRUETT:** Objection, that's an argumentative
7 question.

8 **TROOPER HORTON:** Okay. Why ---

9 **HEARING OFFICER** Rephrase.

10 **TROOPER HORTON:** --- are you telling the Court that
11 you asked me to retake the test? Because I
12 don't remember that.

13 **MR. PRUETT:** That's an argumentative question again,
14 I object. And plus, it's in evidence, Judge.

15 **TROOPER HORTON:** Do -- did you ask me ---

16 **HEARING OFFICER** Overruled. I -- well, I'm sorry.
17 Sustained, but I will watch the video to
18 determine whether or not she asked to take it
19 again.

20 **TROOPER HORTON:** So would you know at that time that
21 just because if you did ask that I'm not
22 required to let you retake the test? Would you
23 know that?

24 **MR. PRUETT:** Your Honor, object again. He's asking
25 about the Court of Law.



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1 TROOPER HORTON: I just asked her would she know
2 that. But okay. Your Honor ---

3 HEARING OFFICER I -- I don't think it matters
4 anyway. Anything else?

5 TROOPER HORTON: I have no further questions, Your
6 Honor, at this time.

7 HEARING OFFICER All right. Mr. Pruett, any
8 redirect?

9 MR. PRUETT: No, sir. No redirect, and that would
10 be our case.

11 HEARING OFFICER All right. Do y'all want to make
12 closing arguments?

13 CLOSING STATEMENT - MR. PRUETT:

14 MR. PRUETT: Well I just have a motion, Judge. I
15 think -- I was kind of reading over the case
16 law and procedure. I need to make a motion,
17 which really is, in summary will probably be
18 the closing, but the motion, Your Honor, as
19 Your Honor correctly surmised earlier, the --
20 the Respondent submits that this was a
21 constructive type refusal that was discussed in
22 the Chisolm case, and I have a copy of that to
23 hand up to Your Honor, but the case of Chisolm
24 vs. South Carolina Department of Motor
25 Vehicles, and the site is (inaudible) SC-593,



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1 and that's a case in the Court of Appeals from
2 2013. And the Chisolm case, I mean, is the
3 only case I know of, reported case, that
4 discusses in some detail on whether or not in
5 a setting comparable to this, individual
6 intentionally refuses to submit a sufficient
7 breath test sample, whereby the machine can
8 actually conduct the test. And it's notable,
9 Your Honor, that the Court of Appeals, they
10 cited several cases, and its discussion about
11 when -- and a perfect setting may be that --
12 that the Court needs to look at whether or not
13 it was an intentional refusal. Because not
14 every inadequate or insufficient sample is a
15 refusal, and one of the cases they cited was
16 Bomba vs. The Commonwealth. And in that case,
17 the (inaudible) case they referred to and they
18 discussed at length, and I've highlighted it,
19 Your Honor, (inaudible) the Court is that in
20 that case the individual gave a series of short
21 breaths but not one continuous breath during
22 that two minutes. And the -- the breath test
23 device, you know, indicated that it had not
24 been an adequate sample and whether or not it
25 should have been a refusal and the officer hit



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1 the yes button and it went down as a refusal.
2 And ultimately that case was reversed by the
3 Appellate Courts because you have a situation
4 where the individual is making a good faith
5 attempt, although unsuccessful, to submit a
6 proper breath sample. And in these situations,
7 it's completely within the discretion of the
8 officer as to whether or not he chooses to
9 offer another test, or to hit the refusal
10 button and maintain the individual had refused.
11 And that's what the purposes of this morning's
12 is, is to review the video and make a
13 determination whether or not Ms. Jeter in fact
14 intentionally was seeking to refuse to submit
15 an adequate breath sample that the machine can
16 test. And, Your Honor, I know you haven't seen
17 the video yet, but watching the video and the
18 testimony of Trooper Horton is that Ms. Jeter
19 did nothing to indicate that she was going to
20 refuse the breath test. Throughout the process
21 she never said I'm not gonna take the test or
22 I may not take the test. She cooperated fully.
23 When the time came for her to submit a sample
24 she didn't delay taking it. And I know the
25 Court has probably watched many videos and I



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1 know Trooper Horton has made many arrests where
2 individuals will attempt to kind of talk their
3 way out of it by asking questions and when the
4 machine actually starts beeping, they'll begin
5 to make excuses for not taking the test or
6 delay it. That didn't happen in this case, she
7 immediately took the tube, she -- as she
8 testified again, blowing kind of slowly at
9 first and then as we get a few seconds into the
10 actual testing to -- two minute time frame as
11 she said she began to blow harder. And it's
12 one of those things, Judge, that you just have
13 to watch it to see how many times she took a
14 deep breath, blew into the tube, but apparently
15 did not submit an adequate sample. I know
16 Trooper Horton testified that he never -- I
17 guess as a matter of practice, tells
18 individuals who are taking the test that you
19 need to take a deeper breath or you need to
20 blow harder. That's within his discretion to
21 do or not do that. But I would say again, in
22 my experience, when an officer sees an
23 individual who is sincerely attempting at to
24 least take the test, they normally say
25 something like you're not submitting a



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1 sufficient sample, you need to take a deeper
2 breath, you need to blow harder, if you intend
3 to submit a sample. So I would say based upon
4 the video recording that has been submitted
5 into evidence, the Court will watch, and based
6 upon the fact that there's no indication that
7 Ms. Jeter ever intended to intentionally refuse
8 the test, that she should not be penalized with
9 a suspension. Again, she testified how
10 important it is for her to have a license, and
11 I know that's true of everybody. Everyone
12 wants to have a license, but for some
13 individuals, the ability to drive impacts your
14 ability to work, or in her case, to maintain
15 her current status as a person in the United
16 States Army. And, you know, if it was me, if
17 it was a lawyer, I wouldn't probably care if I
18 took the test or not, it's not gonna impact my
19 ability to practice law. But for another
20 individual, they're gonna be concerned and
21 they're gonna be wanting to take that test to
22 avoid the consequences of refusal. That's all
23 I have, Judge. Thank you for hearing.

24 **HEARING OFFICER** Yes, sir. All right, Trooper
25 Horton, anything?



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CLOSING STATEMENT - TROOPER HORTON:

TROOPER HORTON: Yes, sir. So Your Honor, it's gonna be left up to your discretion to watch the video obviously, and understand whether or not I gave her clear, concise, and thorough instructions on how to submit or not to submit to this breath sample that I requested of her. She already stated that she studied very diligently, thoroughly for her driver's test. But she saw it of no importance by her own words, really, of anything about DUI; why was I even asking that. That's a very important thing for her to note. You know, every batter who steps into the batter's box, or everybody who shoots a basketball, their intent is to score. Their intent is to provide expertise in that area. So the intent can be overlooked sometimes when you're taking these tests, there's no way I would know whether she intended to take this test properly or not based on what I saw her or did not hear or see. But I can tell you that I gave her very thorough instructions on how to take this test, and she admitted and acknowledged that she understood completely. And for me, I do not



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1 encourage or discourage anybody to take
2 anything on breath tests. I don't instruct
3 them to continue to keep going, or that you're
4 not providing an adequate sample as counsel
5 just mentioned, because for me to say during
6 all of that, first of all is a distraction.
7 Secondly, once they've already told me, as she
8 did, that she understood how to do the test
9 properly, there's no need for me to reiterate
10 anything. And then thirdly, if I were to say
11 to her during that test, hey, you're not doing
12 it right or you're not providing an adequate
13 sample, would defeat the whole process and
14 basically show that I did not believe what she
15 was telling me, which is she understood how to
16 take this test and provide a sample. Now,
17 intent, I have seen people in my close to 600
18 DUI arrests, I have seen people who may be
19 unconscious, or maybe didn't want to flat out
20 take the test or started to take the test and
21 then stepped away, or just plain out blatantly
22 said I'm not gonna do it, however I still gave
23 them the 20 minute observation period. Had she
24 told me, I still would have waited the 20
25 minutes. Didn't happen in this case, but as we



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1 stated again, there's no way for me to know her
2 intent, because I have seen intent many
3 different forms and varieties with DUI arrests.
4 So for me to sit there and tell her that she --
5 this is how to take the test, what to listen,
6 what to look for, what to do. She clearly did
7 not follow instructions at all. Just as she
8 did not follow instructions during her
9 standardized field sobriety tests, so there's
10 no -- no reason for us to believe at all that
11 she took this test properly just based on maybe
12 her intent. So, Your Honor, with that, I'll
13 just note that I did everything properly
14 according to SLED policies and South Carolina
15 State Law in reference to driving under the
16 influence charges. And I have nothing further
17 to say at this time, Your Honor, except please
18 look at the entire video, not just the minutes
19 that counsel referred to, because it will show
20 several other things that might be of interest
21 to you to make your decision.

