

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley Robinson, Administrative Law Judge
H. Philip Hayes, Jr., OMVH Hearing Officer

Docket No. 11-ALJ-21-0563-AP
Docket No. 10-OMVH-01-3433-CC

Edward Eli Saleeby, III, ... Appellant,

v.

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

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SC Court of Appeals

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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,

vs.

Edward Eli Saleeby, III,
Respondent.

Docket No. 10-OMVH-01-3433-CC

FINAL ORDER AND DECISION

Appearances:

For the Respondent: Edward Eli Saleeby, Jr., Esquire

Christopher Scott, Esquire

Others: Edward Eli Saleeby, III, Respondent

For the Petitioners: (Witness) C.D. Brigham, SCDPS - Florence

Other Information:

Respondent's Driver's License # 11290751

Type of Hearing: Implied Consent (S. C. Code Ann. § 56-5-2950) (Supp. 2009)

Respondent alleged refusal to take chemical test(s)

INTRODUCTION

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) upon a request by Edward Eli Saleeby, III for a contested case hearing. Respondent was arrested on July 3, 2010 for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon refusal to submit to testing of his breath, blood or urine to determine his alcohol concentration, Respondent was charged with a violation of S. C. Code Ann. §56-5-2950 (Supp. 2009) and received a notice of suspension from the investigating officer. The matter was assigned to me to conduct a hearing.

Written notice of the hearing was sent to the Petitioners, (South Carolina Department of Public Safety and South Carolina Department of Motor Vehicles), and to the Respondent. It was held on October 19, 2011 at the Florence City/County Complex, Florence, 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 is sustained.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing 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:

1. Notice of the date, time, place, and subject matter of the hearing was timely given to the parties.
2. On July 3, 2010 while on routine patrol in Darlington County, Trooper Brigham witnessed a black in color Chevrolet pickup truck traveling on U.S. 15 within the city limits of Hartsville. Trooper Brigham witnessed the truck following too close to a vehicle in front of it. Both vehicles were in the same lane of travel. Trooper Brigham initiated a traffic stop on the truck.
3. The driver of the truck was Edward Eli Saleeby, III, the Respondent.
4. Trooper Brigham noticed a very strong odor of alcohol coming from within the truck. The Respondent was asked to exit the truck. There were two (2) passengers left inside the truck. Trooper Brigham noticed an odor of alcohol on the Respondent outside his truck. The Respondent appeared disoriented, and his eyes were dilated. The Respondent stated that he had taken Loricets because he had chipped a tooth.
5. The Respondent contends that he had taken a small dose of Hydrocodone prescribed to him by a medical doctor.
6. The Respondent stated that he has Ataxia which is a coordination disorder.
7. Field sobriety tests were offered to the Respondent. The first (1st) test was the "HGN" test. The Respondent had no nystagmus; however his pupils were dilated.

8. The second (2nd) test was the "walk and turn" test. The Respondent started the test before instructions were finished; did not touch heel-to-toe; lost his balance while walking; and took an incorrect number of steps.
9. The third (3rd) test was the "one (1)-leg stand" test. The Respondent swayed while balancing; used his arms for balance; and put his foot down.
10. Trooper Brigham arrested the Respondent for Driving under the Influence.
11. During an inventory of the Respondent's vehicle, Trooper Brigham found a prescription of Xanax in the center console.
12. The Respondent was transported to the Hartsville Police Department for the offering of the breath test.
13. When the Respondent entered the DataMaster Test room, the Respondent was advised that he was being video-recorded. The Respondent was allowed to use the rest room at the DataMaster Test site. Trooper Brigham advised the Respondent that he believed the Respondent to be under the influence of narcotics.
14. The Respondent stated that he wanted to give a blood sample and not a breath sample.
15. Trooper Brigham read and gave the Respondent a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement for breath testing) in writing.
16. The Respondent's mouth was checked for foreign material.
17. The Respondent was observed for twenty (20) minutes.
18. The DataMaster Test machine was operating properly.
19. The Respondent submitted to a breath test for alcohol concentration, and test result indicated an alcohol concentration of zero one-hundredths of one percent (0.00%).
20. Trooper Brigham is a certified DataMaster Test Operator.
21. Trooper Brigham read and gave the Respondent a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement for urine testing) in writing. The Respondent signed the Implied Consent Advisement.
22. Trooper Brigham advised the Respondent that he would be transported to Carolina Pines for a urine test.

23. During transport to Trooper Brigham's vehicle, the Respondent verbally refused the urine test. The Respondent's refusal to urine testing was not video-taped.
24. The Respondent contends that he did not refuse urine testing; however, during cross examination, the Respondent testified that he did not "recall" refusing to submit to urine testing.
25. The Respondent was charged with a violation of S.C. Code Ann. § 56-5-2950 (Supp. 2010) for refusing to submit to a urine test.
26. On July 3, 2010, the Respondent was issued a Notice of Suspension by Trooper Brigham which suspended the Respondent's driver's license or driving privilege.
27. The Respondent signed the Notice of Suspension.

CONCLUSIONS OF LAW

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

General

1. In S. C. Code Ann. §1-23-600 (Supp.2009), the General Assembly provided for the creation of the South Carolina Division of Motor Vehicle Hearings. Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of drivers' licenses. The name of the DMVH was changed to the Office of Motor Vehicle Hearings (OMVH) effective October 1, 2008.
2. 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).
3. Appeals from final decisions of the Hearing Officers will be to the SCALC in accordance with S. C. Code Ann. § 1-23-600 (Supp. 2009).
4. Petitioner 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 (2006)

5. 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 Petitioner 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, Petitioner 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.

Unlawful to drive while under the influence

6. Pursuant to S. C. Code Ann. § 56-5-2930 (Supp. 2009), 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.

Implied consent to submit to testing

7. S.C. Code Ann. § 56-5-2950(A)(Supp. 2009) 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) (Supp. 2009).

8. S.C. Code Ann. § 56-5-2950(B) (Supp. 2009) 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.

9. 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)(Supp.2009).

10. If a person drives a motor vehicle and 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 issues a notice of suspension which is effective beginning on the date of the alleged violation. See S.C. Code Ann. § 56-5-2951(A) (Supp. 2009)

11. 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) (Supp.2009). 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.

12. Counsel for the Respondent argued that the suspension of Respondent's driver's license or driving privilege should be rescinded based on the Respondent not verbally refusing to submit to urine testing. I disagree.

The videotape of the DataMaster Test room shows Trooper Brigham advising the Respondent that a urine test is being requested. Trooper Brigham turns off the videotape. Trooper Brigham testified that the Respondent verbally refused to submit to urine testing as he and the Respondent were in transit to his vehicle for transport of the Respondent to Carolina Pines. The Respondent testified that he did not refuse urine testing; however, under cross-examination, the Respondent testified that he did not "recall" refusing the urine test. The conflicting testimonies lead one to believe that Trooper Brigham's testimony concerning the Respondent's refusal to urine testing is true, steadfast, and without doubt; whereas, the Respondent first testified that he did not refuse urine testing but under cross-examination testified that he did not "recall" refusing the urine test. I conclude the Respondent did verbally refuse to submit to the urine test offered to him by Trooper Brigham.

13. Counsel for the Respondent argued that the suspension of Respondent's driver's license or driving privilege should be rescinded based on Trooper Brigham not providing affirmative assistance to the Respondent as required by Section 56-5-2950 (D) and (E) in reference to the Respondent's request for a blood test. I disagree.

When the Respondent first entered the DataMaster Test room, he requested a blood test. Trooper Brigham followed statutory procedure and first offered the Respondent a breath test although he believed the Respondent to be under the influence of drugs. The Respondent had a breath alcohol analysis test reading of zero one-hundredths of one percent (0.00%). Based on Trooper Brigham finding Xanax in the Respondent's vehicle after the Respondent admitted to taking Loricets, Trooper Brigham offered the Respondent the opportunity to submit to urine testing. The Respondent verbally refused the urine test.

Section 56-5-2950 (D) and (E) provide that the person tested or giving samples for testing may have a qualified person of his own choosing conduct *additional tests* at his expense. The officer must provide affirmative assistance to the person requiring *additional tests*. Because the Respondent refused the urine test, there was no initial test and therefore no duty to provide affirmative assistance for *additional tests*. The Respondent verbally refused to submit to urine testing for drugs and did not give a urine sample for drug testing; therefore, affirmative assistance is not an issue in this case.

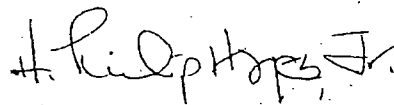
14. I conclude as a matter of law that the Petitioners have met the burden of proof pursuant to Section 56-5-2950 (Supp.2009). The Respondent was lawfully arrested for Driving under the Influence; the Respondent was read and given a copy of the appropriate Implied Consent Advisement (Driving under the Influence Advisement) in writing; and the Respondent refused the urine test by verbally stating to Trooper Brigham that he would not submit to the urine testing. Accordingly, the relief requested by the Respondent is denied.

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 sustained.

AND IT IS SO ORDERED.

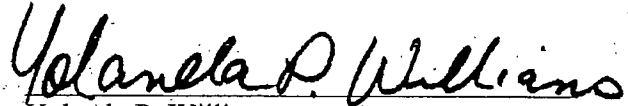


H. Philip Hayes, Jr.
OMVH Hearing Officer

October 24, 2011
Florence, South Carolina

CERTIFICATE OF SERVICE

I, Yolanda P. Williams, 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, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).


Yolanda P. Williams

October 25, 2011
Columbia, South Carolina

NOTICE

A party may appeal this final decision by filing written notice with the South Carolina Administrative Law Court within thirty (30) days of receipt of the order to the following address:

Attn: Clerk
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

The notice must be accompanied by proof of service of the notice on all parties and a filing fee in the amount of \$150.00 made payable to the South Carolina Administrative Law Court. See ALC Rules 3(A), 4(B), 31(A), 33 and 71(A). A copy of the notice must also be sent to the OMVH and a copy of the transcript shall be ordered within ten days after service of the notice. The transcript must be ordered by the Appellant and the Appellant is responsible for the cost thereof.

Furthermore, a party may file a written motion with the OMVH within ten (10) days after notice of this order requesting the Hearing Officer reconsider this final decision. However, the filing of a Motion of Reconsideration does not stay the provisions of this final decision nor excuse compliance with its provisions. See OMVH Rule 15 (D). A stay must be requested specifically by motion. See OMVH Rule 15 (E). The filing of a motion for reconsideration does stay the time for an appeal until an order is issued; however, if the hearing officer does not issue a written order on the motion for reconsideration, it is deemed denied thirty days after it is filed.

Only original documents are accepted. Documents must be filed via hand-delivery or by depositing the document in the U.S. Mail, properly addressed, with sufficient first class postage attached. Facsimiles sent to the OMVH and the South Carolina Administrative Law Court do not comply with filing requirements and are not authorized. See ALC Rules 4(B).

The Rules of the Administrative Law Court are found at: www.scalc.net

The Rules of the Office of Motor Vehicle Hearings are found at: www.scomvh.net

FILED

AUG 02 2013

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Edward Eli Saleeby, III,

Docket No. 11-ALJ-21-0563-AP

Appellant,

v.

ORDER

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

Respondents.

STATEMENT OF THE CASE

This matter is an appeal by Appellant Edward Eli Saleeby, III ("Appellant") from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings ("OMVH") dated October 24, 2011. The OMVH's decision was issued following an administrative hearing held pursuant to S.C. Code Ann. § 56-5-2951(B)(2). Upon careful review of the matter, OMVH's decision is affirmed.

BACKGROUND

On July 3, 2010, Trooper Brigham of the South Carolina Department of Public Safety, while on routine patrol in Darlington County, observed a truck following too closely to a vehicle in front of it. Trooper Brigham initiated a traffic stop on the truck. Trooper Brigham approached the vehicle, and he identified Appellant as the driver. Trooper Brigham noticed a very strong odor of alcohol coming from within the truck. However, upon speaking with Appellant outside of the vehicle, there was no odor of alcohol. Trooper Brigham observed that Appellant appeared disoriented, and his eyes were dilated. Appellant subsequently stated that he had taken Lorcet because he had a chipped tooth.

Trooper Brigham then requested Appellant to perform field sobriety tests. Prior to performing the field sobriety tests, Appellant informed the Trooper that Appellant had a medical condition that caused problems with balance. During the Horizontal Gaze Nystagmus test, Appellant had no nystagmus; however his pupils were dilated. During the walk-and-turn test, Appellant started the test before instructions were finished, stepped off the line, and took the

incorrect number of steps. During the one-leg stand test, Appellant swayed while balancing and used his arms to balance himself, as well as placed his foot down. Appellant was subsequently placed under arrest for driving under the influence and transported to the Hartsville Police Department for a DataMaster test. While conducting an inventory search of Appellant's vehicle, Trooper Brigham found a prescription bottle of Xanax located in the center console.

Prior to beginning the DataMaster test, Appellant was advised that he was being video-recorded. Trooper Brigham further advised Appellant that he believed Appellant to be under the influence of narcotics. Appellant then informed Trooper Brigham that he wanted to give a blood sample and not a breath sample. Trooper Brigham advised Appellant that he was required to give Appellant a breath test first because Appellant was medically able to provide the breath sample. Trooper Brigham, a certified DataMaster operator, advised Appellant of his implied consent rights verbally and in writing. Appellant's mouth was checked for foreign material, he was observed for twenty minutes, and the DataMaster machine was working properly. Appellant consented to the test and provided a breath sample of 0.00%. Based upon the breath test result, Trooper Brigham advised Appellant that he would be transported to Carolina Pines Hospital for a urine test.

During transport to Trooper Brigham's vehicle, Appellant verbally refused the urine test. Appellant's refusal to urine testing was not videotaped. Based upon Appellant's refusal to submit to a urine test, a notice of suspension was issued to him. Appellant signed a copy of the notice of suspension indicating his license was being suspended due to refusing to submit to a urine sample. After Respondent South Carolina Department of Motor Vehicles ("Department") received the notice of suspension, it suspended Appellant's driver's license in accordance with state law.

Appellant subsequently requested an administrative hearing. The hearing was held on October 19, 2011. On October 24, 2011, the OMVH hearing officer issued a Final Order and Decision sustaining Appellant's suspension. Appellant then filed this appeal with the ALC on November 4, 2011.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660. Therefore, the OMVH is an "agency" under the

Administrative Procedures Act ("APA"). See S.C. Code Ann. § 1-23-310(2). As such, the APA's standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380; see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard used by appellate bodies, including the ALC, to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5). This section provides:

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 [of the agency] 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.

S.C. Code Ann. § 1-23-380(5).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion reached by the agency. Bilton v. Best W. Royal Motor Lodge, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). A decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The fact that the record, when considered as a whole, 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 Res. Conservation Comm'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).

In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). 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.

ISSUES ON APPEAL

1. Did the Hearing Officer err in finding that sufficient evidence had been presented to establish probable cause for Appellant's arrest?
2. Did the Hearing Officer err by failing to rescind Appellant's suspension based upon the arresting officer's failure to videotape Appellant's refusal?
3. Did the arresting officer err in his advisement to Appellant concerning the blood test?
4. Did the Hearing Officer err in his determination regarding Appellant's request for "affirmative assistance"?

DISCUSSION

Probable Cause

Appellant argues that the Hearing Officer erred in relying upon portions of Trooper Brigham's testimony in making his determination that probable cause existed to arrest Appellant for driving under the influence. More specifically, Appellant argues that the Hearing Officer erred in relying upon testimony regarding a prescription bottle found within Appellant's vehicle and Appellant's performance on the field sobriety tests.

Appellant argues that the Hearing Officer should not have considered any testimony regarding the prescription bottle of Xanax found within Appellant's vehicle because there was no evidence or testimony that Appellant had consumed that medication on the night in question. Appellant also argues that he has a medical condition which prevents him from properly performing field sobriety tests. Specifically, Appellant asserts that he suffers from Ataxia, which can cause an individual to have balancing problems. Because Appellant informed Trooper Brigham of his medical condition, Appellant argues that Trooper Brigham should not have requested him to perform any field sobriety tests which include balancing as a component.

The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been

committed by the person being arrested. Id. Whether probable cause exists depends on the totality of the circumstances surrounding the information at the officer's disposal. Id.

With regard to the prescription bottle found within the vehicle, there is no requirement that the arresting officer prove that Appellant was under the influence of this particular medicine at the time of the traffic stop. Notably, the question before the Hearing Officer was not whether the Department had proved that Appellant was guilty of driving under the influence, or much less, under the influence of this particular medicine. See Lapp v. S.C. Dep't of Motor Vehicles, 387 S.C. 500, 506, 692 S.E.2d 565, 568 (Ct. App. 2010) (noting that an implied consent hearing "is *not* a trial in regard to the guilt or innocence of the defendant on a DUI charge") (emphasis in original). Instead, the question was merely whether the circumstances within the Trooper's knowledge were sufficient to lead a reasonable person to believe that Appellant had committed the offense of driving under the influence. See Baccus, 367 S.C. at 49, 625 S.E.2d at 220.

Given the totality of the circumstances in the case before this Court, the Hearing Officer did not err in concluding that Trooper Brigham's testimony established that probable cause existed for Appellant's arrest for driving under the influence. Trooper Brigham testified that he placed Appellant under arrest for driving under the influence based upon his observations, including: following too closely to the vehicle in front of him; a strong odor of alcohol coming from within the vehicle; when speaking with Appellant, he appeared disoriented; Appellant's pupils were dilated; Appellant admitted "he was on Lorcet"; Appellant's performance on the field sobriety tests; and, upon searching Appellant's vehicle, Trooper Brigham found a prescription bottle for Xanax. Trooper Brigham's testimony was clearly sufficient, as a whole, to establish probable cause for Appellant's arrest. Cf. State v. Goodstein, 278 S.C. 125, 127, 292 S.E.2d 791, 792 (1982) (holding that there was "abundant testimony" to sustain the conclusion that motorist's arrest for driving under the influence was lawful where arresting officer testified that the motorist was speeding, had a strong odor of alcohol about his person, had slurred speech, and was obnoxious and unsteady on his feet). Moreover, South Carolina courts have found probable cause to arrest for driving under the influence where there was no mention of evidence that the motorist had slurred speech or bloodshot eyes. See e.g., Kelly v. S.C. Dep't of Highways, 323 S.C. 334, 474 S.E.2d 443 (Ct. App. 1996); State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (1978).

Videotape

Appellant next argues that his "alleged" refusal to submit to urine testing should not have been considered by the Hearing Officer because the refusal is "a misstatement of fact" and because no videotape exists to support the alleged refusal. Although Appellant argues that the Hearing Officer's determination that Appellant refused the urine test is a misstatement of fact, there is substantial evidence in the Record to support the contrary determination reached by the Hearing Officer. See Lark, 276 S.C. at 135, 276 S.E.2d at 306 (stating "[s]ubstantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.").

Trooper Brigham testified that Appellant refused the urine test during transport from the Detention Center to his patrol car. Although Appellant testified that he did not refuse the Trooper's request, he later testified that he "did not recall" refusing to submit to the urine test. Moreover, Appellant signed the notice of suspension issued to him as a result of his refusal to submit to a urine test. "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (citing Palmetto Alliance, Inc. v. S.C. Public Service Commission, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). Based on the testimony and the evidence presented during the hearing, reasonable minds could reach the conclusion the Hearing Officer reached in this matter. The Hearing Officer observed the witnesses and is in the best position to judge their demeanor and veracity and to evaluate the credibility of each witness' testimony. See Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

With regard to Appellant's argument that the Trooper must videotape Appellant's refusal to submit to a urine test, Appellant cites State v. Elwell, 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011) as "related case law" to support his assertion. In Elwell, the Court recognized that in all driving under the influence cases, "the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so." Elwell, 396 at 336-7, 721 S.E.2d at 454 (citing S.C. Code Ann. § 56-5-

2950(A)(2)(b)-(c)).¹ As acknowledged by Appellant in his brief, there is no case law, statute or regulation that requires a videotape of a person who refuses a urine test in a driving under the influence matter. In Elwell, the Court discussed the videotape in the context of a breath test, not a urine test like the instant matter. Id. The Court, therefore, finds the Hearing Officer properly determined that a video was not required regarding Appellant's refusal to submit to urine testing. Moreover, Appellant was video-recorded during the DataMaster pre-test procedures, and this video was made available online.

Advisement

Appellant next argues that Trooper Brigham wrongfully advised Appellant that a blood test was not an option, and thus, failed to provide affirmative assistance to Appellant when he requested the blood test. Appellant further argues that he should have been granted a blood test because it "provides the most comprehensive determination of what amount, if any, of narcotics was in [Appellant's] system."

In reviewing the Record, Trooper Brigham advised Appellant that proceeding with a blood test at the time Appellant requested it was premature. Pursuant to S.C. Code Ann. § 56-5-2950, the Trooper was required to first offer a breath test to Appellant: "At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration." § 56-5-2950(A). The only statutory exception applies if the motorist is "physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel." Id. None of these exceptions applied in Appellant's circumstances.

Moreover, § 56-5-2950(A) also provides that "[i]f the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that urine sample be taken for testing." The statute further directs the officer that the "breath sample taken for testing must be collected within two hours of the arrest" and that "[a]ny additional tests to collect other samples must be collected within three hours of the arrest. Id. Based upon the Trooper's observations during the traffic stop, it is reasonable to conclude that the Trooper was required, by time-constraints, to

¹ The motorist appealed the Court of Appeals' decision in Elwell. The South Carolina Supreme Court granted review and issued a decision affirming the Court of Appeals' decision. State v. Elwell, No. 2012-209726, 2013 WL 2325600 (S.C. May 29, 2013).

administer the breath test prior to administering any additional tests including blood or urine tests.

And while a blood test may or may not provide a more "comprehensive" determination of any narcotics in a person's system, nothing in the statute requires the officer to proceed with a blood test prior to administering a breath test. As noted above, the officer is required, by statute, to first administer a breath test to an individual to determine his alcohol concentration. See § 56-5-2950(A).

Affirmative Assistance

Appellant next argues that the Hearing Officer erred in his determination that affirmative assistance is not an issue in this case. More specifically, the Hearing Officer concluded that because Appellant "refused a urine test, there was no initial test and therefore no duty to provide affirmative assistance for additional tests."

Section 56-5-2950(D) and (E) provide for the following:

(D) The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

(E) The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED must test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.

Appellant first requested a blood test prior to receiving his implied consent rights and prior to submitting to the breath test. At that point, affirmative assistance was not applicable: Section 56-5-2950(D) authorizes a "person tested or giving samples for testing" to have a "qualified person of his own choosing conduct additional tests at his expense." (emphasis

added). Appellant had not submitted to any tests, and therefore, affirmative assistance to receive a blood test was not applicable. Appellant subsequently consented to a breath test, and the test result registered 0.00%. At this point, Appellant was advised by Trooper Brigham that a urine sample was being requested due to the Trooper's belief that Appellant was under the influence of narcotics. Trooper Brigham advised Appellant that he was being transported to Carolina Pines Regional Medical Center for urine testing. Appellant verbally refused to provide a urine sample. Despite the Trooper's statement that Appellant was being transported to the hospital, Appellant did not make any further requests for a blood test after he refused to provide a urine sample.

Trooper Brigham was not required to provide affirmative assistance to Appellant after his refusal to provide a urine sample. The purpose of the statute is to provide a person the opportunity to challenge the state's test or procedures. See Town of Fairfax v. Smith, 285 S.C. 458, 459, 330 S.E.2d 290, 290 ("The purpose of [§§ 56-5-2950(D) and (E)] is to permit an accused person to gather independent evidence to submit in reply to that of the prosecuting authority.")². In Appellant's case, Appellant is not seeking to challenge the DataMaster test result or any procedures related to the test. Nevertheless, even if Trooper Brigham failed to provide affirmative assistance to Appellant, the remedy for such failure is to bar "the admissibility of the breath test result in any judicial or administrative proceeding." S.C. Code Ann. § 56-5-2950(E). Appellant does not challenge the breath test result or procedures in any way. Rather, he is attempting to challenge the Hearing Officer's determination that Appellant refused to submit to urine testing.

Accordingly, the OMVH Hearing Officer did not err in finding that there was probable cause to arrest Appellant for driving under the influence, that Appellant's refusal to submit to urine testing was not required to be videotaped, that the Trooper did not err in his advisement to Appellant regarding the blood test, and that Appellant's suspension will not be rescinded based upon "affirmative assistance." Moreover, the OMVH Final Order and Decision is supported by the substantial evidence in the Record.

ORDER

IT IS HEREBY ORDERED that the OMVH Final Order and Decision sustaining the suspension of Appellant's driver's license or driver's privilege is **AFFIRMED**.

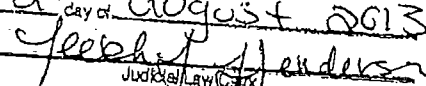
² Town of Fairfax v. Smith, 285 S.C. 458, 330 S.E.2d 290, was decided under prior versions of S.C. Code Ann. §§ 56-5-2950(D) and (E). The amendments to these sections did not change the substance of the statute.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

August 2nd, 2013
Columbia, South Carolina

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 paid, or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s).

This 2 day of August 2013
By: 
Joseph J. Henderson
Judd & Law, P.C.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edward Eli Saleeby, III,

Appellant,

v.

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

Respondents.

Docket No. 11-ALJ-21-0563-AP

ORDER DENYING
MOTION FOR
RECONSIDERATION

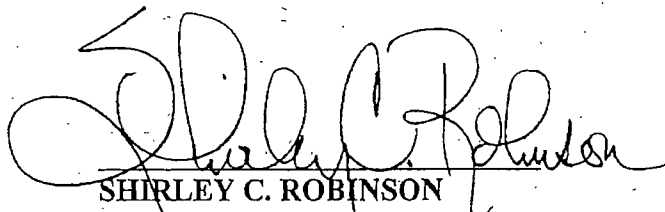
This matter is before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to the Notice of Appeal filed by Edward Eli Saleeby, III ("Appellant") on November 4, 2011. On August 2, 2013, the Court issued an Order affirming the OMVH's decision to sustain the suspension of Appellant's driver's license or driver's privilege.

Subsequently, on August 9, 2013, the Appellant filed a motion requesting the Court to reconsider its decision. Having considered the facts of this appeal and the Appellant's motion, the Court finds that its August 2, 2013 Order must stand.

THEREFORE, IT IS HEREBY ORDERED that Appellant's Motion for Reconsideration is **DENIED**.

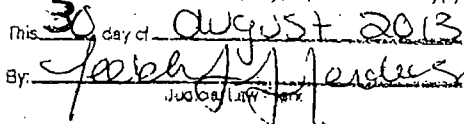
AND IT IS SO ORDERED.

August 30th, 2013
Columbia, South Carolina


SHIRLEY C. ROBINSON
Administrative Law Judge

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 paid, or in the emergency Mail Service addressed to the party(ies) or their attorney(s).

This 30 day of August, 2013
By: 
Judicial Law Clerk

FILED

AUG 30 2013

The South Carolina Court of Appeals

Edward Eli Saleeby, III, Appellant,

v.

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

Appellate Case No. 2013-002081

ORDER

Appellant has filed a petition for supersedeas. In light of the fact the South Carolina Administrative Law Court has stayed the suspension of Appellant's driver's license until a decision of this court is rendered, this court need not act on Appellant's petition for supersedeas.

Additionally, Appellant's first motion for an extension to serve and file his initial brief and designation of matter is granted. Appellant shall serve and file his initial brief and designation of matter by November 29, 2013.


FOR THE COURT

Columbia, South Carolina

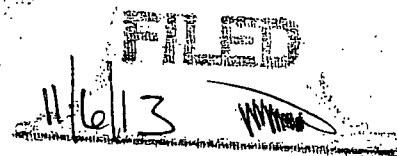
cc:

Christopher Joshua Scott

John S. Nichols

John Clarke Newton

Frank L. Valenta, Jr.



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edward Eli Saleeby, III,

Appellant,

vs.

South Carolina Department of Public Safety)

And South Carolina Department of)

Motor Vehicles,)

Respondents.)

Docket No. 11-ALJ-21-0563-AP

APPELLANT'S
BRIEF ON APPEAL

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edward Eli Saleeby, III,
DL# 011290751
Appellant,

vs.

South Carolina Department of Public Safety

And South Carolina Department of
Motor Vehicles,
Respondents.

)
)
)
)
) APPELLANT'S BRIEF SUPPORTING
) HIS APPEAL OF THE S.C.
) OMVH's ORDER SUSTAINING THE
) SUSPENSION OF HIS DRIVER'S
) LICENCE

Statement of Jurisdiction

In accordance with S.C. Code Ann. §1-23-600 (Supp. 2009), the Office of Motor Vehicle Hearings is authorized to employ Hearing Officer's to preside over contested case hearings involving suspensions of drivers' licenses and appeals of the Hearing Officer's final decision is to the South Carolina Administrative Law Court. Pursuant to S.C. Code Ann. §1-23-570 (Supp. 2010), the instant appeal of the Final Order and Decision of H. Phillip Hayes, Jr., Hearing Officer for the South Carolina Office of Motor Vehicles, dated October 24th, 2011 (OMVH Docket No.: 10-OMVH-01-3433-CC) is properly before the Honorable Shirley C. Robinson of the South Carolina Administrative Law Court. The above OMVH hearing was conducted based upon the Appellant's alleged refusal to submit to urine testing pursuant to the implied consent statute, S.C. Code Ann. § 56-5-2950 (Supp. 2009), which is provided in the 'Argument and Authorities' section below.

Statement of the Issues

Notice of Appeal ISSUE {3} Appellant withdraws issue 3 contained in his Notice of Appeal and asks this Court to strike the same from further consideration.

