

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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SC Court of Appeals

Appellate Case No. 2023-001148

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Breyonna Shaquelle Jeter, Respondent,

v.

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

of which South Carolina Department of Motor  
Vehicles is the Appellant.

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FINAL BRIEF OF THE RESPONDENT

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TRENT N. PRUETT, S.C. Bar# 4585  
Pruett & Cook Law Firm  
202 North Petty Street  
Gaffney, South Carolina 29340  
Telephone: (864) 488-0120  
Email: pruettlaw@currently.com  
Attorney for the Respondent

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**TRENT N. PRUETT, S.C. Bar# 4585  
Pruett & Cook Law Firm  
202 North Petty Street  
Gaffney, South Carolina 29340  
Telephone: (864) 488-0120  
Email: pruettlaw@currently.com  
Attorney for the Respondent**

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## STATEMENT OF ISSUE ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT (ALC) ERR IN REVERSING THE “FINAL ORDER AND DECISION” OF THE HEARING OFFICER BY CONCLUDING THAT THE RESPONDENT DID NOT REFUSE OR CONSTRUCTIVELY REFUSE TO SUBMIT A BREATH SAMPLE FOR TESTING 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 Respondent, Breyonna Shaquella Jeter, for Driving Under the Influence. Immediately following the Respondent’s arrest, she was transported to the Spartanburg County Detention Center, where Trooper Horton offered the Respondent a breath test. Pursuant to the mandatory video recording requirements of S.C. Code Ann. §56-5-2953, the entire breath test procedure was video recorded. Pursuant to the breath test procedure, Trooper Horton advised the Appellant both verbally and in writing of the Respondent’s implied consent rights set forth at S.C. Code Ann. §56-5-2950. Following a twenty-minute waiting period, the Respondent was given an opportunity to submit a breath sample. During the two-minute time period that a person may submit a breath sample, the Respondent blew several times into the breath test tube connected to the breath test machine (the DataMaster), however, she did not submit a sufficient or adequate sample for testing. At the conclusion of the two-minute period, Trooper Horton advised the Respondent that he had refused to take the breath test, and that her actions would be treated as a refusal. The Respondent contested that she refused to take the breath test. Another breath test was not offered to the Respondent. Trooper Horton issued a “Notice of Suspension” to the Respondent.

Upon her release from jail, the Respondent 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, 2023, a contested case hearing was held as provided for by S.C. Code Ann. §56-5-2951. At the hearing, Trooper Horton, as the arresting officer and breath test operator, was the only witness to testify for the Appellant. At the conclusion of Trooper Horton's testimony, the Respondent testified. A video recording of the breath test was introduced into evidence.

On August 17, 2022, the OMVH Hearing Officer issued a "Final Order and Decision," sustaining the suspension of the Respondent, and finding that the Respondent had constructively refused to submit a breath sample.

On September 15, 2022, the Respondent appealed the OMVH Hearing Officer's decision to the Administrative Law Court (ALC) stating in her "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.

On June 20, 2023, the Administrative Law Court issued an Order reversing the decision of the OMVH Hearing Officer, finding that substantial evidence did not support the OMVH Hearing Officer's determination that the Respondent refused the breath test.

On July 13, 2023, the Appellant filed a "Notice of Appeal" with this Court, appealing the Order of the Administrative Law Court (ALC).

## STANDARD OF REVIEW

The provisions of S.C. Code Ann. §1-23-610(B) (Supp. 2022) set forth the standard of review for an appeal from an order of the Administrative Law Court by an appellate court. *Lapp v. South Carolina Department of Motor Vehicles*, 387 S.C. 500, 504, 692 S.E.2d 565, 567 (Ct.App. 2010). Section §1-23-610(B), reads:

(B) The review of the administrative law judge's order must be confined to the record. 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; or, it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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.

The Administrative Law Court reversed the decision of the OMVH Hearing Officer, finding that substantial evidence did not support the OMVH Hearing Officer's decision. 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*, 387 S.C. 360, 366, 692 S.C. 910, 913 (2010). 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). "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 related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Protection of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001).