22 **HEARING OFFICER** All right. I think that's it, so
23 with that I'll consider this hearing now
24 closed. I'll issue a decision soon in writing.
25 Thank you all.



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1 (There being nothing further, the hearing concluded.)
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September 15, 2022

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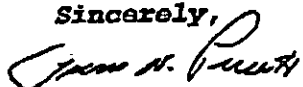
Samuel L. Johnson, Hearing Officer
Office of Motor Vehicle Hearings
Edgar A. Brown Building, Suite 325
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Breyonna Shaquelle Jeter v. South Carolina Department of Motor
Vehicles and South Carolina Department of Public Safety
Docket No. 22-OMVH-01-2294-CC

Dear Mr. Johnson:

Enclosed with this letter is a Notice of Appeal and other related items. Because Ms. Jeter has initiated an appeal, I am requesting that a transcript be made of the contested case hearing heard by you in this matter on August 15, 2022, at the Greer Municipal Court, located in Greer, South Carolina. Please contact me if you have any questions regarding this request for a transcript.

Sincerely,



Trent N. Pruett

c: Honorable Jana E. Shealy
Clerk of Court
S.C. Administrative Law Court
Edgar A. Brown Building, Suite 224
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September 15, 2022

Honorable Jana E. Shealy
Clerk of Court
S.C. Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Breyonna Shaquelle Jeter v. South Carolina Department of
Motor Vehicles and South Carolina Department of Public Safety
Docket No. 22-OMVH-01-2294-CC

Dear Ms. Shealy:

Please find enclosed with this letter a Notice of Appeal, which appeals the "Final Order and Decision" of Hearing Officer Samuel L. Johnson, of the Office of Motor Vehicle Hearings, dated August 17, 2022. Also enclosed with this letter is the \$150.00 filing fee required for the appeal, a Certificate of Service by Mail, a copy of the Hearing Officer's "Final Order and Decision," and a copy of the letter requesting a transcript from the Hearing Officer.

Please advise me if anything else is needed to supplement this appeal.

Sincerely,

Trent N. Pruett

c: Samuel L. Johnson, Hearing Officer
Office of Motor Vehicle Hearings
Edgar A. Brown Building, Suite 325
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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Breyonna Shaquelle Jeter,	)	Docket No. 22-OMVH-01-2294-CC
	)	
Appellant,	)	
	)	
v.	)	
	)	
South Carolina Department	)	NOTICE OF APPEAL
of Motor Vehicles and	)	
South Carolina Department	)	
of Public Safety,	)	
	)	
Respondents.	)	
	)	

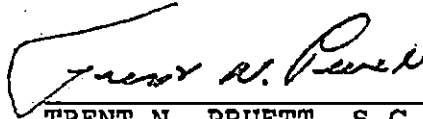
Notice is hereby given that Appellant, Breyonna Shaquelle Jeter, does hereby appeal the "Final Order and Decision" of Hearing Officer Samuel L. Johnson, of the Office of Motor Vehicle Hearings, dated August 17, 2022, and received by the Appellant on August 17, 2022, which upheld the suspension of the Appellant's driving privileges pursuant to the provisions of S.C. Code Ann. §§56-5-2950 and 2951.

That more specifically, the Appellant states that as her ground for appeal the following:

1. That the Hearing Officer erred by finding and concluding that the Appellant refused, or constructively refused, to submit an adequate or sufficient breath sample that could be tested pursuant to the provisions of S.C. Code Ann. §56-5-2950 and S.C. Code Ann. §56-5-2951.

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September 15, 2022

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Brayonna Shaquelle Jeter,	)	Docket No. 22-OMVH-01-2294-CC
	)	
Appellant,	)	
	)	
v.	)	
	)	
South Carolina Department	)	CERTIFICATE OF SERVICE
of Motor Vehicles and	)	BY MAIL
South Carolina Department	)	
of Public Safety,	)	
	)	
Respondents.	)	
	)	

I certify that I have served the Appellant's "Notice of Appeal" in the above-captioned action, by depositing same in the United States Mail, first class postage prepaid, on September 15, 2022, addressed to the following:

Honorable Jana E. Shealy
Clerk of Court
S.C. Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

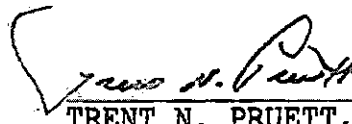
Samuel L. Johnson, Hearing Officer
Office of Motor Vehicle Hearings
Edgar A. Brown Building, Suite 325
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September 15, 2022

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**STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS**

South Carolina Department of Public Safety)
and)
South Carolina Department of Motor)
Vehicles,)

Petitioners,)

v.)

Breyonna Shaquelle Jeter,)

Respondent.)

Docket No. 22-OMVH-01-2294-CC

FINAL ORDER AND DECISION

APPEARANCES: For Petitioners: Jesse Horton, SCDPS

For Respondent: Trent Pruett, Esq.

OTHER INFORMATION: 104168506

Type of Hearing: Implied Consent (S.C. Code Ann. § 56-5-2950)

Respondent's alleged refusal to take chemical test(s)

STATEMENT OF THE CASE

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) pursuant to Respondent Breyonna Shaquellé Jeter's (Respondent) request for a contested case hearing regarding the suspension of her driver's license or driving privilege. Respondent was arrested on May 8, 2022, for an offense arising out of an act alleged to have been committed while she was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon the alleged refusal to submit to a breath, blood, or urine test, Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 (2018) and received a notice of suspension. The matter was assigned to me to conduct a hearing.

Written notice of the hearing was sent to Petitioners South Carolina Department of Public Safety (SCDPS) and South Carolina Department of Motor Vehicles (SCDMV), and to Respondent. The hearing was held on August 15, 2022 at the Greer Municipal Court in Greer, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege should be upheld.

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FINDINGS OF FACT

Having considered the documents admitted into evidence and observed the witnesses and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

Notice of the date, time, place, and subject matter of the hearing was timely given to the parties.

On May 8, 2022, at approximately 4:18 a.m., Trooper Horton was on routine patrol, sitting stationary, on U.S. Highway 176 in Spartanburg, South Carolina. He was checking speeds and was a certified speed-measuring-device operator (Petitioners' Exhibit 2) at the time he saw a gray Nissan sedan (the vehicle in question) traveling on Highway 176 at a speed he estimated to be seventy-five miles per hour (mph) in a thirty-five-mph zone. There were no other vehicles in the vicinity at that time. Trooper Horton then operated his speed device on the vehicle, which indicated the vehicle was traveling at seventy-six mph. The speed measuring device had been properly calibrated and was working properly at the time. Trooper Horton measured the speed of the vehicle. He beeped his horn when the vehicle passed him. Trooper Horton then initiated traffic stop on the vehicle. The vehicle continued speeding before abruptly changing lanes to the right and eventually pulling over at a gas station.

Trooper Horton approached the vehicle and found two occupants, the driver being Respondent. Trooper Horton asked Respondent to produce her driver's license. Respondent searched in several places for her license before remembering that it was in her front left pocket. The driver's license is how Trooper Horton identified Respondent. Trooper Horton explained the reason for the stop and observed a large (forty-ounce) beer in the front console that was three-quarters full and was still fresh and cold. Trooper Horton also observed that Respondent was wearing an orange wrist band. Respondent stated that she used this wrist band to be able consume alcohol at a place called Twerker's, a local bar in Spartanburg. Respondent's eyes were extremely bloodshot, glassy, and watery. She also had slow and slurred speech and took a while to respond to Trooper Horton's questions and requests. There was also a strong odor of alcohol coming from inside the vehicle. Trooper Horton had Respondent exit the vehicle and still smelled alcohol on Respondent's person but saw no sign of any spilled alcohol on Respondent's person.