ISSUE 1: Improper Field Sobriety Tests

Whether the Hearing Officer erred in allowing Standard Field-Sobriety Tests (SFST) involving balance, to be relied upon in a probable cause determination by a law enforcement officer, Trooper C.D. Brigham, when the Appellant notified Trooper Brigham of a medically diagnosed condition which greatly affects balance *prior* to SFST being administered.

ISSUE 2: Empty and expired prescription bottle

Whether the Hearing Officer erred in his probable cause determination by considering Trooper Brigham's testimony of finding a legally prescribed bottle of Xanax during a post-arrest search of Saleeby's vehicle, when the testimony establishes that Trooper Brigham had already made his probable cause determination prior to finding this prescription bottle and Saleeby readily admitted to keeping an out-of-date prescription bottle in his motor vehicle.

ISSUE 3: No videotape of alleged refusal

Whether the Hearing Officer erred in finding that the Respondents met their burden of proving Appellant refused to submit to a urine test, when the evidence establishes that Trooper Brigham had the opportunity and properly working video equipment required by S.C. Code Ann § 56-5-2950(B), but avoided using the best evidence and vitiated the

intent of the statute (§ 56-5-2950(B)) by failing to videotape Saleeby's alleged refusal in either the breathalyzer room or in the patrol car.

ISSUE 4: Timing of request for affirmative assistance

Whether the Hearing Officer erred by interpreting the language of S.C. Code Ann § 56-5-2950 to mean that the Appellant is precluded from asserting his statutory right to "affirmative assistance" prior to being read his implied consent rights by Trooper Brigham.

ISSUE 5: Applicability of affirmative assistance

Whether the Hearing Officer erred in determining that "affirmative assistance" required by S.C. Code Ann § 56-5-2950 (D) & (E) is not an issue in this case, despite Saleeby providing a valid breath sample of .00 blood alcohol concentration.

ISSUE 6: Superiority of blood over urine tests

Whether the Hearing Officer erred in Ordering the suspension of Saleeby's driver's license for allegedly refusing to submit to a urine test, which only show the presence or absence of narcotics, when the evidence establishes that Saleeby a) did not refuse to submit to urine test and b) requested a blood test which provides the "gold standard" of quantitative analysis of amount, if any, of narcotics that might been in Saleeby's body in the night in question.

ISSUE 7: Wrongful advisement of implied consent rights and the needed remedy

A) Whether Trooper Brigham's wrongful advisement, as shown on the breathalyzer room video, to Saleeby that "the only thing that would show up in blood is alcohol" thwarted the clear policy objectives of S.C. Code Ann. § 56-5-2950 by materially affecting the accuracy or reliability of the test results or the fairness of the testing procedure? B) If so,

what is the proper remedy when the Appellant provided a breath sample of .00 and the statutory remedy of excluding test results fails to address the alleged urine refusal charge?

Statement of the Case

A. Course of Proceedings and Disposition of OMVH

On November 4, 2011 Appellant (Saleeby) filed his Notice of Appeal with this Court, appealing the Final Order and Decision of H. Phillip Hayes, Jr., Hearing Officer for the South Carolina Office of Motor Vehicles, dated October 24, 2011. (OMVH Docket No.: 10-OMVH-01-3433-CC) On the same date, Appellant directed Notice of Appeal and Request for Transcript to the above-named Respondents. On November 15, 2011 this Court issued a Notice of Assignment and then issued an Order governing procedure on the following day. On January 30, 2012, Appellant filed a Motion for Default based on OMVH's untimely filing of the Record on Appeal and SCDMV filed its response on February 2, 2012. On February 3, 2012 this Court issued an Order Denying the Appellant's Motion for Default. Contained herein is Appellant's Brief of his Appeal of OMVH's Final Order of the implied consent hearing which is before this Court.

The Respondents to this action, the South Carolina Department of Public Safety (SCDPS) and South Carolina Department of Motor Vehicles (SCDMV) support the Final Order of OMVH Hearing Officer H. Phillip Hayes, Jr., which held that Appellant's driver's license suspension was proper based on SCDPS Trooper C. D. Brigham's assertion that Appellant refused to submit to a urine test. Appellant denied that the refusal took place (R.54) and instigated this appeal based on eight separate issues; chiefly, the

denial by Trooper Brigham of providing Appellant the statutory right of affirmative assistance in obtaining a blood test.

B. Statement of Facts

On June 17, 2010, the Appellant, Edward Eli Saleeby, III, suffered a heat stroke during a lake outing and was admitted to Carolina Pines Hospital in Hartsville, South Carolina for treatment of dehydration and a chipped tooth sustained during a fall from the stroke. The attending physician prescribed Saleeby five (5) Lorcet tablets to take, as needed, for pain caused by the chipped tooth, with no refills. Sixteen days later, on the evening July 3, 2010, Saleeby was still awaiting his dentist appointment to repair the tooth. On that same night, Saleeby accompanied a long-time friend and his date, as a designated driver. As the pain from his chipped tooth worsened, Saleeby took a single Lorcet from his prescription.

Later that evening in the City of Hartsville, Trooper C.D. Brigham instigated a traffic stop of Saleeby for following too closely. Upon approaching the vehicle, Trooper Brigham stated that he noticed a strong smell of alcohol and requested Saleeby exit the vehicle, which he did. After exiting the vehicle, it was apparent to Trooper Brigham that the odor of alcohol was not coming from Saleeby. Trooper Brigham, however, noticed that Saleeby's pupils were dilated. Trooper Brigham relayed this information to Saleeby. Saleeby explained that he had taken a single dose of his prescription medicine Lorcet and the reason for this. Trooper Brigham stated that Saleeby was disoriented at the time of the traffic stop, but did not offer any further explanation of what, if any, behavior qualified Saleeby as being disoriented. While standing in front of the pulsing blue lights, Saleeby explained that he was nervous, but displayed numerous types of normal-ability field

sobriety actions during the roadside traffic stop. Trooper Brigham's patrol car video camera evidences that Saleeby understood the Trooper's commands and responded intelligently. Indeed, Saleeby was polite, cooperative, and respectful. Further, as the record later that evening shows, Saleeby even held a clearly communicated conversation with Trooper Brigham that was recorded by the in-car video during the subsequent transport to the Hartville Police Department.

Nevertheless, as Saleeby stood outside of his vehicle, Trooper Brigham requested that Saleeby submit to Standard Field Sobriety Tests from the National Highway Safety Administration, which included; Horizontal Gaze Nystagmus, Walk & Turn, and One-Leg-Stand. Saleeby agreed to perform these tests after notifying Trooper Brigham that he suffered from a medical condition that impaired his ability to balance and walk in a straight line. This medical disorder, Ataxia, was later confirmed at the OMVH hearing through medical records of January 28, 2010, roughly six months prior to the traffic stop in question. (R. 89) Saleeby had no symptoms of Horizontal Gaze Nystagmus, but the balanced based Walk & Turn and One-Leg-Stand proved too difficult for Saleeby.

Without the benefit of Saleeby's medical records, coupled with the alleged dilation of Saleeby's pupils, Trooper Brigham thought it necessary to perform additional tests to determine whether Saleeby was in fact driving under the influence. Trooper Brigham then arrested Saleeby and transported him to the Hartsville Police Department. Upon arrival, and at Saleeby's request, Trooper Brigham allowed Saleeby to urinate before administering any tests. Saleeby was also allowed a phone call to his attorney, which Trooper Brigham observed. (R.29) Saleeby's attorney (father) advised him to submit to a blood test based on the common knowledge that a blood test is the pinnacle

for exoneration. As Saleeby entered the breathalyzer room, knowing that he had nothing to hide and the ability to pay medical expenses, he requested a blood test.(R.31) Trooper Brigham then explained, as shown on video, that a blood test was not an option because Saleeby was not suspected of being under the influence of alcohol. (R.25) Further, despite common knowledge otherwise, Trooper Brigham advised Saleeby that a blood test was for alcohol and a urine test was for narcotics. This misstatement of law and reality was recorded on the breathalyzer room videotape and flies in the face of truth, known by both the judicial system and the layperson.

As SLED procedure dictates, Trooper Brigham then read the implied consent advisement to Saleeby and began the twenty minute observation, during which, Saleeby was told that he would be required to submit to a urine test. (See S.C. ADC 73-3&5) Saleeby agreed to submit to a urine test, which is confirmed by the aforementioned videotape. As expected, Saleeby's breathalyzer result was .00, at which point the video recording ceased. There is no affirmative evidence of any subsequent events that transpired that night, despite the fact that Saleeby was transported from the Hartsville Police Department to the Darlington County jail in Trooper Brigham's patrol car. As evidenced by the earlier in-car video of Saleeby's transport from the roadside stop, Trooper Brigham's patrol car was equipped with a properly working video camera, a camera that was not used to record the alleged refusal to submit to urine testing.

As one would suspect, it is this undocumented transport from the Hartsville City Police Department, to where Saleeby thought additional testing would take place, Carolina Pines; where the alleged refusal took place.

Summary of Argument

Appellant presents seven issues for this Court to consider as basis for overturning the Final Order of OMVH, each of which support the position that Appellant should not be penalized for, nor charged with, refusing to submit to urine testing when the video evidence shows Saleeby agreeing to the Trooper's request for a urine sample. (R.31) To uphold the Final Order and Decision of the OMVH, this Court would have to accept the Hearing Officer's fragile premise that: Saleeby's testimony that he did not refuse a urine test, which was later qualified by Saleeby in a response to Trooper Brigham's third consecutive, repetitious question, should be equated to an admission by Saleeby of refusing the urine test; despite the breathalyzer room video confirming that he consented. (R.54) Furthermore, field sobriety tests and breathalyzer tests/refusals must now be video recorded in South Carolina pursuant to S.C. Code §56-5-2950 (B). Certainly, the legislature did not intend for refusals of other chemical tests to escape the video requirement imposed on breathalyzer tests.

This Appeal highlights the divergence of statutory interpretation from two schools of thought; the procedural protocols of law enforcement versus the analytical-legal public policy view espoused by legal practitioners. Trooper Brigham seems convinced that the protocol he was trained to follow overrides the express protections granted to those accused of driving under the influence, such as the Appellant. (R.32, 34) It is undisputed that the State has invested heavily in breath testing equipment and retains a valuable interest in a uniform and cost effective prosecution of individuals accused of driving under the influence and that law enforcement officers are required to uniformly administer the breathalyzer tests as an initial determination of alcohol intoxication. (See.

1976 S.C. Code §§ 17-7-780, 23-3-130, 23-3-600 through 23-3-690 and Art. 1, Chap. 23, Title 16, Art.3 of Chap.31, Title 23, and Chap. 17, Title 40. And also SC ADC 73-1-5.) Surely, the State could not afford to pay for a comprehensive blood test at a hospital for each person alleged to have driven under the influence. On the other hand, South Carolina law explicitly provides for a blood test, not urine test, to be administered when any person involved in an accident is severely hurt or incapacitated, so that a reliable determination can be made of what intoxicants, and the level of such, are in a person's system. (See S.C. Code Ann. 2950 (H) (Supp. 2009)) Trooper Brigham stated that in his training and experience as a South Carolina State Trooper, he has never been aware of any person involved in a motor vehicle collision being taken to a hospital for a blood test which indicated intoxicants other than alcohol. As everyone can agree, the implied consent statute speaks to alcohol and narcotics, or a combination of both.

Appellant believes that his request for a blood test was valid at the time it was made. Subsection (B) of §2950 cannot and should not be construed as adding qualifications about when the statutory right of affirmative assistance can be asserted. Instead, subsection (B) §2950 merely governs the behavior of law enforcement, by ensuring that the accused is only given chemical tests after being reminded of their implied consent rights. Most importantly, the evidence establishes that the Appellant was misadvised by Trooper Brigham of his right to affirmative assistance in obtaining a blood test from an impartial source. (R.24-25)

Argument and Authorities

STANDARD OF REVIEW

OMVH is authorized to determine contested case hearings of the SCDMV pursuant to S.C. Code Ann. § 1-23-660 (Supp. 2007). Therefore, appeals from the decisions of the OMVH are properly decided under the Administrative Procedures Act's (APA) standard of review. Section 1-23-660 provides that all appeals from decisions of the OMVH hearing officers must be taken to the ALC pursuant to the ALC's appellate rules of procedure. Thus, the Administrative Law Judge sits in an appellate capacity under the Administrative Procedures Act (APA) rather than as an independent finder of fact. In South Carolina, Section 1-23-380(A)(6) of the APA dictates the circumstances in which an appellate body may review an agency decision. That section states:

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.

S.C. Code Ann. § 1-23-380(A)(6) (2007).

The party challenging an agency action has the burden of proving that the agency's decision is unsupported by substantial evidence. Waters, 321 S.C. at 226 (1996)

APPLICABLE LAW

Appellant has the right to challenge the following issues during an implied consent hearing before the OMVH pursuant to S.C. Code Ann §56-5-2951 (F):

- (1) Whether he was lawfully arrested or detained;
- (2) Was given a written copy of and verbally informed of the rights enumerated in §56-5-2950;
- (3) Whether he refused to submit to a test pursuant to §56-5-2950; or
- (4) He consented to taking a test pursuant to §56-5-2950, and the:

(c) Tests administered and samples obtained were conducted pursuant to §56-5-2950

(G) An administrative hearing is a contested case proceeding under the Administrative Procedures Act, and a person has a right to appeal the decision of the hearing officer pursuant to that act to the Administrative Law Court in accordance with its appellate rules. The filing of an appeal stays the suspension until a final decision is issued on appeal.

The issues below challenge Trooper Brigham's calculation of probable cause to arrest, detain, and eventually charge Saleeby with refusing to submit to a urine test. These issues on appeal also question Trooper Brigham's denial of providing affirmative assistance and his mischaracterization of the rights enumerated in §56-5-2950 (B), (D) & (E). The incorrect factual and legal conclusions of the OMVH are numerous, and specifically at issue is that Saleeby did refuse to submit to a urine test and that Trooper Brigham's actions were proper under the implied consent statute, S.C. Code Ann §56-5-2950, which provides in pertinent part:

- (A) 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 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. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine

sample be taken for testing. A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest. The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. Before the breath test is administered, an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent. Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

(B) 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 test 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.

(C) Omitted

(D) The person tested or giving samples for testing may have a qualified person of his own choosing conduct additional tests at his expense and must be notified in writing of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial. The failure or inability of the person tested to obtain additional tests does not preclude the admission of evidence relating to the tests or samples obtained at the direction of the law enforcement officer.

(E) The arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED must test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in any judicial or administrative proceeding.

(F) A qualified person who obtains samples or administers the tests or assists in obtaining samples or the administration of tests at the direction of a law enforcement officer is released from civil and criminal liability unless the obtaining of samples or tests is performed in a negligent, reckless,

or fraudulent manner. No person may be required by the arresting officer, or by another law enforcement officer, to obtain or take any sample of blood or urine.

G) In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following: (inferences relating to escalating breathalyzer readings omitted)

The provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of them.

(H) A person who is unconscious or otherwise in a condition rendering him incapable of refusal is considered to be informed and not to have withdrawn the consent provided by subsection (A) of this section.

(I) A person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence. A person who obtains additional tests must furnish a copy of the time, method, and results of any test to the officer before any trial, hearing, or other proceeding in which the person attempts to use the results of the additional tests as evidence.

(J) Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party. The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules 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.

ISSUE 1: Improper Field Sobriety Tests

The conclusions of Trooper Brigham (R. 86) about Saleeby's inability to successfully perform 'Walk & Turn Test' and 'One-Leg Stand Test' should not have been considered in the probable cause determination by the Hearing Officer for OMVH. Saleeby submitted proof from his physician to the OMVH Hearing Officer, of the diagnosis that Saleeby suffers from Ataxia/Dysdiadochokinesia. Saleeby also submitted information from the National Ataxia Foundation and other medical references (R. 89-91) to the Hearing Officer, which substantiate Saleeby's problem with balance. Trooper Brigham admits that Saleeby notified him at the scene of the roadside stop about

“medical issues that may prevent him from providing what was in question.” (R. 61) The National Highway Transportation Safety Administration (NHTSA) Instruction and Student Manuals state that the above mentioned tests, ‘Walk & Turn Test’ and ‘One-Leg Stand Test’, should not be administered to persons who suffer from medical problems or disabilities which relate to these balance tests. (See www.nhtsa.gov) The Ohio Supreme Court agreed that SFST conducted in a manner that departs from the methods established by the NHTSA “are inherently unreliable.” (See *Ohio v. Homan*, 732 N.E.2d 952 (Ohio 2000)) This calls into question the validity of Appellant’s arrest because a major part of Trooper Brigham’s contention that probable cause for the arrest existed has been refuted by medical evidence from the Appellant.

The South Carolina Legislature has emphasized the importance of Field Sobriety Tests and the role these test play in inculpatng or exculpating persons charged with Driving Under the Influence, through the enactment of S.C. Code Ann. § 56-5-2953 (Supp. 2009), which explicitly requires that the administration of these tests be recorded through videotaping at the scene by law enforcement. Appellant believes that it was improper for Trooper Brigham to have submitted the results of Field Sobriety Tests involving balance in this case based upon the instructions of the National Highway Safety Administration and standard law enforcement training in South Carolina. Trooper Brigham was made aware that Appellant suffered from a medical condition but chose to administer these balance tests to build a case against Appellant, even though S.C. Code Ann. §56-5-2953 (A) (1) (b) allows Appellant to refuse to take these tests in the first place. The OMVH Hearing Officer’s determination that probable cause for an arrest did exist in this instance, was based, in part, upon results of Field Sobriety Tests which

Appellant's medical records refute and which South Carolina law does not require. The preponderance of the evidence standard was only met, in the eyes of OMVH, by a very narrow margin. Put simply, when the results of these balance tests are removed from the probable cause analysis, the Respondents' position fails.

ISSUE 2: Empty and expired prescription bottle

The Order of OMVH erroneously considered the presence of an old prescription bottle of Xanax in the motor vehicle driven by Appellant because there was no evidence or testimony that Appellant had consumed that medication on the night in question. Trooper Brigham testified that his determination of probable cause was partially based "upon searching the vehicle, there were also prescriptions found in his vehicle of Xanax in the center console." (R.10) Nothing else in the record substantiates that Appellant was under the influence of this medicine, and Trooper Brigham admits that it is "not against the law in the State of South Carolina to consume prescription narcotics." (R. 60)

Further, and for the record, the undersigned believes it repugnant that a law enforcement officer would seek to bolster a probable cause determination by sensationalizing the Appellant's properly prescribed pharmaceutical remedy, Xanax, that he uses to combat an anxiety disorder. Appellant's anxiety disorder is not in any way, shape, or form, at issue in this case, but will forever be part of the public record of the State of South Carolina.

Most importantly, OMVH Hearing Officer was not presented with the alleged prescription bottle or any medication that may have been seized by Trooper Brigham during the search of Appellant's motor vehicle. Based upon the logic set forth by the United States Supreme Court in Brinegar v. U.S., 338 U.S. 160 (1949), an empty bottle

that was prescribed three years ago should be considered differently by the Court than a recently filled prescription where the medication would be within reach of a driver. Much like a warrant that must be stated with particularity to be valid, the practical considerations of a reasonable man require some tangible and specific evidence be brought to light before that evidence is included in a probable cause analysis. Here, the Appellant testified that there were numerous "empty bottles that I've had in there. I got some old stuff in there right now. It's just been sitting in there." (R. 55) Appellant believes that evidence concerning old, empty, prescription bottles found in his motor vehicle should be stricken from the consideration of probable cause by the Court. In 2009, our Court of Appeals decided State v. Simmons, 384 S.C. 145, and elucidated three elements which the State must prove in a probable cause analysis, one element is that the methods used to secure evidence are safe and reliable. In the instant case, the alleged evidence of a prescription was used against the Appellant by the Hearing Officer in the probable cause determination, despite that "evidence" never being secured or produced by Trooper Brigham.

ISSUE 3: No Videotape of alleged refusal

Appellant believes that the alleged refusal to submit to urine testing should not have been considered by the Hearing Officer because no videotape evidence exists to support this allegation. The conclusion by the Hearing Officer that Saleeby refused to submit to a urine test is clearly a misstatement of fact. Appellant believes this is an issue of first impression in South Carolina and that sound logic and reasonable consideration of related case law supports Appellant's contention that an alleged refusal to submit to urine testing which can be video-taped, must be video-taped. As our Court of Appeals stated in

State v. Elwell, Opinion No. 4912 (2011) “the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence...In all cases, the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so.” (See S.C. Code Ann. §56-5-2953 (A)(2)(b)-(c) (Supp. 2007)) While South Carolina courts have validated this principle of videotaping DUI evidence in detail, urine testing has not received the same attention, despite the administrative penalties for refusing to submit to breath and urine samples being equally severe.

ISSUE 4: Timing of request for affirmative assistance

It is undisputed that Saleeby expressly consented to the breathalyzer test and requested a blood test. (R. 31) Saleeby’s submission of a breath sample resulted in a reading of .00 blood alcohol concentration. (R. 84) OMVH adopted Trooper Brigham’s untenable position that Saleeby’s *express* statutory right to affirmative assistance in obtaining a blood test can only be effectuated after Trooper Brigham read Saleeby’s *implied* consent rights prior to administering the breathalyzer. (R.78) In other words, despite the clear intention of the South Carolina Legislature in recently promulgating a right of those accused of driving under the influence to obtain the most reliable and comprehensive proof of any substance that could have been in their system, the OMVH Order contends that Saleeby’s right to affirmative assistance is only triggered upon the advisement of implied consent rights, which is exactly what the right to affirmative assistance is designed to ensure the full exercise of.

Just as a question to admit or exclude test results under §2950 should turn on whether the violation thwarted clear policy objectives underlying the statute, and not solely on the whether proscribed law enforcement procedures were followed with exacting compliance; Appellant's request for a blood test should be honored by a law enforcement officer to comply with policy objections, without regard to whether that request complies with the order of testing which law enforcement attempts (R.32) to following pursuant to SLED regulations. See City of Florence v. Jordan, 362 S.C. 227, 223 (2004) citing State v. Huntley, 349 S.C. 1 (2002).

ISSUE 5: Applicability of affirmative assistance

Saleeby's submission to a breathalyzer test is the initial test, upon which, additional tests may follow. OMVH's Final Order states that, "(b)ecause Respondent refused a urine test, there was no initial test and therefore no duty to provide affirmative assistance for additional tests." (R. 79) It is incomprehensible that the OMVH can ignore Saleeby's breathalyzer results, find that there was no initial test, and validate the erroneous denial of affirmative assistance. This strained logic does not comport with the South Carolina Supreme Court's consideration of one of the basic aspects of statutory interpretation. In State v. Sweat, 386 S.C. 339 (2010), the Court stated "(c)ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." The case of State v. Knighton, January 4th, 1999 Case # 2923, (S.C. Ct. App. 1999) states the elementary law that a person who submits to breathalyzer testing has an unequivocal right to obtain a blood test. Clearly, OMVH's finding that Saleeby was not entitled to

affirmative assistance based on a lack of an initial test, is an erroneous statement of fact and law. Therefore, the Final Order and Decision of OMVH should be reversed.

ISSUE 6: Superiority of blood over urine tests

The evidence establishes that Saleeby a) agreed to submit to a urine test and b) requested a blood test, which provides the most comprehensive determination of what amount, if any, of narcotics was in Saleeby's system. As previously stated, OMVH erroneously concluded that Saleeby's alleged refusal was an established fact. (R.78) Confounding the above error, OMVH's Final Order states boldly that affirmative assistance is not an issue in this case, despite Appellant's Exhibit #3 showing that the study of pharmacokinetics through blood-level data is extremely detailed and easily superior to urine testing, which Trooper Brigham explained as relying on metabolites. (R. 94-111) Essentially, Saleeby's request and offer to pay for a blood test would save the State of South Carolina from expending resources on a urine test to detect the mere presence of an intoxicant through its byproducts (metabolites (R.24)) and definitively show the amount of intoxicants, if any, in his body. Perhaps law enforcement's position would be strengthened by a mere showing of an unquantifiable presence of prescription medication in Saleeby's system, but the judicial process is strengthened by a fair and reasonable determination of the accused's right to be exonerated at his own expense through the best means available: a blood test. Therefore, this Court should reinstate Appellant's driving privilege in full.

ISSUE 7: Wrongful advisement of implied consent rights and needed remedy

Appellant submits that Trooper Brigham's wrongful advisement of the right to affirmative assistance prejudiced him and thwarted the clear policy objectives of S.C. Code Ann § 56-5-2950 by materially affecting the accuracy or reliability of the test results or the fairness of the testing procedure. In light of State v. Knighton, and the clear requirements of §2950 (D) & (E), Saleeby should have been given the opportunity to provide evidence of his innocence. As previously mentioned, blood tests best serve the accuracy, reliability and the fairness of this testing process, which was greatly compromised by Trooper Brigham refuting the advice of Appellant's attorney and convincing the Appellant that the gold standard of chemical testing was not an option. This Court should consider the likelihood for this situation to arise again when crafting the remedy for this appeal. As OMVH's Final Order stands, law enforcement can arrest drivers with less than probable cause, charge that accused person for refusing without reliable evidence and then deny access to the blood test that would exonerate the accused, since the statutory remedy of suppressing breath results means little to an accused who was not under the influence of alcohol in the first place. The Appellant, and drivers similarly suited in the future, must be allowed to obtain evidence of their innocence through exercise of the right to affirmative assistance.

Conclusion

The facts of this case are not complex; they are, however, extremely convoluted. The undisputed facts establish that the OMVH Hearing Officer incorrectly concluded affirmative assistance was not an issue in Appellant's case. South Carolina courts have rarely, if ever, addressed a scenario such as this, where the alleged offender makes a

request for affirmative assistance in obtaining a blood test, is misadvised by law enforcement of his rights, properly submits a breath sample, and is eventually charged for refusing to submit to a urine test. However, in State v. Knighton, January 4th, 1999 Case # 2923, the South Carolina Court of Appeals stated "Clearly, because Knighton submitted to a breathalyzer test, he was entitled to affirmative assistance from the officers in obtaining an independent blood test." Our current law means exactly what it says; if a person arrested for driving under the influence, submits to a breathalyzer test, their request for a blood test must be honored. In Knighton, the standard upon which law enforcement was judged was of "reasonable assistance." *Id.* The current iteration of our DUI law places a stricter standard on law enforcement, saying that law enforcement "must provide affirmative assistance" and that the remedy is related to the principal of strict liability. If law enforcement transports a suspect to a medical facility for objective blood testing, the results of the breathalyzer are suppressed. This court should extend that reasoning to the instant case in order to discourage arbitrary and capricious exercises of the power to arrest and suspend driving privileges.

It is undisputed that Saleeby, at the advice of his attorney, requested a blood test from Trooper Brigham, and that Saleeby had the ability to pay for that test, but was denied that right by Trooper Brigham. South Carolina Code Ann. § 56-5-2950 explicitly states that "[t]he arresting officer must provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility," however, the remedy included this statute fails to address the Appellant's case because Appellant does not wish to suppress the evidence of his breathalyzer results. The

answer to this question lies in previously quoted South Carolina Supreme Court decision in State v. Sweat, 386 S.C. 339 (2010), which stated that “A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers...Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.”

It is difficult for a reasonable mind to ascertain why Officer Brigham would agree to transport a suspected offender to a local hospital for a urine analysis, yet refuse to allow that same offender to obtain the more comprehensive blood test. This decision is not only highly illogical; it also negates the Trooper’s affirmative duty to ensure a fair and accurate confirmation of his suspicions. The sole purpose of testing the breath, urine, or blood of a person accused of driving under the influence is to determine whether the level of intoxicants in that person’s system rises to the level of material and appreciable impairment. The gold standard of blood testing ensures justice to both the State and the accused.

THE APPELLANT HAS PROVED convincingly that OMVH’s Final Order and Decision is unsupported by substantial evidence. Specifically, Edward Eli Saleeby, III submitted a breath sample of .00, agreed on video to submit a urine sample, was denied his statutory right of affirmative assistance in obtaining a blood test, and ask this Court for the following relief, and any such further relief this Court deems proper:

- 1) Reverse the Final Order and Decision of OMVH, Docket No.: 10-OMVH-01-3433-CC;
- 2) Reinstate Appellant’s driving privilege in full;

- 3) Order discovery of all recordings, data, etc. regarding Appellant's instant charge;
- 4) Order discovery of all DUI arrests (felony or otherwise) from the past five (5) years, in which Trooper Brigham was involved in the administration of blood, breath, or urine tests. ;
- 5) Allow for additional, supporting evidence to be submitted pursuant to the Administrative Procedures Act;
- 6) Enjoin Respondents from suspending the driver's license of persons who are denied affirmative assistance in obtaining a blood test.

Respectfully Submitted,

Hartsville, South Carolina
This ____ day of _____ 2012

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

Edward Eli Saleeby, III,

Appellants,

v.

South Carolina Department of Motor Vehicle,

Respondent.

Docket No. 11-ALJ-21-0563-AP
SCDL No. 11290751

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

This case comes before the Administrative Law Court pursuant to the appeal Edward Eli Saleeby, III, which seeks review of the October 24, 2011 Final Order & Decision sustaining the Appellant's implied consent suspension. The DMV seeks to have the Final Order & Decision affirmed and the suspension remain.

STATEMENT OF THE ISSUES ON APPEAL

The Hearing Officer did not err in finding that pursuant to Section 56-5-2950, the Respondents met their burden of proof for sustaining the suspension of the Appellant's driver's license and driving privileges.

STATEMENT OF THE CASE

The Appellant was arrested on July 3, 2010 for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol or drugs. Appellant's refused to submit to chemical testing. Appellant was issued a written notice of suspension of the driver's license or driving privileges for violation of S.C. Code Ann. Section 56-5-2950. The Appellant requested an administrative hearing. Pursuant to notice to the parties, a hearing was held before OMVH Hearing Officer, Phil Hayes on October 19, 2011. The Appellant appeared and was represented by Christopher J. Scott, Esquire and Edward Saleeby, Jr. Esquire. By Final Order & Decision dated October 24, 2011, the suspension was sustained. The Appellant then filed this appeal.