## ARGUMENT

### **I. THE ADMINISTRATIVE LAW COURT (ALC) DID NOT ERR IN REVERSING THE “FINAL ORDER AND DECISION” OF THE OMVH HEARING OFFICER, BY CONCLUDING THAT THE HEARING OFFICER’S DECISION THAT THE RESPONDENT REFUSED OR CONSTRUCTIVELY REFUSED TO SUBMIT A BREATH SAMPLE FOR TESTING WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

#### **A. Statement of Applicable Law**

This case involves the question whether the Respondent’s driving privileges should be suspended for having refused to submit a breath sample for testing pursuant to the implied consent provisions of S.C. Code Ann. §56-5-2950. Pursuant to the provisions of section 56-5-2950 (A), a person arrested in South Carolina for Driving Under the Influence has given their consent to the chemical testing of their breath, blood or urine for the purpose of determining the presence of alcohol and/or drugs. When a person refuses to submit to any chemical test, the driving privileges of such person are immediately suspended. S.C. Code Ann. §56-5-2951(A). In the case of a refusal to submit to a test for a first offense Driving Under the Influence, the suspension period is for six months.

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(B). When a contested case hearing is requested, the scope of the hearing when a person has refused a breath test is limited to three simple issues, which are, 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...
- S.C. Code Ann. §56-5-2951(F).

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).

## 1. What May Constitute a Refusal

In this case, the only issue raised by the Respondent during the contested case hearing was whether the Respondent refused to submit a breath sample for testing. The provisions of sections 56-5-2950 and 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, 599, 741 S.E.2d 42, 46 (Ct. App. 2013).

As noted by the ALC in her decision, SLED Policy No. 8.12.5(F)(4)(last revised January 18, 2019) provides that a refusal may be express, or implied by the actions of the person, e.g., where the person does not cooperate, or seeks to delay or otherwise prevent a test from taking place. The applicable policy provision in this case, is the same provision at issue in the *Chisolm* case, which relates to when a person does attempt to blow, but gives an inadequate sample. SLED Policy No. 8.12.5(F)(4)(i), reads:

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

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;...(emphasis added)

In *Chisolm*, the arrestee 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 the arrestee was blowing into the DataMaster, meaning air was going into the DataMaster, the DataMaster did not “read” the sample. There was no evidence that the DataMaster’s failure to register the arrestee’s breath sample resulted from the arrestee’s own fault by faking or thwarting the test, i.e., being uncooperative, acting unruly, delaying the administration on the test, etc. The test operator offered the arrestee another opportunity to take the test, which the arrestee agreed to, however, the machine would not allow for another test. The test operator treated the arrestee’s

failure to submit an adequate sample as a refusal, and suspended the arrestee's driving privileges. The arrestee requested an administrative hearing, and the suspension was upheld. The arrestee then appealed to the Administrative Law Court, and the suspension ruling was affirmed. On appeal to the Court of Appeals, the ruling of the Administrative Law Court was reversed, with the Court concluding that the arrestee's refusal was not willful. In discussing the testing procedure, the *Chisolm* Court noted that SLED policies and procedures include a specific protocol for when DataMaster does not register a breath sample. See SLED Policy No. 8-12-5(L)(2)(f)(vii). If an inadequate sample is submitted, the DataMaster will prompt a message to the test operator asking whether the subject refused. The test operator, not the machine, makes a subjective determination whether the subject has refused to submit a sample, and must answer "Yes" or "No" as to whether the person refused the test. SLED Policies and procedures provide that a "No" should be entered only if the subject failed to provide an acceptable breath sample through no fault of their own. As noted by the *Chisolm* Court "... 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*, 402 S.C. at 601, 741 S.E.2d at 47. In the *Chisolm* case, the test operator's testimony was that he did not know why the arrestee's breath sample would not register, and decided that the arrestee refused even though he did not know why the instrument would not register and test the breath sample. The DataMaster's failure to register a test report in and of itself, absent other facts, should not have ended the test operator's inquiry into determining whether the arrestee had refused the breath test. Based on the facts and circumstances of the case, the *Chisolm* Court concluded that the arrestee never refused within the meaning of section 56-5-2951. Accordingly, the arrestee in *Chisolm* should not have been placed under suspension for refusing to take the breath test.