Respondent stated she considered herself healthy, had no broken bones, and was not seeing a doctor or dentist to get prescribed medications. She also told Trooper Horton that she was in the

National Guard and would rather have a warning because she would get in trouble if she received a citation. Respondent also admitted to drinking at the bar and at a friend's house (a cranberry-grape alcoholic drink) and had been on her way to her aunt's house. When asked if she would perform standardized field sobriety tests (SFSTs), which Trooper Horton was certified to administer (Petitioners' Exhibit 1), Respondent consented. She initially stated that she did not wear glasses or contacts, but when Trooper Horton showed her that she had a vision restriction on her driver's license, she stated that she wore soft contact lenses. Respondent was allowed to leave her contact lenses in during the SFSTs.

During the horizontal gaze nystagmus (HGN) test, Respondent had equal pupil size and equal tracking in both eyes. She exhibited a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation in both eyes, and nystagmus prior to forty-five degrees; she did not exhibit vertical nystagmus.

During the walk-and-turn test, Respondent was allowed to take her sandals/flipflops off. Trooper Horton then gave her instructions, which she said she understood. Respondent did not stay in the starting position, never touched heel to toe (though she had been instructed to do so), used her arms for balance, swayed, stepped offline, and sometimes took "large, gaping steps" (though never instructed to).

During the one-leg stand test, Trooper Horton had Respondent stand still and put her arms by her side. He then gave Respondent instructions, which she stated she understood. Respondent still had her sandals/flipflops off, and there were no holes, cracks, or debris on the pavement, and it was a flat, level surface. It was also 66 degrees on a clear night. During the test, Respondent swayed, used her arms for balance, and put her foot down multiple times.

At 4:36 a.m., Respondent was arrested for driving under the influence (DUI). Respondent to be given a warning, but Trooper Horton did not give one. Respondent was taken to the Spartanburg County Detention Center, where Respondent asked to go to the bathroom, which Trooper Horton allowed. Respondent was then placed in the breath analysis (BA) room a few minutes later.

After Respondent was placed in the BA room, Trooper Horton turned on the video recording system and advised Respondent that she was being videotaped and recorded and told her that she would be asked to take a breath test. He instructed Respondent not to put anything in her mouth. He also read and provided Respondent with a written copy of her implied consent rights

(Petitioners' Exhibit 3), and Respondent signed the written copy and said she understood them. Trooper Horton checked Respondent's mouth for foreign materials and again instructed her not to put anything in her mouth, and she stated she understood and did not. They waited the twenty-minute observation period, during which Trooper Horton explained at length how to take the breath test. At the end of the twenty-minute observation period, Trooper Horton told Respondent to take one long breath in and one long breath out. He also told her to "take a deep breath, as big as you can and exhale into this mouthpiece."¹ He also told Respondent not to spit, flick her tongue, or cover the mouthpiece. He also told her not to put the whole tube in her mouth, only about halfway and not to suck back on the mouthpiece while taking the test. He again instructed Respondent to take "one long breath in, one long breath out." He also instructed her that once she started the test, to breathe out until he told her to stop. He further told her that if she stops and has to start over, the machine would beep intermittently because she is not providing a sample. He stated that as "[the machine] has got a long, steady tone, you are providing a sample; that's what we want to hear." Respondent indicated by the affirmative nodding of her head that she understood the instructions on how to take the test, and she nodded her head in the negative that she did not have any questions. She then consented to take the test.

During the two minutes given for the test, Respondent breathed into the machine intermittently and took breaths in, but she did not provide an adequate breath sample and the machine timed out. Respondent began blowing into the machine at approximately 31:10 on the video (Respondent's Exhibit 1) and produced a steady tone until approximately 31:14. The machine then resumed beeping for approximately fifteen seconds (until 31:29). Respondent then produced another steady tone for approximately three seconds (until 31:32). There was then a steady tone for approximately five seconds (until 31:37). There was then beeping for the next approximately thirteen seconds (until 31:50). There was then a steady tone for approximately twelve seconds (until 32:02). The beep lasted one second, and then a steady tone resumed for approximately thirteen seconds (until 32:16). A beep then lasted one second, and then a steady tone resumed for approximately eight seconds (until 32:25). A beep then lasted one second, and then a steady tone resumed for approximately six seconds (until 32:32). Beeping then resumed for

¹ For my findings relating to the instructions given to Respondent after the twenty-minute observation period and Respondent's performance during the test, I relied on the video footage in Respondent's Exhibit 1, which was offered without objection for minutes 29:00 (approximately 6:13 a.m.) to 37:00 (approximately 6:21 a.m.) on the video.

the next approximately ten seconds (until 32:42). A steady tone then resumed for approximately two seconds (until 32:44). A steady tone then resumed for another approximately two seconds after a second of beeping (until 32:47). The machine then beeped for the remainder of the test, which was approximately fourteen seconds (until 33:01). Respondent did not appear to ever take a deep breath into the machine as instructed and did not produce a sufficient sample.

Respondent did not ask questions during the testing, causing any delay, but Trooper Horton stated that she asked no questions because she had stated that she understood the instructions. After the test, Trooper Horton reminded Respondent about the instructions he had given her and told Respondent that she had refused to take the test because she did not follow the instructions. Respondent replied that she "was doing it long and steady." Trooper Horton responded that she had to provide enough of a sample for the machine to be able to analyze it, and that she did not. Respondent replied that she "was doing it," and "kept breathing" until the test stopped. Trooper Horton told Respondent that she did not have to breathe the entire two minutes but only had to take one deep breath in and one deep breath out but did not follow that instruction. Respondent replied that she breathed out but could not control the fact that the machine did not detect it. She again stated to Trooper Horton that she did breathe out but could not breathe out for that long a period of time.

Respondent testified that she had not taken a breath test before, but she thought she understood the instructions and took breath in and breathed out. She testified that she tried to blow harder and, since she was not told she was not blowing hard enough, did not think she was taking the test incorrectly. She also testified that she had difficulty catching her breath because she was blowing for two minutes and that she was not trying to trick the machine. Trooper Horton does not, as a policy, talk to drivers during the breath test (encouraging them to breath harder, informing them that they have not yet provided an adequate sample, etc.) because he does not want to interfere with the process, and he has already given the drivers the instructions and confirms that they understand those instructions before the test; Trooper Horton followed the same policy in this case by remaining silent during the test. He also testified that in his thirteen years of experience in law enforcement, during which he has conducted approximately 600 DUI arrests, it typically takes a driver ten to fifteen seconds to provide a breath sample. Trooper Horton averred that the machine was working properly before, during, and after the test.

Trooper Horton recorded a refusal at 6:17 a.m. At 6:20 a.m., Trooper Horton printed a copy of the test results, which he signed, and gave it to Respondent to sign, which she refused to sign because she believed she tried to take the test and did not refuse. Trooper Horton, therefore, wrote "Refused to sign" and initialed it (Petitioners' Exhibit 4). Trooper Horton informed Respondent that the suspension of her driver's license would be for six months and issued her a notice of suspension. (Petitioners' Exhibit 5). At 6:21 a.m., Trooper Horton turned the video off after Respondent indicated that she had no questions. Respondent was then released to the Spartanburg County Detention Center.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude as a matter of law the following:

In S.C. Code Ann. § 1-23-600 (Supp. 2021), the General Assembly provided for the creation of the South Carolina Division of Motor Vehicle Hearings. Effective January 1, 2006, the SCDMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of drivers' licenses. The name of the SCDMVH was changed to the Office of Motor Vehicle Hearings (OMVH) effective October 1, 2008.

All hearings presided over by Hearing Officers of the OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the OMVH. A filing of a request for a hearing stays the suspension until a final decision is issued. S.C. Code Ann. § 56-5-2951(G).

Appeals from final decisions of the Hearing Officers will be to the SCALC in accordance with S. C. Code Ann. § 1-23-600 (Supp. 2021).

Petitioner SCDMV is an administrative agency of the State of South Carolina which is charged with administering its motor vehicle laws and delivering accurate and secure credentials and transaction documents to the citizens of this state. S.C. Code Ann. § 56-1-5 (2018).

Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, *South Carolina Administrative Practice and Procedure*, 200-201 (2004). Since SCDMV asserts the affirmative of an issue, i.e. the enforcement of a driver's license suspension, and since it will be subject to an adverse ruling if no evidence is

introduced, SCDMV bears the burden of proof in this enforcement action. *See Alex Sanders and John S. Nichols, Trial Handbook for South Carolina Lawyers*, Second Edition, 2001, § 9:3, p. 366.

Pursuant to S.C. Code Ann. § 56-5-2930 (2018), it is unlawful for a person to drive a motor vehicle within this State while:

- a. under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired;
- b. under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired; or
- c. under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciably impaired.