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STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code Section 1-23-380(A)(6).

(A) 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....

- (6) The court shall not substitute its judgment for that 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

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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

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capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

THE HEARING OFFICER DID NOT ERR IN FINDING THAT PURSUANT TO SECTION 56-5-2950, THE RESPONDENTS MET THEIR BURDEN OF PROOF FOR SUSTAINING THE SUSPENSION OF THE APPELLANT'S DRIVER'S LICENSE AND DRIVING PRIVILEGES.

DMV submits that Trooper Brigham had sufficient facts and circumstances within his observation to give him probable cause to believe that the Appellant was driving under the influence. According to his testimony, while on routine patrol, he observed the Appellant for following too closely to a vehicle in front of his lane of travel (ROA p.07). He conducted a traffic stop and observed the Appellant in the driver's seat of the vehicle (ROA p 8). The officer observed an odor of alcoholic beverage coming from the vehicle and asked the Appellant to exit the vehicle. The trooper further testified that "there was no odor of alcohol coming from Mr. Saleeby", "however, Mr. Saleeby appeared to be disoriented" and his pupils were dilated (ROA p 08). Based upon his observations, the trooper conducted several standardized field sobriety tests and concluded that the Appellant's faculties were appreciably impaired and placed him under arrest. In *State v. Williams*, 321 S.C. 381, 468 S.E.2d 656 (1996), the Court stated, "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Wortman v. City of Spartanburg*, 310 S.C. 1, 425 S.E.2d 18 (1992). Probable cause may be found somewhere between suspicion and sufficient evidence to convict. *Thompson v. Smith*, 289 S.C. 334, 336-37, 345 S.E.2d 500, 502 (Ct. App., 1986) [overruled in part on other grounds by *Jones v. City of Columbia*, 301 S.C. 62, 389 S.E. 2d 662 (1990)] The testimony of the trooper clearly established probable cause for the arrest of the Appellant.

Upon entering the Datamaster room, the Appellant was advised that he was being video recorded and that the trooper suspected that the Appellant was under the influence of narcotics, not alcohol (ROA p. 010). While Section 56-5-2950 provides that a person arrested for driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs

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"must be first be offered a breath test to determine the person's alcohol concentration", it further provides that "[I]f the officer has reasonable grounds to believe that the person is under the influence of drugs other than alcohol, the officer may order that a urine sample be taken for testing". Appellant was advised of his implied consent rights and he offered to submit to a blood test rather than a breath test (ROA p. 12). The trooper explained the statutory requirements and proceeded with the breathalyzer test. The Appellant registered .00% and was advised by the trooper that a urine sample was being requested due to the narcotics that may have been in his system and he was going to be transported to Carolina Pines for testing. During transport to the vehicle, the Appellant refused to submit to the urine sample. (ROA p. 11-12)

The trooper and the Appellant testified regarding whether the Appellant refused to submit to urine testing and the Hearing Officer correctly concluded that the true, steadfast and without a doubt testimony of the trooper was most credible in that the Appellant initially testified that he did not refuse urine testing; however, under cross-examination, he testified that he did not recall refusing the urine test.

In S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 523, 613 S.E.2d 544, 549 (Ct. App. 2005) (citing S.C. Code Ann. §§ 56-5-2950, 2951), the Court of Appeals held that the "requirements for suspension for refusal to consent are: (1) a person (2) operating a motor vehicle (3) in South Carolina (4) be arrested for an offense arising out of acts alleged to have been committed while the person was driving under the influence of alcohol, drugs, or both, and (5) refuse to submit to alcohol or drug testing". The evidence presented at the hearing established that the Respondents met the burden of proof by making a prima facie showing that the Appellant was (1) lawfully arrested for Driving under the Influence; (2) read and given a copy of the appropriate Implied Consent Advisement and (3) Appellant refused to submit to urine testing.

While the Appellant makes a number of assignments of error, none appear to have bearing upon or contradict the prima facie showing of the Respondents. The Appellant's assertion that the sobriety testing was impermissible and if removed from the probable cause analysis would negate the finding is meritless. The determination was made upon all the facts and circumstances and observations of the trooper based upon his training and experience. The fundamental question in determining the lawfulness of an arrest is whether probable cause existed to make the arrest. *State v. Baccus*, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). Probable cause for a warrantless arrest exists when the circumstances within the arresting

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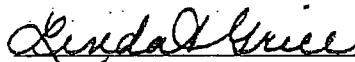
officer's knowledge are sufficient to lead a reasonable person to believe that the person being arrested has committed a crime. *Id.* Likewise, the Appellants argument regarding the medication bottles found in the Appellant's vehicle, the exclusion in the findings of any reference to the prescription bottles would not alter the Hearing Officer's finding of probable cause just as the inclusion did not bolster the determination of probable cause.

The Appellant asserts error in the failure of the trooper to video tape the refusal, however, he provides no statutory or case law to support this assertion. Also, the Hearing Officer correctly found that Section 56-5-2950 provides for *additional* testing and because the Appellant refused to submit to the ordered urine testing, affirmative assistance to obtain additional testing is not an issue. In point of fact, it should be noted that the Appellant was released and not held in jail. (ROA p.14) It would appear that the affirmative assistance in getting additional tests would be required because of the person being in custody and requiring custodial transportation. The record reflects that the Appellant was not held at the detention center. The Hearing Officer did not err in determining that affirmative assistance was not an issue in this matter.

CONCLUSION

Based upon the foregoing arguments, the Department of Motor Vehicles respectfully requests that the Final Order and Decision be affirmed and the suspensions remain.

Respectfully submitted,



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March 23, 2012

Blythewood, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edward Eli Saleeby, III,

Appellant,

vs.

South Carolina Department of Public Safety,
And South Carolina Department of
Motor Vehicles,
Respondents.

Docket No. 11-ALJ-21-0563-AP

APPELLANT'S
MOTION FOR RECONSIDERATION

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edward Eli Saleeby, III,

Appellant,

vs.

South Carolina Department of Public Safety)

And South Carolina Department of)

Motor Vehicles,)

Respondents.)

Docket No. 11-ALJ-21-0563-AP

SCDL No. 11290751

APPELLANT'S
MOTION FOR RECONSIDERATION

Appellant respectfully requests that this Honorable Court reconsider its Order of August 2, 2013 and/or grant the Appellant the opportunity to present oral arguments based on the following:

- 1) Appellant's constitutional right pursuant to the Fourth Amendment's protection against unreasonable search and seizure as well as probable cause requirements are directly in question. This Court's Order avoids several facts which were part of the record and go directly to the 'totality of the circumstances' analysis used in calculating that Trooper Brigham's testimony meets the "abundant testimony"¹ standard. Fact one; Appellant was diagnosis with a condition which affects balance. Fact Two: in car video records Appellant speaking clearly. Fact Three; the arresting officer admitted the odor of alcohol did not stem from the Appellant. Fact Four; Appellant passed the Horizontal Gaze Nystagmus test.
- 2) The decision of the OMVH Hearing officer, that the arresting officer was correct in advising the Appellant that a blood test was only for alcohol, was made in excess of statutory authority². Further, the decision of the OMVH Hearing Officer essentially creates a qualification to the right to affirmative assistance outlined S.C Code Ann. §56-5-2950 (B) which does not exist.
- 3) To treat a refusal of the breathalyzer differently than that of a urine test ignores the normal procedural safeguards guaranteed through Equal Protection of our Constitution. This Court

¹ Pg 5 ALC Order citing State v. Goodstein, 278 S.C. 125 (1982)

² S.C. Code Ann. 2950 (H) (Supp. 2009)

an accused person with refusal, when the statutorily mandated breathalyzer video showed the accused attempting to give a breath sample seven times in two minutes, the accused believing a breath sample to be valid, yet being charged by the arresting officer with refusing to comply with the implied consent law of South Carolina.³ The videotape evidence in the instant case shows Appellant requesting a blood test and agreeing to a urine test, yet Appellant held to the alleged “off camera” refusal. The facts of the instant case and OMVH’s decision can only be characterized as unwarranted exercise of discretion.⁴

To again demonstrate the capricious nature of the OMVH decision; an officer requesting a breath sample “has discretion to determine whether there was a refusal and has the option to conduct a second breath test,”⁵ but in the instant case, OMVH found that the trooper has discretion to ignore the Appellant agreement to testing on the videotape in favor of a supposed refusal off camera.

- 4) It is an error of law to hold that §56-5-2950 (A) adds a timing qualification to §56-5-2950 (B) and therefore, allow the arresting officer to use the order in which he must proceed with the various implied consent tests as a method of avoiding Appellant’s request for a blood test.
- 5) The law in South Carolina is clear, in State v. Knighton, January 4th, 1999 Case # 2923, the South Carolina Court of Appeals stated “Clearly, because Knighton submitted to a breathalyzer test, he was entitled to affirmative assistance from the officers in obtaining an independent blood test.” Trooper Brigham’s interpretation of the timing of appellant’s request for a blood test circumvents the plain purpose of the statute; to reliably determine what intoxicants are present in a driver’s body.⁶ Just as in the Richardson case, Appellant agreed and even requested during the breathalyzer video, for further testing without regard to what the results of the breathalyzer. This video “reveals an individual who was trying to

³ Richardson v. S.C.D.M.V., 12-AJ-21-0027-AP (2013)

⁴ Bomba v. Com., Dep’t of Transp., Bureau of Driver Licensing, 28 A.3d 946, 949 (Pa. Commw. Ct. 2011)

⁵ Chisolm v. S.C.D.M.V., 402 S.C. 593, 601 (Ct. App. 2013)

⁶ Pg. 32-33 Transcript of OMVH Hearing.

comply and trying to provide an adequate... sample but was not given instructions" or allow to do so. To say the least, the instant case remains an arbitrary and capricious exercise of discretion.

- 6) The actions of the arresting officer in 1) ignoring Appellant's medical condition which limited performance on SFSTs, 2) using an empty and expired prescription bottle as probable cause, 3) refusing to confirm appellant's alleged refusal through the best evidence of his in-car camera, 4) using SLED procedures as a basis for misadvising Appellant that a blood test was not applicable, 5) miraculously stating under oath that in his professional experience a blood test is not the superior test for intoxicants; all lead a reasonable person, in the light most favorable to the State to the conclusion that the OMVH hearing officer's decision is clearly erroneous based upon reliable, probative, substantial evidence on whole record.

CONCLUSION

As OMVH's Final Order stands, law enforcement can arrest drivers with less than probable cause, charge that accused person for refusing without reliable evidence and then deny access to the blood test that would exonerate the accused, since the statutory remedy of suppressing breath results means little to an accused who was not under the influence of alcohol in the first place. The Appellant, and drivers similarly suited in the future, must be allowed to obtain evidence of their innocence through exercise of the right to affirmative assistance.

Sincerely and Respectfully Submitted,

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This ____ day of August, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department)
of Motor Vehicles,)

Petitioner,)

vs.)

Edward Saleeby, III,)

Respondent.)
-----)

TRANSCRIPT OF
HEARING

October 19, 2011

THE COURT: My name is Phil Hayes and I've been appointed by the South Carolina Administrative Law Court to preside at this implied consent hearing held in conjunction with the respondent's alleged refusal to submit to tests at the request of law enforcement officer. Attorney Saleeby, of the issues to be decided here today, are any or all contested?

MR. SALEEBY: Mr. Scott's the official attorney on this case.

THE COURT: Okay. Attorney Scott.

MR. SALEEBY: I may be, depending on whether I have to be a witness.

THE COURT: Okay.

MR. SCOTT: Yes, yes, sir.

1 THE COURT: You're saying all issues?

2 MR. SCOTT: Yes.

3 THE COURT: For the State, all issues will be
4 contested. Let the record show that the
5 respondent, Edward Eli Saleeby is represented
6 by Attorney Christopher Scott and Attorney
7 Edward Saleeby. The entire proceedings are
8 being tape recorded for departmental reference
9 and are a matter of public record. All those
10 present who intend to testify in this matter,
11 please identify yourself for the record by your
12 full name, your address, and your position as
13 related to this matter. You're requested to
14 raise your right hand for administration of
15 oath.

16 TROOPER BRIGHAM: My name is Trooper C.D. Brigham,
17 (inaudible) South Carolina Highway Patrol
18 located at 3415 East Palmetto Street, Florence,
19 South Carolina. I'm also a certified police
20 officer and Datamaster operator.

21 THE COURT: Raise your right hand, please, sir. Do
22 you solemnly swear the testimony you're about
23 to give in this matter will be the truth, the
24 whole truth, and nothing but the truth?

25 TROOPER BRIGHAM: I do.

1 THE COURT: And, sir, your full name?

2 MR. SALEEBY: Yes, I'm Edward Eli Saleeby, III. I

3 reside at (inaudible)

4 , South Carolina

5 THE COURT: And you are the respondent, is that
6 correct?

7 MR. SALEEBY: Yes, sir.

8 THE COURT: Do you solemnly swear that the testimony
9 you're about to give in this matter will be the
10 truth, the whole truth, and nothing but the
11 truth?

12 MR. SALEEBY: Yes, sir.

13 THE COURT: Okay. Arresting officer have testimony
14 he'd like to enter at this time?

15 TROOPER BRIGHAM: Yes, sir.

16 DIRECT TESTIMONY BY TROOPER BRIGHAM:

17 TROOPER BRIGHAM: On July 3rd, 2010, while on patrol
18 in Darlington County, I witnessed a black
19 Chevrolet pick-up traveling on U.S. 15 in the
20 City Limits of Hartsville.

21 THE COURT: Continue.

22 TROOPER BRIGHAM: Following too closely to the
23 vehicle in front of his lane of travel.

24 THE COURT: Continue.

25 TROOPER BRIGHAM: I then conducted a traffic stop on

1 U.S. 15 and just down from Lake View Boulevard.

2
3 THE COURT: Continue.

4 TROOPER BRIGHAM: Once approaching the vehicle, I
5 identified the driver as Mr. Saleeby.

6 THE COURT: Continue.

7 TROOPER BRIGHAM: There was a strong odor of alcohol
8 coming from inside the vehicle.

9 THE COURT: Continue.

10 TROOPER BRIGHAM: I then asked Mr. Saleeby to exit
11 the vehicle.

12 THE COURT: Continue.

13 TROOPER BRIGHAM: There were two passengers inside
14 the vehicle, as well.

15 THE COURT: Continue.

16 TROOPER BRIGHAM: Upon speaking with Mr. Saleeby
17 outside the vehicle, there was no odor of
18 alcohol coming from Saleeby?

19 THE COURT: Continue.

20 TROOPER BRIGHAM: However, Mr. Saleeby appeared to
21 be disoriented.

22 THE COURT: Continue.

23 TROOPER BRIGHAM: Upon speaking with Mr. Saleeby, I
24 advised Mr. Saleeby that his eyes ... his
25 pupils were dilated and which he stated he

1 knew. I asked him if he was under any
2 prescription narcotics. He stated he was on
3 Lorcet.

4 **THE COURT:** Spell that.

5 **TROOPER BRIGHAM:** L-O-R-C-E-T.

6 **THE COURT:** Continue.

7 **TROOPER BRIGHAM:** Upon observation of driving that I
8 witnessed and the appearance of Mr. Saleeby
9 being disoriented as he was, I advised Mr.
10 Saleeby that the Highway Patrol was going to
11 conduct the standardized field sobriety tests
12 on Mr. Saleeby. Which (inaudible) provided.
13 On his HGN, there was no nystagmus on any of
14 his tests. However, his pupils were very
15 dilated and which he noted the fact that his
16 pupils were very dilated. Upon doing the walk
17 and turn test, he started before instructions
18 were finished, stepped off line, and took the
19 incorrect number of steps. On the next
20 (inaudible) test, the one-legged stand test, he
21 swayed while balancing and used his arms to
22 balance himself, as well as placed his foot
23 down.

24 **THE COURT:** Continue.

25 **TROOPER BRIGHAM:** Mr. Saleeby was placed under

1 arrest for DUI and was transported to
2 Hartsville Police Department. I enter to the
3 Court, Your Honor, I've already provided to the
4 defense a copy of Mr. Saleeby's charging
5 document, as well as his roadside field
6 sobriety testing.

7 **THE COURT:** Attorney Scott, do you have this?

8 **MR. SCOTT:** I do.

9 **THE COURT:** Okay. I will let you look at it.

10 **TROOPER BRIGHAM:** That's for the Court.

11 **THE COURT:** Okay. Continue.

12 **TROOPER BRIGHAM:** Upon entering into the Datamaster
13 room, Mr. Saleeby was advised that he was being
14 video recorded and at that point in time, the
15 South Carolina Highway Patrol requested that a
16 breath sample be provided. He was also advised
17 that I wasn't ... had any suspicion of alcohol
18 in his system. However, I did suspect of
19 narcotics at that point in time. Upon
20 searching the vehicle, there was also
21 prescriptions found in his vehicle of Xanax in
22 the center console, as well, while doing
23 inventory of the vehicle itself, as well as the
24 admission of Mr. Saleeby taking Lorcets. He
25 was advised he was being video recorded and the

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1 South Carolina Highway Patrol at that point in
2 time requested a breath sample be provided.
3 And which Mr. Saleeby advised me that he wanted
4 to give blood, not breath. I stated to him at
5 that point in time that we had to proceed with
6 the breath sample due to the fact that Mr.
7 Saleeby was medically able to provide a breath
8 sample, that he had no mouth injuries and there
9 was no medical reason for him to be transported
10 to the hospital which would expire the two-hour
11 time frame for me to put him on a Datamaster
12 machine, which are the only two elements that
13 are required, mouth injuries or time restraints
14 due to the two hours, would result to an
15 individual providing a blood sample. Mr.
16 Saleeby was advised of his implied consent
17 rights. He was provided ... he was provided a
18 copy ...

19 **THE COURT:** Attorney Scott, do you have a copy of
20 this?

21 **MR. SCOTT:** I do.

22 **THE COURT:** Okay.

23 **TROOPER BRIGHAM:** He was provided a copy of his
24 breath sample ... correction, a copy of his
25 implied consent rights and which he was read,

1 too, his implied consent rights. His mouth was
2 checked for any foreign objects. 20 minute
3 observation period did lapse. Upon the 20
4 minute observation period lapsing, as I had
5 already stated to Mr. Saleeby that there was no
6 indication or belief that he was under the
7 influence of any alcohol, his results read
8 double zeros.

9 **MR. SCOTT:** We've got a copy of that, as well.

10 **THE COURT:** Okay.

11 **TROOPER BRIGHAM:** Mr. Saleeby was then advised as
12 his implied consent right still applied, that
13 he was ... South Carolina Highway Patrol at
14 that point in time was requesting that a urine
15 sample be provided due to the narcotics that
16 may have been in his system. And which time he
17 was going to be transported to Carolina Pines.
18 During transport to the vehicle, Mr. Saleeby
19 refused to submit to the urine sample.

20 **THE COURT:** When was this?

21 **TROOPER BRIGHAM:** Transport.

22 **THE COURT:** And refused what kind of test?

23 **TROOPER BRIGHAM:** Urine.

24 **THE COURT:** Continue.

25 **TROOPER BRIGHAM:** As he was advised his implied

1 consent rights still applied, and that refusing
2 to submit to a urine sample would result into
3 a suspension, and which he signed for, as well,
4 which has been provided to the defense.

5 **THE COURT:** Attorney Scott, have you got a copy of
6 this?

7 **MR. SCOTT:** We do have a copy of that.

8 **TROOPER BRIGHAM:** He was then transported to
9 Darlington County Detention Center and which he
10 was released. All copies were provided to Mr.
11 Saleeby other than his notice of suspension on
12 video due to it being provided to him at the
13 actual Detention Center itself, but, however,
14 the State does reflect the fact that he did
15 sign for his refusal to submit to a urine
16 sample. Just to submit to the Court, Your
17 Honor, here's my certification to operate the
18 Datamaster machine which has been provided to
19 the defense, as well, due to Mr. Saleeby
20 actually providing a breath sample of a reading
21 of 0.00, as well as to provide to the Court ...

22 **THE COURT:** Attorney Scott ...

23 **TROOPER BRIGHAM:** ... my certification to operate
24 ... or to provide a standardized field sobriety
25 testing, to record any indicators provided.

1 THE COURT: Attorney Scott?

2 MR. SCOTT: Got that.

3 TROOPER BRIGHAM: He was then transported to
4 Darlington County and released and cited for
5 refusing to submit to a urine sample.

6 THE COURT: Any further?

7 TROOPER BRIGHAM: No, Your Honor.

8 THE COURT: Cross?

9 TROOPER BRIGHAM - EXAMINATION BY MR. SCOTT:

10 Q: Officer Brigham, I'm Christopher Scott, Mr.
11 Saleeby, III's attorney. If it please the
12 Court, I've just got a few questions. When you
13 pulled over Mr. Saleeby's car, you said he was
14 following too closely?

15 A: That's correct.

16 Q: Do you remember what that ... what car he was
17 following too closely?

18 A: It's actually on the video. Roadside field
19 sobriety ... on the roadside video, you'll see
20 me activate my camera, switch lanes, and I want
21 to say it was a Grand Prix that was in front of
22 him.

23 Q: Okay. And so when you ask him to step out of
24 the car, at that time, you did not suspect that
25 he was using alcohol, I believe is what you

1 stated?

2 A: Well, there was an odor of alcohol coming from
3 inside the vehicle, which, in return, is the
4 reason why I had him exit the vehicle.

5 Q: And so from that, you conclude that the alcohol
6 present was much likely from other folks in the
7 car?

8 A: That's correct.

9 Q: Okay. And you said that you suspected there
10 was something else maybe in his system and
11 that's why you gave him the field sobriety
12 tests?

13 A: That's correct.

14 Q: When you looked through his truck and did the
15 inventory, how many of these Lorcets were in
16 the pill bottle?

17 A: That I don't recall. I don't ... I don't
18 recall even seeing any Lorcets within the
19 vehicle. If they were, they were generic brand
20 for ... I'm not a pharmacist.

21 Q: Right.

22 A: But I do know what Xanax would be.

23 Q: Okay.

24 A: Which was ... which was found in the vehicle,
25 but the admission of Mr. ... Mr. Saleeby gave

1 admission to have taken the Lorcets because I
2 think he had chipped a tooth and he hadn't had
3 a opportunity to get to the doctor yet.

4 Q: And so he freely admitted to you that, you
5 know, he had taken one of these maybe a few
6 hours before hand. Did he specify a time to
7 you, a time frame?

8 A: He wasn't for certain. He wanted to ask the
9 passenger when he took it because he wasn't ...
10 he wasn't capable of telling me at what time.
11 And at that point in time, I said, "No, sir,"
12 I said, "I'm asking you when you took it."
13 Which is on video, as well.

14 Q: And when you gave him these field sobriety
15 tests, did you ask him if he had any problems
16 with balance, if he had any medical issues?

17 A: I did. He gave a reason for something to do
18 with ... I believe it was his ... maybe his
19 liver.

20 Q: Exhibit Number One for the respondent would be
21 medical records of Edward Eli Saleeby, III,
22 diagnosing him with ataxia and a print-out from
23 the official website of the National Ataxia
24 Foundation and what this details is that as far
25 as ...

1 **THE COURT:** I need to look at that before you give
2 that to ...

3 Q: ... being able to maybe perform the walk and
4 turn, the nine-step, as far as his balance and
5 some coordination issues, that there may be a
6 reason why he may perform maybe not up to your
7 standards on that.

8 **THE COURT:** Do y'all need to see it?

9 Q: Did he tell you ... so he did tell you he had
10 a medical issue before you gave the field
11 sobriety test?

12 A: That's correct. And then once again I asked
13 him if it would prevent him from walking a
14 straight line.

15 Q: And he's not a medical expert either, to your
16 knowledge?

17 A: Nor am I, that's correct.

18 Q: And you said you did not remember finding any
19 of the Lorcets that he admitted to using or
20 possibly having in his system in the truck?

21 A: That's correct.

22 Q: Would it surprise you to know that the
23 prescription for the chipped tooth was a very
24 small prescription that had recently been
25 prescribed for him by a Dr. Hassler, I believe

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....
MR. SALEEBY: Harless.

Q: ... Harless, excuse me.

MR. SCOTT: And I would pass this up to the Court.
This is a statement of account from his ...
from Mr. Saleeby, III's ...

THE COURT: Could you highlight the account and when
it was issued and the type of medication?

MR. SCOTT: I sure can.

Q: And so what this shows is on maybe ... let's
see, June 18, 2010, Mr. Saleeby had a
prescription for Hydrocodone issued to him and
the amount paid for that of \$1.99. Copies for
Trooper. At any time ...

THE COURT: Just one minute. Attorney ... I mean,
Trooper, do you have that?

TROOPER BRIGHAM: Your Honor, this ... I don't need
any of this.

THE COURT: Okay.

MR. SCOTT: I'd just like to make it part of the
record that we submitted this to the Court.

THE COURT: It will be listed as Exhibit Number Two.

MR. SCOTT: As Exhibit Number Two. That Trooper
Brigham has decided he does not need a copy of
that.

1 Q: During the transport, did you explain to Mr.
2 Saleeby, the transport to the Hartsville Police
3 Department, did you explain to Mr. Saleeby,
4 III, that you were going to take a breath
5 sample?

6 A: As he was given his roadside advisements that
7 he would be requested to take a breath sample
8 and that any other charges would be a result
9 ... or refusal to submit to a breath sample
10 would result into a driver's license
11 suspension, he would be entitled to a hearing
12 for any additional charges.

13 Q: When you arrived at the Hartsville Police
14 Department, isn't it true that Mr. Saleeby,
15 III, asked to use the restroom and that you
16 watched him while he took a bathroom break to
17 urinate?

18 A: Possibly.

19 Q: Possibly?

20 A: I don't recall.

21 Q: You don't recall that that ... but you don't
22 refute that?

23 A: Right.

24 Q: At that time, if the urine test was needed,
25 don't you think it was reasonable that you

1 could have asked him at that point to provide
2 it?

3 A: Based upon the Section 56-5-2950 and the SLED
4 policies and the section of law as stated in my
5 testimony, the only thing that would prevent
6 Mr. Saleeby from providing the first step
7 that's required by patrol is to provide or
8 request a breath sample, which we have to do.
9 We have to request a breath sample before we
10 can go into any other type of testing. And if
11 there's any type of medical reasons that would
12 prevent them providing a breath sample, that
13 would be warranted to a blood sample.

14 Q: I understand.

15 A: In other words, if they had medical injuries to
16 their mouth or if they were medically in the
17 hospital with a broke arm or femur, but their
18 mouth wasn't injured, of course, there's no way
19 we could get them to a DMT machine, so which in
20 that would grant to ... or warrant retrieving
21 blood. But in this particular manner, there
22 was no reason for those causes at that point in
23 time. And it also states that it has to be
24 taken from a medical physician and I'm not a
25 medical physician to acquire or take those

1 urine samples.

2 Q: I understand that. You stipulated that on the
3 record for us. My question is were you at all
4 concerned that, you know, him going to urinate
5 with you watching him may give you problems of
6 him being able to urinate a few minutes later,
7 that's what was already in your mind. I think
8 you had stated at some point before you gave
9 him the Breathalyzer, you already had an
10 assumption that you wanted to confirm through
11 the breathalyzer test that he wasn't under the
12 influence of alcohol?

13 A: Right.

14 Q: Did that concern you at all that you may have
15 let him go to the restroom?

16 A: Well, I knew there would be a minimum of about
17 40 minutes lapsed time before he would be ...
18 actually by the time we got to the hospital or
19 longer before there would be a urine sample
20 requested.

21 Q: When you and I'm assuming in your years on
22 the Highway Patrol, you've given quite a few
23 urine tests, correct?

24 A: That's correct.

25 Q: You've read the SLED policies on how to

1 administer those properly and submit it with
2 the guidelines of SLED, how to handle a urine
3 sample?

4 A: That's correct.

5 Q: So when you normally take a urine sample,
6 you're familiar with what you're supposed to do
7 to collect that sample, how you're supposed to
8 mark it?

9 A: That's correct.

10 Q: All those things?

11 A: That's correct.

12 Q: Okay. At any time at the jail after the
13 breathalyzer gave you a readout of 0.0, did you
14 ask him to give a urine test, a urine sample?

15 A: I advised him that as suspected that the ...
16 that he was going to read 00 and at that point
17 in time, the South Carolina Highway Patrol was
18 requesting a urine sample be provided.

19 Q: And isn't it true that at that time, he does
20 not refuse?

21 A: At that time, he did not, that's correct.

22 Q: Now, your understanding and what you've
23 communicated to us maybe twice now is that the
24 blood test is something that deals with alcohol
25 or the 2945 statute of a DUI homicide, great

1 bodily injury, that that's usually when a blood
2 test is something that's in play, correct?

3 A: Ask the question again.

4 Q: Your understanding and what you've stipulated
5 on the record is that a blood test is something
6 that tests for alcohol and comes into play
7 during a felony DUI?

8 A: Or if there's any great bodily injury that a
9 person cannot provide a breath sample.

10 Q: Right, correct.

11 A: That's correct.

12 Q: And so your understanding is that if you
13 suspect urine ... excuse me, I apologize. If
14 you suspect narcotics, that the urine test is
15 what you use?

16 A: That's correct. That's what we've been trained
17 to ask for is urine at that point.

18 Q: During your years on the Highway Patrol, have
19 you ever been personally involved or have
20 personal knowledge of an incident where a full
21 blood test was done because of great bodily
22 injury? In other words, a MAIT report, a
23 situation where a blood test was given under
24 those circumstances you specified just now, and
25 the results of what that blood test shows?