In reaching its decision, the *Chisolm* Court noted that the appellate courts of South Carolina had not been presented with the question whether a driver's inability to provide a registerable breath sample may constitute a refusal. (To date, it appears that the *Chisolm* decision is the only reported case addressing this issue.) In the *Chisolm* opinion, the Court discussed the case of *Bomba v. Com', Department of Transportation, Bureau of Driver Licensing*, 28 A.3d 946 (Pa. Commw.Ct.2011), which is noteworthy because it mirrors the facts of this case. In *Bomba*, the arrestee was charged with Driving Under the Influence and offered a breath test. Just prior to the arrestee being offered the test, the test operator instructed the arrestee to "blow with one steady breath ...until told to stop." *Bomba*, 28 A.3d 946, 948 (Pa. Commw.Ct.2011). The arrestee submitted a breath sample by giving a series of short breaths, not one continuous breath. After the two-minute period for submitting a sample had elapsed, the breath test instrument prompted the test operator to report whether there had been a refusal, and test operator pressed the "yes" button. The arrestee appealed the suspension, which was overturned. In finding that the arrestee had not refused the breath test, the *Bomba* Court noted that: "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." *Bomba*, 28 A.3d 946, 951 (Pa. Commw.Ct.2011). Quoted in *Chisolm*, 402 S.C. at 605, 741 S.E.2d at 49. Accordingly, the central inquiry in refusal cases when the arrestee has submitted an inadequate sample, is whether the arrestee deliberately, or in bad faith, submitted an inadequate sample.

**B. Statement of Applicable Facts**

As noted, the sole issue raised by the Respondent at her contested case hearing was whether she intentionally refused to submit a breath sample. Because the entire breath test procedure was video recorded, and the video recording was made a part of the record, there can be no dispute as to what occurred. (R. p. 141, Exhibit IC; and R. p. 145, Exhibit “Breath Alcohol Analysis Test Report.”<sup>1</sup>) Unlike a case where the only evidence of a past event is the testimony of witnesses, which may require the fact-finder to determine the credibility of the witnesses, in this instance the circumstances surrounding the administration of the breath test to the Respondent are undisputed.<sup>2</sup> With respect to the video recording in this case, the portion 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 Respondent:

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 mouth, 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?

Respondent:            [Silently nods yes.]

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<sup>1</sup> Using the “Breath Alcohol Analysis Test Report.” the video recording from the breath test site may also be viewed by going to [www.sled.sc.gov](http://www.sled.sc.gov), clicking on “Implied Consent,” then clicking on “Breath Site Video Recordings,” and then entering the Subject Id: 16BF9D69A1, and the Subject Password: 67183.

<sup>2</sup>*Cf. State v. Frasier*, 431 S.C. 234, 847 S.E.2d 274 (Ct.App. 2020), *reversed*, 437 S.C. 625, 879 S.E.2d 762 (2022) (the South Carolina Supreme Court recently observed that with the ubiquitous use of video recording devices in criminal investigations, appellate courts are no longer dependent on the determinations of trial courts when reviewing evidence on appeal; while the need for deferential review remains, particularly in determining issues of witness credibility, it is no longer necessary for an appellate court to defer to the trial court’s overall ruling in every case).

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?

Respondent: [Silently nods yes.]

Trooper Horton: Do you have any questions?

Respondent: [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. Are you ready?

Respondent: [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 the sample may be submitted, the Respondent blew into tube connected to the DataMaster nine (9) times. Notably, between 31:57 and 32:26, the Respondent 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 Respondent:

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

Respondent: 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...

Respondent: 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.

Respondent: 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.

Respondent: 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.

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

Trooper Horton: I never told you to stop.

Respondent: 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 time limit, okay.

Respondent: 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.

Respondent: 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 your copy for me.

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

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

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

That with respect to the instructions given by Trooper Horton, these instructions may seem direct enough to officers, lawyers, and judges familiar with the breath testing process, however, for a person completely unfamiliar with the testing process and the DataMaster machine, there is ample room for misunderstanding. Trooper Horton instructed the Respondent 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 Respondent, "Once you start to take the test, breath out until I ask you to stop. If you have to start over the 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 the machine would begin beeping "intermittently," and then the Respondent would have to perhaps take a deeper breath and blow longer or stronger a second time, or more, to submit an adequate breath sample. 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 she is correctly performing the test. Trooper Horton testified that he never advises a breath test subject that a breath test is not being performed correctly. (R. p. 92, lines 10-18) 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. SLED Policies are silent as to whether a test operator should advise a person during the breath test that the person is incorrectly or not sufficiently providing a breath sample. In practice, this seems to be left to the discretion of the individual test operator.

At the end of the testing process, the Respondent clearly communicated to Trooper Horton that she intended to take the test, however, Trooper Horton, acting within his sole discretion, refused to take the few minutes required to reset the DataMaster and allow the Respondent to retake the test.