S.C. Code Ann. § 56-5-2950(A) (2018) provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of the law enforcement officer who arrested [the] person....

Furthermore, the breath test must be administered by a person trained and certified by Petitioner pursuant to State Law Enforcement Division (SLED) policies. S.C. Code Ann. § 56-5-2950(A) (2018).

S.C. Code Ann. § 56-5-2950(B) (2018) further provides:

No tests may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;

- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

Upon motion by any party, the OMVH Hearing Officer may review the application of the policies, procedures, and regulations promulgated by SLED. If the Hearing Officer finds that the failure to follow any of the policies, procedures, regulations or other provisions of S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The Hearing Officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure. *See* S.C. Code Ann. § 56-5-2950(J) (2018).

If a person drives a motor vehicle and refuses to provide a breath sample or provides a breath sample that has an alcohol concentration of fifteen one-hundredths of one percent or more, Petitioner must suspend the person's driver's license, permit, or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer shall issue a notice of suspension that is effective beginning on the date of the alleged violation. *See* S.C. Code Ann. § 56-5-2951(A) (2018).

A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (2018). Section 56-5-2951(F) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;
- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
 - (d) the machine was working properly.

Nothing in this section prohibits the introduction of evidence at the administrative hearing on the issue of the accuracy of the breath test result.

At the close of the evidence, Respondent's counsel argued that I should rescind the

suspension of Respondent's driver's license or driving privileges because Respondent did nothing to indicate she would refuse to take the test and was cooperative. She did not say she was not did not keep asking questions to attempt to delay. She blew harder as the test went on and took deep breaths while blowing into the tube. Counsel also stated that in his experience, officers tend to tell individuals taking the test if they are not providing a sufficient sample, that they need to take a deeper breath and blow harder if they intend to provide a sample, though counsel conceded that it was within Trooper Horton's discretion to do that or not. He further argued that there is not indication that Respondent intended to intentionally refuse to take the test. Respondent also testified as to how important it was for her to have her license to maintain her job status with the army and would have wanted to take the test to avoid a refusal. Counsel also cited to *Chisolm v. S.C. Dep't of Motor Vehicles*, 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013) and to a case the court of appeals discusses in *Chisolm: Bomba v. Com., Dep't of Transp., Bureau of Driver Licensing*, 28 A.3d 946, 948 (Pa Commw. Ct. 2011) to support Respondent's position.

In response, Trooper Horton argued that he thoroughly gave Respondent instructions as to how to take the breath test, and Respondent stated that she understood. He never reiterates to drivers (during the breath test) the need to provide an adequate sample because it is a distraction, and it was not necessary because Respondent already stated she understood the instructions. He also argued that there are various forms of intent in these cases, but Respondent did not follow instructions during the breath test, just as she did not during the SFSTs. He averred that he did everything properly.

As an initial matter, I conclude, based on the totality of the circumstances, that Respondent was lawfully detained, as Trooper Horton observed Respondent driving seventy-six mph in a posted thirty-five-mph zone. I also conclude that Respondent was lawfully arrested for DUI. In addition to the excessive speeding, Respondent was seen driving by Trooper Horton and admitted to heading to her aunt's house; admitted to consuming alcohol at a friend's house and at a local bar (from which she received an orange wristband that she was still wearing); smelled of alcohol; had bloodshot, glassy, and watery eyes; had slow and slurred speech; exhibited cognitive impairment when trying to find her driver's license and in her slow responses to questions; and she performed poorly on all three SFSTs, as discussed in the findings above. I thus conclude that there was sufficient probable cause for Trooper to arrest Respondent for DUI.

I also conclude, and there was no dispute, that Respondent was verbally advised of her

implied consent rights and was provided a copy of them, which she signed.

The issue in this case pertains to the breath test. After being advised of her implied consent rights, Respondent was offered a breath test, and she consented to provide a breath sample. There is no evidence that Respondent overtly refused to provide a breath sample; but because Respondent never provided a breath sample, the question becomes whether her failure to provide a breath sample constituted a constructive refusal to provide one. I conclude that Respondent constructively refused to provide a breath sample.

Though counsel cites to *Chisolm*, I find this case to be distinguishable from *Chisolm*. In *Chisolm*, a motorist blew into the DataMaster machine for approximately one minute and fifty-three seconds, with a steady tone from the machine while she blew (indicating that air was going into the machine). 402 S.C. at 595, 741 S.E.2d at 43-44. However, the machine did not give a reading. The officer asked the motorist if she would take the test again, and she agreed to do so, but the machine would not let the motorist take the test again because it had registered an inadequate sample from the first blow. The officer recorded a refusal by the motorist. *Id.* at 595, 741 S.E.2d at 44. The S.C. Court of Appeals observed that merely because a breath test machine does not produce a report reflecting an acceptable breath sample within the required two-minute period under the SLED policies and procedures does not automatically mean that the motorist refused to take the breath test and provide a sample. 402 S.C. at 608, 741 S.E.2d at 50. The court looked at the fact that the driver blew into the machine, producing a steady tone, and found that “at no time did the machine indicate that [the driver] was not blowing an adequate sample, as evidenced by the steady tone.” *Id.* at 606, 741 S.E.2d at 49-50. The court found this distinguishable from other cases where drivers provided only intermittent tones. *Id.* at 606, 741 S.E.2d at 49. The court also looked at the *Bomba* case, in which a suspension was overturned where the driver gave “a series of short breaths, not one continuous breath.” *Id.* at 605, 741 S.E.2d at 49 (internal citations and quotations omitted). The driver in that case, however, also asked to retake the breath test after her failed effort to take the test but was refused. *Id.* Similarly, the driver in *Chisolm* agreed to take a second test but the machine would not allow it. *Id.* at 595, 606, 741 S.E.2d at 44, 50. The court found that the driver consented to the breath test, attempted the test, asked to take a second test, and was consistently blowing into the machine (producing a steady tone), and there was no evidence that the driver was “faking or thwarting the test, being uncooperative, acting unruly, delaying the administration of the test, ingesting prohibited substances during the observation

period, failing to cooperate with the officer's instructions, or behaving in any manner that would amount to a constructive refusal." *Id.* at 606, 741 S.E.2d at 50.

Unlike in *Chisolm*, where the driver provided a continuous tone for a minute and fifty-three seconds and "at no time did the machine indicate that [the driver] was not blowing an adequate sample," Respondent did not provide a continuous tone but instead provided only intermittent tones. Respondent proceeded to breathe into the DataMaster multiple times over approximately one minute and fifty-one seconds (from the time she first breathed into the machine until the test ended), and several of the attempts produced a steady tone; but the longest tones lasted only thirteen and fourteen seconds, respectively, and they were all too weak in terms of the volume of breath to register a result. Respondent did not appear to take deep breaths and stopped in between attempts, even though Trooper Horton had instructed her prior to the test that she need to take a long breath in and a long breath out and to "take a deep breath, as big as you can and exhale into this mouthpiece." He also instructed Respondent that she would hear beeping if she stopped breathing because that would mean she was not providing a sample, so Respondent should have been aware that she was not providing an adequate sample when she heard the beeping. Respondent also discontinued breathing into the machine during the final fourteen seconds of the test, even though Trooper Horton had instructed her that once she started the test, to breathe out until he told her to stop. Despite Trooper Horton's instructions as to how Respondent should breathe, Respondent did not appear to try any harder to take deep breaths as instructed, and she continued to blow only intermittently into the machine. As a result, Respondent did not blow enough air to produce a recordable sample.

Counsel argued that in his experience, officers usually tell drivers during the test when they are not providing sufficient samples and encourage them to breathe deeper and blow harder. However, I am unaware of any requirement for law enforcement to provide such aid to drivers during the breath test, especially where, as here, detailed instructions were plainly stated to the driver just before the test, confirmation of the driver's understanding of those instructions was obtained from the driver, and the driver had no questions to ask about how to take the test following the instructions. Indeed, one of the reasons that Trooper Horton does not, as his standard practice, speak to drivers during the breath test is because, as here, he has already provided instructions and confirmed that the drivers understood them. He also does not wish to distract drivers during the test (which is timed). Moreover, having never taken a breath test before, Respondent would not

have had a reason to believe or expect that Trooper Horton would have told her during the test that she was not providing a sufficient sample and needed to take a deep breath and blow harder, especially since Trooper Horton had told her just before the test to keep breathing into the machine until he told her to stop. Furthermore, Respondent did not evince any confusion during the test or ask any questions, such as whether she had provided a sufficient sample yet, and she could not have known, having never taken a breath test before with Trooper Horton, that he had a policy of not speaking during the test (assuming he would not have answered any questions asked during the test, which is unclear).