1 A: I'm not sure I understand your question.

2 Q: Have you ever been involved in a felony DUI or
3 where great bodily injury has occurred ...

4 A: Right.

5 Q: ... and you have either personally or have
6 personal knowledge of an individual suspected
7 of that felony DUI being transported for a
8 blood test and the results of those blood
9 tests?

10 A: Yes.

11 Q: Isn't it true that a blood test shows not only
12 what may be in your system as far as a
13 presence, but a level of whether that substance
14 is at a therapeutic level or a toxic level? I
15 understand you're not a medical expert.

16 A: That's right.

17 Q: But you understand my question that isn't it
18 true those blood tests show not just the
19 presence of a substance, but how much is in
20 your system and whether that level is an
21 intoxicated level?

22 A: As well as the urine, it shows metabolites in
23 the urine. The ... the blood is for the
24 purpose of the breath, okay, so what we've done
25 is whenever we offer a breath sample and it

1 gives a reading of .00, which ... which it
2 auxiliiarates any cause or concern of alcohol
3 within the system, which is your breath alcohol
4 content ...

5 Q: I understand.

6 A: ... so if Mr. Saleeby had no breath alcohol
7 content, our next test would have been ...
8 warranted would have been a urine sample to see
9 what type of narcotics would have been in Mr.
10 Saleeby's system, as well.

11 Q: I believe you stipulated earlier that Mr.
12 Saleeby had asked for a blood test and your
13 response was that that's for alcohol; this
14 isn't a situation that warranted that. That
15 you believed urine was ...

16 A: And that was before implied consent was even
17 read to him and after the implied consent was
18 read, there was no mention of blood after that,
19 as well.

20 Q: Okay.

21 A: And which as I stated to him the requirements
22 are that the legislature has found, that the
23 breath sample is a sufficient testing tool to
24 test for breath alcohol content, which is the
25 alcohol content that is within one's system.

1 Q: What is your understanding of a person that
2 requests a blood test, which I think we've
3 already gone over shows much more than a urine
4 test, I think we can agree that a blood test
5 ... And actually for the Court's record, I'd
6 like to submit a scientific report. I'd like
7 for the Court to take judicial notice of this.
8 This is a Winek's Drug and Chemical Blood-Level
9 Data 2001, the report was done by a professor
10 of toxicology at Duquesne University School of
11 Pharmacy and he also teaches at the
12 University's School of Education, Graduate
13 School of Arts and Sciences, and the Law
14 School. He's been certified by the American
15 Board of Forensic Toxicology and Academy of
16 Toxicological Sciences. And what this report
17 would show is that blood testing can show down
18 to a very exact science not only that a
19 substance ... a foreign substance may be
20 present, but that that substance can be at a
21 therapeutic level. In other words, it could be
22 at a therapeutic level that would not impair a
23 driver, or it can be at a toxic level that does
24 cause impairment of functions.

25 TROOPER BRIGHAM: Your Honor, the State would object

1 to any entrance into this because it's a study
2 and same as cancer, anything else, everybody
3 has their own beliefs behind ...

4 **THE COURT:** I will accept it. However, I ... there
5 again, as an exhibit and look at it. However,
6 I will base my decision on statute.

7 **TROOPER BRIGHAM:** Yeah.

8 **THE COURT:** This is just Exhibit Number Three.

9 Q: So my question goes back to when a subject
10 requests a blood test, what is your
11 understanding of affirmative assistance?

12 A: At this point in time, when Mr. Saleeby was ...
13 requested a blood sample, he was not even
14 advised of his implied consent rights at that
15 point in time and once he was even advised of
16 his implied consent rights, he never mentioned
17 of any blood sample at that point and which
18 that ... my interpretation is for you to
19 receive affirmative assistance for additional
20 testing, you have to have a test to ... to
21 contradict is the purpose behind it. In other
22 words, if ... if Mr. Saleeby would have
23 provided a breath sample of .010 or .10, the
24 purpose in requesting a blood sample for
25 affirmative assistance would be to contradict

1 what the .08 was reading.

2 Q: So I think we can agree you're testifying as to
3 your interpretation of the statute. Let's read
4 the statute. I'm quoting from Section 56-5-
5 2950, Section (d) and I'll read to (e). The
6 person tested or giving samples for testing may
7 have a qualified person of his own choosing
8 conduct additional tests at his expense and
9 must be notified in writing of that ... of that
10 right. A person's request or failure to
11 request additional blood or urine tests is not
12 admissible against a person in a criminal
13 trial. The failure or inability of a person
14 tested to obtain additional tests does not
15 preclude the admission of evidence relating to
16 the test or samples obtained at the direction
17 of law enforcement officer. Section (e), the
18 arresting officer must provide, and I emphasize
19 must, must provide affirmative assistance to
20 the person to contact a qualified person to
21 conduct and obtain additional tests.
22 Affirmative assistance at a minimum includes
23 providing transportation for that person to the
24 nearest medical facility which performs blood
25 tests. Were you ever aware of Mr. Saleeby

1 contacting his attorney over the phone?

2 A: Oh, yes, I was there. I allowed him to do so.

3 Q: And so you listened to his attorney tell him
4 you need to request a blood test?

5 A: No, I didn't hear. I wasn't privileged to the
6 conversation.

7 Q: Okay.

8 A: And the conversation was prior to him being
9 advised of his implied consent.

10 Q: And so the way I understand your position is
11 you don't have to give affirmative assistance
12 if somebody requests a blood test before you
13 read them their implied consent rights?

14 A: That's not ... in other words, if you refuse to
15 submit to a urine sample, which is what my
16 whole purpose and belief was at roadside that
17 he was under the influence of a narcotic, not
18 that he was under the influence of alcohol,
19 that he provide a urine sample and which he
20 refused to submit to a urine sample. So upon
21 him refusing to submit to a urine sample, which
22 is what the State was requesting, additional
23 tests would have been to collaborate against
24 the sample that he provided and which he
25 refused to submit.

1 Q: I understand your position. I'm going to play,
2 as I believe we're on State's Exhibit ...
3 excuse me, Respondent's Exhibit Four, the DUI
4 tape you provided to us, Trooper Brigham, and
5 at the very beginning of this tape, I believe
6 this would be right after what you described
7 that Mr. Saleeby requested a blood test before
8 his implied consent rights, and the tape begins
9 ... and I'll just let ... I'll play it for
10 everybody here with your explanation of why
11 that wasn't in play. And after we ... after we
12 get through with this, my question for you is
13 if Mr. Saleeby asked for a blood test ...

14 THE COURT: Turn it more this way. Would you turn
15 that louder?

16 (Video is played.)

17 MR. SCOTT: I'm going to back it up and start it
18 over. This laptop doesn't have real loud
19 speakers, but I will play it right beside this
20 microphone.

21 (Video is played.)

22 THE COURT: I still haven't heard any request for a
23 blood test. Has it come yet?

24 (Video is played.)

25 Q: Now, I'm going to stop it right there. Officer

1 Brigham, what's implied from that is that Mr.
2 Saleeby at that time had asked you about a ...
3 requested a blood test and you don't refute
4 that, correct?

5 A: No, sir, I don't.

6 **THE COURT:** I'm going to interrupt there because
7 there's so many things coming here. When did
8 the respondent ask for a blood test?

9 **TROOPER BRIGHAM:** When the video camera was first
10 activated. And that's the point of when the
11 video camera was ...

12 **THE COURT:** First inside the ...

13 **TROOPER BRIGHAM:** Activated, that's correct.

14 **MR. SCOTT:** At the Hartsville jail.

15 **THE COURT:** Okay. Continue with it.

16 Q: And so my question is you've told us that when
17 you took him to the jail and you state on the
18 tape later, you didn't suspect there was
19 alcohol in his system?

20 A: That's correct.

21 Q: And you expected the breathalyzer to read 00
22 and so when you explained to him the reasons
23 why you weren't going to give him affirmative
24 assistance, that was because you say that
25 alcohol doesn't show ... that, excuse me, the

1 only thing that shows up in a blood test is
2 alcohol, that's what you said right there on
3 that tape, correct?

4 A: The purpose in the Highway Patrol requesting a
5 blood sample ...

6 Q: I understand the purpose. I'm asking what you
7 said.

8 A: The best of my knowledge, that's correct.

9 Q: To the best of your knowledge. Now, you've
10 told me that you don't believe a forensic
11 toxicologist that can test for every type of
12 level, you don't believe that that's somebody's
13 opinion if nothing else shows up in blood?

14 A: First of all, it's not an original copy.

15 Q: I understand.

16 A: So I don't know where it comes from.

17 Q: Okay.

18 A: Okay. Second of all, based upon my training
19 and the way we're required to do it is A, B,
20 and C, okay, and that's the way we provide
21 breath samples is A, B, and C. Breath's first;
22 urine second. There's no ... can't
23 differentiate from either one. The only way
24 you go straight from blood to urine would be
25 the fact of whether they were incompetent and

1 couldn't provide it. In other words, they were
2 injured, their mouth was injured or ...

3 Q: And you said you've had experience with that
4 before?

5 A: What do you mean?

6 Q: You've had a subject ...

7 A: Their mouth ...

8 Q: You've had blood taken from a subject?

9 A: That is correct.

10 Q: Has it ever showed, say the person was on, for
11 instance, marijuana, alcohol?

12 A: Wasn't tested for that because it was tested
13 for blood alcohol content.

14 Q: Isn't it true when you specify either a urine
15 test or a blood test as a Highway Patrolman,
16 you can indicate what you would like that panel
17 to show, what you would like that ... what
18 would you like that urine and/or blood to show?

19 A: Whenever we get our ... when we get our drug
20 kits that are provided to us, it has two vials
21 and one urine sample for sample purposes that
22 can be sent to SLED. So if we suspect of any
23 narcotics, there is a urine sample that can be
24 taken from the catheter, whether they're
25 incompetent, you know, that they're not alert

1 or whatnot. So if you suspect of that, you can
2 get the urine out of the catheter. Then you
3 have two vials for blood.

4 Q: Right.

5 A: That are in our SLED packets, so it's not a
6 catch all with blood. In other words, they
7 give us the urine packet, as well, for the
8 narcotic purposes.

9 Q: Did you believe Mr. Saleeby was able to pay?
10 Did he tell you he had a credit card and that
11 he was able to pay for a blood test?

12 A: That wasn't an issue.

13 Q: That wasn't an issue?

14 A: Huh-uh (negative response).

15 Q: And so you're telling this Court today and
16 you're telling me that when somebody requests
17 a blood test that can show anything from
18 whether you've got precursors for cancer or in
19 this case whether the amount of Hydrocodone in
20 his system that he admits to may have been at
21 a therapeutic level and not a level that would
22 have impaired him, you're telling me that
23 that's not an option when somebody requests
24 that, that you would rather have a urine test?

25 A: That's what the State's next level of testing

1 is is urine. If he would have provided a urine
2 sample, then and he wanted blood, then the
3 State's obligation is to assist him with
4 affirmative assistance.

5 Q: So as I understand your position, you don't
6 think you have to give affirmative assistance
7 to a blood test until the person submits the
8 urine?

9 A: If they refuse to submit to a test, to receive
10 additional tests.

11 Q: When did he ... when did he refuse?

12 A: During transport.

13 Q: Is that on video?

14 A: No, it's not.

15 Q: It's not on video that Mr. Saleeby, III,
16 refused the urine test. In fact, when you
17 talked to him on the video we just watched, you
18 mentioned a urine ... a urine test and there's
19 no refusal there?

20 A: That's correct. And he also signed for his
21 refusal that he refused to submit to a urine
22 sample.

23 Q: I understand that. When was that signed?

24 A: When we got to the Darlington County Detention
25 Center.

1 Q: Okay. And so, we'll make it clear one more
2 time, your understanding of the statute seems
3 to be that when somebody requests a blood test
4 and we can agree on how intensive that blood
5 analysis would be, but your position seems to
6 be that affirmative assistance is not required
7 by you until Mr. Saleeby, III, provides a urine
8 sample?

9 A: Based upon the video and what transpired on
10 that night, Mr. Saleeby asked for a blood
11 sample before he was even advised of a breath
12 sample.

13 Q: And you knew that he talked to his lawyer; you
14 let him talk to his lawyer.

15 A: So what I'm getting at is ...

16 Q: Okay.

17 A: ... is Mr. Saleeby's ... my interpretation of
18 Mr. Saleeby's belief was he wanted to give
19 blood, not breath, and which he was advised
20 that he had to provide the breath sample and
21 that it wasn't warranted for him to just go
22 straight to blood.

23 Q: And ...

24 A: And when I explained that to him, he provided
25 the breath sample and he was advised ... or he

1 was advised of his implied consent rights in
2 which he blew a 00. Then I advised him the
3 next step that the South Carolina Highway
4 Patrol is requesting. At that point in time,
5 nothing else was mentioned of the actual blood.

6 Q: And Mr. Saleeby, Jr., was requesting that I
7 play this tape through to show where you
8 mentioned the urine sample will be taken and
9 Mr. Saleeby III does not object to that. I
10 think we've gone over that.

11 TROOPER BRIGHAM: Your Honor, I'm not disputing
12 that.

13 MR. SCOTT: He's not ... he's not disputing that,
14 that there was no refusal on this tape; that
15 the refusal came allegedly during the
16 transport, of which there is no corroborating
17 evidence there, and so ... and I think we're
18 clear, I think we can both agree that you read
19 ... on this video in the Datamaster room at the
20 Hartsville Police Department, Mr. Saleeby does
21 not refuse the urine test, correct?

22 A: Not on video, that's correct.

23 Q: And there is no ... there is no transport tape
24 that you know of that would show him refusing
25 that urine test?

1 A: As I stated, during transport to the vehicle is
2 when he refused and which once we was at the
3 Darlington Detention Center ...

4 **THE COURT:** Did you say transport to the vehicle?

5 A: To, that's correct.

6 **THE COURT:** Continue.

7 Q: Transport to, and I'll ask you to clear that
8 up. To take the breathalyzer or to the ...

9 A: Patrol car. After ... after ...

10 Q: Leaving this ...

11 A: ... leaving ... leaving ...

12 Q: ... and taking him to the Detention Center?

13 A: That's correct.

14 Q: So in the car, even though here he doesn't
15 refuse?

16 A: That's correct.

17 Q: And so my question is when you left here, where
18 would you have taken ...

19 A: To my patrol car.

20 Q: To take a urine sample?

21 A: That's what was warranted. And then to the
22 transport to my vehicle is whenever he refused.

23 Q: Well, so Mr. Saleeby, Jr., and I have conferred
24 and so what our question is we agree both
25 of us agree that Mr. Saleeby, III, did not

1 refuse the urine test on this video and you
2 asked him again during the transport to the
3 Detention Center to provide the urine sample
4 then and you allege at that point is when he
5 refused it and there is no video evidence of
6 that?

7 A: No, it's not that I asked him again. He stated
8 he did not want to take the test. It's not
9 that it was asked again.

10 Q: Let me ...

11 **THE COURT:** That phone needs to be cut off.

12 **MR. _____:** I'm cutting it off now.

13 **THE COURT:** Okay, now both sides, I want one answer.
14 I've gotten several questions about this ...
15 the refusal, the urine refusal. In the vehicle
16 or ...

17 **TROOPER BRIGHAM:** Transport to the vehicle.

18 **THE COURT:** ... or to the vehicle?

19 **TROOPER BRIGHAM:** To the vehicle, Your Honor.

20 Q: To the vehicle?

21 **THE COURT:** So that is his testimony. That's what I
22 have down here and then we were talking about
23 inside the vehicle. So you might want to go
24 back there.

25 Q: Is it your testimony today, Trooper Brigham,

1 that Mr. Saleeby when he left this breathalyzer
2 room, refused urine?

3 A: That's correct.

4 Q: And so at that point, you decided to transport
5 him to the Darlington County Detention Center,
6 correct?

7 A: That's correct.

8 Q: And, of course, we've gone over this there is
9 no ... there's no ... nothing to corroborate
10 that; there's no, you know, evidence. Did you
11 think at some point during the transport this
12 is what I'm going to charge him with. I'm
13 going to charge him with refusal. I can cut on
14 the in-car video like you did on the way to the
15 breathalyzer room. At any point did you think
16 to do that?

17 A: No.

18 Q: Okay. Wouldn't that be the best evidence in an
19 ... I mean, if you want a video ... if you know
20 the law requires a video of him in the
21 breathalyzer room and you know it requires you
22 to videotape his field sobriety tests, the
23 charge you're going to charge him with refusing
24 to take a urine sample, wouldn't you think to
25 cut on your car camera?

1 A: If he was in the hospital, there wouldn't be no
2 camera there, as well, and they refuse there
3 and it's not on audio or video and they sign
4 for their refusals at the hospital, just like
5 Mr. Saleeby signed for his refusal.

6 Q: And so you had no way of knowing if he took
7 this ... if he was prescribed this?

8 A: It wasn't an issue.

9 Q: It wasn't an issue. And it wasn't an issue
10 when he wanted to go to the hospital and get a
11 blood test, that wasn't an issue for you
12 either?

13 A: It wasn't one due to the way the section is.

14 Q: If he ...

15 **TROOPER BRIGHAM:** Your Honor, I've already answered
16 the question.

17 Q: Okay. I've got one more. Have you ever
18 experienced a DUI or a scenario where you have
19 any personal knowledge of someone being
20 administered a blood test that showed a
21 substance besides alcohol? In other words, if
22 you based a conviction on a DUI on somebody
23 having alcohol and some other substance,
24 whether it's marijuana, whether it's a
25 prescription, are you ... have you ever relied

1 on that in a case? Do you have any knowledge
2 of a blood test showing alcohol and another
3 elicit or intoxicating substance?

4 **TROOPER BRIGHAM:** Your Honor, as I stated in
5 testimony, the SLED packets that are provided
6 to us for SLED contain a urine and two vials
7

8 **MR. SCOTT:** Your Honor, ...

9 **TROOPER BRIGHAM:** ... for the purpose of testing for
10

11 **THE COURT:** Okay. I'm going to ask you to ask that
12 question one more time and if you'll answer it
13 if you have answered it before one more time
14 and then we'll move forward.

15 **Q:** Trooper Brigham, during your time in law
16 enforcement, have you ever, yourself or with
17 personal knowledge, been aware of a blood test
18 being given to a suspect that showed an
19 intoxicant, whether prescription medicine,
20 elicit substance, whatever it might be, besides
21 alcohol. Are you ... have you ever been aware
22 of that?

23 **A:** Not by ... not by blood.

24 **Q:** Not by blood, okay.

25 **MR. SCOTT:** Your Honor, if I could have the Court's

1 indulgence for one second. I want to look at
2 the refusal sheet. Now, the one we've been
3 provided is not very clear. If there's a
4 better copy with more legible, it's probably
5 just a printer issue. Here's the original.
6 Trooper Brigham's, for the record, showing us
7 this, his copy.

8 Q: And Trooper Brigham, there's no ... Trooper
9 Brigham, the sheet ... the notice of suspension
10 sheet, is it your understanding that when
11 someone signs for this, it's acknowledging that
12 they received it, not that they agree with what
13 it stipulates their charge to be?

14 A: Based upon the bold letters there it states
15 that they understand they cannot drive in the
16 State of South Carolina until their license
17 (inaudible)

18 Q: But you wouldn't have this Court believe that
19 that's an admission of guilt?

20 A: Oh, by no means. As they're told in the
21 implied consent ... or in the BA room that
22 their signature's not for any innocence or
23 guilt. It's just simply stating they received
24 that copy.

25 Q: Right. And so by Mr. Saleeby signing this

1 sheet, which there's no time stamp on it,
2 correct?

3 A: There's not.

4 Q: There's no time stamp. But by Mr. Saleeby
5 receiving this sheet, he doesn't agree that he
6 refused the test; he agrees that you allege he
7 refused the test.

8 **TROOPER BRIGHAM:** That's stipulating, Your Honor.

9 Q: I'm going to read the line into the record
10 where Mr. Saleeby signed. I understand that I
11 cannot drive until a license has been issued to
12 me. And that's in bold and I think that's just
13 what you referred to, Trooper Brigham, and so
14 we can agree on the record that he's not
15 admitting that he was guilty of refusal, just
16 that he got a copy?

17 A: As it's stated in this top square, as well, it
18 states that the reason for the suspension is
19 due to refusing to submit to a urine sample.

20 **MR. SCOTT:** I would ... I would just ask for a yes
21 or no answer whether Trooper Brigham believes
22 that Mr. Saleeby, III, was admitting by signing
23 this to admitting of guilt or whether he was
24 merely understanding that this charge was being
25 issued against him by the State.

1 **TROOPER BRIGHAM:** Receipt (inaudible), Your Honor,
2 just simply stating that he received a copy,
3 that he was under suspension for refusing to
4 submit to a urine test.

5 **THE COURT:** And the Trooper has answered the
6 question.

7 **Q:** Is ... I think we've seen the video; I think
8 it's on the record as far as you explained to
9 Mr. Saleeby why you didn't think the urine test
10 ... or excuse me, the blood test was in play or
11 that you had to provide affirmative assistance,
12 I think we've stipulated on the record. My
13 question is why ... it seems reasonable to me.
14 Does it seem unreasonable to you for you to
15 have given him a blood test when he requested
16 and had the money to pay for it instead of
17 basically explaining to him that he didn't have
18 that right?

19 **A:** I never explained to him he didn't have the
20 right. At that point in time that he requested
21 that a blood sample be provided, he was not
22 advised of his implied consent rights at that
23 point in time, in which he was advised of his
24 implied consent rights, that the South Carolina
25 Highway Patrol at that point in time was

1 requesting a breath sample be provided. In
2 other words, there was no reason for me to ...
3 the State to request a blood sample. In other
4 words, the legislature has approved that the
5 DMT machine is a legitimate cause ... equipment
6 to detect a BAC, a breath alcohol content.
7 Therefore, a blood alcohol content was not
8 warranted due to the fact that he was eligible
9 to provide the breath sample.

10 Q: And I understand that your understanding of the
11 statute is different from mine and that's okay.
12 My question just once again is when he asked
13 for affirmative assistance on the tape and he
14 asked for the blood test, what you're telling
15 me is you didn't think it applied because
16 affirmative assistance doesn't require you to
17 take him to the hospital before his implied
18 consent rights are read?

19 A: At no point in time did he ask for affirmative
20 assistance. He stated he wanted to give a
21 blood test. He never stated that he wanted
22 affirmative assistance for a blood test.

23 Q: Is it your testimony today that if the person
24 doesn't use affirmative assistance, those two
25 words, you don't have to take them to the

1 hospital to get them a blood test?

2 A: My point being is it wasn't warranted at that
3 time because he was physically able to provide
4 a breath sample as he was advised.

5 Q: And he did that, did he not?

6 A: He did and, therefore, he didn't ask for
7 anything else about blood.

8 Q: So let me be clear. Does a person have to use
9 the words affirmative assistance for you to
10 take them to a hospital and let them have a
11 blood sample drawn?

12 A: Not necessarily affirmative assistance, but
13 they have to be advised of their implied
14 consent rights and if there's nothing warranted
15 to the fact of him me physically having to
16 take him at my point for the State's request
17 for the actual initial test, which would be
18 blood if he's not able to provide a breath
19 sample, that would have been where blood would
20 have come into play. This was so premature to
21 even him being advised.

22 Q: And I understand that, but you've testified,
23 have you not, on the record that you were aware
24 before this breathalyzer tape in the Hartsville
25 Police Department was running that Mr. Saleeby,

1 III, had talked to his attorney? You were
2 aware of that?

3 A: I allowed him to make a phone call to his
4 father, that's correct.

5 Q: And so when he talked to his father, who's an
6 attorney, and got legal advice and you're
7 saying that his request for a blood test is
8 premature even though he just talked to a
9 lawyer?

10 A: That's correct, because he wasn't even advised
11 of his implied consent rights at that point in
12 time.

13 Q: So, and I apologize for going over this again,
14 is there anything in the statute that ... which
15 I have read into the record that says a person
16 cannot request affirmative assistance before
17 his implied consent rights are read?

18 A: There's nothing there that says it does. My
19 point being is the actual affirmative
20 assistance for additional, in other words, if
21 you refuse to submit to the State's request for
22 additional tests to be answered to, you have to
23 have a test before you can have an additional.

24 Q: Can't we agree, Trooper Brigham, that a blood
25 test is going to show a much more detailed

1 analysis of toxins in the body than a urine
2 test?

3 A: For alcohol, I would agree. I can't for any
4 other.

5 Q: You won't agree to anything else?

6 A: I can't agree to that because it's not to my
7 knowledge.

8 Q: And I think you stipulated earlier that you're
9 not aware of ... you've never handled a case or
10 dealt with anything where any other intoxicants
11 showed up on a blood test?

12 A: But there is metabolites that show within the
13 urine that tells whether they're under the
14 influence at that given time.

15 Q: And when you say metabolites, what is your
16 understanding a metabolite is ...

17 A: What is withheld in their system a degree of
18 levelness that SLED can testify to whether it
19 was ... they were under the influence at that
20 given time.

21 Q: Isn't it true that a metabolite is a byproduct
22 of the toxin?

23 A: This is the terminology that I was trained with
24 ARD, which is Advanced Roadside Detection,
25 which is a ... a advanced roadside for impaired

1 driving under narcotics.

2 Q: And so you're telling me with all that advanced
3 training, they never give people blood tests
4 that shows narcotics in the system?

5 A: Narcotics would be the sole purpose for urine,
6 which is the reason why you have a breath
7 sample and a urine sample.

8 Q: I understand what you keep repeating. I'm
9 asking a question that during all that training
10 did they ever mention or tell you or you have
11 any knowledge of a blood test showing
12 narcotics?

13 A: I don't. We ask for the breath sample and then
14 the urine sample would be the measures

15 Q: So your testimony is no, I am not aware of a
16 blood test showing narcotics?

17 A: That I'm not aware of, that's correct.

18 Q: And I think we've stipulated ...

19 MR. SALEEBY: Is this on the record?

20 THE COURT: Yeah, everything is on record.

21 MR. SALEEBY: Then we'll provide you a copy.

22 THE COURT: I beg your pardon?

23 MR. SALEEBY: We'll provide you a copy of this
24 video.

25 THE COURT: I can get ... I have that. I will watch

1 the tape since it has been brought into play.

2 **MR. SCOTT:** That's all I have on cross.

3 **THE COURT:** Respondent have testimony he'd like to
4 enter at this time?

5 **MR. SCOTT:** Yes, Your Honor, we at this time call
6 Edward Saleeby, III. I think he's been sworn
7 in.

8 **THE COURT:** He has.

9 **MR. SALEEBY - EXAMINATION BY MR. SCOTT:**

10 Q: Mr. Saleeby, you understand that everything you
11 say here is under oath?

12 A: Yeah.

13 Q: And you'll tell the truth to the best of your
14 knowledge?

15 A: Yes.

16 Q: If you can't remember something, tell me you
17 can't remember. When you got pulled over, do
18 you remember following too closely?

19 A: Not at all.

20 Q: When you got pulled out of the car, Trooper
21 Brigham's testified that he administered field
22 sobriety tests. Did you tell him anything as
23 to why you may not be able to perform those
24 tests?

25 A: Yes, I told him I had a syndrome from when I

1 was in the hospital and whatnot that affects my
2 legs and the nerves in my legs, but I could not
3 recall the actual name of it.

4 Q: Did anything happen from the time he put you in
5 his patrol car and the time the video we've
6 viewed here today at the Hartsville Police
7 Department (inaudible)?

8 A: Yes, right when I walked into the police
9 station at Hartsville, I requested to go to the
10 bathroom and he went there and, you know, was
11 standing behind me and from there went back to
12 the middle room and right before the
13 breathalyzer room, I asked to call my father,
14 which I did. And he advised me to take a blood
15 test and, you know, all tests, which I had
16 already was going to do anyway and from there
17 on after the phone call, I asked for the blood
18 test. I know the blood test is the gold
19 standard when it comes to alcohol and
20 quantifying of drugs..

21 Q: And you took the breathalyzer at the request of
22 Trooper Brigham?

23 A: No problem, yeah. I knew there was nothing in
24 my system (inaudible).

25 Q: And what you just told me is that in your

1 understanding of drug tests, blood tests, urine
2 tests, at any time did you have the intention
3 to refuse a test?

4 A: Not at all.

5 Q: Did you feel like there was anything you had to
6 hide?

7 A: No.

8 Q: And you testified that you've told voluntarily
9 Officer Brigham that you had taken a Lorcet, I
10 believe is what you said?

11 A: (Inaudible)

12 Q: And why did you take that?

13 A: Because of my chipped tooth that I suffered
14 when I collapsed for a heat stroke I had at the
15 sailing club ...

16 Q: I understand.

17 A: ... two weeks ago.

18 Q: And so you testified that Officer Brigham
19 observed you taking a break for ... to relieve
20 yourself at the jail or at the Hartsville
21 Police Department and that you asked for a
22 blood test and that at no time during this
23 scenario did you feel like you wanted to hide
24 anything or refuse any test?

25 A: I was willing to take anything ...

1 Q: To your memory.

2 A: I was willing to take anything because, I mean,
3 I was clearly not intoxicated.

4 MR. SCOTT: That's cross. Have nothing further.

5 THE COURT: Cross?

6 MR. SALEEBY - EXAMINATION BY TROOPER BRIGHAM:

7 Q: Mr. Saleeby, are you aware that standardized
8 field sobriety tests is not required in the
9 State of South Carolina to arrest somebody for
10 driving under the influence of alcohol?