Lastly, during the contested case hearing, the Respondent testified that she wanted to take the breath test to avoid the suspension of her driving privileges, which would negatively impact upon her ability to perform her duties in the Army. (R. p. 101, line 23 through p. 102, line 10) The Respondent testified she had never been arrested for driving under the influence, and had never been offered a breath test. (R. p. 101, lines 17-22) Perhaps most importantly, the Respondent testified that she blew into the DataMaster, and that she thought she was correctly submitting the breath sample. (R. p. 103, lines 6-7) The Respondent further testified that in the absence of any correction by Trooper Horton that she thought that she was correctly performing the test. (R. p. 103, lines 3-7)

C. Application of Law to the Case

In this case, the ALC reversed the decision of the OMVH Hearing Officer, finding that the decision was not supported by substantial evidence. The Appellant's appeal from the decision of the Administrative Law Court (ALC) is predicated on the argument that the ALC reweighed the evidence and substituted its judgment for that of the OMVH Hearing Officer's decision. In the context of contested case hearings involving implied consent refusals, the ALC must necessarily examine the evidence to make a legal determination whether the decision of OMVH Hearing Officer's is supported by substantial evidence. This examination of the evidence requires the ALC to review and discuss the evidence presented during the contested case hearing.

In *Chisolm*, this Court reviewed the evidence presented during the contested case hearing of that case, and reversed the decisions of both the OMVH Hearing Officer and the ALC. The *Chisolm* case is not what would be considered the archetypical case, where the test subject blew into the DataMaster 1 minute and 53 seconds out of a possible 2 minute period to submit a sample. As this Court noted in *Chisolm*, there are other ways a person may not be refusing a breath test when an inadequate sample is submitted. The *Chisolm* case, with its discussion from cases from other jurisdictions, does not stand for the limited proposition that in order for a person to contest a finding that they refused the breath test that such person must establish that they blew into the DataMaster for a period of 1 minute and 53 seconds, or a comparable time. Rather, the *Chisolm* decision focused on the willfulness or deliberateness of the person's refusal. Accordingly, the touchstone to any inquiry regarding a person's refusal where there is an inadequate breath sample, is the intent of the person being tested to submit, or not submit, to a breath sample.

In this case, the ALC concluded that the evidence in the record from the contested case hearing clearly demonstrated that the Respondent was earnestly attempting to submit a breath sample, and stated the following in her decision:

Here, substantial evidence does not support that [Respondent] constructively refused the breath test. The testimony unequivocally reveals that [Respondent] 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 [Respondent] 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 [Respondent] refused to answer or incorrectly answer biographical information, nor evidence of [Respondent] intentionally causing the instrument to have an error or failure. In fact, Trooper Horton acknowledged that [Respondent] willfully submitted to the test without having delayed its administration. And while the inadequate sample may have been a result of [Respondent's] intermitted breathing there is no evidence that she acted willful to thwart the administration of the breath test. On direct, [Respondent] 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...I thought I was doing it correctly the whole time." (R. 55:25-56:7). [Respondent's] testimony is further corroborated by the video recording which shows that during the two-minute administration of the breath test, [Respondent] produced nine steady tones, ranging in length for two to thirteen seconds. Trooper Horton did not instruct [Respondent] to how long the steady tone must last but rather only that a steady tone was indication that she was properly completing the test correctly. [*Chisolm*] at 606, 741 S.E.2d at 50. Moreover, similar to Chisolm's request to take a second breath test, [Respondent's] immediate challenge to Trooper Horton's advisement that a refusal was recorded, provides further evidence that Appellant did not refuse the test. *Id.* [Footnote omitted]

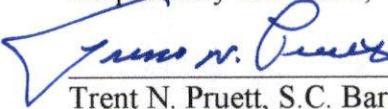
Order of Shirley C. Robinson, Administrative Law Judge, dated June 20, 2023, pp. 7-8.

(R. pp. 8-9)

**CONCLUSION**

That based upon the above argument and the applicable law, the Order of the Administrative Law Court should be affirmed.

Respectfully submitted,



---

Trent N. Pruett, S.C. Bar # 4585

Pruett & Cook Law Firm

202 North Petty Street

Gaffney, South Carolina 29340

(864) 488-0120

pruettlaw@currently.com

Attorney for the Respondent

October 10, 2023

**CERTIFICATE OF COUNSEL**

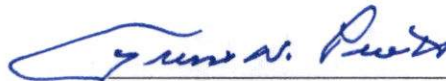
I hereby certify that this, the "Final Brief of the Respondent," complies with Rule 211(b), SCACR.

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OCT 12 2023

Respectfully Submitted,

SC Court of Appeals



TRENT N. PRUETT, S.C. Bar# 4585  
Pruett & Cook Law Firm  
202 North Petty Street  
Gaffney, South Carolina 29340  
Telephone: (864) 488-0120  
Email: pruettlaw@currently.com  
Attorney for the Respondent

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