The facts of this case with respect to the breath test are more akin to one of the cases cited by the court in *Chisolm: State v. Householder*, where the Ohio Court of Appeals affirmed the lower court's determination that the invalid breath sample was based on the driver's failure to adequately blow into the DataMaster. 181 Ohio App.3d 269, 275, 908 N.E.2d 987, 992 (2009). The officer's testimony in that case, as the instructions given in the instant case, was that if the machine starts beeping, the driver is not blowing sufficiently into the machine. The officer in that case also testified that "an invalid sample ... means that the subject did not provide an adequate amount of basically what we are hunting for, deep lung air to complete the test." *Id.* at 271, 908 N.E.2d at 989-99. The breath machine in that case, as in the instant case, "went from a steady tone, to a beep, back to a steady tone[,] " which indicated that the reason for the invalid sample was a "discontinued blowing pattern." The court in *Chisolm* distinguished that case from *Householder* because unlike in *Householder*, "Chisolm's breath test produced a steady tone ... [and] at no time did the machine indicate that she was not blowing an adequate sample, as evidenced by the steady tone."

In the instant case, as in *Householder* and unlike in *Chisolm*, the breath machine went from a steady tone to a beep back to a steady tone, and actually did so numerous times in the instant case, as described in the findings above. As in *Householder*, the reason for an invalid sample in the instant case was due to a "discontinued blowing pattern" from Respondent.

The instant case is further distinguishable from *Chisolm* in that there is no evidence that Respondent expressed a desire to take the breath test again. The court in *Chisolm*, in discussing *Bomba*, mentions at least five times that the driver asked to take a second test, and the court compared that fact to the similar fact that Chisolm had agreed to retake the breath test. In the instant case, Trooper Horton, unlike the officer in *Chisolm*, did not offer Respondent the opportunity to retake the breath test (nor was he required to), so there is no way to determine

whether Respondent would have retaken the test had she been re-offered the test. What is clear from the video footage in Respondent's Exhibit 1 is that Respondent never requested to take the breath test again.

Also, based on Trooper Horton's testimony and breath alcohol analysis test report (Petitioner's Exhibit 4), the machine was in proper working order, so the fault did not lie with the machine. Rather, I conclude that Respondent was uncooperative by failing to follow Trooper Horton's instructions (which she had indicated she understood just before taking the test) to take long, deep breaths and to breathe long, deep breaths into the machine.

For the above reasons, I conclude that Respondent constructively refused to provide an adequate breath sample.²

ORDER

Based upon the above findings of fact and conclusions of law, it is hereby:

ORDERED that the suspension of Respondent's driver's license or driving privilege is **UPHELD**.

AND IT IS SO ORDERED.

August 17, 2022
Columbia, South Carolina

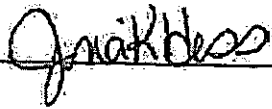

Samuel L. Johnson
OMVH Hearing Officer



² Moreover, as a matter of public policy, it would create an avenue for drivers to evade breath tests if a driver could avoid a refusal by simply blowing into the DataMaster just enough to create a steady tone and do so intermittently without having to blow long, continuous deep breaths into the machine. This is surely not what the General Assembly or the court of appeals in *Chisolm* intended.

CERTIFICATE OF SERVICE

I, Jena' K. Hess, hereby certify that I have this date served this Order upon all parties to this caused by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



August 17, 2022
Columbia, South Carolina

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Exhibits - IC

Hearing:
Petitioners: South Carolina Department of Public Safety
South Carolina Department of Motor Vehicles
Respondent: Breyonna Shaquelle Jeter

Docket No.: 22-OMVH-01-2294-CC

Date of Hearing: August 15, 2022 Location: Greer, SC

Hearing Officer: Samuel Johnson

☐ I hereby certify that neither party offered exhibits into the record.

☒ I hereby certify that exhibit(s) were offered into the record and are indicated below.

PETITIONERS:

Admitted (No Objection)

- 1 DUI Detection/SFST Practitioner Certification
- 2 Speed Measuring Device Operator
- 3 Advisement of Implied Consent Rights
- 4 Breath Alcohol Analysis Test Report
- 5 Notice of Suspension

RESPONDENT:

Admitted (No Objection)

- 1 DVD Video Footage from BA Room, specifically from 29:00 (6:13 a.m.) to 37:00 (6:21 a.m.)

☐ I hereby certify that no exhibits were attached to this form and it was delivered to the OMVH Office by either _____ hand delivery or _____ mail courier.

☒ I hereby certify that the listed exhibits were attached to this form and delivered to the OMVH Office by either X hand delivery or _____ mail courier.

Date placed in the mail _____ or Date hand-delivered – August 17, 2022

Signature _____

000094

0141

SC Criminal Justice Academy

Hereby Certified

Jesse Newton Horton

As a

DUI Detection/SEST Practitioner

Expiration Date: 10/31/2028

The above named officer has met the standards prescribed by the South Carolina Criminal Justice Academy. The authority to perform Standardized Field Sobriety Tests will expire on the date listed above.

Lewis J. Swindler, Jr.

Lewis J. Swindler, Jr. - Director, SCCJA

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SC Criminal Justice Academy

Hereby Certified

Jesse Newton Horton

Academy ID 2229-5127

As a
SERVE

Speed Measuring Device Operator

Expiration Date: 10/31/2023

The above named officer has been trained and certified having demonstrated the required proficiency following an approved course on operation, is hereby certified as a qualified SMD Operator.

The authority to operate SMD is a Three Year Certification.

Lewis J. Swindler, Jr.

Lewis J. Swindler, Jr. - Director, SCJIA

P. S. B. 2

Breyonna Shiquelle Jeter

Subject's Name (Print)

104168506

Driver's License Number

ADVISEMENT OF IMPLIED CONSENT RIGHTS



10-12-2000

Date of Birth

SC

State Licensed

DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here-> - Inform subject of video recording.
If answer is No, start here-> - Inform subject of type samples requested(i.e. breath,blood,urine).
- (B) Provide subject with a written copy of the following advisement and read the advisement to the subject:
- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended.
 - The arresting officer has directed that samples be taken for alcohol and/or drug testing.
 - The samples will be taken and tested according to Section 56-5-2950 and SLED policies.
 - You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months, with the option of ending the suspension if you enroll in the Ignition Interlock Device Program, and your refusal may be used against you in court.
 - If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933.
 - If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least one (1) month, with the option of ending the suspension if you enroll in the Ignition Interlock Device Program.
 - You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, shall provide you affirmative assistance.
 - You have the right to request a contested case hearing within thirty (30) days of the issuance of the notice of suspension.
 - If you do not request a contested case hearing or if your suspension is upheld at the contested case hearing, you shall enroll in an Alcohol and Drug Safety Action Program.
- If applicable, perform the following procedures:
- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.)
- (D) Enter biographical data into DataMaster DMT. (Required for all tests, including refusals.)
- (E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.)

ADVERTENCIA Y LECTURA DE DERECHOS POR MANEJAR BAJOS LOS EFECTOS DE ALCOHOL O DROGAS (DUI)