11 A: Yes, sir.

12 Q: Did you not refuse to submit to a urine sample?
13 Did you not refuse to submit to a urine sample?

14 A: I clearly stated that I would take a urine
15 sample.

16 Q: At no point in time you refused to submit to a
17 urine sample?

18 A: Not at all.

19 Q: Not at all. So at no point in time you looked
20 at me and told me you didn't want to submit to
21 a urine sample?

22 A: Not that I recall.

23 Q: Not that you recall. You don't recall walking
24 to my patrol car?

25 A: I remember walking from the Datamaster room to

1 your patrol car.

2 Q: You do? Do you recall what you were wearing
3 that night?

4 A: I was wearing a fuschia/pink shirt, tennis
5 shoes, and khaki shorts.

6 Q: Do you recall who was in the vehicle with you
7 that night?

8 A: Yes, Alan (inaudible), a friend of mine, as
9 well as one of his lady friends.

10 Q: Do you recall any other prescriptions that were
11 in your vehicle that night?

12 A: Oh, I have all kinds of stuff, empty bottles
13 that I've had in there. I got some old stuff
14 in there right now. It's just been sitting in
15 there.

16 Q: Do you recall telling me your eyes were dilated
17 and you were aware of them being dilated?

18 A: I don't know how I would be aware of my eyes
19 being dilated if I haven't looked in a mirror.
20 But, I mean, if you pointed it out to me, I was
21 willing to take it, you know, your word for it.

22 Q: Do you recall signing this form here saying
23 that you refused?

24 A: I recall signing many sheets towards
25 (inaudible)

1 **THE COURT:** We've already been through that.

2 **Q:** Do you recall ... do you recall signing this
3 form ...

4 **MR. SALEEBY:** (Inaudible)

5 **THE COURT:** Ask the question for ...

6 **TROOPER BRIGHAM:** I ...

7 **THE COURT:** Just one minute. Ask the question first
8 and then I will ...

9 **Q:** Do you recall signing this form here, sir?

10 **A:** I recall signing many sheets ...

11 **Q:** Okay.

12 **A:** ... while I was held at the jail.

13 **Q:** Do you recall signing a notice of suspension
14 resulting from refusing to submit to a urine
15 test that you understand that you could not
16 drive until a license had been issued to you?

17 **A:** I remember signing a sheet that I would be
18 suspended until something happened with the
19 court or whatnot, not that I refused urine.

20 **Q:** Okay.

21 **TROOPER BRIGHAM:** No further, Your Honor.

22 **THE COURT:** At this time, we'll go to closing. No
23 new evidence or testimony will be entered into
24 the record. Attorney ...

25 **MR. SALEEBY:** There is some ... we would like ...

1 THE COURT: We're following protocol. What ...

2 MR. SALEEBY: I would like to do redirect on new
3 matter brought up in cross. If it was not new
4 matter, I would not have the right to.

5 THE COURT: Okay. I'm going to allow this for a
6 very short period of time, but this is an
7 administrative hearing ...

8 MR. SALEEBY: I understand.

9 THE COURT: ... and not a criminal hearing.

10 MR. SALEEBY: I understand.

11 THE COURT: And we ... I am concerned only on the
12 issues to be heard here. I will allow that,
13 but it needs to be short.

14 MR. SALEEBY: I understand that.

15 TROOPER BRIGHAM - CROSS-EXAMINATION BY MR. SALEEBY:

16 Q: Will you please ... well, you brought it up.
17 You tried to say into the record, this is on
18 your question that he signed, that he refused.
19 Will you read the black bold print?

20 A: South Carolina Highway ...

21 Q: No, the black bold print I'm pointing to,
22 Trooper ...

23 THE COURT: Okay. I'm going to interrupt here and
24 we have been over this issue and I have it
25 recorded what is in bold print here. Is there

1 any difference from what it was earlier ...

2 **TROOPER BRIGHAM:** There's not.

3 **THE COURT:** ... from either party?

4 **TROOPER BRIGHAM:** There's not.

5 **MR. SALEEBY:** He just tried ... I'm pointing to the
6 top. I'm asking down here is what he's signing
7 to, not up here.

8 **THE COURT:** Right. And if you want to read it in
9 bold print or not right there.

10 **TROOPER BRIGHAM:** Okay. This states that he
11 understood that he could not drive until a
12 license had been issued to him.

13 **Q:** Thank you.

14 **THE COURT:** Okay.

15 **Q:** It does not say that he refused the test, does
16 it? He did not sign that, did he, sir?

17 **THE COURT:** We've already covered that issue and I'm
18 going to go forward ...

19 **MR. SALEEBY:** All right. New matter ... new matter.

20 **THE COURT:** We're going to closing right now. No
21 new evidence or testimony will be entered into
22 the record. Attorney, do you have a closing
23 statement?

24 **MR. SCOTT:** Your Honor, if it please the Court. I
25 understand that Trooper Brigham interprets the

1 statute certain ways. I would ask this Court
2 to look at the testimony, look at the fact that
3 on the record Trooper Bringham does not refute
4 the fact that Mr. Saleeby, III, requested a
5 blood test and there being no evidence of ...
6 at last for this Court to view of any sort of
7 refusal. My client also consulted an attorney
8 before he requested the blood test and from the
9 evidence we've been able to view, there was not
10 a refusal. And our position is Trooper Bringham
11 is well versed in DUI cases and he acknowledges
12 that if he was going to charge my client with
13 refusing a urine test, that he could have
14 turned on his camera and that that would have
15 been best practices and recorded that. And I
16 probably at that point wouldn't have spent so
17 much time if we could have cleared that up one
18 way or the other. At no time during that video
19 that we viewed today and that you'll probably
20 view in full does Mr. Saleeby refuse a urine
21 test and it's clearly inferred that he's
22 willing to take a breathalyzer, which showed
23 00, that he wanted a blood test. And his
24 understanding and testimony today is that blood
25 test would show anything and everything, a full

1 disclosure of any intoxicants in his system,
2 not just what Trooper Brigham might want to
3 show that there was an existence or not of say
4 a metabolite of a prescription medicine that we
5 have shown this Court was prescribed to Mr.
6 Saleeby, in a very small quantity to Mr.
7 Saleeby, and that he had a valid reason to use
8 that. And he tried his hardest, he attempted
9 for affirmative assistance to show Trooper
10 Brigham that a blood test would explain exactly
11 what was in his system and the fact he was not
12 impaired to drive a vehicle on the roads of
13 South Carolina.

14 **THE COURT:** Any further?

15 **MR. SCOTT:** Nothing further.

16 **THE COURT:** State have closing?

17 **TROOPER BRIGHAM:** Yes, Your Honor, probable cause to
18 stop the vehicle for following too closely,
19 which was provided to the defense, which you'll
20 see on the video (inaudible). Not in question
21 whether the (inaudible) medication Mr. Saleeby
22 had in his possession or whether it was even
23 prescribed to Mr. Saleeby. It's not against
24 the law in the State of South Carolina to
25 consume prescription narcotics. It's against

1 the law in the State of South Carolina to be
2 impaired while operating a vehicle and based
3 upon the totality of circumstances and me being
4 certified to do standardized field sobriety-
5 testing, which was conducted on Mr. Saleeby.
6 He did give notation that he did have some
7 medical issues that may prevent him from
8 providing what was in question. He was placed
9 under arrest and transported to Darlington or
10 to Hartsville Police Department and which he
11 was taken to a Datamaster room where a video
12 recording was activated. He did request a
13 blood sample premature to any advisements of
14 his implied consent rights, which there was no
15 indication after that of any type of blood test
16 requested. And which he was advised of his
17 implied consent rights and the cause of the
18 implied consent rights being a breath sample
19 versus a urine sample and the reasons behind
20 the two. As given under sworn oath, Mr.
21 Saleeby did refuse to submit to a urine sample
22 in transmit to my patrol car to go and retrieve
23 a urine sample, and which he was provided a
24 copy of that and which he signed for. He was
25 also provided a copy of all the other

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1 documentation, a copy of his implied consent
2 rights where the State was asking for a urine
3 sample, as well as a breath sample, as well as
4 a copy of his breath analysis report, which he
5 signed for, as well. Therefore, the State
6 feels its met its burden of proof based on
7 Section 56-5-2950 (inaudible) affirmative
8 assistance would be when you ask for
9 assistance, additional testing. In other
10 words, if you refuse to submit to a State test,
11 the State feels that it's a additional test to
12 contradict the test that's been provided, and
13 when you refuse a test that the State has
14 requested, additional tests would not be
15 warranted. In other words, you've got to have
16 a test to have an addition. You've got to have
17 a house to have an addition. You've got to
18 have a test to have an addition. Therefore,
19 the State feels it's met its burden of proof
20 based upon Section 56-5-2950 and SLED policies.

21 **THE COURT:** This hearing is now concluded.

22 (There being nothing further, the hearing was
23 concluded.)
24
25

***** INSTANT BILL ***** ACCT [REDACTED] DATE: 01/26/11 PAGE 1 OF 2
R. JOSEPH HEALY, M. D., P. A.
805 PAMPLICO HWY, STE A-130
P.O. BOX 3408
FLORENCE, SC 29505
LAST PAYMENT YTD PAY
01/28/10 [REDACTED] \$0.00

Resp. [REDACTED]
#1 exhibit

OFFICE PH: [REDACTED] HOME PH: [REDACTED] BUSINESS PH: [REDACTED]
EXT: [REDACTED]
PAT NAME APPOINTMENT
[REDACTED] [REDACTED]

EDWARD E. SALEEBY III

ES EDWARD E. SALEEBY III

DIAGNOSIS

1-781.3 ATAXIA/ DYSIDIADOKINESIA

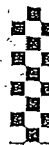
NUM DOCTOR

TAX ID

1 R. JOSEPH HEALY, M.D. [REDACTED]

CONTINUED ON NEXT FORM

000089



HARTSVILLE DRUG CO.
134 W. CAROLINA AVE.
HARTSVILLE, SC 29550

#2 resp. exhibit
A FINANCE CHARGE OF 1.50 % PER MONTH
(AN ANNUAL PERCENTAGE RATE OF 18.0%) OR A
MINIMUM SERVICE CHARGE OF \$.50 WILL BE CHARGED
ON ALL AMOUNTS 30 DAYS OR MORE PAST DUE

STATEMENT OF ACCOUNT

STATEMENT DATE: 06/26/2010

PHONE: 843-332-6581

SALEEBY, ED JR.

SC

SALEE

GRP-\

PAGE

3

AMOUNT PAID

AMT DUE

PLEASE DETACH HERE AND RETURN TOP PORTION WITH YOUR PAYMENT
HARTSVILLE DRUG CO. 134 W. CAROLINA AVE. HARTSVILLE, SC 29550

DATE	Rx NUMBER	QTY	DESCRIPTION	DEPT CD	MED DED	AMOUNT	SALES TAX	ITEM TOTAL
06/16/10		1	**Rcpt # [REDACTED]					
** PRESCRIPTION FOR SALEEBY, EDWARD, III						SALEED		
06/17/10			[REDACTED]		*			
** PRESCRIPTION FOR SALEEBY, EDWARD, III						SALEED		
06/17/10			[REDACTED]		*			
06/17/10		1	**Rcpt # [REDACTED]					
** PRESCRIPTION FOR SALEEBY, EDWARD, III						SALEED		
06/18/10	4115908		HYDROCODONE-APAP		*	1.99		
06/18/10		1	Dvy Fee			1.00		
06/18/10		1	**Rcpt # [REDACTED] 3026					2.99
** PRESCRIPTION FOR [REDACTED]			[REDACTED]		*			
06/08/10			[REDACTED]		*			
06/08/10		1	[REDACTED]					
06/08/10		1	**Rcpt # [REDACTED]					
** PRESCRIPTION FOR [REDACTED]			[REDACTED]					
06/16/10			[REDACTED]		*			
** PRESCRIPTION FOR [REDACTED]			[REDACTED]		*			
06/16/10			[REDACTED]		*			
06/16/10		1	[REDACTED]					
06/16/10		1	**Rcpt # [REDACTED]					
PAY 932.44 ***IF PAID BY 07/16/2010							3.42	

TOTAL TAX

MED DED
FOR MONTH

YTD MED
DEDUCTION

PREVIOUS BALANCE

CHARGES
THIS MONTH

FINANCE CHARGE

TOTAL CHARGES

TOTAL
PAYMENTS & CREDITS

AMOUNT DUE

resp exhibit #3

Winek's Drug & Chemical Blood-Level Data 2001

Prepared by: Charles L. Winek, Ph.D., Wagdy W. Wahba, Ph.D., Charles L. Winek, Jr., B.S. (Pharm.), M.S., and Tracey Winek Balzer B.S. (Pharm.), M.S.

We have gathered the data in the table from the literature and from personal experience. The values are not considered absolute, but are to be used as a guide in evaluating a given case. The values can be affected by dose, route of administration, absorption differences, age and sex, tolerance, method of analysis, pathological or disease state, postmortem redistribution, etc. Users of the table are referred to *Winek's Toxicology Annual* and Chapter 72 in *Forensic Medicine*, Volume III, by Tedeschi, Eckert and Tedeschi for chapters discussing the data, reference to the data, and factors affecting blood-level values. For additional pharmacokinetic information and other tissue levels, users are referred to Baselt's reference, *Disposition of Toxic Drugs and Chemicals in Man*.

Users are cautioned against pharmacists using pharmacokinetics for interpretation of blood-level data when death is involved. It should be obvious that kinetics, even pharmacokinetics, are not applicable to the moribund state.

Definition of Blood Levels

Therapeutic Blood Level

Winek defines a therapeutic blood level as that concentration of drug and/or its active metabolite(s) present in the blood (serum or plasma) following therapeutically effective dosage in humans.

Toxic Blood Level

The concentration of drug and/or its active metabolite(s) or chemical present in the blood (serum or plasma) that is associated with serious toxic symptoms in humans.

Lethal Blood Level

The concentration of drug and/or its active metabolite(s) or chemical present in the blood (serum or plasma) that has been reported to cause death, or is so far above reported therapeutic or toxic concentrations, that one can judge that it might cause death in humans.

Normal Blood Level

Some of the values under normal represent normal body constituents and others represent values related to normal environmental exposure. Values can, and do, vary with geographical location.

Suggested additions or corrections can be made by contacting the author at drwinek@aol.com. Recommendations are always welcomed.

Units

Drugs and chemicals in the table are reported in both mg% and µg/mL. Drugs are listed by both their trade and generic names. Mg% (milligram percent) is equal to mg/dL (milligram/deciliter); µg/mL (microgram/milliliter) is equal to mg/L (milligram/liter).

NOTE:

Divide the mg% level by 100 to obtain mg/mL. Divide the µg% level by 100 to obtain µg/mL. To convert mg/L or µg/L to mg% or µg%, divide level by 10.

Examples:

1mg/L = 0.1mg%

3µg/L = 0.3µg%

µg is the representation for microgram (mcg).

Many therapeutic drugs are reported in nanograms/milliliter (ng/mL). To convert the listed mcg/mL in this table to ng/mL, multiply the listed value by 1000. For example, digoxin concentration of 0.0022 mcg/mL would be $0.0022 \times 1000 = 2.2$ ng/mL. Put simply, you move the decimal point three places to the right.



Dr. Charles L. Winek

Dr. Winek is a professor of toxicology at Duquesne University School of Pharmacy and also teaches for the University's School of Education, Graduate School of Arts and Sciences, and the Law School. He is a diplomate of both American Board of Forensic Toxicology and the Academy of Toxicological Sciences.

Dr. Winek is currently the director of Pittsburgh Criminalistics Laboratory and is the former chief toxicologist for the Allegheny County Coroner's Office, positions he held for 32 years. He continues to testify frequently as an expert witness in both criminal and civil cases in Allegheny County and throughout the United States.

Dr. Winek has published 119 articles in scientific journals and authored, co-authored or contributed to 29 books.

Additionally, Dr. Winek is toxicology editor for the scientific journal *Forensic Science International* and a member of the editorial boards of *The Journal of Applied Toxicology* and the journal *Analytical Toxicology*.

(NOTE: *Winek's Drug & Chemical Blood-Level Data 2000* is reprinted with written permission as a courtesy to our customers. Fisher HealthCare accepts no responsibility for the accuracy of its contents.)

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
A						
Acetabulol (Spectral)	0.05 - 0.12	0.5 - 1.2	*****	*****	*****	*****
Acetaminophen (Tylenol)	1 - 2	10 - 20	15	150	>16	>160
Acetazolamide (Diamox)	1.0 - 1.5	10 - 15	*****	*****	*****	*****
Acetohexamide (Dymelor)	2.1 - 5.6	21 - 56	*****	*****	*****	*****
Acetone	*****	*****	20 - 30	200 - 300	55	550
Acetonitrile (met: to Cyanide)	*****	*****	*****	*****	0.077	0.77
Acetylsalicylic Acid (as met: Salicylate-for analgesic use)	2 - 10	20 - 100	15 - 30	150 - 300	50	500
Acetylsalicylic Acid (as met: Salicylate-for rheumatoid arthritis)	2 - 25	20 - 250	*****	*****	*****	*****
Actidil (Triprolidine)	0.0004 - 0.0044	0.004 - 0.044	*****	*****	*****	*****
Actifed (Pseudoephedrine) (Triprolidine)	0.050 - 0.077	0.50 - 0.77	*****	*****	1.9	19
Actron (Ketoprofen)	0.0004 - 0.0044	0.004 - 0.044	*****	*****	*****	*****
Adalat (Nifedipine, Procardia)	0.5 - 1.5	5 - 15	*****	*****	*****	*****
Adalat (Nifedipine, Procardia)	0.0015 - 0.0162	0.015 - 0.162	*****	*****	*****	*****
Alcalne (Proparacaine)	*****	*****	*****	*****	1.5	15
Aldrin	0.00015	0.0015	0.00035	0.0035	*****	*****
Alfenta (Alfentanil)	0.010 - 0.12	0.10 - 1.2	*****	*****	*****	*****
Alfentanil (Alfenta)	0.010 - 0.12	0.10 - 1.2	*****	*****	*****	*****
Allegra (Fexofenadine)	0.018 - 0.021	0.18 - 0.210	*****	*****	*****	*****
Alphaprodine (Nisentil)	0.087 - 0.100	0.87 - 1.00	*****	*****	0.33	3.3
Alprazolam (Xanax)	0.0025 - 0.0102	0.025 - 0.102	*****	*****	0.0122 - 0.039	0.122 - 0.39
Aluminum	0.013	0.13	*****	*****	*****	*****
Amantadine (Symmetrel)	0.006 - 0.031	0.06 - 0.31	0.1 - 0.05	1 - 0.5	0.21 - 0.48	2.1 - 4.8
Ambien (Zolpidem)	0.0029 - 0.0272	0.029 - 0.272	*****	*****	0.05 - 0.112	0.5 - 1.12
Aminophylline (Theophylline)	1 - 2	10 - 20	3 - 4	30 - 40	5 - 25	50 - 250
Amitriptyline (Elavil)	0.012 - 0.025	0.12 - 0.25	>0.05	>0.5	0.2 - 2.0	2 - 20
Amitriptyline (Elavil) (+met: Nortriptyline)	0.012 - 0.025	0.12 - 0.25	>0.05	>0.5	*****	*****
Ammonia	0.05 - 0.17	0.5 - 1.7	*****	*****	*****	*****
Amobarbital (Amytal)	0.1 - 0.5	1 - 5	1 - 3	10 - 30	1.3 - 9.6	13 - 96
Amoxapine (Asendin)	0.0017 - 0.021	0.017 - 0.21	*****	*****	0.295 - 2.0	2.95 - 20
Amoxapine (Asendin) (+met: 8-OH-amoxapine)	0.02 - 0.04	0.2 - 0.4	*****	*****	*****	*****
Amphetamine	0.003 - 0.011	0.03 - 0.11	>0.05	>0.5	>0.1	>1
Amytal (Amobarbital)	0.1 - 0.5	1 - 5	1 - 3	10 - 30	1.3 - 9.6	13 - 96
Anafranil (Clomipramine)	0.01 - 0.045	0.1 - 0.45	*****	*****	*****	*****
Anaprox (Naproxen)	3.1 - 12	31 - 120	40	400	*****	*****
Analeridine (Leritine)	<0.05	<0.5	*****	*****	0.09 - 0.70	0.9 - 7.0
Aniline	*****	*****	*****	*****	0.63	6.3
Ansaid (Fibuprofen)	1 - 2.2	10 - 22	*****	*****	*****	*****
Antabuse (Disulfiram)	0.038 - 0.25	0.38 - 2.5	*****	*****	37 - 58	370 - 580
Antipyrine	0.5 - 2.5	5 - 25	*****	*****	11	110
Aralen (Chloroquine)	0.002 - 0.040	0.02 - 0.40	*****	*****	0.3 - 9.9	3 - 99
Arsenic	0.002 - 0.0062	0.02 - 0.062	0.1	1	0.9 - 1.5	9 - 15
Asendin (Amoxapine)	0.0017 - 0.021	0.017 - 0.21	*****	*****	0.295 - 2.0	2.95 - 20

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Asendin (Amoxapine)	0.02 - 0.04	0.2 - 0.4	*****	*****	*****	*****
[+met: 8-OH-amoxapine]						
Astemizole (Hismanal)	0.00004	0.0004				
Atarax (Hydroxyzine, Vistaril)	0.0022 - 0.008	0.022 - 0.08	*****	*****	0.4 - 3.9	4.2 - 39
Atenolol (Tenorim)	0.02 - 0.07	0.20 - 0.70	3.5	35	*****	*****
Ativan (Lorazepam)	0.001 - 0.024	0.01 - 0.24	0.03 - 0.06	0.3 - 0.6	*****	*****
Atromid (Clofibrate)	12.2	122	*****	*****	*****	*****
Atropine	0.0035 - 0.0200	0.035 - 0.200	*****	*****	0.02	0.2
Avelox (Moxifloxacin)	0.45 - 1.44	4.5 - 14.4	*****	*****	*****	*****
Aventyl (Nortriptyline)	0.005 - 0.0375	0.05 - 0.375	0.05	0.5	1.3	13
[met: Amitriptyline (Elavil)]						
AZT (Retrovir, Zidovadine)	0.027 - 0.08	0.27 - 0.8	*****	*****	*****	*****
B						
Baclofen (Lioresal)	0.01 - 0.06	0.1 - 0.6	0.11 - 0.35	1.1 - 3.5	*****	*****
Barbital	1 - 2.6	10 - 26	6 - 8	60 - 80	>10	>100
Barbiturates (intermediate acting)	0.1 - 0.5	1 - 5	1 - 3	10 - 30	>3	>30
Barbiturates (long acting)	1 - 4	10 - 40	4 - 6	40 - 60	>8	>80
Barbiturates (short acting)	0.1	1	0.7	7	1	10
Benadryl (Diphenhydramine)	0.0025 - 0.0112	0.025 - 0.112	0.5	5	>0.8	>8
Benemid (Probenecid)	10 - 20	100 - 200	*****	*****	*****	*****
Bentyl (Dicyclomine)	0.002 - 0.008	0.02 - 0.08	*****	*****	*****	*****
Benzedrex (Propylhexedrine)	0.001	0.01	*****	*****	0.2 - 0.3	2 - 3
Benzene	*****	*****	>0	>0	0.090 - 0.12	0.90 - 1.2
Benzphetamine (Didrex)	0.0025 - 0.0500	0.025 - 0.500	>0.05	>0.5	1.4	14
Benztropine (Cogentin)	0.008 - 0.0126	0.08 - 0.126	0.0048	0.048	0.02 - 0.07	0.2 - 0.7
Bethanid (Bethanidine)	0.002 - 0.050	0.02 - 0.50	*****	*****	*****	*****
Bethanidine (Bethanid)	0.002 - 0.050	0.02 - 0.50	*****	*****	*****	*****
Bismuth	0.004 - 0.008	0.04 - 0.08				
Blocadren (Timofol)	0.004 - 0.023	0.04 - 0.23	*****	*****	*****	*****
Boron	0.08	0.8	4	40	5	50
Brethine (Terbutaline)	0.0002 - 0.0006	0.002 - 0.006	*****	*****	0.004	0.04
Brevibloc (Esmolol)	0.11 - 0.159	1.1 - 1.59	*****	*****	*****	*****
Bromide	0.30 - 23	3 - 230	50 - 150	500 - 1500	200	2000
Bromide [met: Carbomal (Carbital)]	0.6	6	40 - 125	400 - 1250	128.5 - 245.0	1285 - 2450
Bropheniramine (Dimetane)	0.0008 - 0.0015	0.008 - 0.015	*****	*****	*****	*****
Bupivacaine (Marcaine)	0.022 - 0.345	0.22 - 3.45	1	10	*****	*****
Buprenex (Buprenorphine)	0.0014 - 0.011	0.014 - 0.11	*****	*****	*****	*****
Buprenorphine (Buprenex)	0.0014 - 0.011	0.014 - 0.11	*****	*****	*****	*****
Bupropion (Wellbutrin)	0.0025 - 0.0100	0.025 - 0.100	*****	*****	0.73	7.3
Buspar (Buspirone)	0.0088 - 0.0147	0.088 - 0.147	*****	*****	*****	*****
Buspirone (Buspar)	0.0088 - 0.0147	0.088 - 0.147	*****	*****	0.73	7.3
Butabarbital (Butisol)	0.76 - 1.69	7.6 - 16.9	*****	*****	>3	>30
Butalbital (Sandoval, Fioricet, Fiorinal)	0.17 - 0.26	1.7 - 2.6	0.7 - 4	7 - 40	1.3 - 2.6	13 - 26
Butanediol	*****	*****	*****	*****	28	280
Butaperazine (Repolse)	0.002 - 0.069	0.02 - 0.69	*****	*****	*****	*****
Butazolidin (Phenylbutazone)	1.6 - 15.0	16 - 150	20	200	40	400
Butisol (Butabarbital)	0.76 - 1.69	7.6 - 16.9	*****	*****	>3	>30

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Butorphanol (Stadol)	0.00011-0.00017	0.0011 - 0.0017	*****	*****	*****	*****
Butyl Nitrite (Nitrite)	0.05 - 0.40	0.50 - 4	*****	*****	2.2	22
C						
Cadmium	0.00005-0.00040	0.0005 - 0.0040	0.005	0.05	0.11	1.1
Caffeine	0.2 - 1.0	2-10	*****	*****	>10	>100
Calan (Isopitin, Verapamil)	0.0055 - 0.0355	0.055 - 0.355	0.09	0.9	0.09 - 8.5	0.9 - 85
Captopril (Capoten)	0.051 - 0.131	0.51 - 1.31	*****	*****	2 - 6	20 - 60
Capoten (Captopril)	0.051 - 0.131	0.51 - 1.31	*****	*****	2 - 6	20 - 60
Carbamazepine (Tegretol)	0.14 - 1.2	1.4 - 12	>1.5	>15	>5	>50
Carbital (Carbromal) [as met: Bromide]	0.6	6	40 - 125	400 - 1250	128.5 - 245.0	1285 - 2450
Carbocaine (Mepivacaine)	0.028 - 0.550	0.28 - 5.50	1	10	5	50
Carbon Monoxide	1 - 2%	*****	15 - 35%	*****	48-95%	*****
[% Hemoglobin as Carboxyhemoglobin]						
Carbon Tetrachloride	*****	*****	2 - 5	20 - 50	10 - 20	100 - 200
Carbromal (Carbital) [as met: Bromide]	0.6	6	40 - 125	400 - 1250	128.5 - 245.0	1285 - 2450
Cardene (Nidardipine)	0.0036 - 0.015	0.036 - 0.150	*****	*****	*****	*****
Cardizem (Diltiazem)	0.005 - 0.04	0.05 - 0.40	0.37 - 0.61	3.7 - 6.1	0.67	6.7
Carisoprodol (Soma)	1 - 4	10 - 40	3 - 5	30 - 50	11	110
Cataflam (Voltaren, Diclofenac)	0.075 - 0.20	0.75 - 2.0	0.6	6	*****	*****
Catapres (Clonidine)	0.00003-0.00015	0.0003-0.0015	0.0006	0.006	0.023	0.23
Celexa (Citalopram)	0.0081 - 0.016	0.081 - 0.16	*****	*****	0.024 - 0.13	0.24 - 1.3
Cefontin (Methsuximide)	1.0 - 4	10 - 40	4.4	>44	*****	*****
[as met: Desmethylnmethsuximide]						
Centrax (Prazepam)	0.001 - 0.004	0.01 - 0.04	*****	*****	*****	*****
China White (Methylenfentanyl)	*****	*****	*****	*****	0.0002 - 0.0011	0.002 - 0.011
Chlor-Trimeton (Chlorpheniramine)	0.0017	0.017	2 - 3	20 - 30	*****	*****
Chloral Hydrate (Noctec)	0.2 - 1.2	2 - 12	10	100	25	250
[as met: Trichloroethanol]						
Chloramphenicol (Chloromycetin)	1 - 2	10 - 20	*****	*****	20	200
Chlorcyclizine	0.005 - 0.010	0.05 - 0.10				
Chlormepiramine	*****	*****	*****	*****	0.015 - 0.055	0.15 - 0.55
(plus metabolite - Norchlormepiramine)						
Chlordane	0.0001	0.001	0.00025	0.0025	0.17 - 0.49	1.7 - 4.9
Chlordiazepoxide (Librium)	0.067 - 0.31	0.67 - 3.1	0.5	5	2	20
Chlormezanone (Trancopal)	0.25 - 0.88	2.5 - 8.8	*****	*****	*****	*****
Chloromycetin (Chloramphenicol)	1 - 2	10 - 20	*****	*****	20	200
Chloroform	2 - 50	20 - 500	7 - 25	70 - 250	39	390
Chlorophen (Chlorpheniramine)	0.032	0.32	*****	*****	*****	*****
Chloroprocaine (Nesacaine)	0.2 - 0.4	2 - 4	*****	*****	*****	*****
Chloroquine (Aralen)	0.002 - 0.040	0.02 - 0.40	*****	*****	0.3 - 9.9	3 - 99
Chlorothiazide	0.6	6	*****	*****	*****	*****
Chlorpheniramine (Chlor-Trimeton)	0.001 - 0.0017	0.01 - 0.017	*****	*****	0.05 - 0.11	0.5 - 1.1
Chlorpheniramine (Chlorophen)	0.032	0.32	*****	*****	*****	*****
Chlorpromazine (Thorazine)	0.001 - 0.050	0.01 - 0.50	0.1 - 0.2	1 - 2	0.3 - 1.2	3 - 12
Chlorpropamide (Diabenese)	3.0 - 36.3	30 - 363	20 - 75	200 - 750	*****	*****
Chlorprothixene (Taractan)	0.004 - 0.030	0.04 - 0.30	0.04 - 0.08	0.4 - 0.8	*****	*****
Chlor-Trimeton (Chlorpheniramine)	0.001 - 0.0017	0.01 - 0.017	*****	*****	0.05 - 0.11	0.5 - 1.1

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Chlorthalidone (Combipress)	0.021 - 0.140	0.21 - 1.40	*****	*****	*****	*****
Cimetidine (Tagamet)	0.05 - 0.45	0.5 - 4.5	*****	*****	*****	*****
Citalopram (Celexa)	0.0081 - 0.016	0.081 - 0.16	*****	*****	0.024 - 0.13	0.24 - 1.3
Citanest (Prilocaine)	0.1 - 0.5	1 - 5	*****	*****	*****	*****
Claritin (Loratidine)	0.0007 - 0.0028	0.007 - 0.028	0.046	0.46	*****	*****
[metabolite: descarboethoxyloratadine]	0.0007 - 0.0028	0.007 - 0.028	0.046	0.46	*****	*****
Clinoril (Sulindac)	0.4 - 0.5	4 - 5	*****	*****	*****	*****
Clofibrate (Atromid)	12.2	122	*****	*****	*****	*****
Clomipramine (Anafranil)	0.01 - 0.045	0.1 - 0.45	*****	*****	*****	*****
Clonazepam (Klonopin)	0.0007 - 0.0075	0.007 - 0.075	*****	*****	*****	*****
Clonidine (Catapres)	0.00003 - 0.00015	0.0003 - 0.0015	0.0006	0.006	0.023	0.23
Clorazepate (Tranxene)	0.01 - 0.16	0.1 - 1.6	>0.5	>5.0	*****	*****
[as met: N-Desmethyldiazepam]						
Clozapine (Clozaril)	0.0102 - 0.0771	0.102 - 0.771	*****	*****	*****	*****
Clozaril (Clozapine)	0.0102 - 0.0771	0.102 - 0.771	*****	*****	*****	*****
Cocaine	0.005 - 0.093	0.05 - 0.930	0.09	0.9	0.1 - 2.0	1 - 20
Codeine	0.003 - 0.034	0.03 - 0.34	*****	*****	>0.16	>1.6
Cogentin (Benztropine)	0.008 - 0.0126	0.08 - 0.126	0.0048	0.048	0.02 - 0.07	0.2 - 0.7
Colbenemid (Colchicine)	0.00003 - 0.00300	0.0003 - 0.0300	*****	*****	0.0021 - 0.025	0.021 - 0.25
Colchicine (Colbenemid)	0.00003 - 0.00300	0.0003 - 0.0300	*****	*****	0.0021 - 0.025	0.021 - 0.25
Combipress (Chlorthalidone)	0.021 - 0.140	0.21 - 1.40	*****	*****	*****	*****
Compazine (Prochlorperazine)	*****	*****	>0.1	>1	0.5	5
Copper	0.10 - 0.15	1.0 - 1.5	0.54	5.4	0.25 - 6.30	2.5 - 63.0
Coumadin (Warfarin)	0.10 - 0.31	1.0 - 3.1	*****	*****	*****	*****
Cresol	*****	*****	*****	*****	0.90 - 1.90	9-19
Cyanide	0.0004 - 0.0041	0.004 - 0.041	*****	*****	0.11 - 5.3	1.1 - 53
Cylert (Pemoline)	0.07 - 0.62	0.70 - 6.2	*****	*****	*****	*****
Cyclizine	0.003 - 0.030	0.03 - 0.30	0.076	0.76	1.5	15
Cyclobenzaprine (Flexeril)	0.0015 - 0.0036	0.015 - 0.036	*****	*****	>0.04	>0.4
Cyclopropane	8 - 18	80 - 180	*****	*****	*****	*****
Cyclosporine (Sandimmune)	0.005 - 0.0045	0.05 - 0.045	*****	*****	*****	*****
D						
Dalmane (Flurazepam)	0.00005 - 0.00280	0.0005 - 0.0280	0.02	0.2	0.05 - 0.40	0.5 - 4.0
Dalmane (Flurazepam)	0.0033 - 0.0144	0.033 - 0.144	*****	*****	*****	*****
[+met: N-Desalkylflurazepam]						
Dantrium (Dantrolene)	0.1 - 0.3	1 - 3	*****	*****	*****	*****
Dantrolene (Dantrium)	0.1 - 0.3	1 - 3	*****	*****	*****	*****
Darvon (Propoxyphene)	0.023 - 0.107	0.23 - 1.07	0.03 - 0.06	0.3 - 0.6	0.1 - 1.7	1-17
Darvon (Propoxyphene)	0.104 - 0.371	1.04 - 3.71	0.28 - 1.2	2.8 - 12	0.27 - 4.7	2.7 - 47
[+ met: Norpropoxyphene]						
DDT	0.0013	0.013	*****	*****	*****	*****
Demerol (Meperidine)	0.007 - 0.080	0.07 - 0.80	0.5	5	0.8 - 2.0	8 - 20
Depakene (Valproic Acid)	5 - 10	50 - 100	0.71 - 20.0	7.1 - 200	*****	*****
Desipramine (Norpramin)	0.005 - 0.0684	0.05 - 0.684	>0.05	>0.5	1 - 2	10 - 20
[met: Imipramine (Tofranil)]						
Desmethylnormethsuximide	1.6 - 4	16 - 40	4.4	>44	*****	*****
[met: Celontin (Methsuximide)]						

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Desyrel (Trazodone)	0.07 - 0.489	0.7 - 4.89	*****	*****	1.5	15
Dextromethorphan	0.038	0.38	*****	*****	>0.3	>3
Diabinese (Chlorpropamide)	3.0 - 36.3	30 - 363	20 - 75	200 - 750	*****	*****
Diacetolol	0.063 - 0.433	0.63 - 4.33	*****	*****	*****	*****
Diamox (Acetazolamide)	1.0 - 1.5	10 - 15	*****	*****	*****	*****
Diazepam (Valium)	0.002 - 0.400	0.02 - 4.00	0.5 - 2.0	5 - 20	>3	>30
Diazepam (Valium)	0.031 - 0.600	0.31 - 6.00	*****	*****	>3.4	>34
[+ met: N-Desmethyldiazepam]						
Diazoxide (Hyperstat)	1.5 - 2.0	15 - 20	>10	>100	*****	*****
Diazinon	*****	*****	*****	*****	0.07 - 27.7	0.7 - 277
Dichloromethane (Methylene Chloride)	*****	*****	*****	*****	9.5 - 60	95 - 600
Diclofenac (Voltaren, Cataflam)	0.075 - 0.20	0.75 - 2.0	0.6	6	*****	*****
Dicumarol	0.8 - 5.9	8 - 59	7	70	*****	*****
Dicyclomine (Bentyl)	0.002 - 0.008	0.02 - 0.08	*****	*****	*****	*****
Didrex (Benzphetamine)	0.0025 - 0.0500	0.025 - 0.500	>0.05	>0.5	1.4	14
Dieldrin	0.00015 - 0.002	0.0015 - 0.02	0.015 - 0.0303	0.15 - 0.303	0.05 - 0.116	0.5 - 1.16
Diethylpropion (Tenuate)	0.0007 - 0.0280	0.007 - 0.200	*****	*****	0.54	5.4
Difenoxin (Motofen)	0.016	0.160	*****	*****	*****	*****
Diflucan (Fluconazol)	0.5 - 1.5	5 - 15	*****	*****	*****	*****
Diflunisal (Dolobid)	0.9 - 13	9 - 130	*****	*****	37 - 58	370 - 580
Digoxin	0.00007-0.0022	0.0007 - 0.022	0.00030-0.00040	0.0030 - 0.0040	0.0035 - 0.02	0.035 - 0.20
Dihydrocodonone (Hydrocodone)	0.003 - 0.025	0.03 - 0.25	0.05 - 0.2	0.5 - 2	0.07 - 1.2	0.7 - 12
Dilantin (Phenytoin, Diphenylhydantoin)	1 - 2	10 - 20	2 - 5	20 - 50	>10	>100
Dilaudid (Hydromorphone)	0.0008 - 0.0049	0.008 - 0.049	*****	*****	0.03	0.3
Diltiazem (Cardizem)	0.005 - 0.04	0.05 - 0.40	0.37 - 0.61	3.7 - 6.1	0.67	6.7
Dimetane (Brompheniramine)	0.0008 - 0.0015	0.008 - 0.015	*****	*****	*****	*****
Dimethylsulfoxide (DMSO)	5.04 - 338	50.4 - 3380	*****	*****	160 - 300	1600 - 3000
Dimethyltryptamine	0.0001 - 0.0100	0.001 - 0.100	*****	*****	*****	*****
Dinitro-O-Cresol	*****	*****	3 - 6	30 - 60	7.5	75
Diphenhydramine (Benadryl)	0.0025 - 0.0112	0.025 - 0.112	0.5	5	>0.8	>8
Diphenoxylate (Lomotil)	0.001 - 0.004	0.01 - 0.04	*****	*****	*****	*****
Diphenylhydantoin (Phenytoin, Dilantin)	1 - 2	10 - 20	2 - 5	20 - 50	>10	>100
Diprivan (Propofol)	0.2 - 1.6	2 - 16	*****	*****	*****	*****
Disopyramide (Norpace)	0.2 - 0.6	2 - 6	0.7	7	2.6	26
Disulfiram (Antabuse)	0.038 - 0.25	0.38 - 2.5	*****	*****	37 - 58	370 - 580
Divinyl Oxide	*****	*****	*****	*****	70	700
DMSO (Dimethylsulfoxide)	5.04 - 338	50.4 - 3380	*****	*****	160 - 300	1600 - 3000
Dolobid (Diflunisal)	0.9 - 13	9 - 130	*****	*****	37 - 58	370 - 580
Dolophine (Methadone)	0.0075 - 0.110	0.075 - 1.10	0.02 - 0.2	0.20 - 2.0	0.04 - 0.18	0.4 - 1.8
Dopram (Doxapram)	0.27 - 0.52	2.7 - 5.2	*****	0.04 - 0.8	*****	*****
Doral (Quazepam)	1.1 - 14.8	11 - 148	*****	*****	*****	*****
Doriden (Glutethimide)	0.2 - 1.2	2 - 12	1 - 8	10 - 80	3 - 10	30 - 100
Dothiepin (Prothliden)	0.0017 - 0.0420	0.017 - 0.420	*****	*****	0.03 - 0.25	0.3 - 2.5
Doxapram (Dopram)	0.27 - 0.52	2.7 - 5.2	*****	*****	*****	*****
Doxepin (Sinequan)	0.010 - 0.025	0.10 - 0.25	0.012 - 0.43	0.12 - 4.3	0.2 - 2.6	2 - 26
Doxepin (Sinequan)	0.010 - 0.025	0.10 - 0.25	>0.05	>0.5	0.8 - 3.5	8 - 35
[+met: N-Desmethyldoxepin]						

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Doxylamine (Unisom)	0.0069 - 0.0138	0.069 - 0.138	*****	*****	0.07 - 1.2	0.7 - 12
Duranest (Etidocaine)	0.05 - 0.15	0.5 - 1.5	*****	*****	*****	*****
Dymelor (Acetohexamide)	2.1 - 5.6	21 - 56	*****	*****	*****	*****
Dyphyline	0.65 - 1.43	6.5 - 14.3	3.6	36	*****	*****
E						
Effexor (Venlafaxine)	0.007 - 0.393	0.07 - 3.93	*****	*****	*****	*****
[met: O-Desmethylvenlafaxine]	0.0061 - 0.075	0.061 - 0.75	0.1 - 0.15	1 - 1.5	*****	*****
Elavil (Amitriptyline)	0.012 - 0.025	0.12 - 0.25	>0.05	>0.5	0.2 - 2.0	2 - 20
Elavil (Amitriptyline)	0.012 - 0.025	0.12 - 0.25	>0.05	>0.5	0.2 - 2.0	2 - 20
[+met: Nortriptyline]						
Eldepryl (Selegiline)	0.0009 - 0.0019	0.009 - 0.019	*****	*****	*****	*****
Emetine	0.005 - 0.0075	0.05 - 0.075	*****	*****	0.24	2.4
Enalapril (Vasotec)	0.0063 - 0.007	0.063 - 0.070	*****	*****	*****	*****
Encainide (Enkaid)	0.01 - 0.03	0.1 - 0.3	*****	*****	*****	*****
[as met: O-Desmethylencainide]						
Encainide (Enkaid)	0.006 - 0.028	0.06 - 0.28	*****	*****	*****	*****
[as met: Methoxy-O-demethylencaidine]						
Endrin	0.0003	0.003	0.0007 - 0.0032	0.007 - 0.032	0.045	0.45
Ephedrine	0.0068 - 0.01	0.068 - 0.10	*****	*****	0.35 - 2.1	3.5 - 21
Estazolam (Prosom)	0.0042 - 0.0100	0.042 - 0.100	0.125	1.25	*****	*****
Ethanol (listed toxic concentration is legal intoxication for driving in most states)	*****	*****	80 - 100	800 - 1000	>350	>3500
Ethchlorvynol (Placidyl)	0.05 - 0.88	0.5 - 8.8	*****	*****	2.2 - 21.3	22 - 213
Ethinamate (Valmid)	0.4 - 1.1	4 - 11	*****	*****	10 - 20	100 - 200
Ethosuximide (Zarontin)	4 - 10	40 - 100	*****	*****	25	250
Ethyl Chloride	20 - 30	200 - 300	*****	*****	40	400
Ethyl Ether	90 - 100	900 - 1000	*****	*****	140 - 189	1400 - 1890
Ethylene Glycol	*****	*****	150.0	1500.0	200 - 400	2000 - 4000
Etidocaine (Duranest)	0.05 - 0.15	0.5 - 1.5	*****	*****	*****	*****
Etodolac (Lodine)	1.2 - 4.7	12 - 47	*****	*****	*****	*****
F						
Famotidine (Pepcid)	0.0007 - 0.0035	0.007 - 0.035	*****	*****	*****	*****
Felbamate (Felbatol)	0.27 - 3.3	2.7 - 33	14 - 20	140 - 200	*****	*****
Felbatol (Felbamate)	0.27 - 3.3	2.7 - 33	14 - 20	140 - 200	*****	*****
Feldene (Piroxicam)	0.085 - 0.8	0.85 - 8.00	*****	*****	*****	*****
Felodipine (Plendil)	0.00015 - 0.00088	0.0015 - 0.0088	0.001 - 0.0015	0.01 - 0.015	*****	*****
Fentfluramine (Pondimin)	0.004 - 0.030	0.04 - 0.3	0.07 - 0.09	0.7 - 0.9	0.6 - 1.5	6 - 15
Fenopropfen (Nalfon)	2.7 - 6.6	27 - 6.6	*****	*****	71	710
Fentanyl (Sublimaze)	0.001 - 0.010	0.01 - 0.10	*****	*****	*****	*****
Fexofenadine (Allegra)	0.018 - 0.021	0.18 - 0.210	*****	*****	*****	*****
Floricet (Butalbital)	0.17 - 0.26	1.7 - 2.6	0.7 - 4	7 - 40	1.3 - 2.6	13 - 26
Florinal (Butalbital)	0.17 - 0.26	1.7 - 2.6	0.7 - 4	7 - 40	1.3 - 2.6	13 - 26
Flecainide (Tambocor)	0.02 - 0.10	0.2 - 1.0	*****	*****	*****	*****
Flexeril (Cyclobenzaprine)	0.0015 - 0.0036	0.015 - 0.036	*****	*****	>0.04	>0.4
Flexin (Zoxazolamine)	0.3 - 1.3	3 - 13	*****	*****	*****	*****
Flubiprofen (Ansalid)	1 - 2.2	10 - 22	*****	*****	*****	*****
Flucanazol (Diflucan)	0.5 - 1.5	5 - 15	*****	*****	*****	*****

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Flumazenil (Mazicon, Romazicon)	0.0006 - 0.0039	0.006 - 0.039	*****	*****	*****	*****
Flunitrazepam (Rohypnol)	0.006 - 0.0052	0.06 - 0.052	0.001 - 0.005	0.01 - 0.05	*****	*****
Fluoride	0.0014 - 0.04	0.014 - 0.4	*****	*****	1.5 - 20	15 - 200
Fluothane (Halothane)	2.2 - 26.0	22 - 260	*****	*****	20	200
Fluoxetine (Prozac)	0.009 - 0.040	0.09 - 0.40	*****	*****	0.13 - 0.68	1.3 - 6.8
Fluphenazine (Prolixin)	0.00009 - 0.00170	0.0009 - 0.0170	*****	*****	*****	*****
Flurazepam (Dalmiane)	0.00005 - 0.00280	0.0005 - 0.0280	0.02	0.2	0.05 - 0.40	0.5 - 4.0
Flurazepam (Dalmiane)	0.0033 - 0.0144	0.033 - 0.144	*****	*****	*****	*****
(+met: N-Desalkylflurazepam)						
Fluvoxamine (Luvox)	0.0031 - 0.0087	0.031 - 0.087	*****	*****	*****	*****
Forane (Isoflurane)	2.0 - 7.0	20.0 - 70.0	*****	*****	*****	*****
Furadantoin (Nitrofurantoin)	0.18	1.8	*****	*****	*****	*****
Fortavase, Invirase (Saquinavir)	0.011 - 0.11	0.11 - 1.1	*****	*****	*****	*****
Furosemide (Lasix)	0.1 - 1.0	1 - 10	>2	>20	*****	*****
Q						
Gabapentin (Neurontin)	0.2 - 1.0	2 - 10	*****	*****	*****	*****
Gabitol (Tiagabine)	0.0001 - 0.0234	0.001 - 0.234	*****	*****	*****	*****
Gamma-Hydroxybutyrate (GHB)	<0.1	<1.0	2.6 - 36	26 - 360	>75	>750
GHB (Gamma-Hydroxybutyrate)	<0.1	<1.0	2.6 - 36	26 - 360	>75	>750
Glucophage (Metformin)	0.1 - 0.4	1 - 4	4.5 - 7.0	45 - 70	*****	*****
Glutethimide (Doriden)	0.2 - 1.2	2 - 12	1 - 8	10 - 80	3 - 10	30 - 100
Glycopyrrolate (Robinul)	0.005 - 0.0076	0.050 - 0.076	*****	*****	*****	*****
Gold (Sodium Aurothiomalate)	0.3 - 0.8	3 - 8	*****	*****	*****	*****
Guaifenesin (Robitussin)	0.04 - 0.14	0.4 - 1.4	21	210	*****	*****
Guanethidine (Ismelin)	0.001	0.01	*****	*****	*****	*****
H						
Habitrol (transdermal) (Nicotine)	0.0004 - 0.0444	0.004 - 0.444	*****	*****	0.14	1.4
Halcion (Triazolam)	0.002	0.02	*****	*****	*****	*****
Haldol (Haloperidol)	0.0006 - 0.0245	0.006 - 0.245	0.005 - 0.050	0.05 - 0.50	*****	*****
Haloperidol (Haldol)	0.0006 - 0.0245	0.006 - 0.245	0.005 - 0.050	0.05 - 0.50	*****	*****
Halothane (Fluothane)	2.2 - 26.0	22 - 260	*****	*****	20	200
Hexachlorophene (PhisoHex)	0.0003 - 0.0650	0.003 - 0.650	*****	*****	0.22 - 3.5	2.2 - 35
Hismanol (Astemizole)	0.00004	0.0004	*****	*****	*****	*****
Hydralazine	0.02 - 0.09	0.2 - 0.9	*****	*****	*****	*****
Hydrochlorothiazide (Hydrodiuril)	0.007 - 0.038	0.07 - 0.38	*****	*****	*****	*****
Hydrocodone (Lortab, Vicodin)	0.003 - 0.025	0.03 - 0.25	0.05 - 0.2	0.5 - 2	0.07 - 1.2	0.7 - 12
Hydrodiuril (Hydrochlorothiazide)	0.007 - 0.038	0.07 - 0.38	*****	*****	*****	*****
Hydrogen Sulfide	*****	*****	*****	*****	0.092	0.92
Hydromorphone (Dilaudid)	0.0008 - 0.0049	0.008 - 0.049	****	*****	0.03	0.3
Hydroxychloroquine (Plaquenil)	0.0019 - 0.0210	0.019 - 0.210	*****	*****	6.1	61
Hydroxyzine (Alaxar, Vistaril)	0.0022 - 0.008	0.022 - 0.08	*****	*****	0.4 - 3.9	4.2 - 39
Hyoscyline (Scopolamine)	0.00003 - 0.0019	0.0003 - 0.019	*****	*****	0.189	1.89
Hyperstat (Diazoxide)	1.5 - 2.0	15 - 20	>10	>100	*****	*****
I						
Ibuprofen (Motrin)	1.7 - 4.9	17 - 49	8.4 - 70	84 - 700	*****	*****
Imitrex (Sumatriptan)	0.0024 - 0.0095	0.024 - 0.095	*****	*****	*****	*****
Imipramine (Tofranil)	0.015 - 0.0105	0.15 - 0.105	0.05 - 0.15	0.5 - 1.5	0.28 - 0.85	2.8 - 8.5

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DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Imipramine (Tofranil)	0.015 - 0.025	0.15 - 0.25	*****	*****	*****	*****
{+met: Desipramine}						
Inderal (Propranolol)	0.001 - 0.034	0.01 - 0.34	0.2	2	0.8 - 1.2	8 - 12
Indocin (Indomethacin)	0.01 - 0.40	0.1 - 4	0.6	6	*****	*****
Indomethacin (Indocin)	0.01 - 0.40	0.1 - 4	0.6	6	*****	*****
INH (Isoniazid)	0.06 - 2.0	0.6 - 20	2 - 14.3	20 - 143	6.5 - 16.8	65 - 168
Invirase, Fortovase (Saqinavir)	0.011 - 0.11	0.11 - 1.1	*****	*****	*****	*****
Ionamin (Phentermine)	0.009 - 0.051	0.09 - 0.51	*****	*****	0.15 - 0.76	1.5 - 7.6
Iron	0.027 - 0.293	0.27 - 2.93	0.28 - 2.5	2.8 - 25	2 - 5	20 - 50
Ismelin (Guanethidine)	0.001	0.01	*****	*****	*****	*****
Isoflurane (Forane)	2.0 - 7.0	20.0 - 70.0	*****	*****	*****	*****
Isoniazid (INH)	0.06 - 2.0	0.6 - 20	2 - 14.3	20 - 143	6.5 - 16.8	65 - 168
Isopropanol	*****	*****	>40	>400	>150	>1500
Isoptin (Calan, Verapamil)	0.0055 - 0.0355	0.055 - 0.355	0.09	0.9	0.09 - 8.5	0.9 - 85
Isordil (Isosorbide Dinitrate)	0.0008 - 0.0038	0.008 - 0.038	*****	*****	*****	*****
Isosorbide Dinitrate (Isordil)	0.0008 - 0.0038	0.008 - 0.038	*****	*****	*****	*****
K						
Kemadrin (Procyclidine)	0.008 - 0.063	0.08 - 0.63	*****	*****	*****	*****
Ketamine	0.02 - 0.63	0.2 - 6.3	*****	*****	*****	*****
Ketoprofen (Orudis, Actron)	0.5 - 0.15	5 - 1.5	*****	*****	*****	*****
Ketorolac (Toradol)	0.087 - 0.45	0.87 - 4.5	*****	*****	*****	*****
Klonopin (Clonazepam)	0.0007 - 0.0075	0.007 - 0.075	*****	*****	*****	*****
Kwell (Lindane)	0.0001 - 0.0031	0.001 - 0.031	0.05	0.5	0.13	1.3
L						
Labetalol (Normodyne, Trandate)	0.0036 - 0.0271	0.036 - 0.271	*****	*****	*****	*****
Lamactal (Lamotrigine)	0.20 - 1.90	2 - 19	1.5 - 3.6	15 - 36	*****	*****
Lamotrigine (Lamactal)	0.20 - 1.90	2 - 19	1.5 - 3.6	15 - 36	*****	*****
Lasix (Furosemide)	0.1 - 1.0	1 - 10	>2	>20	*****	*****
Lead	0.04	0.4	0.04 - 1.37	0.4 - 13.7	0.11 - 0.53	1.1 - 5.3
Leritine (Anileridine)	<0.05	<0.5	*****	*****	0.09 - 0.70	0.9 - 7.0
Levo-Dromoran (Levorphanol)	0.0007 - 0.0021	0.007 - 0.021	*****	*****	0.08 - 0.27	0.8 - 2.7
Levoprome (Methotrimeprazine)	0.002 - 0.0271	0.02 - 0.271	*****	*****	*****	*****
Levorphanol (Levo-Dromoran)	0.0007 - 0.0021	0.007 - 0.021	*****	*****	0.08 - 0.27	0.8 - 2.7
Librium (Chlordiazepoxide)	0.067 - 0.31	0.67 - 3.1	0.5	5	2	20
Lidocaine (Xylocaine)	0.15 - 0.50	1.5 - 5.0	0.7 - 2	7 - 20	>2.5	>25
Lindane (Kwell)	0.0001 - 0.0031	0.001 - 0.031	0.05	0.5	0.13	1.3
Lioresal (Baclofen)	0.01 - 0.06	0.1 - 0.6	0.11 - 0.35	1.1 - 3.5	*****	*****
Lisinopril (Prinivil, Zestril)	0.002 - 0.0082	0.02 - 0.082	*****	*****	*****	*****
Lithium	0.42 - 0.97	4.2 - 9.7	1.39	13.9	>3.47	>34.7
Lodine (Etodolac)	1.2 - 4.7	12 - 47	*****	*****	*****	*****
Lomotil (Diphenoxylate)	0.001 - 0.004	0.01 - 0.04	*****	*****	*****	*****
Lopressor (Metoprolol)	0.003 - 0.027	0.03 - 0.27	*****	*****	0.47 - 14.2	4.7 - 142
Loratadine (Claritin)	0.0007 - 0.0028	0.007 - 0.028	0.046	0.46	*****	*****
metabolite: descarboethoxyloratadine	0.0007 - 0.0028	0.007 - 0.028	0.046	0.46	*****	*****
Lorazepam (Ativan)	0.001 - 0.024	0.01 - 0.24	0.03 - 0.06	0.3 - 0.6	*****	*****
Lortab (Hydrocodone, Vicodin)	0.003 - 0.025	0.03 - 0.25	0.05 - 0.2	0.5 - 2	0.07 - 1.2	0.7 - 12
Loxapine (Loxitane)	0.001 - 0.003	0.01 - 0.03	*****	*****	0.19 - 0.77	1.9 - 7.7

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DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Loxitalone (Loxapine)	0.001 - 0.003	0.01 - 0.03	*****	*****	0.19 - 0.77	1.9 - 7.7
LSD (Lysergic Acid Diethylamide, Lysergide)	*****	*****	0.0001 - 0.0009	0.001 - 0.009	*****	*****
Ludomil (Maprotiline)	0.005 - 0.0718	0.05 - 0.718	0.024 - 0.080	0.24 - 0.80	0.2 - 1.3	2-13
Luvox (Fluvoxamine)	0.0031 - 0.0087	0.031 - 0.087				
Lysergic Acid Diethylamide (LSD, Lysergide)	*****	*****	0.0001 - 0.0009	0.001 - 0.009	*****	*****
Lysergide (LSD, Lysergic Acid Diethylamide)	*****	*****	0.0001 - 0.0009	0.001 - 0.009	*****	*****
M						
Magnesium	1.2 - 3.2	12 - 32	8 - 12	80 - 120	20 - 32	200 - 320
Malathion	0.0 - 0.35	0.0 - 3.5	*****	*****	0.05 - 0.35	0.5 - 3.5
Manganese [serum values]	0.00002 - 0.00011	0.0002 - 0.0011	0.46	4.6	*****	*****
Maprotiline (Ludomil)	0.005 - 0.0718	0.05 - 0.718	0.024 - 0.080	0.24 - 0.80	0.2 - 1.3	2-13
Marcaine (Bupivacaine)	0.022 - 0.345	0.22 - 3.45	1	10	*****	*****
Mazicon (Flumazenil, Romazicon)	0.0006 - 0.0039	0.006 - 0.039	*****	*****	*****	*****
MDA (3,4-Methylenedioxymphetamine)	*****	*****	*****	*****	0.18 - 2.6	1.8 - 26
Mebaral (Mephobarbital)	0.05 - 0.35	0.5 - 3.5	*****	*****	*****	*****
Mefenamic Acid (Ponstel)	0.03 - 2.00	0.3 - 20.0	1.1 - 11.0	11 - 110	*****	*****
Mellaril (Thioridazine)	0.01 - 0.26	0.1 - 2.6	0.24 - 1.18	2.4 - 11.8	0.1 - 1.8	1 - 18
Mellaril (Thioridazine)	0.03 - 0.40	0.3 - 4.0	*****	*****	*****	*****
[+met: Mesoridazine]						
Meperidine (Demerol)	0.007 - 0.080	0.07 - 0.80	0.5	5	0.8 - 2.0	8 - 20
Mephentoin (Mesantoin)	2.5 - 4.0	25 - 40	5	50	*****	*****
[+met: N-Desmethylnmephentoin]						
Mephobarbital (Mebaral)	0.05 - 0.35	0.5 - 3.5	*****	*****	*****	*****
Mepivacaine (Carbocaine)	0.028 - 0.550	0.28 - 5.50	1	10	5	50
Meprobarbame	0.2 - 2.6	2 - 26	6 - 10	60 - 100	14 - 35	140 - 350
Mercury (Inorganic)	*****	*****	0.018 - 0.062	0.18 - 0.62	0.04 - 2.20	0.4 - 22.0
Mercury (Organic)	<0.008	<0.08	>0.02	>0.2	>0.06	>0.6
Mesantoin (Mephentoin)	2.5 - 4.0	25 - 40	5	50	*****	*****
[+met: N-Desmethylnmephentoin]						
Mesoridazine (Serentil)	0.118 - 0.352	1.18 - 3.52	*****	*****	0.3	3
Mestlinon (Pyridostigmine)	40	400	*****	*****	*****	*****
Metaclopramide (Reglan)	0.0072 - 0.075	0.072 - 0.75	*****	*****	*****	*****
Metaxalone (Skelaxin)	29.6	296	*****	*****	*****	*****
Metformin (Glucophage)	0.1 - 0.4	1 - 4	4.5 - 7.0	45 - 70	*****	*****
Methadone (Dolophine)	0.0075 - 0.110	0.075 - 1.10	0.02 - 0.2	0.20 - 2.0	0.04 - 0.18	0.4 - 1.8
Methamphetamine	0.001 - 0.005	0.01 - 0.05	0.06 - 0.50	0.6 - 5.0	>1	>10
Methanol	*****	*****	20	200	>89	>890
Methaqualone (Quaalude)	0.04 - 0.80	0.4 - 8.0	1 - 3	10 - 30	>0.5	>5
Methazolamide (Neptazane)	4	40	*****	*****	*****	*****
Methocarbamol (Robaxin)	2.6 - 4.1	26 - 41	*****	*****	*****	*****
Methohexital	0.34 - 1.07	3.4 - 10.7	*****	*****	9.8	98
Methotrimeprazine (Levoprome)	0.002 - 0.0271	0.02 - 0.271	*****	*****	0.08 - 0.41	0.8 - 4.1
Methoxy-O-demethylencalide	0.006 - 0.028	0.06 - 0.28	*****	*****	*****	*****
[met: Encalide]						