- (A) ¿Se grabará el análisis en video? Si la respuesta es Si, empiece aquí-> - Informe a la persona que va a ser grabada en video.
Si la respuesta es No, empiece aquí-> - Informe a la persona de las muestras que se requieren (ejemplos: soplar, sangre, orina).
- (A) Dele a la persona una copia escrita de la advertencia siguiente y lea la advertencia al sujeto:
- (B) Dele a la persona una copia escrita de la advertencia siguiente y léasela a la persona:
- Usted está arrestado por Manejar Bajo los Efectos de Alcohol o Drogas (DUI), Sección 56-5-2930, del Código Legal de Carolina del Sur de 1976, según su enmienda.
 - El policía que efectuó el arresto dispuso que le sacaran muestras de alcohol y/o drogas para ser analizadas.
 - Se obtendrán y analizarán las muestras según la Sección 56-5-2950 y las normas del SLED.
 - Usted no está obligado a hacerse los análisis ni a proporcionar muestras, pero si se niega a someterse a estos análisis, se le tendrá que suspender o negar su privilegio de manejar en Carolina del Sur por lo menos durante seis (6) meses con la opción de terminar la suspensión si se inscribe en el Programa del Dispositivo de Bloqueo del Arranque. Negarse a ello podrá usarse en su contra en un tribunal.
 - Si usted se somete a los análisis o proporciona las muestras y tiene una concentración de alcohol de ocho centésimos del uno por ciento (0.08%) o más, podría ser acusado en vez de Manejar con una Concentración Ilegal de Alcohol (DUAC), según la Sección 56-5-2933.
 - Si usted tiene una concentración de alcohol de quince centésimos del uno por ciento (0.15%) o más, su privilegio de manejar en Carolina del Sur debe ser suspendido por lo menos durante un (1) mes con la opción de terminar la suspensión si se inscribe en el Programa del Dispositivo de Bloqueo del Arranque.
 - Usted tiene el derecho de que una persona que usted elija y que esté capacitada para hacerlo, realice por su cuenta los análisis adicionales que usted tendrá que pagar y en ese caso, el agente debe brindarle ayuda si usted la solicita.
 - Usted tiene el derecho de solicitar una audiencia para disputar el caso dentro de los treinta (30) días a partir de la fecha en que se emitió la notificación de la suspensión.
 - Si usted no solicita una audiencia para disputar el caso o si se le confirma la suspensión en la audiencia para disputar el caso, usted tiene que inscribirse en un Programa de Medidas de Seguridad para el Consumo Responsable del Alcohol y las Drogas.
- Si es pertinente, haga lo siguiente:
- (C) Inspeccione la boca de la persona y quite todo material extraño de la boca. (No se requiere si se niega la persona.)
- (D) Ingrese los datos biográficos en el DataMaster DMT. (Obligatorio para todos los análisis aunque se niegue la persona.)
- (E) Observe a la persona un mínimo de (20) minutos antes de obtener una muestra de su aliento. (No se requiere si se niega la persona.)

Subject's Signature

Firma de la Persona (recibió una copia)

Officer's Signature

Firma del Agente

date/time

fecha/hora

000097 SLED Form 1-1-00, October 1, 2014



P5 EAT4

**SOUTH CAROLINA LAW ENFORCEMENT DIVISION
BREATH ALCOHOL ANALYSIS TEST REPORT
DRIVING UNDER THE INFLUENCE**



SUBJECT BIOGRAPHICAL INFORMATION

SUBJECT NAME: BREYONNA S JETER
RACE: BLACK
SEX: F
DOB: 10/12/2000

DL NUMBER: 104168506
DRIVER'S LICENSE: SC
SUBJECT ADDRESS: 133 WILLIAM E FREE PATH
UNION SC 29379

ARREST INFORMATION

OFFICER NAME: JESSE N HORTON
TICKET NUMBER: 20222351024642
ARREST DATE: 05/08/2022

AGENCY ORI: SC042SP00
COUNTY OF ARREST: 42 - SPARTANBURG
ARREST TIME: 04:36

OPERATOR INFORMATION

TEST OPERATOR: JESSE N HORTON
CERTIFICATION #: DMT012914
SOLUTION LOT #: 21802

AGENCY ORI: SC042SP00
EXPIRATION DATE: 03/29/2023
BOTTLE: 0457

BREATH TEST VIDEO RECORDED? YES
SUBJECT'S MOUTH CHECKED AND
ANY FOREIGN MATERIAL REMOVED? YES
SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

SUBJECT INFORMED OF VIDEO RECORDING? YES
SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES
SUBJECT OBSERVED FOR A MINIMUM OF (20)
TWENTY MINUTES? YES

SUBJECT'S BREATH ALCOHOL TEST RESULTS

DATAMASTER DMT SERIAL # 112307

TEST DATE		05/08/2022
OBSERVATION START TIME:		05:51:30
BLANK TEST	0.00	06:14:26
INTERNAL STANDARD	VERIFIED	06:14:32
0.08% SIMULATOR TEMPERATURE	33.99°C	06:14:54
0.08% SIMULATOR VERIFICATION	0.078	06:14:54
BLANK TEST	0.00	06:15:46
SUBJECT SAMPLE	REFUSED	06:17:50
BLANK TEST	0.00	06:19:03
INTERNAL STANDARD	VERIFIED	06:19:09

Refused to sign JNH
Subject's Signature

5-8-2022 / 0620
(Received Copy) Date/Time

JN Horton
Arresting Officer's Signature

JN Horton
Test Operator's Signature

VISIT WWW.SLED.SC.GOV AND CLICK ON IMPLIED CONSENT. THEN CLICK ON BREATH SITE VIDEO RECORDINGS. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST:

SUBJECT ID: 16BF9D69A1 DATE/TIME: 05/08/2022 06:13:31
SUBJECT PASSWORD: 67184 DMT SERIAL NUMBER: 112307

IMPORTANT NOTICE

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

SLED Forensics Form # ICS 018, April 2010

000098



South Carolina Department of Motor Vehicles NOTICE OF SUSPENSION

MV-65
(Rev. 02/19)

PS Ex. 5

Breyonna Shaquell Jeter 104168506 10-12-2000
Driver's Name BP/DL State and Number Date of Birth
133 William E Free Path Union, SC 29379
Address on Driver's License: Street address, Apt. No., City, State, Zip Code

Special mailing address for notices (if different from driver's license address): Street address, Apt. No., City, State, Zip Code
56055935

Vehicle License Plate State and No. _____ Vehicle Type: Commercial ☐ Yes ☒ No Hazardous Material ☐ Yes ☒ No

**YOUR PRIVILEGE TO DRIVE IN SOUTH CAROLINA IS SUSPENDED IMMEDIATELY FOR THE FOLLOWING:
(CHECK ONLY ONE BOX)**

**UNDER THE AGE OF TWENTY-ONE (21)
AND NOT UNDER ARREST FOR DUI***

- ☐ Registering an alcohol concentration of .02 or greater*
- ☐ Refusing to submit to a breath, blood or urine test*
Date of Test/Refusal _____

ANY AGE UNDER ARREST FOR DUI

- ☐ Registering an alcohol concentration of .15 or greater
- ☒ Refusing to submit to a breath, blood or urine test
5-8-2022 Date of Test/Refusal

*A person who is taken for testing under 56-1-286 cannot be prosecuted under 20-7-8920, 20-7-8925, 56-5-2930 or 56-5-2933.

Pursuant to S.C. Code §56-5-2951, please be advised: 1) You have the right to obtain a temporary alcohol driver's license and to request a contested case hearing before the South Carolina Office of Motor Vehicle Hearings; 2) If you do not request a contested case hearing within 30 days of the issuance of this notice of suspension, you will waive your right to the contested case hearing, and your suspension will continue for the period provided for in S.C. Code §56-5-2951(i); and 3) If your suspension is upheld at the contested case hearing or if you do not request a contested case hearing, you must enroll in ADSAP (and successfully complete ADSAP within 1 year of enrollment).

A request for a contested case hearing must be filed with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of this Notice of Suspension. There is a \$200.00 filing fee. (Personal checks are not accepted.) Bring or mail this form, with the back completed, plus the filing fee, to the SC Office of Motor Vehicle Hearings, 1205 Pendleton St., Suite 325, Columbia, SC 29201. This completed form and the fee must be either hand-delivered or mailed on or before the thirtieth (30th) day of the date on this notice of suspension.

If a hearing is scheduled, you may be able to get a temporary alcohol restricted license. The temporary alcohol restricted license costs \$100.00 and allows you to drive without restrictions until the hearing results are issued by the Office of Motor Vehicle Hearings. If you obtain a temporary alcohol restricted license and the hearing officer rules against you, your suspension will go back into effect. If you obtain a temporary alcohol restricted license and the hearing officer rules in your favor, the suspension will be cancelled and your driving privileges will be reinstated. However, you must go to a SCDMV office to have a regular license issued.

If you do not obtain a temporary alcohol restricted license, your suspension continues. If your suspension continues, you cannot drive until you either obtain a route-restricted license or your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP successfully within 1 year of your enrollment, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you are under the age of twenty-one (21) and were not arrested for DUI, you cannot drive until your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP successfully within 1 year of your enrollment, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you were suspended after having been arrested for DUI, you may be entitled to have a route-restricted license during your suspension period. More information on the route-restricted license is contained on the back side of this notice.