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DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Methsuximide (Celontin)	1.0 - 4	10 - 40	4.4	>44	*****	*****
[as met: DesmethyImethsuximide]						
Methyldopa	0.10 - 0.75	1.0 - 7.5	1	10	*****	*****
Methylene Chloride (Dichloromethane)	*****	*****	*****	*****	9.5 - 60	95 - 600
3-4-Methylenedioxymphetamines (MDA)	*****	*****	*****	*****	0.18 - 2.6	1.8 - 26
Methylfentanyl (China White)	*****	*****	*****	*****	0.0002 - 0.0011	0.002 - 0.011
Methylphenidate (Ritalin)	0.001 - 0.006	0.01 - 0.06	0.08	0.8	0.23	2.3
Methypylon (Noludar)	0.5 - 1.5	5 - 15	3 - 6	30 - 60	10	100
MeloproloI (Lopressor)	0.003 - 0.027	0.03 - 0.27	*****	*****	0.47 - 14.2	4.7 - 142
Mexiletine (Mexilitil)	0.05 - 0.20	0.5 - 2.0	*****	*****	2.1 - 4.5	21 - 45
Mexitil (Mexiletine)	0.05 - 0.20	0.5 - 2.0	*****	*****	2.1 - 4.5	21 - 45
Mianserin	0.001 - 0.016	0.01 - 0.16	0.011 - 0.050	0.11 - 0.50	0.01 - 0.26	0.1 - 2.6
Mldazolam (Versed)	0.008 - 0.025	0.08 - 0.25	*****	*****	*****	*****
Milontin (Phensuximide)	0.4 - 1.4	4 - 14	8 - 15	80 - 150	*****	*****
Mirtazapine (Remeron)	0.0039 - 0.018	0.039 - 0.18	*****	*****	*****	*****
Moclobemide	0.3	3	*****	*****	5.6 - 9.0	56 - 90
Molybdenum	0.0015	0.015	*****	*****	*****	*****
Morphine	0.01	0.10	*****	*****	0.005 - 0.400	0.05 - 4.00
Motrin (Ibuprofen)	1.7 - 4.9	17 - 49	8.4 - 70	84 - 700	*****	*****
Motofen (Difenoxin)	0.016	0.160	*****	*****	*****	*****
Moxifluxacin (Avelox)	0.45 - 1.44	4.5 - 14.4	*****	*****	*****	*****
Mysoline (Primidone)	0.2 - 1.9	2 - 19	5 - 8	50 - 80	10	100
N						
N-Acetylprocainamide (NAPA)	0.2 - 1.2	2 - 12	1.6	16	*****	*****
[met: Procainamide (Pronestyl)]						
N-Desalkylflurazepam	0.001 - 0.014	0.01 - 0.14	*****	*****	*****	*****
[met: Flurazepam (Dalmane)]						
N-Desmethyldiazepam (Nordiazepam)	0.01 - 0.26	0.1 - 2.6	>0.5	>5	*****	*****
[met: Clorazepate (Tranxena)]						
N-Desmethyldiazepam (Nordiazepam)	0.002 - 0.180	0.02 - 1.80	*****	*****	*****	*****
[met: Diazepam (Vallium)]						
Nalfon (Fenoprofen)	2.7 - 6.6	27 - 66	*****	*****	71	710
Naloxone (Narcan)	0.001	0.01	*****	*****	*****	*****
NAPA (N-Acetylprocainamide)	0.2 - 1.2	2 - 12	1.6	16	*****	*****
[met: Procainamide (Pronestyl)]						
Naprosyn (Naproxen)	3.1 - 12	31 - 120	40	400	*****	*****
Naproxen (Anaprox)	3.1 - 12	31 - 120	40	400	*****	*****
Narcan (Naloxone)	0.001	0.01	*****	*****	*****	*****
Nardil (Phenelzine)	0.0001 - 0.0002	0.001 - 0.002	*****	*****	>0.15	>1.5
Navane (Thiothixene)	0.001 - 0.010	0.01 - 0.10	*****	*****	*****	*****
Nebcin (Tobramycin)	0.16 - 0.78	1.6 - 7.8	*****	*****	*****	*****
Nefazodone (Serzone)	0.01 - 0.12	0.1 - 1.2	*****	*****	*****	*****
Nembutal (Pentobarbital)	0.1 - 0.3	1 - 3	>0.5	>5	1.0 - 16.9	10 - 169
Neo-Synephrine (Phenylephrine)	0.003	0.03	*****	*****	*****	*****
Neptazane (Methazolamide)	4	40	*****	*****	*****	*****
Nesacaine (Chloroprocaine)	0.2 - 0.4	2 - 4	*****	*****	*****	*****
Neurontin (Gabapentin)	0.2 - 1.0	2 - 10	*****	*****	*****	*****

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	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Nicardipine (Cardene)	0.0036 - 0.015	0.036 - 0.150	*****	*****	*****	*****
Nickel	0.011	0.11	*****	*****	*****	*****
Nicotine	0.0004 - 0.0444	0.004 - 0.444	*****	*****	0.14	1.4
Nicotine (Transdermal)	0.0004 - 0.0031	0.004 - 0.031	*****	*****	*****	*****
(Prostep, Habitrol, Nicotrol)						
Nicotrol (Transdermal, Nicotine)	0.0004 - 0.0031	0.004 - 0.031	*****	*****	*****	*****
Nifedipine (Adalat, Procardia)	0.0015 - 0.0162	0.015 - 0.162	*****	*****	*****	*****
Nisentil (Alphaprodine)	0.087 - 0.100	0.87 - 1.00	*****	*****	*****	*****
Nitrite (Butyl Nitrite)	0.05 - 0.40	0.5 - 4	*****	*****	2.2	22
Nitro-Bid (Nitro-Dur, Nitroglycerin)	0.0002 - 0.0013	0.002 - 0.013	*****	*****	*****	*****
Nitro-Dur (Nitro-Bid, Nitroglycerin)	0.0002 - 0.0013	0.002 - 0.013	*****	*****	*****	*****
Nitrofurantoin (Furadantin)	0.18	1.8	*****	*****	*****	*****
Nitroglycerin (Nitro-Bid, Nitro-Dur)	0.0002 - 0.0013	0.002 - 0.013	*****	*****	*****	*****
Nitroprusside [as met: Thiocyanate]	0.55 - 2.9	5.5 - 29	>10	>100	20	200
Nitrous Oxide	29 - 44	290 - 440	*****	*****	35	350
Noctec (Chloral Hydrate)	0.2 - 1.2	2 - 12	10	100	25	250
[as met: Trichloroethanol]						
Noludar (Methpyrion)	0.5 - 1.5	5 - 15	3 - 6	30 - 60	10	100
Nordiazepam (N-Desmethyldiazepam)	0.01 - 0.26	0.1 - 2.6	>0.5	>5.0	*****	*****
[met: Clorazepate (Tranxene)]						
Nordiazepam (N-Desmethyldiazepam)	0.002 - 0.180	0.02 - 1.80	*****	*****	*****	*****
[met: Diazepam (Valium)]						
Norflex (Orphenadrine)	0.003 - 0.085	0.03 - 0.85	0.2	2	0.4 - 0.8	4.0 - 8.0
Norfluoxetine [met: Fluoxetine (Prozac)]	0.0018 - 0.0466	0.018 - 0.466	*****	*****	0.09 - 0.5	0.9 - 5.0
Normodyne (Labetalol, Trandate)	0.0036 - 0.0271	0.036 - 0.271	*****	*****	*****	*****
Norpace (Disopyramide)	0.2 - 0.6	2 - 6	0.7	7	2.6	26
Norpramin (Desipramine)	0.005 - 0.0684	0.05 - 0.684	>0.05	>0.5	1 - 2	10 - 20
[met: Imipramine (Tofranil)]						
Nortriptyline (Aventyl)	0.005 - 0.0375	0.05 - 0.375	0.05	0.5	1.3	13
[met: Amitriptyline (Elavil)]						
Norverapamil	0.0160 - 0.0207	0.160 - 0.207	*****	*****	*****	*****
[met: Verapamil (Calan, Isoptin)]	0.4 - 0.8	4 - 8	1	10	>2	>20
Norvir (Ritonavir)	1.1 - 6.6	11.2 - 66.0	*****	*****	*****	*****
Novocaine (Procaine)	0.02 - 1.30	0.2 - 13.0	>2.1	>21	*****	*****
0						
O-Demethylenecainide [met: Encainide]	0.01 - 0.03	0.1 - 0.3	*****	*****	*****	*****
Olanzapine (Zyprexa)	0.0009 - 0.0023	0.009 - 0.023	*****	*****	0.12	1.2
Ondansetron (Zofran)	0.0022 - 0.0114	0.022 - 0.114	*****	*****	*****	*****
Orinase (Tolbutamide)	4.3 - 9.6	43 - 96	*****	*****	64	640
Orphenadrine (Norflex)	0.003 - 0.085	0.03 - 0.85	0.2	2	0.4 - 0.8	4.0 - 8.0
Orudis (Ketoprofen)	0.5 - 0.15	5 - 1.5	*****	*****	*****	*****
Oxalate	0.2	2	*****	*****	1 - 11	10 - 110
Oxaprozin (Daypro)	0.01 - 0.04	0.1 - 0.4				
Oxazepam (Serax)	0.015 - 0.140	0.15 - 1.4	>0.2	>2	*****	*****
Oxycodone (Percodan, Oxycontin)	0.001 - 0.010	0.01 - 0.10	0.02 - 0.50	0.2 - 5.0	*****	*****
Oxycontin (Oxycodone, Percodan)	0.001 - 0.010	0.01 - 0.10	0.02 - 0.50	0.2 - 5.0	*****	*****
Oxyphenbutazone (Tandemil)	1.1 - 11.8	11 - 118	*****	*****	*****	*****

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
P						
Pancuronium (Pavulon)	0.009 - 0.022	0.09 - 0.22	*****	*****	0.16	1.6
Papaverine	0.025 - 0.400	0.25 - 4.00	*****	*****	*****	*****
Paraldehyde	0.11 - 0.50	1.1 - 5.0	*****	*****	*****	*****
Paraldehyde	2.0 - 33.2	20 - 332	20 - 40	200 - 400	>50	>500
Paramethadione (Paradione)	0.11 - 0.50	1.1 - 5.0	*****	*****	*****	*****
Para-Methoxyamphetamine (PMA)	*****	*****	*****	*****	0.02 - 0.49	0.2 - 4.9
Paraquat	*****	*****	0.06 - 0.32	0.6 - 3.2	>1.5	>15
Parathion	*****	*****	*****	*****	0.05 - 3.40	0.5 - 34.0
Parnate (Tranylcypromine)	0.005	0.05	*****	*****	*****	*****
Paroxetine (Paxil)	0.0031 - 0.0062	0.031 - 0.062	*****	*****	0.14 - 0.34	1.4 - 3.4
Pavulon (Pancuronium)	0.009 - 0.022	0.09 - 0.22	*****	*****	0.16	1.6
Paxil (Paroxetine)	0.0031 - 0.0062	0.031 - 0.062	*****	*****	0.14 - 0.34	1.4 - 3.3
PCP (Phencyclidine)	*****	*****	0.0007 - 0.0240	0.007 - 0.240	0.1 - 0.5	1 - 5
Pemoline (Cylert)	0.07 - 0.62	0.70 - 6.2	*****	*****	*****	*****
Pentachlorophenol	*****	*****	*****	*****	>4.6	>46
Pentazocine (Talwin)	0.003 - 0.100	0.03 - 1.00	0.2 - 0.5	2 - 5	>0.03	>0.3
Pentobarbital (Nembutal)	0.1 - 0.3	1 - 3	>0.5	>5	1.0 - 16.9	10 - 169
Pentothal (Thiopental)	0.1 - 4.2	1 - 42	>0.7	>7	1 - 40	10 - 400
Pentoxifylline (Trental)	0.006 - 0.16	0.06 - 1.6	*****	*****	>0.6	>6.0
Pepcid (Famotidine)	0.0007 - 0.0035	0.007 - 0.035	*****	*****	*****	*****
Percodan (Oxycodone)	0.001 - 0.010	0.01 - 0.10	0.02 - 0.50	0.2 - 5.0	*****	*****
Perphenazine (Trilafon)	0.00004 - 0.00300	0.0004 - 0.0300	0.1	1	*****	*****
Phenacetin	0.01 - 2.00	0.1 - 20.0	>3	>30	*****	*****
Phencyclidine (PCP)	*****	*****	0.0007 - 0.0240	0.007 - 0.240	0.1 - 0.5	1 - 5
Phendimetrazine	0.002 - 0.024	0.02 - 0.24	*****	*****	*****	*****
Phenelzine (Nardil)	0.0001 - 0.0002	0.001 - 0.002	*****	*****	>0.15	>1.5
Phenergan (Promethazine)	0.0006 - 0.0099	0.006 - 0.099	*****	*****	0.24 - 1.2	2.4 - 12
Phenmetrazine	0.004 - 0.024	0.04 - 0.24	*****	*****	0.4	4
Phenobarbital	1 - 4	10 - 40	4 - 6	40 - 60	>8	>80
Phenol	*****	*****	*****	*****	>4.6	>46
Phensuximide (Milonin)	0.4 - 1.4	4 - 14	8 - 15	80 - 150	*****	*****
Phentermine (Ionamin)	0.009 - 0.051	0.09 - 0.51	*****	*****	0.15 - 0.76	1.5 - 7.6
Phenylbutazone (Butazolidin)	1.6 - 15.0	16 - 150	20	200	40	400
Phenylephrine (Neo-Synephrine)	0.003	0.03	*****	*****	*****	*****
Phenylpropanolamine	0.003 - 0.048	0.03 - 0.48	*****	*****	>1	>10
Phenytoin (Dilantin, Diphenylhydantoin)	1 - 2	10 - 20	2 - 5	20 - 50	>10	>100
Phisoex (Hexachlorophene)	0.0003 - 0.0650	0.003 - 0.650	*****	*****	0.22 - 3.5	2.2 - 35
Phosphorus (Adult)	2.0 - 4.8	20 - 48	*****	*****	*****	*****
Phosphorus (Child)	4 - 7	40 - 70	*****	*****	*****	*****
Piroxicam (Feldene)	0.085 - 0.8	0.85 - 8.00	*****	*****	*****	*****
Placidyl (Ethchlorvynol)	0.05 - 0.88	0.5 - 8.8	*****	*****	2.2 - 21.3	22 - 213
Plaquenil (Hydroxychloroquine)	0.0019 - 0.0210	0.019 - 0.210	*****	*****	6.1	61
Plendil (Felodipine)	0.00015 - 0.00088	0.0015 - 0.0088	0.001 - 0.0015	0.01 - 0.015	*****	*****
PMA (Para-Methoxyamphetamine)	*****	*****	*****	*****	0.02 - 0.49	0.2 - 4.9
Polythiazide (Renese)	0.2 - 0.7	2 - 7	*****	*****	*****	*****
Pondimin (Fenfluramine)	0.004 - 0.030	0.04 - 0.3	0.07 - 0.09	0.7 - 0.9	0.6 - 1.5	6 - 15

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Ponstel (Mefenamic Acid)	0.03 - 2.00	0.3 - 20.0	1.1 - 11.0	11 - 110	*****	*****
Prizepam (Centrax)	0.001 - 0.004	0.01 - 0.04	*****	*****	*****	*****
Preludin (Phenmetrazine)	0.004 - 0.024	0.04 - 0.24	*****	*****	0.4	4
Prilocaine (Citanest)	0.1 - 0.5	1 - 5	*****	*****	*****	*****
Primidone (Mysoline)	0.2 - 1.9	2 - 19	5 - 8	50 - 80	10	100
Prinivil (Lisinopril, Zestril)	0.002 - 0.0082	0.02 - 0.082				
Probenecid (Banamid)	10 - 20	100 - 200	*****	*****	*****	*****
Procalnamide (Pronestyl)	0.4 - 0.8	4 - 8	1	10	>2	>20
Procaine (Novocaine)	0.02 - 1.30	0.2 - 13.0	>2.1	>21	*****	*****
Procardia (Adalat, Nifedipine)	0.0015 - 0.0162	0.015 - 0.162	*****	*****	*****	*****
Prochlorperazine (Compazine)	*****	*****	>0.1	>1	0.5	5
Procyclidine (Kemadrin)	0.008 - 0.063	0.08 - 0.63	*****	*****	*****	*****
Prolixin (Fluphenazine)	0.00009 - 0.00170	0.0009 - 0.0170	*****	*****	*****	*****
Prograf (Tacrolimus)	0.0005 - 0.002	0.005 - 0.02	>0.003	>0.03	*****	*****
Promazine (Sparine)	*****	*****	>0.1	>1	>0.5	>5
Promethazine (Phenergan)	0.0006 - 0.0099	0.006 - 0.099	*****	*****	0.24 - 1.2	2.4 - 12
Pronestyl (Procalnamide)	0.4 - 0.8	4 - 8	1	10	>2	>20
Propafenone (Rythmol)	0.0176 - 0.165	0.17 - 1.65	*****	*****	*****	*****
Proparacaine (Alcaine)	0.2 - 1.6	2 - 16	*****	*****	*****	*****
Propofol (Diprivan)	0.023 - 0.107	0.23 - 1.07	0.03 - 0.06	0.3 - 0.6	0.1 - 1.7	1-17
Propoxyphene (Darvon)	0.023 - 0.107	0.23 - 1.07	0.03 - 0.06	0.3 - 0.6	0.1 - 1.7	1-17
Propoxyphene (Darvon)	0.104 - 0.371	1.04 - 3.71	0.28 - 1.2	2.8 - 12	0.27 - 4.7	2.7 - 47
[+met: Norpropoxyphene						
Propranolol (Inderal)	0.6 - 71.1	6 - 711	*****	*****	*****	*****
Propylene Glycol	0.01 - 0.034	0.1 - 0.34	0.2	2	0.8 - 1.2	8 - 12
Propylhexedrine (Benzedrex)	0.001	0.01	*****	*****	0.2 - 0.3	2 - 3
Prosom (Estazolam)	0.0042 - 0.0100	0.042 - 0.100	0.125	1.25	*****	*****
Prostep (transdermal) (Nicotine)	0.0004 - 0.0031	0.004 - 0.031	*****	*****	*****	*****
Prothiaden (Dothiepin)	0.0017 - 0.0420	0.017 - 0.420	*****	*****	0.03 - 0.25	0.3 - 2.5
Protriptyline (Vivactil)	0.007 - 0.038	0.07 - 0.38	0.05 - 0.20	0.5 - 2.0	>0.1	>1
Prozac (Fluoxetine)	0.009 - 0.040	0.09 - 0.40	*****	*****	0.13 - 0.68	1.3 - 6.8
Pseudoephedrine (Sudafed)	0.050 - 0.077	0.50 - 0.77	*****	*****	1.9	19
Pyribenzamine (Tripeleminamine)	0.006	0.06	*****	*****	1	10
Pyridostigmine (Mestinon)	40	400	*****	*****	*****	*****
Q						
Quaalude (Methaqualone)	0.04 - 0.80	0.4 - 8.0	1 - 3	10 - 30	>0.5	>5
Quazepam	1.1 - 14.8	11 - 148	*****	*****	*****	*****
Quetiapine (Serogrel)	0.0195 - 0.0632	0.195 - 0.632	1.3	13	*****	*****
Quinidine	0.10 - 0.60	1 - 6	1	10	3 - 5	30 - 50
Quinine	0.17 - 0.97	1.7 - 9.7	>1	>10	1.2	12
R						
Rantidine (Zantac)	0.0036 - 0.0094	0.036 - 0.094	*****	*****	*****	*****
Reglan (Metaclopramide)	0.0072 - 0.075	0.072 - 0.75	*****	*****	*****	*****
Remeron (Mirtazapine)	0.0039 - 0.018	0.039 - 0.18	*****	*****	*****	*****
Remifentanyl (Ultiva)	0.0003 - 0.005	0.003 - 0.05	*****	*****	*****	*****
Renese (Polythiazide)	0.2 - 0.7	2 - 7	*****	*****	*****	*****
Repoise (Butaperazine)	0.002 - 0.069	0.02 - 0.69	*****	*****	*****	*****

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Restoril (Temazepam)	0.04 - 0.09	0.4 - 0.9	*****	*****	*****	*****
Retrovir (AZT, Zidovadine)	0.027 - 0.08	0.27 - 0.8	*****	*****	*****	*****
Rezulin (Troglitazone)	0.1 - 0.3	1 - 3	*****	*****	*****	*****
Risperdal (Risperidone)	0.0003 - 0.0012	0.003 - 0.012	*****	*****	*****	*****
Risperidone (Risperdal)	0.0003 - 0.0012	0.003 - 0.012	*****	*****	*****	*****
9-Hydroxy Risperidone	0.099	0.990	*****	*****	*****	*****
Ritalin (Methylphenidate)	0.001 - 0.006	0.01 - 0.06	0.08	0.8	0.23	2.3
Ritonavir (Norvir)	1.1 - 6.6	11.2 - 66.0	*****	*****	*****	*****
Robaxin (Methocarbamol)	2.6 - 4.1	26 - 41	*****	*****	*****	*****
Robinul (Glycopyrrolate)	0.005 - 0.0076	0.050 - 0.076	*****	*****	*****	*****
Robitussin (Guaifenesin)	0.04 - 0.14	0.4 - 1.4	21	210	*****	*****
Rofecoxib (Vioxx)	0.016 - 0.032	0.16 - 0.32	*****	*****	*****	*****
Rohypnot (Flunitrazepam)	0.006 - 0.0052	0.06 - 0.052	0.001 - 0.005	0.01 - 0.05	*****	*****
Romazicon (Flumazenil, Mazicon)	0.0006 - 0.0039	0.006 - 0.039	*****	*****	*****	*****
Rythmol (Propafenone)	0.0176 - 0.165	0.17 - 1.65	*****	*****	*****	*****
S						
Salicylamide	0.5	5.0	*****	*****	4	40
Salicylate	2 - 10	20 - 100	15 - 30	150 - 300	50	500
[met: Acetylsalicylic Acid - for normal usage]						
Salicylate	2 - 25	20 - 250	*****	*****	*****	*****
[met: Acetylsalicylic Acid-for rheumatoid arthritis]						
Sandimmune (Cyclosporine)	0.005 - 0.045	0.050 - 0.045	*****	*****	*****	*****
Sandoval (Butalbital)	0.17 - 0.26	1.7 - 2.6	0.7 - 4	7 - 40	1.3 - 2.6	13 - 26
Saquinavir (Invirase, Fortovase)	0.011 - 0.11	0.11 - 1.1	*****	*****	*****	*****
Scopolamine (Hyoscine)	0.00003 - 0.0019	0.0003 - 0.019	*****	*****	0.189	1.89
Secobarbital (Seconal)	0.1 - 0.22	1 - 2.2	>0.3	>3	0.5 - 5.2	5 - 52
Seconal (Secobarbital)	0.1 - 0.22	1 - 2.2	>0.3	>3	0.5 - 5.2	5 - 52
Sectral (Acebutolol)	0.05 - 0.12	0.5 - 1.2	*****	*****	*****	*****
Seldane (Terfenadine) [as active metabolite]	0.0133 - 0.0423	0.133 - 0.423	*****	*****	*****	*****
Selegiline (Eldepryl)	0.0009 - 0.0019	0.009 - 0.019	*****	*****	*****	*****
Serax (Oxazepam)	0.015 - 0.140	0.15 - 1.40	>0.2	>2	*****	*****
Serentil (Mesoridazine)	0.118 - 0.352	1.18 - 3.52	*****	*****	0.3	3
Seroflurane (Seroflurane)	1.34	13.4	*****	*****	*****	*****
Serofrane (Seroflurane)	1.34	13.4	*****	*****	*****	*****
Serogrel (Quetiapine)	0.0195 - 0.0632	0.195 - 0.632	1.3	13	*****	*****
Sertraline (Zoloft)	0.0055 - 0.025	0.055 - 0.25	*****	*****	*****	*****
Serzone (Nefazodone)	0.01 - 0.12	0.1 - 1.2	*****	*****	*****	*****
Sildenafil (Viagra)	0.0127 - 0.115	0.127 - 1.15	*****	*****	*****	*****
Simvastatin (Zocor)	0.00027 - 0.00056	0.0027 - 0.0056	*****	*****	*****	*****
Sinequan (Doxepin)	0.010 - 0.025	0.10 - 0.25	0.012 - 0.43	0.12 - 4.3	0.2 - 2.6	2 - 26
Sinequan (Doxepin)	0.010 - 0.025	0.10 - 0.25	>0.05	>0.5	0.8 - 3.5	8 - 35
[+met: N-Desmethyldoxepin]						
Skelaxin (Metaxalone)	29.6	296	*****	*****	*****	*****
Sodium Aurothiomalate (Gold)	0.3 - 0.8	3 - 8	*****	*****	*****	*****
Soma (Carisoprodol)	1 - 4	10 - 40	3 - 5	30 - 50	11	110
Sparine (Promazine)	*****	*****	>0.1	>1	>0.5	>5
Stadol (Butorphanol)	0.00011 - 0.00017	0.0011 - 0.0017	*****	*****	*****	*****