I understand that I cannot drive until a license has been issued to me. _____ 5-8-2022
Signature of Driver Date Signed

Driver's license or permit surrendered (yes or no) Yes (If yes, license must be attached to yellow copy of this form)

5-8-2022 Jesse N. Horton
Date Signed Signature of Arresting Officer Printed Name of Arresting Officer

SCHP/Troop 3/Post 4/Spartanburg 2229-5127 864-587-4700
Agency Name Academy ID Number Agency Telephone Number

5-8-2022 Jesse N. Horton
Date Signed Signature of DataMaster Operator Printed Name of DataMaster Operator

SCHP/Troop 3/Post 4/Spartanburg 2229-5127 864-587-4700
Agency Name Academy ID Number Agency Telephone Number

Blue Copy - Driver Yellow Copy - DMV/Driver Records Green Copy - Officer White Copy - Officer's Agency 000099

PRUETT & COOK

Attorneys at Law

202 North Petty Street
Gaffney, South Carolina 29340
Phone (864) 488-0120 Fax (864) 488-0803

H. Dean Cook
dean@deancookpa.com

Trent N. Pruett
pruettlawfirm@bellsouth.net

August 16, 2022

S.C. Office of Motor Vehicle Hearings
Attn: Samuel Johnson, Hearing Officer
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201

Re: Department of Public Safety v. Breyonna Jeter
(Implied Consent Hearing)

Dear Judge Johnson:

Please find enclosed a copy of the breath site video recording which was downloaded from the State Law Enforcement Division website. I have included the entire recording, with the understanding that the Court has specific times which both Trooper Horton and I refer to during the contested case hearing which specifically relates to Ms. Breyonna Jeter submitting a breath sample.

Please contact my office if you have any questions or other matters that I need to address.

Sincerely,

Trent N. Pruett

Trent N. Pruett

Enclosed: DVD copy of breath test site video recording

c: Trooper J.N. Horton
Post D Headquarters
Spartanburg Patrol Office
3794 Fairforest Road
Spartanburg, South Carolina 29303

RECEIVED
AUG 19 2022
SCOMVH
000100

0147

PRUETT & COOK

Attorneys at Law

202 North Petty Street
Gaffney, South Carolina 29340
Phone (864) 488-0120

H. Dean Cook
dean@deancookpa.com

Trent N. Pruett
pruettlawfirm@bellsouth.net

May 13, 2022

S.C. Office of Motor Vehicle Hearings
Attention: Implied Consent Hearings
1205 Pendleton Street, Suite 325
Columbia, South Carolina 29201

Re: Request for Contested Case Hearing
Breyonna S. Jeter

To Whom It Concerns:

Please find enclosed a Notice of Suspension Form (Blue Form), and a \$200.00 money order, requesting a contested case hearing in the above cited matter. Please do not schedule any hearing for April 4, 2022, April 25, 2022, May 16, 2022, June 6, 2022, and June 13, 2022 as I have mandatory General Sessions appearances on each Monday at 9 a.m.

Please contact my office if you have any questions about my request for a contested case hearing in this matter.

Sincerely,

Trent N. Pruett

Trent N. Pruett

RECEIVED

MAY 16 2022

SCOMVH

Enclosed: Official Notice/\$200.00 Money Order

c: Breyonna S. Jeter

000101

0148

**STATE OF SOUTH CAROLINA
OFFICE OF MOTOR VEHICLE HEARINGS**

South Carolina Department of Public Safety
and
South Carolina Department of Motor
Vehicles,

Petitioner,

vs.

Breyonna Shaquelle Jeter,
Respondent.

Docket No. 22-OMVH-01-2294-CC
104168506

NOTICE OF HEARING

On Sunday, May 8 2022 Respondent was arrested by J. N. Horton and Respondent's driver's license or privilege was suspended. The Respondent is being represented by Attorney Trent N. Pruett. This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) pursuant to Respondent's request for a contested case hearing.

IT IS HEREBY NOTICED that a hearing on the merits of this action before Hearing Officer Samuel Johnson is scheduled to begin at **9:00 AM on Monday, August 15 2022 at Greer Municipal Court 100 S. Main St. Greer SC**. All parties are to arrive at least fifteen minutes prior to the time set for the hearing.

1. This hearing will be conducted in accordance with the Rules of Procedure for the South Carolina Office of Motor Vehicle Hearings (OMVH). A copy may be obtained from the Administrative Coordinator of the OMVH or from the OMVH website, www.scomvh.net. The South Carolina Rules of Evidence apply.

2. All parties must bring to the hearing all documents, records, and witnesses needed to present their case. All exhibits moved for introduction at the hearing must be originals. Upon good cause shown at the hearing, copies may be substituted for original exhibits.

3. Subpoenas are available to the parties pursuant to S.C. Code Ann. § 1-23-320(d) (as amended) and the rules of the OMVH, to compel the attendance of witnesses or for the production of documents at the hearing. The parties are responsible for service of subpoenas and any cost involved. Subpoena may be obtained from the OMVH website.

4. A party may represent himself or may be represented by an attorney at the hearing.

5. **FOR GOOD CAUSE SHOWN**, a party may request a continuance no later than two (2) business days prior to the scheduled hearing date. All requests must be made in writing and forwarded to the scheduling assistant listed below for the assigned hearing officer of the OMVH by U.S. Mail or email. A copy of your request must be sent to all parties.

6. In case a party settles a case or wishes to withdraw their request for a hearing, they must notify the scheduling assistant of the OMVH as soon as possible. If in the event you cannot reach the scheduling assistant then contact the Administrative Coordinator as soon as possible at (803) 734-3201.

Yolanda P. Williams, Administrative Coordinator, OMVH

By: Jena' K. Hess
Scheduling Assistant

May 17, 2022
Columbia, South Carolina

000102

0149

Jena' K. Hess

From: Jena' K. Hess
Sent: Tuesday, May 17, 2022 12:18 PM
To: HPU@scdmv.net; Troop 3 (edwintolley@scdps.gov); pruettlawfirm@bellsouth.net;
Donna Foxx
Subject: Notice of Hearing Breyonna Jeter 8-15-22 dk# 22-2294.pdf
Attachments: Notice of Hearing Breyonna Jeter 8-15-22 dk# 22-2294

Jena' K. Hess
Scheduling Assistant
Hearing Officer Samuel Johnson
SC Office of Motor Vehicle Hearings
1205 Pendleton Street Ste. 325
Columbia SC 29201
803-734-3201
803-734-3200 (fax)

myCaseLoad

Case Number 

Actions	Search	Generate	Tools
Accounts Receivable			

[Return to List](#) 

Cash Receipt

Actions:  Workflow action is required

Number:	CR2205-0279	Dated:	05-16-2022
Till:	OMVH Till	Total Paid	\$200.00
Posted:	No	Applied	\$200.00

Void Information

Void Method:	Voided:	No
Void Timestamp:	Void Posted:	No
Void Explanation:		

Generate

Select a Packet   Invoices (1)

							Show:	40 	Go 
View	Date	Number	Payee Name	Void	Due Date	Total			
	05-16-2022	NV2205-0279	Jeter, Breonna Shaquell	No	05-16-2022	200.00			

 Payment Receipts (1)

				Show:	40 	Go 
Payment Method	Reference	Paid				
Money Order	MO#19-399339264	200.00				

 Audit



South Carolina Department of Motor Vehicles
NOTICE OF SUSPENSION

MV-65
(Rev. 02/19)

Driver's Name Breyonna Shaquelle Jeter 104168506 10-12-2003
SS/DL State and Number Date of Birth

133 William E Free Path Union, SC 29379
Address on Driver's License: Street address, Apt. No., City, State, Zip Code

2022-OMVH-01-2294
Special mailing address for notices (if different from driver's license address): Street address, Apt. No., City, State, Zip Code

SC/UDJ435
Vehicle License Plate State and No. Vehicle Type: Commercial ☐ Yes ☒ No Hazardous Material ☐ Yes ☒ No

YOUR PRIVILEGE TO DRIVE IN SOUTH CAROLINA IS SUSPENDED IMMEDIATELY FOR THE FOLLOWING:
(CHECK ONLY ONE BOX)

UNDER THE AGE OF TWENTY-ONE (21)
AND NOT UNDER ARREST FOR DUI*

- ☐ Registering an alcohol concentration of .02 or greater*
- ☐ Refusing to submit to a breath, blood or urine test*
Date of Test/Refusal

ANY AGE UNDER ARREST FOR DUI

- ☐ Registering an alcohol concentration of .15 or greater
- ☒ Refusing to submit to a breath blood or urine test
5-8-2022 Date of Test/Refusal

*A person who is taken for testing under 56-1-286 cannot be prosecuted under 20-7-8920, 20-7-8925, 56-5-2930 or 56-5-2933.

Pursuant to S.C. Code §56-5-2951, please be advised: 1) You have the right to obtain a temporary alcohol driver's license and to request a contested case hearing before the South Carolina Office of Motor Vehicle Hearings; 2) If you do not request a contested case hearing within 30 days of the issuance of this notice of suspension, you will waive your right to the contested case hearing, and your suspension will continue for the period provided for in S.C. Code §56-5-2951(1); and 3) If your suspension is upheld at the contested case hearing or if you do not request a contested case hearing, you must enroll in ADSAP (and successfully complete ADSAP within 1 year of enrollment).

A request for a contested case hearing must be filed with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of this Notice of Suspension. There is a \$200.00 filing fee. (Personal checks are not accepted.) Bring or mail this form, with the back completed, plus the filing fee, to the SC Office of Motor Vehicle Hearings, 1205 Pendleton St., Suite 325, Columbia, SC 29201. This completed form and fee must be either hand-delivered or mailed on or before the thirtieth (30th) day of the date on this notice of suspension.

If a hearing is scheduled, you may be able to get a temporary alcohol restricted license. The temporary alcohol restricted license costs \$100.00 and allows you to drive without restrictions until the hearing results are issued by the Office of Motor Vehicle Hearings. If you obtain a temporary alcohol restricted license and the hearing officer rules against you, your suspension will go back into effect. If you obtain a temporary alcohol restricted license and the hearing officer rules in your favor, the suspension will be canceled and your driving privileges will be reinstated. However, you must go to a SCDMV office to have a regular license issued.

If you do not obtain a temporary alcohol restricted license, your suspension continues. If your suspension continues, you cannot drive until you either obtain a route-restricted license or your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP successfully within 1 year of your enrollment, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you are under the age of twenty-one (21) and were not arrested for DUI, you cannot drive until your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP successfully within 1 year of your enrollment, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you were suspended after having been arrested for DUI, you may be entitled to have a route-restricted license during your suspension period. More information on the route-restricted license is contained on the back side of this notice.

I understand that I cannot drive until a license has been issued to me. Breyonna Jeter 5-8-2022
Signature of Driver Date Signed

Driver's license or permit surrendered (yes or no) Yes (If yes, license must be attached to yellow copy of this form)

5-8-2022 Jesse Horton Jesse N. Horton
Date Signed Signature of Arresting Officer Printed Name of Arresting Officer

SCHP/Troop 3/Post 0/Spartanburg 2229-5127 864-587-4700
Agency Name Academy ID Number Agency Telephone Number

5-8-2022 Jesse Horton Jesse N. Horton
Date Signed Signature of DataMaster Operator Printed Name of DataMaster Operator

SCHP/Troop 3/Post 0/Spartanburg 2229-5127 864-587-4700
Agency Name Academy ID Number Agency Telephone Number

Blue Copy - Driver Yellow Copy - DMV/Driver Records Green Copy - Officer White Copy - Officer's Agency 000105

HEARING REQUEST

I am requesting an administrative hearing. I understand that I must file my request with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the Notice of Suspension to have a hearing and to obtain a temporary alcohol restricted license.

05-13-2022

Date

Boyer
Signature of Driver

133 William W. Free Path, Union SC
Driver's Mailing Address for Notice 29379

Driver's Current Mailing Address
Trent N. Pruett, 202 N. Petty St., Gaffney, SC 29340

Young Attorney's Name
864-488-0120

Attorney's Address
pruettlawfirm@bellsouth.net

Attorney's Phone Number

Attorney's Mailing Address

If you do not list an attorney above, you must tell your attorney when your hearing is scheduled.

INSTRUCTIONS FOR USING THIS FORM TO REQUEST A HEARING

1. Complete the Hearing Request form, including your name, address, telephone number, and email address, where to be reached.
2. Complete the Hearing Request form, including your name, address, telephone number, and email address, where to be reached.
3. Bring your completed form to the hearing. The hearing is held at the SC Office of Motor Vehicle Hearings, 1205 Pendleton St., Suite 333, Columbia, SC 29201. This completed form and fee must be either hand-delivered or mailed on or before the thirtieth (30th) day of the date of the notice of suspension.

INSTRUCTIONS FOR REQUESTING A HEARING WHEN NOT USING THIS FORM

1. You may file the Original Notice of Suspension with the DMV to request a hearing. However, the thirty (30) days to file the hearing request expires on the date of the suspension. Be sure to include your mailing address, phone number, and email address.
2. Complete a 30-day hearing fee for a hearing. Personal checks are not accepted.
3. Without either form, you may still request a hearing. Such a request, even if made by your name, would be subject to the DMV's hearing fee. If you are eligible for a hearing, the DMV will mail your letter stating your eligibility. If you are not eligible, the DMV will mail your letter stating your ineligibility. Be aware that your request will not be assigned and the request will not be assigned to the DMV until the hearing fee and either the Notice of Suspension or the Original Notice from the DMV have been received by the SC Office of Motor Vehicle Hearings.
4. You must file the hearing fee and either the Notice of Suspension or the Original Notice from the DMV.

INSTRUCTIONS FOR OBTAINING A TEMPORARY ALCOHOL RESTRICTED LICENSE

1. If you are eligible for a hearing, you may be eligible for a temporary alcohol restricted license. However, the temporary alcohol restricted license is not available in permanent alcohol license.
2. The temporary alcohol restricted license is not available in permanent alcohol license.
3. After you file your request for a hearing, the SC Office of Motor Vehicle Hearings will determine whether you are eligible for a temporary alcohol restricted license. If you are eligible, the DMV will mail your letter stating your eligibility.
4. If you are not eligible for a hearing, you may still request a hearing. Such a request, even if made by your name, would be subject to the DMV's hearing fee. If you are not eligible, the DMV will mail your letter stating your ineligibility. Be aware that your request will not be assigned and the request will not be assigned to the DMV until the hearing fee and either the Notice of Suspension or the Original Notice from the DMV have been received by the SC Office of Motor Vehicle Hearings.

INSTRUCTIONS FOR OBTAINING A ROUTE RESTRICTED LICENSE

1. If you are eligible for a hearing, you may be eligible for a temporary alcohol restricted license. However, the temporary alcohol restricted license is not available in permanent alcohol license.
2. A route restricted license allows you to drive to and from work, school, ADAP classes, and a court-ordered drug program and to meet other requirements for employment or college.
3. After you file your request for a hearing, the SC Office of Motor Vehicle Hearings will determine whether you are eligible for a temporary alcohol restricted license. If you are eligible, the DMV will mail your letter stating your eligibility.
4. If you are not eligible for a hearing, you may still request a hearing. Such a request, even if made by your name, would be subject to the DMV's hearing fee. If you are not eligible, the DMV will mail your letter stating your ineligibility. Be aware that your request will not be assigned and the request will not be assigned to the DMV until the hearing fee and either the Notice of Suspension or the Original Notice from the DMV have been received by the SC Office of Motor Vehicle Hearings.

ADAP classes, court-ordered drug program, and other requirements for employment or college. After you file your request for a hearing, the SC Office of Motor Vehicle Hearings will determine whether you are eligible for a temporary alcohol restricted license. If you are eligible, the DMV will mail your letter stating your eligibility. If you are not eligible, the DMV will mail your letter stating your ineligibility. Be aware that your request will not be assigned and the request will not be assigned to the DMV until the hearing fee and either the Notice of Suspension or the Original Notice from the DMV have been received by the SC Office of Motor Vehicle Hearings.

000106

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Certificate of Service

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage aid, or in the interagency Mail Service addressed to the party (ies) or their attorney(s).

This 20th day of October 2022

By: 

Title: Administrative Coordinator, OMVH

000107

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge

RECEIVED

OCT 06 2023

SC Court of Appeals

Appellate Case No. 2023-00148

Breyonna Jeter Appellant,

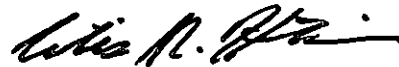
v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety Respondent.

Of Whom the South Carolina Department of Motor Vehicles is the Respondent

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies pursuant to SCARC Rule 210(g) that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Curtis R. Hutchinson, SC Bar # 76634
Deputy General Counsel
S.C. Department of Motor Vehicles

October 5, 2023
Blythewood, SC