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Stelazine (Trifluoperazine)	0.05 - 0.20	0.5 - 2.0	0.12 - 0.30	1.2 - 3.0	0.3 - 0.8	3 - 8
Strychnine	*****	*****	0.2	2	0.28 - 1.20	2.8 - 12.0
Sublimaze (Fentanyl)	0.001 - 0.010	0.01 - 0.10	*****	*****	*****	*****
Sudafed (Pseudoephedrine)	0.050 - 0.077	0.50 - 0.77	*****	*****	1.9	19
Sufenta (Sufentanil)	0.0001 - 0.0011	0.001 - 0.011	*****	*****	*****	*****
Sufentanil (Sufenta)	0.0001 - 0.0011	0.001 - 0.011	*****	*****	*****	*****
Sulfadiazine	8 - 15	80 - 150	*****	*****	*****	*****
Sulfaguanidine	3 - 5	30 - 50	*****	*****	*****	*****
Sulfanilamide	10 - 15	100 - 150	*****	*****	*****	*****
Sulfisoxazole	9 - 10	90 - 100	*****	*****	*****	*****
Sulindac (Clinoril)	0.4 - 0.5	4 - 5	*****	*****	*****	*****
Sumatriptan (Imitrex)	0.0024 - 0.0095	0.024 - 0.095	*****	*****	*****	*****
Surmontil (Trimipramine)	0.001 - 0.030	0.01 - 0.30	*****	*****	0.87 - 1.20	8.7 - 12.0
Symmetrel (Amantadine)	0.006 - 0.031	0.06 - 0.31	0.1 - 0.05	1 - 0.5	0.21 - 0.48	2.1 - 4.8
T						
Tacrolimus (Prograf)	0.0005 - 0.002	0.005 - 0.02	>0.003	>0.03	*****	*****
Tagamet (Cimetidine)	0.05 - 0.45	0.5 - 4.5	*****	*****	*****	*****
Talwin (Pentazocine)	0.003 - 0.100	0.03 - 1.00	0.2 - 0.5	2 - 5	>0.03	>0.3
Tambocor (Flecainide)	0.02 - 0.10	0.2 - 1.0	*****	*****	*****	*****
Tandearil (Oxyphenbutazone)	1.1 - 11.8	11 - 118	*****	*****	*****	*****
Taractan (Chlorprothixene)	0.004 - 0.030	0.04 - 0.30	0.04 - 0.08	0.4 - 0.8	*****	*****
Tegretol (Carbamazepine)	0.14 - 1.2	1.4 - 12	>1.5	>15	>5	>50
Temazepam (Restoril)	0.04 - 0.09	0.4 - 0.9	*****	*****	*****	*****
Tenormin (Atenolol)	0.02 - 0.07	0.20 - 0.70	3.5	35	*****	*****
Tenuate (Dietylpropion)	0.0007 - 0.0200	0.007 - 0.200	*****	*****	0.54	5.4
Terbutaline (Brethine)	0.0002 - 0.0006	0.002 - 0.006	*****	*****	0.004	0.04
Terfenadine (Seldane) [as active metabolite]	0.0133 - 0.0423	0.133 - 0.423	*****	*****	*****	*****
Tetrachloroethylene	*****	*****	*****	*****	0.45 - 4.0	4.5 - 44.0
Tetrahydrocannabinol (THC)	<0.019	<0.19	*****	*****	*****	*****
Thallium	<0.008	<0.08	>0.1	>1	0.05 - 1.10	0.5 - 11.0
THC (Tetrahydrocannabinol)	<0.019	<0.19	*****	*****	*****	*****
Theophylline (Aminophylline)	1 - 2	10 - 20	3 - 4	30 - 40	5 - 25	50 - 250
Thiocyanate	0.6 - 2.9	6 - 29	*****	*****	*****	*****
Thiocyanate [met: Nitroprusside]	0.55 - 2.9	5.5 - 29	>10	>100	20	200
Thiopental (Pentothal)	0.1 - 4.2	1 - 42	>0.7	>7	1 - 40	10 - 400
Thioridazine (Mellaril)	0.01 - 0.26	0.1 - 2.6	>0.5	>5	0.1 - 1.8	1 - 18
Thioridazine (Mellaril)	0.03 - 0.40	0.3 - 4.0	*****	*****	*****	*****
[+met: Mesoridazine]						
Thiothixene (Navane)	0.001 - 0.010	0.01 - 0.10	*****	*****	*****	*****
Thorazine (Chlorpromazine)	0.001 - 0.050	0.01 - 0.50	0.1 - 0.2	1 - 2	0.3 - 1.2	3 - 12
Tiagabine (Gabitol)	0.0001 - 0.0234	0.001 - 0.234	*****	*****	*****	*****
Tigan (Trimethobenzamide)	0.1 - 0.2	1 - 2	*****	*****	*****	*****
Timolol (Blocadren)	0.004 - 0.023	0.04 - 0.23	*****	*****	*****	*****
Tin	0.012 - 0.014	0.12 - 0.14	*****	*****	*****	*****
Tobramycin (Nebcin)	0.16 - 0.78	1.6 - 7.8	*****	*****	*****	*****
Tocainide (Tonocard)	0.4 - 1.0	4 - 10	*****	*****	*****	*****
Tofranil (Imipramine)	0.015 - 0.0105	0.15 - 0.105	0.05 - 0.15	0.5 - 1.5	0.28 - 0.85	2.8 - 8.5

Drug and Chemical Blood Level Data - 2001

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	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
Tofranil (Imipramine) [+met: Desipramine]	0.015 - 0.025	0.15 - 0.25	*****	*****	*****	*****
Tolbutamide (Orinase)	4.3 - 9.6	43 - 96	*****	*****	64	640
Tolectin (Tolmetin)	3.7	37	>6	>60	*****	*****
Tolmetin (Tolectin)	3.7	37	>6	>60	*****	*****
Toluene	*****	*****	*****	*****	1	10
Tonocard (Tocainide)	0.4 - 1.0	4 - 10	*****	*****	*****	*****
Toradol (Ketorolac)	0.087 - 0.45	0.87 - 4.5	*****	*****	*****	*****
Tramadol (Ultram)	0.01 - 0.06	0.1 - 0.6				
Trancopal (Chlormezanone)	0.25 - 0.88	2.5 - 8.8	*****	*****	*****	*****
Trandate (Labetalol, Normodyne)	0.0036 - 0.0271	0.036 - 0.271	*****	*****	*****	*****
Tranxene (Chlorazepate)	0.01 - 0.16	0.1 - 1.6	>0.5	>5.0	*****	*****
[as met: N-Desmethyldiazepam]						
Tranylcypromine (Parnate)	0.005	0.05	*****	*****	*****	*****
Trazodone (Desyrel)	0.07 - 0.489	0.7 - 4.89	*****	*****	1.5	15
Trental (Pentoxifylline)	0.006 - 0.16	0.06 - 1.6	*****	*****	>0.6	>6.0
Triazolam (Halcion)	0.002	0.02	*****	*****	*****	*****
Tribromoethanol	*****	*****	*****	*****	9	90
Trichloroethane	*****	*****	*****	*****	10 - 100	100 - 1000
Trichloroethanol	0.2 - 1.2	2 - 12	10	100	25	250
[met: Chloral Hydrate (Noctec)]						
Trichloroethylene	0.1 - 9.0	1 - 90	*****	*****	0.3 - 11.0	3 - 110
Tridione (Trimethadione)	1 - 3	10 - 30	*****	*****	*****	*****
Trifluoperazine (Stelazine)	0.05 - 0.20	0.5 - 2.0	0.12 - 0.30	1.2 - 3.0	0.3 - 0.8	3 - 8
Trilafon (Perphenazine)	0.00004 - 0.00300	0.0004 - 0.0300	0.1	1	*****	*****
Trimethadione (Tridione)	1 - 3	10 - 30	*****	*****	*****	*****
Trimethobenzamide (Tigan)	0.1 - 0.2	1 - 2	*****	*****	*****	*****
Trimethoprim (Trimpex)	0.1 - 0.2	1 - 2	*****	*****	*****	*****
Trimipramine (Surmontil)	0.001 - 0.030	0.01 - 0.30	*****	*****	0.87 - 1.20	8.7 - 12.0
Trimpex (Trimethoprim)	0.1 - 0.2	1 - 2	*****	*****	*****	*****
Triptelennamine (Pyrilbenzamine)	0.006	0.06	*****	*****	1	10
Triprolidine (Actidil)	0.0004 - 0.0044	0.004 - 0.044	*****	*****	*****	*****
Tubocurarine	0.004 - 0.600	0.04 - 6.00	*****	*****	*****	*****
Tylenol (Acetaminophen)	1 - 2	10 - 20	15	150	>16	>160
U						
Ulliva (Remilentanil)	0.0003 - 0.005	0.003 - 0.05	*****	*****	*****	*****
Ultram (Tramadol)	0.01 - 0.06	0.1 - 0.6				
Unisom (Doxylamine)	0.0069 - 0.0138	0.069 - 0.138	*****	*****	0.07 - 1.2	0.7 - 12
Uric Acid	3 - 7	30 - 70	*****	*****	*****	*****
V						
Valium (Diazepam)	0.002 - 0.400	0.02 - 4.00	0.5 - 2.0	5 - 20	>3	>30
Vallum (Diazepam)	0.031 - 0.600	0.31 - 6.00	*****	*****	>3.4	>34
[+met: N-Desmethyldiazepam]						
Valmid (Ethinamate)	0.4 - 1.1	4 - 11	*****	*****	10 - 20	100 - 200
Valproic Acid (Depakene)	5 - 10	50 - 100	0.71 - 20.0	7.1 - 200	*****	*****
Vancomycin	3 - 4	30 - 40	*****	*****	*****	*****
Vasotec (Enalapril)	0.00063 - 0.007	0.0063 - 0.070	*****	*****	*****	*****
Venlafaxine (Effexor)	0.007 - 0.393	0.07 - 3.93	*****	*****	*****	*****

Drug and Chemical Blood Level Data - 2001

DRUG	Therapeutic or Normal		Toxic		Lethal	
	mg%	ug/ml	mg%	ug/ml	mg%	ug/ml
[met: O-Desmethylenlafaxine]	0.0061 - 0.075	0.061 - 0.75	0.1 - 0.15	1 - 1.5	*****	*****
Verapamil (Calan, Isoplin)	0.0055 - 0.0355	0.055 - 0.355	0.09	0.9	0.09 - 8.5	0.9 - 85
Versed (Midazolam)	0.008 - 0.025	0.08 - 0.25	*****	*****	*****	*****
Viagra (Sildenafil)	0.0127 - 0.115	0.127 - 1.15				
Vicodin (Hydrocodone, Lortab)	0.003 - 0.025	0.03 - 0.25	0.05 - 0.2	0.5 - 2	0.07 - 1.2	0.7 - 12
Vioxx (Rofecoxib)	0.016 - 0.032	0.16 - 0.32	*****	*****	*****	*****
Vivactil (Protriptyline)	0.007 - 0.038	0.07 - 0.38	0.05 - 0.20	0.5 - 2.0	>0.1	>1
Vistaril (Atarax, Hydroxyzine,)	0.0022 - 0.008	0.022 - 0.08	*****	*****	0.4 - 3.9	4.2 - 39
Vistazine (Hydroxyzine)	0.008	0.08	1.3	13	3.9	39
Voltaren (Diclofenac, Cataflam)	0.075 - 0.20	0.75 - 2.0	0.6	6	*****	*****
W						
Warfarin (Coumadin)	0.10 - 0.31	1.0 - 3.1	*****	*****	*****	*****
Wellbutrin (Bupropion)	0.0025 - 0.0100	0.025 - 0.100	*****	*****	0.73	7.3
X						
Xanax (Alprazolam)	0.0025 - 0.0102	0.025 - 0.102	*****	*****	0.0122 - 0.039	0.122 - 0.390
Xylene	*****	*****	*****	*****	0.3 - 11.0	3 - 110
Xylocaine (Lidocaine)	0.15 - 0.50	1.5 - 5.0	0.7 - 2	7 - 20	>2.5	>25
Y						
Yocon (Yohimbine)	0.0046 - 0.029	0.046 - 0.290	*****	*****	*****	*****
Yohimbine (Yocon)	0.0046 - 0.029	0.046 - 0.290	*****	*****	*****	*****
Z						
Zantac (Ranitidine)	0.0036 - 0.0094	0.036 - 0.094	*****	*****	*****	*****
Zarontin (Ethosuximide)	4 - 10	40 - 100	*****	*****	25	250
Zestril (Lisinopril, Prinivil)	0.002 - 0.0082	0.02 - 0.082				
Zidovadine (AZT, Retrovir)	0.027 - 0.08	0.27 - 0.8	*****	*****	*****	*****
Zilenton (Zyflo)	0.04 - 0.31	0.4 - 3.1	*****	*****	*****	*****
Zinc	0.068 - 0.136	0.68 - 1.36	*****	*****	*****	*****
Zocor (Simvastatin)	0.00027 - 0.00056	0.0027 - 0.0056	*****	*****	*****	*****
Zofran (Ondansetron)	0.0022 - 0.0114	0.022 - 0.114	*****	*****	*****	*****
Zolmitriptan (Zomig)	0.0029 - 0.0272	0.029 - 0.272	*****	*****	0.05 - 0.112	0.5 - 1.12
Zoloft (Sertraline)	0.0055 - 0.025	0.055 - 0.25	*****	*****	*****	*****
Zolpidem (Ambien)	0.0003 - 0.0018	0.003 - 0.018	*****	*****	*****	*****
Zomig (Zolmitriptan)	0.0029 - 0.0272	0.029 - 0.272	*****	*****	0.05 - 0.112	0.5 - 1.12
Zoxazolamine (Flexin)	0.3 - 1.3	3 - 13	*****	*****	*****	*****
Zyflo (Zilenton)	0.04 - 0.31	0.4 - 3.1	*****	*****	*****	*****
Zyprexa (Olanzapine)	0.0009 - 0.0023	0.009 - 0.023	*****	*****	0.12	1.2

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Tina D. Richardson,

Appellant,

v.

South Carolina Department of Motor
Vehicles,

Respondent.

Docket No. 12-ALJ-21-0027-AP

FINAL ORDER

This matter is before the Administrative Law Court (ALC or Court) on a Notice of Appeal filed by Tina D. Richardson (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH) dated December 14, 2011. The Appellant argues that the OMVH Hearing Officer erred in finding the Appellant refused to submit to a breath, blood, or urine test in violation of S.C. Code Ann. § 56-5-2950 (Supp. 2011) and, therefore, erred in sustaining the suspension of her driver's license. After careful consideration of the briefs and the record, the OMVH Hearing Officer's decision is reversed.

BACKGROUND

On September 17, 2011, Trooper S.W. Tukes, with the South Carolina Highway Patrol, arrested the Appellant for an offense arising out of an act alleged to have been committed while driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Trooper Tukes transported the Appellant to a detention center where he informed the Appellant verbally and in writing of her implied consent rights in preparation for a DataMaster breath test.

After the mandatory twenty-minute observation period, Trooper Tukes placed a mouthpiece on the tube, gave the mouthpiece to the Appellant, and told her to "blow when you're ready." The Appellant placed the mouthpiece in her mouth and blew on it until the short beeps stopped and the machine produced a steady tone for approximately three seconds. The Appellant removed the mouthpiece and the short beeps began again. The Trooper told her "you have to blow." She repeated the process until the machine produced a steady tone for approximately four seconds and then she stopped. The Trooper said, "You're not blowing in

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it." The Appellant said, "You see it fogging up," and then repeated the process resulting in a four-second tone before she removed the mouthpiece. The Appellant watched the machine for several seconds and then repeated the process resulting in a five-second tone before she stopped. Without any prompting from Trooper Tukes, the Appellant again repeated the process resulting in a four-second tone before she stopped. After several seconds passed, she looked at the Trooper and asked, "Really?" Trooper Tukes responded, "You're not blowing in there." The Appellant again placed the mouthpiece in her mouth and blew on it resulting in a four-second tone before she stopped. After several seconds passed and without any prompting from Trooper Tukes, the Appellant repeated the process. During this attempt, the DataMaster machine began producing a steady tone and then produced a single, short beep. Trooper Tukes then stated, "That's it. Your time is up." The Appellant stared at the machine for several seconds. The DataMaster results were registered as "refused." When Trooper Tukes stated, "You didn't put enough air in the machine," the Appellant asked him to tell her what she was doing wrong. The Appellant subsequently requested four times to take the DataMaster test again with instructions of how to provide a proper sample. Trooper Tukes declined to provide a second test, asserting SLED policies only allow one test. The Appellant then stated that she wanted to have a blood test.

Trooper Tukes issued a written notice of suspension of the Appellant's driving privileges and charged the Appellant with a violation of S.C. Code Ann. § 56-5-2950 for refusing to submit to a chemical test of her breath. The Appellant thereafter was transported to AnMed Emergency Room where she paid for the blood test and was given the test by personnel at AnMed.

On September 20, 2011, the Appellant requested an administrative hearing challenging the suspension of her driving privileges. After notice was sent to all parties, a hearing was held on October 26, 2011, before OMVH Hearing Officer Tracy Holland. On December 14, 2011, the OMVH Hearing Officer issued a Final Order and Decision sustaining the Appellant's suspension. The Appellant filed a Motion for Reconsideration and Motion to Stay at the OMVH on December 19, 2011. After thirty days passed with no action from the OMVH, the Appellant timely filed this appeal with the Administrative Law Court. See OMVH Rule 10(D)(2) ("The hearing officer shall act on the motion for reconsideration within thirty (30) days after it is filed, and if no action is taken by the hearing officer within that period, the inaction shall be deemed a denial of the relief sought in the motion.").

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2011). The ALC has jurisdiction to hear appeals of OMVH decisions pursuant to S.C. Code Ann. § 1-23-660(D) (Supp. 2011). The OMVH is an "agency" under the Administrative Procedures Act ("APA"). See S.C. Code Ann. § 1-23-310(2) (Supp. 2011). As such, the APA's standard of review governs appeals from decisions of the OMVH. See S.C. Code Ann. § 1-23-380 (Supp. 2011); see also Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). Section 1-23-380(5) provides the standard for appellate bodies, including the ALC in this matter, to use when reviewing agency decisions:

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.

S.C. Code Ann. § 1-23-380(5) (Supp. 2011).

On review of the facts or orders of administrative agencies, the court 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 § 220(a) (1983). Therefore, the burden is on the Appellant 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. S.C. Pub. Serv. Comm'n, 294 S.C. 320, 364 S.E.2d 455 (1988).

DISCUSSION

On March 13, 2012, the OMVH filed the Record on Appeal in this matter pursuant to OMVH Rule 17(B). On April 19, 2012, the Appellant filed her brief, asserting the OMVH Hearing Officer erred by finding the Appellant refused to submit to the breath test. The Appellant attached as exhibits to her brief the alleged LabCorp blood test results with a chain of

custody document and a Public Index printout regarding the disposition of the Appellant's DUI case. On May 3, 2012, the Department filed a Motion to Dismiss, Strike Appellant's Brief, or Require Resubmission. The Appellant filed a Return to the Department's Motion and also moved to admit the two exhibits as "after-acquired evidence." On May 22, 2012, the Department filed a Reply to the Appellant's Return as well as a Return to the Appellant's Motion. The Department also filed its brief. On May 31, 2012, the Appellant filed her Reply Brief.

Department's Motion

In the Department's Motion to Dismiss, Strike Appellant's Brief, or Require Resubmission, the Department asserts the Appellant's exhibits are not part of the Record on Appeal and, in addition, are irrelevant to this appeal. The Department argues that the Hearing Officer properly excluded the LabCorp blood test results as the chain of custody was not established at the hearing. The Department also noted that the Hearing Officer commented and the Appellant conceded that the blood test results were not relevant to the implied consent hearing. The Department further asserted that the Appellant did not use proper procedure to seek admission of additional evidence.

The Appellant argued that the exhibits are relevant to this appeal because they show the Appellant's subjective state of mind and her motivation to take the test properly. The Appellant specifically argued that even though the blood test results were not admitted into evidence at the hearing, they should have been marked as an exhibit and included in the Record on Appeal. The Appellant also argues that the DUI case was not resolved until after the OMVH hearing and the motion for reconsideration. As such, the outcome of the DUI case was after-acquired evidence intended to bolster the Appellant's argument that she had no motivation to evade the breath test.

Regarding the blood test results, the Appellant sought to enter the exhibit into the record at the hearing. The Hearing Officer sustained the Trooper's objection and found that the blood test results were irrelevant to the implied consent hearing. The Appellant thereafter conceded that the results were irrelevant for the purposes of the implied consent hearing. Pursuant to OMVH Rule 16, the proffer of the blood test results should have been included in the Record on Appeal provided by the OMVH. Because the OMVH—rather than the Appellant—is responsible for preparing and filing the Record on Appeal, the court understands that there may

be times when, through no fault of the Appellant, the Record on Appeal does not contain all of the documents required. The Appellant, however, should have filed a motion to amend the Record on Appeal or requested leave to amend the Record rather than attaching the proffer of excluded evidence as an exhibit to the Appellant's Brief. SCALC Rule 68 (clerical errors in the record arising from oversight or omission may be corrected by the administrative law judge on his own initiative or on the motion of any party); see SCACR Rule 212(b) (when the opposing party has not consented to supplementing the record, "a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so"); SCALC Rule 68 (South Carolina Appellate Court Rules (SCACR) may be applied in proceedings before the court). Nonetheless, the court finds that the results of the blood test are irrelevant to the issue in this appeal. The court will not consider this exhibit or this information in ruling on this appeal.

Regarding the outcome of the Appellant's DUI case, the Appellant should have used the proper procedure to present additional evidence. As argued by the Department, S.C. Code Ann. § 1-23-380(3) provides a method for presenting what the Appellant describes as "after-acquired evidence." This method allows for the agency, here OMVH, to consider material evidence and have the opportunity to modify its findings and decision based on the additional evidence. However, the appropriate procedure would have been for the Appellant to file a separate motion for leave to present additional evidence so that this court could rule on the motion. Brown v. Peoplease Corp., 402 S.C. 476, 741 S.E.2d 761 (Ct. App. 2013). It was not appropriate for the Appellant to simply attach the document as an exhibit to the Appellant's Brief. Further, it would not be appropriate for this court, reviewing this matter in its appellate jurisdiction, to take judicial notice of the outcome of the Appellant's DUI case. See Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011), quoting Masters v. Rodgers Dev., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984). The court finds that the outcome of the Appellant's DUI case is irrelevant to the issue of whether the Appellant refused to take the breath test. The court will not consider this exhibit or this information in ruling on this appeal.

The court, therefore, will strike the documents attached as exhibits to the Appellant's Brief as well as any references to those documents in the Appellant's briefs.¹ The court, however, may still consider the fact that the Appellant requested a blood test and ultimately had

¹ Other jurisdictions similarly have found it was appropriate to strike the exhibits as well as references thereto contained in the brief. Union Pacific Railroad Co. v. Barber, 149 S.W.3d 325 (Ark. 2004); Marriage of Rosenbaum-Golden and Golden, 884 N.E.2d 1272 (Ill. App. Ct. 2008); Duncan v. Querens, 82 So.3d 537 (La. Ct. App. 2011).

the blood test at AnMed Hospital as those facts were contained in the testimony and undisputed. Furthermore, the fact that the Appellant requested and following through with obtaining the blood test is relevant regardless of the results of the blood test. The court finds it unnecessary to require the parties to refile their briefs.

Whether the Appellant Refused to Take the Breath Test

Under South Carolina law, a motorist arrested for driving under the influence implicitly consents to a chemical test of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs, and such test must be administered at the direction of the arresting officer. S.C. Code Ann. § 56-5-2950(A) (Supp. 2011). If a motorist refuses to submit to a test conducted pursuant to § 56-5-2950(A), the motorist's license must be immediately suspended. S.C. Code Ann. § 56-5-2951(A) (Supp. 2011). However, a motorist whose license is suspended under these circumstances may request an administrative hearing to challenge the suspension. S.C. Code Ann. § 56-5-2951(B)(2) (Supp. 2011). If such a hearing is requested, the scope of the hearing must be limited to whether the motorist:

- (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.

S.C. Code Ann. § 56-5-2951(F) (Supp. 2011). According to the South Carolina Supreme Court, a § 56-5-2951 hearing should be "a summary administrative proceeding designed to handle license revocation matters quickly." State v. Bacote, 331 S.C. 328, 333, 503 S.E.2d 161, 164 (1998).

In a § 56-5-2951 hearing, the initial burden of proof is borne by the Department or the applicable law enforcement agency. See, e.g., S.C. Dep't of Motor Vehicles v. Lavigne, 06-ALJ-21-0056-AP (Jan. 10, 2007); S.C. Dep't of Motor Vehicles v. Boyle, 06-ALJ-21-0340-AP

(Sept. 11, 2006); S.C. Dep't of Motor Vehicles v. Heyward, 06-ALJ-21-0533-AP (Feb. 9, 2007); S.C. Dep't of Motor Vehicles v. Witt, 06-ALJ-21-0630-AP (July 5, 2007). However, once a prima facie case is established against the motorist, the burden shifts to the motorist to present evidence to rebut the prima facie case. S.C. Dep't of Motor Vehicles v. Powers, 06-ALJ-21-0578-AP (Jan. 10, 2007) (explaining the application of this principle throughout the states). A prima facie case is made by presenting evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. LaCount v. Gen. Asbestos & Rubber Co., 184 S.C. 232, 240, 192 S.E. 262, 266 (1937); see also Mack v. Branch No. 12, Post Exchange, Fort Jackson, 207 S.C. 258, 272, 35 S.E.2d 838, 844 (1945) ("The words [prima facie evidence] import that the evidence produces for the time being a certain result; but that result may be repelled.").

Thus, if a prima facie case is established against the motorist and the motorist fails to present any evidence to rebut it, then judgment must go against the motorist. See Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 539, 61 S.E.2d 165, 168-69 (1950) ("It is the settled rule of law that once a party establishes a prima facie case, judgment will go in his favor unless the opposite party produces evidence sufficient to overcome the prima facie presumption."); accord Moffitt v. Commonwealth, 434 S.E.2d 684, 687 (Va. Ct. App. 1993) ("Once the Commonwealth has established a prima facie case, it is entitled to judgment, unless the respondent goes forward with evidence that refutes an element of the Commonwealth's case or rebuts the prima facie presumption.").

In this appeal, the OMVH Hearing Officer relied on SLED policies, which provided that any subject will be able to provide an adequate sample, as determined by the instrument. The Hearing Officer then concluded that the Appellant blew into the DataMaster machine but did not provide an adequate breath sample for the machine to register. Based on these findings, the Hearing Officer concluded as a matter of law that the Department met its burden of proving that the Appellant refused to take the breath test. This court disagrees.

A review of the SLED video reveals that the Appellant was cooperative prior to and during the testing. She also did not delay the administration of the test or ingest prohibited substances during the observation period. Once the testing began, the Appellant made seven attempts to blow into the mouthpiece. Each time, the short beeps stopped and the machine

produced a solid tone for several seconds.² Several times, as the Appellant pulled the mouthpiece away from her mouth, her breath expulsion was audible indicating that she had been blowing into the mouthpiece. After the test, the Appellant requested, even pleaded, at least four times to take the test again. The Appellant also stated several times that she did not refuse to take the test. Ultimately, she requested to take a blood test because she understood from the implied consent form that it was her right to request additional testing.

At the hearing, the Appellant testified that she was scared, nervous, and fighting for her job as a delivery driver. She wanted to blow because she thought she would blow less than 0.08% and could get a lesser traffic ticket, based on the information provided by the Trooper and the implied consent form. The Appellant testified that she wanted to go to work Monday morning, she wanted to have her driver's license, and she understood that if she refused to take the test her license would be taken immediately.

According to the Appellant, she had no experience with taking breath tests before and was relying on the Trooper for instructions. The Trooper never informed her that she needed to blow *continuously* into the mouthpiece. The only instructions the Trooper ever provided were that the Appellant needed to blow, which she did seven times. When questioned about why he did not provide additional instruction during the process, Trooper Tukes testified he was not required to give any further instruction except to blow into the machine.

The Trooper also did not provide any indication to the Appellant each time she stopped that there was any urgency to start blowing again. Precious time passed while the Trooper and the Appellant, who appeared to be anxiously awaiting the results, stared at the machine. Several times the Appellant even initiated another round of blowing into the mouthpiece without any prompting or information from the Trooper. The video reveals an individual who was trying to comply and trying to provide an adequate breath sample but was not given instructions on how to do so.

Moreover, when the Trooper informed the Appellant that she could only have one test, she asked if that was on the implied consent form. A review of the implied consent form reveals nothing to indicate that a law enforcement officer is precluded from giving an individual the test more than once. Further, there is nothing in SLED policies to indicate that an officer is restricted

² A steady tone indicates the machine is receiving a breath sample. Chisolm v. S.C. Dep't of Motor Vehicles, 402 S.C. 593, 601, 741 S.E.2d 42, 47 (Ct. App. 2013).

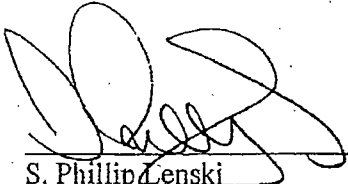
from giving the test twice. To the contrary, the South Carolina Court of Appeals recently explained, "the failure of a driver to supply a registerable breath sample does not automatically result in a refusal, as the officer has discretion to determine whether there was a refusal and has the option to conduct a second breath test." Chisolm v. S.C. Dep't of Motor Vehicles, 402 S.C. 593, 601, 741 S.E.2d 42, 47 (Ct. App. 2013). Under these circumstances, where the videotaped evidence clearly shows that the Appellant was never told to continuously breathe into the mouthpiece, the Appellant definitely blew into the mouthpiece at least seven times during the two-minute period, and the Appellant repeatedly requested to take the test again with instructions from the Trooper, this court finds, based on the whole record, that the hearing officer's determination that the Appellant refused to submit to a breath test was clearly erroneous and characterized by a clearly unwarranted exercise of discretion. Cf. Bomba v. Com., Dep't of Transp., Bureau of Driver Licensing, 28 A.3d 946, 949 (Pa. Commw. Ct. 2011), quoted in Chisolm v. S.C. Dep't of Motor Vehicles, 402 S.C. 593, 605, 741 S.E.2d 42, 49 (Ct. App. 2013) (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."). The court, therefore, finds the OMVH Hearing Officer erred in holding that the Department met its burden of proving that the Appellant refused to submit to a chemical test.

ORDER

Therefore, IT IS HEREBY ORDERED that the Hearing Officer's Final Order and Decision is REVERSED.

AND IT IS SO ORDERED.

July 25, 2013
Columbia, South Carolina


S. Phillip Lenski
Administrative Law Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley Robinson, Administrative Law Judge
H. Philip Hayes, Jr., OMVH Hearing Officer

Docket No. 11-ALJ-21-0563-AP
Docket No. 10-OMVH-01-3433-CC

Edward Eli Saleeby, III, ... Appellant,

v.

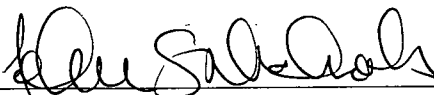
South Carolina Department of Motor
Vehicles and South Carolina Department
of Public Safety, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

Respectfully submitted,

April 29, 2014



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SC Court of Appeals

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley Robinson, Administrative Law Judge
H. Philip Hayes, Jr., OMVH Hearing Officer

Docket No. 11-ALJ-21-0563-AP
Docket No. 10-OMVH-01-3433-CC

Edward Eli Saleeby, III, ... Appellant,

v.

South Carolina Department of Motor
Vehicles and South Carolina Department
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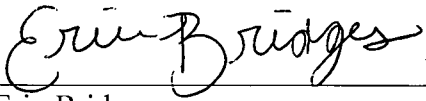
PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Respondents with a copy of the *Record on appeal* by mailing copies of the
same by United States Mail with first class postage prepaid to the following address:

Linda Annette Grice, Esquire
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SC Court of Appeals

May 1, 2014
Columbia, South Carolina


Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC