

Exhibit 4

Case File

201



0 2 3 6 4 9

9-20 7-9 6/6 6/4

CLEVELAND MUNICIPAL COURT EARLE B. TURNER, Clerk of Court

ATTORNEY NAME: STOKES PHONE #: _____

STOKES

STOKES

SET FOR PRETRIAL 5/14

TRIAL 4:30

MEET 5/17/13

MAY 07 2013 STOKES

WARRANT FOR DENYING PRIVILEGE

SET FOR REVIEW 5/13/13

STATE OF OHIO/CITY OF CLEVELAND

STATE OF OHIO/CITY OF CLEVELAND

2013 TRC 023649 3RD FLOOR COURTROOM B
 NESTER, MICHELLE 04/23/2013
 10/08/1978

4511.19A1A
 4511.19A1H
 4511.20

DRIV UNDER INFLUENCE
 ALC/DRUG OR COMBINATION
 OF THEM
 DRIV UNDER INFLUENCE OF
 ALC OR DRUG BREATH: 17
 HUNDRETHS OF ONE GRAM
 OR MORE PER 200TH TEN
 LITERS
 RECKLESS OPERATION

TIP WTI INSURANCE SHOWN NOT SHOWN

PLEA: GUILTY NOT GUILTY NO CONTEST

JUDGE _____ CONTROL # _____

ARRAIGNMENT CONTINUANCE: _____

A: FG / FNG / NOLLE / DWP Fine \$ _____ Days _____ Susp: _____

B: FG / FNG / NOLLE / DWP Fine \$ _____ Days _____ Susp: _____

C: FG / FNG / NOLLE / DWP Fine \$ _____ Days _____ Susp: _____

D: FG / FNG / NOLLE / DWP Fine \$ _____ Days _____ Susp: _____

E: FG / FNG / NOLLE / DWP Fine \$ _____ Days _____ Susp: _____

F: FG / FNG / NOLLE / DWP Fine \$ _____ Days _____ Susp: _____

Perform _____ CSW hours in lieu of F & C (Indigent) by _____

THIS FILE SHALL NOT BE TAKEN FROM THE CUSTODY OF THE CLERK WITHOUT PERMISSION OF THE COURT

A5704-MR 0244A

2/16/14 ALST SENT

4-2-14 Lic. Susp Balance Waived (sent → BMV)

A. STOKES SEP 16 2013

Patricia Probst
to 9-11-2014

CLEVELAND MUNICIPAL COURT

EARLE B. TURNER, Clerk of Court

A. STOKES MAY 14 2013

Code SEPT on 6-4-13 at 9AM

5/29
Motion

A. STOKES JUN 04 2013

2 will
3 will

1 New 10-16

Code SEPT on

7-11-13 at 8:30 AM

Need Pst Report

A. STOKES JUL 11 2013

9/3/13

Motion filed

SEP 04 2013

STOKES

SET FOR REVIEW

9/16/13 9:00
Motion to extend Occupational driving Perm.

A. STOKES SEP 06 2013

Consolidated to 9-11-13

A. STOKES SEP 08 2013

Code SEPT on 9-16-13 at
1:30 PM

Active Probation to
7-11-2014

Municipal COURT Cuyahoga COUNTY, OHIO
STATE OF OHIO CLEVELAND TICKET # B070603
City Village Township

NAME MICHELLE NESTER
STREET 2223 WASLONA AVE.
CITY, STATE LAKEWOOD, OH. ZIP 44127

OPERATOR LICENSE / STATE ID#	None*	BIRTH DATE	ISSUE DATE	STATE				
R2980572		10/8/78	10/13/10	OH				
CLASS	EXPIRES	ENDORSEMENT(S)/RESTRICTION(S)	SS# (last 4 digits)					
D	10/8/14		6180					
SEX	HEIGHT	WEIGHT	EYES	HAIR	RACE	FINANCIAL RESPONSIBILITY PROOF?		
F	508	115	HAZ	BRN	W	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	<input type="checkbox"/> N/A

If no OH/State ID, REQUIRED documentation attached: Yes
TO DEFENDANT: COMPLAINT ON 04/17 2013 AT 0016 PM, YOU
Operated/Passenger/Parked/Walked a Passenger Motorcycle Bicycle Other
 Commercial DOT# >26,001 lbs. <26 Pass. Bus >16 Pass. Bus Haz. Mat.
VEHICLE: YEAR 11 MAKE NISSA MODEL 40
COLOR SIL LICENSE # NWP3460 STATE OH (W.B.)
UPON A PUBLIC HIGHWAY, NAMELY 1290 (M.P. 166)
AT/NEAR IN THE CITY OF CLEVELAND IN Cuyahoga COUNTY (NO. 18) STATE OF OHIO AND COMMITTED THE FOLLOWING OFFENSE(S).

<input type="checkbox"/> SPEED: _____ MPH in _____ MPH zone <input type="checkbox"/> Over limits <input type="checkbox"/> Unsafe for conditions <input type="checkbox"/> ACDA <input type="checkbox"/> Radar <input type="checkbox"/> Air <input type="checkbox"/> VASCAR <input type="checkbox"/> Pace <input type="checkbox"/> Laser <input type="checkbox"/> Stationary <input type="checkbox"/> Moving	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input checked="" type="checkbox"/> OVI: Under the influence of alcohol/drug of abuse. <input type="checkbox"/> Prohibited blood alcohol concentration. 270 BAC <input type="checkbox"/> Blood <input type="checkbox"/> Breath <input type="checkbox"/> Urine <input type="checkbox"/> Refused	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P. 7511.19A1a
Prior OVIs: # of prior OVIs: 0 Years of prior OVIs: 4	7511.19A1a
<input type="checkbox"/> DRIVER LICENSE: <input type="checkbox"/> None <input type="checkbox"/> Not on person <input type="checkbox"/> Revoked <input type="checkbox"/> Suspended EXPIRED: <input type="checkbox"/> <6 months <input type="checkbox"/> >6 months <input type="checkbox"/> Failure to Reinstate Suspension Type:	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input type="checkbox"/> SAFETY BELT: Failure to wear <input type="checkbox"/> Driver <input type="checkbox"/> Passenger <input type="checkbox"/> Child Restraint <input type="checkbox"/> Booster Seat	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input checked="" type="checkbox"/> OTHER OFFENSE: RECKLESS OPERATION	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P. 4511.20
<input type="checkbox"/> OTHER OFFENSE:	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input checked="" type="checkbox"/> DRIVER LICENSE HELD <input type="checkbox"/> VEHICLE SEIZED <input type="checkbox"/> JUVENILE OFFENDER	
PAVEMENT: <input checked="" type="checkbox"/> Dry <input type="checkbox"/> Wet <input type="checkbox"/> Snow <input type="checkbox"/> Ice # of Lanes: 4 <input type="checkbox"/> Construction Zone	
VISIBILITY: <input type="checkbox"/> Clear <input type="checkbox"/> Cloudy <input type="checkbox"/> Dusk <input type="checkbox"/> Night <input type="checkbox"/> Dawn	
WEATHER: <input type="checkbox"/> Rain <input type="checkbox"/> Snow <input type="checkbox"/> Fog <input checked="" type="checkbox"/> No Adverse	
TRAFFIC: <input type="checkbox"/> Heavy <input type="checkbox"/> Moderate <input checked="" type="checkbox"/> Light <input type="checkbox"/> None	
AREA: <input type="checkbox"/> Business <input checked="" type="checkbox"/> Rural <input type="checkbox"/> Residential <input type="checkbox"/> Industry <input type="checkbox"/> School	
CRASH: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Almost Caused <input type="checkbox"/> Non-Injury <input type="checkbox"/> Injury <input type="checkbox"/> Fatal	
Crash Report Number:	
REMARKS:	
ACCOMPANYING CRIMINAL CHARGE <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No TOTAL # OFFENSES	

TO DEFENDANT: SUMMONS PERSONAL APPEARANCE REQUIRED Yes No
You are summoned and ordered to appear on April 23rd 2013 at 1:30 PM
in Municipal Court at CLEVELAND
If you fail to appear at this time and place you may be arrested or your license may be cancelled.
This summons served personally on the defendant on 04/17 2013
The issuing/charging law enforcement officer states under the penalties of perjury and falsification that he/she has read the above complaint and that it is true.

Charging Law Enforcement Officer	Court Case	Unit	Past	Driver
[Signature]	1822	706	18	04

Issuing Law Enforcement Officer [Signature] SAME AS ABOVE
Issuing Officer: Verify address. If different from license address, write present address in space provided.
HP-7 OHP 0060 7/12 10-0060-00 (760-0603) LIMITED ACCESS COURT RECORD

Defendant's Attorney _____ Name / Address / Telephone _____

DATE	COURT ACTION: ORDERS
	BAIL
	<input type="checkbox"/> No Bail - Defendant cited and released. <input type="checkbox"/> Bail in the amount of \$ _____ set by Judge pursuant to bail schedule.

BOND AMOUNT	BOND TYPE
\$ _____	<input type="checkbox"/> Cash <input type="checkbox"/> Personal <input type="checkbox"/> 10% <input type="checkbox"/> AAA/Insurance Bond <input type="checkbox"/> Unsecured <input type="checkbox"/> Surety <input type="checkbox"/> O.L. Held <input type="checkbox"/> Other

Depositor: _____ Name / Address / Telephone _____
 Defendant released upon execution of Bail as noted: _____ See Bond forms - received by _____

CONTINUANCE Requestor: _____	New DATE _____
CONTINUANCE Reason: _____	
<input type="checkbox"/> Defendant Failed to Appear <input type="checkbox"/> Order Supplemental Summons to New Date <input type="checkbox"/> Order Operator's License Forfeiture <input type="checkbox"/> Bond Forfeiture <input type="checkbox"/> Order Warrant: Bond Amount \$ _____ <input type="checkbox"/> Summons Issued Served DATE: _____ <input type="checkbox"/> Warrant Issued Executed DATE: _____	

Judge/Magistrate _____ DATE _____

COURT ENTRY					
Defendant present with/without Counsel. All rights pursuant to Criminal Rules 10 & 11, Traffic Rules 8 & 10 explained.					
	COUNT				
	SPEED	OVI	LICENSE	SEATBELT	
Initial Plea					
Trial Date					
Finding					
Fine \$					
Costs \$					
Jailtime (Days)					
SUSPENDED					
Fines \$					
Costs \$					
Jailtime (Days)					

ADDITIONAL ORDERS

If **OVI conviction**: 72 hour program permitted in lieu of jail,
 Defendant's License is **SUSPENDED** for _____ days / month(s) / year(s),
 which shall commence on _____ and end on _____
 Defendant is granted **Limited Driving Privileges** as follows, effective: _____

Defendant to pay fines on **Payment Program** - see separate entry.
 If **WAIVERED**: MET Requirements of Waiver PAID Fines and Costs ACCEPTED Guilty Plea(s)
 MADE Guilty Finding(s). Imposed Fines and Costs noted below.

Judge/Magistrate _____ DATE _____

FOR CLERK'S USE	COUNT				
	SPEED	OVI	LICENSE	SEATBELT	
Fines \$					
Costs - Local \$					
Costs - State \$					
TOTAL \$					
Receipt #(s)					

If **WAIVERED**: Guilty Plea(s), Waiver(s) and Payments made: In Person By Mail
 Receipt supplied to defendant: In Person Check Is receipt By Mail via USPS **FIRST CLASS LETTER RATE**
 Waiver reviewed, found to be correct and approved. mail to defendant's present address.

Financial Responsibility **PROOF SHOWN**
 NO Financial Responsibility **PROOF**: Clerk to notify BMV
 Financial Responsibility **PROOF NOT APPLICABLE**

Clerk / Violations Clerk / Deputy Clerk _____

DATE Abstract Mailed to BMV _____ DATE Mayor's Court Transfer/Notice of Appeal _____

Municipal COURT Wapakoneta COUNTY, OHIO
 STATE OF OHIO Wapakoneta TICKET # 8070603
 City Village Township CASE #
 NAME MICHELLE NESTER
 STREET 2223 WASCANA AVE
 CITY, STATE LAKESIDE, OH ZIP 44107

OPERATOR LICENSE / STATE ID# <u>DP980572</u>	<input type="checkbox"/> None	BIRTH DATE <u>10/8/78</u>	ISSUE DATE <u>10/13/08</u>	STATE <u>OH</u>
CLASS <u>D</u>	EXPIRES <u>10/8/14</u>	ENDORSEMENT(S)/RESTRICTION(S)	SSN (last 4 digit) <u>6180</u>	
<input type="checkbox"/> CDL <input type="checkbox"/> MC <input type="checkbox"/> Other				
SEX <u>F</u>	HEIGHT <u>508</u>	WEIGHT <u>115</u>	EYES <u>Blue</u>	HAIR <u>Brn</u>
FINANCIAL RESPONSIBILITY PROOF?			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> N/A	
* If no OL/State ID: REQUIRED documentation attached: <input type="checkbox"/> Yes				

TO DEFENDANT: COMPLAINT ON 04/17 20 13 AT 0016 AM/PM, YOU
 Operated/Passenger/Parked/Walked a Passenger Motorcycle Bicycle Other
 Commercial DOT# ≥26,001 lbs. <16 Pass. Bus ≥16 Pass. Bus Haz. Mat.
 VEHICLE: YEAR 11 MAKE NISSA MODEL 40
 COLOR SIL LICENSE # NON 3460 STATE OH
 UPON A PUBLIC HIGHWAY, NAMELY IR 90 (M.P. 116)
 AT/NEAR _____ IN THE CITY OF Wapakoneta IN Wapakoneta
 COUNTY (NO.) 19 STATE OF OHIO AND COMMITTED THE FOLLOWING OFFENSE(S).

<input type="checkbox"/> SPEED: _____ MPH in _____ MPH zone	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input type="checkbox"/> Over limits, <input type="checkbox"/> Unsafe for conditions <input type="checkbox"/> ACDA, <input type="checkbox"/> Radar <input type="checkbox"/> Air <input type="checkbox"/> VASCAR <input type="checkbox"/> Pace <input type="checkbox"/> Laser	<input type="checkbox"/> Stationary <input type="checkbox"/> Moving
<input type="checkbox"/> DVI: <input type="checkbox"/> Under the influence of alcohol/drug of abuse.	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input type="checkbox"/> Prohibited blood-alcohol concentration, <input type="checkbox"/> Blood <input type="checkbox"/> Breath <input type="checkbox"/> Urine <input type="checkbox"/> Refused	<u>4511.19A.1</u>
Prior OVIs: # of prior OVIs _____ Years of prior OVIs _____	<u>4511.19A.1</u>
<input type="checkbox"/> DRIVER LICENSE: <input type="checkbox"/> None <input type="checkbox"/> Not on person <input type="checkbox"/> Revoked <input type="checkbox"/> Suspended	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
EXPIRED: <input type="checkbox"/> <6 months <input type="checkbox"/> >6 months <input type="checkbox"/> Failure to Reinstatement	
Suspension Type: _____	
<input type="checkbox"/> SAFETY BELT: Failure to wear	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input type="checkbox"/> Driver <input type="checkbox"/> Passenger <input type="checkbox"/> Child Restraint <input type="checkbox"/> Booster Seat	
<input type="checkbox"/> OTHER OFFENSE: <u>RECKLESS</u>	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input type="checkbox"/> OTHER OFFENSE: _____	<input type="checkbox"/> ORC <input type="checkbox"/> ORD <input type="checkbox"/> T.P.
<input type="checkbox"/> DRIVER LICENSE HELD <input type="checkbox"/> VEHICLE SEIZED <input type="checkbox"/> JUVENILE OFFENDER	

Court Case _____ COURT NAME _____
 Case # _____ FR SHOWN YES NO FR SHOWN - BMV to process.
 If Bond Forfeiture, Speed OVI License Child Restraint

DATE FORFEITED: _____
 CONVICTION DATE: _____

MOVING VIOLATION?	YES NO	YES NO	YES NO	NO	YES NO	YES NO
PLEA CODE						
POINTS ASSESSED						
BMV OFFENSE CODE						
IF AMENDED, OFFENSE CODE						
FATALITY						

FOR BMV USE

License Suspended _____ days/months/years Effective: _____ to _____
 Suspension Class _____
 MO - Limited Driving Privileges Effective: _____ to _____
 (See Separate Entry) Suspension Is on Count: _____ FRA SUSPENSION
 License Forfeiture - See separate BMV Form 2528
 OL Confiscated - Date sent to BMV: _____
 Other Information - See reverse side.

I hereby certify that the above statements are taken from the records of this Court.
 Authorized Signature _____ DATE _____
 Send completed copy to: Ohio Bureau of Motor Vehicles, P.O. Box 16583, Columbus, OH 43216-6583 ABSTRACT BY COURT RECORD

PRESENT ADDRESS SIGNATURE A CO. RES. PHONE

EARLE B. TURNER CLERK
CLEVELAND MUNICIPAL COURT

2013 APR 22 A 8:17

#7

THE LAW OFFICES OF

LEIF B. CHRISTMAN CO.

ATTORNEY AT LAW



2000 STANDARD BUILDING
1370 ONTARIO STREET
CLEVELAND, OHIO 44113
WWW.OHIOFELONYATTORNEY.COM

PHONE (216) 241-5019
FAX (216) 241-5022
LBCHRISTMAN@HOTMAIL.COM

(216) 548-8260

THE LAW OFFICES OF

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ATTORNEY AT LAW



2000 STANDARD BUILDING
1370 ONTARIO STREET
CLEVELAND, OHIO 44113
WWW.OHIOFELONYATTORNEY.COM

PHONE (216) 241-5019
FAX (216) 363-6013
LBCHRISTMAN@HOTMAIL.COM

Court date: _____

Call office to schedule appointment

Office Appointment: _____ @ _____ AM
PM

**Personal Injury
Criminal Defense**

Court date: _____

Call office to schedule appointment

Office Appointment: _____ @ _____ AM
PM

**Personal Injury
Criminal Defense**

NESTER, MICHELLE	2018577	2013 TRC 023649	DUI
Defendant	Record #	Case # (s)	
2223 WASCANA AVE	LAKESWOOD	OH 44107	277-74-6180
Street	City	State and Zip	SSN

Cleveland Municipal Court Probation Department Compliance Hearing Report

1 YEAR 7-11-13

TO: JUDGE ANGELA R. STOKES From: TINA JANIS Date of Hearing: 3-21-14

Reporting Status: MONTHLY
Agency Involvement: ATJ: COMPLETED DIP ON 6-23-13
5 MADD MTGS: 3/5 MET 8-6-13, 8-13-13, 8-20-13
SAT: *Def. to pay for Urinalysis testing, see below
Substance Testing Summary: SAT: 7-31-13, 8-21-13, 9-12-13, 10-21-13: Negative *Per probation policy RANDOM
Employment/Vocational Training: Rental Property Income & currently a Nursing Student w/ Cleveland Clinic
Medical/Mental Health Status:
Social/Family Status:
Record Check: 10-30-13; 3-19-14 CMC
Other: F/C paid \$766.00 Clerks office showing balance of \$10 unpaid
Recommendation: Probation to be Made IA when all conditions are met.

TINA JANIS 3-19-14
Probation Officer (216)420-8847

PETE ROCHE
Approved by Supervisor (216)664-3710

Cleveland Municipal Court
Earle B. Turner, Clerk
Office of the Clerk of Courts
Criminal Division
1200 Ontario St. Level Three

Fax Cover Sheet

* 04-03-14

Person to receive fax:

Date: 04-02-14

Number of pgs including coversheet: 3

ALS

Arisha ✓

From: Cleveland Municipal Court
Office of Clerk of Courts
Criminal Division-Level Three
Chief Deputy Clerk *[Signature]*

Traffic Department
Phone: (216) 420-8882
Fax: (216) 664-4299

Phone: _____

Fax: 1-614-752-(4748) 7987

Thank you!

Note(s): Please note: the correct case # is
2013 TRC 023649

Remarks: Urgent Review Reply ASAP Please comment

Confidentiality Notice

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✓ = on BM site ✓
as per the JE dated
4-1-14



OHIO DEPARTMENT OF PUBLIC SAFETY
BUREAU OF MOTOR VEHICLES

MODIFICATION ORDER

DRIVER NAME <i>Michelle Nester</i>		COURT NAME <i>Cleveland Municipal</i>	
ADDRESS <i>2223 Wascana Ave</i>		COURT CODE <i>1822</i>	
LICENSE NUMBER <i>RP980572</i>		COURT CASE NUMBER <i>2013TRCO23649</i>	
DATE OF BIRTH <i>10-08-78</i>	SOCIAL SECURITY NUMBER <i>277-74-6180</i>	BMV CASE NUMBER (IF APPLICABLE)	

Per order of the court, please make the following changes to the driver record:

Modify Court Suspension: Start Date _____ End Date _____

Notes:

Terminate: Pretrial Court Suspension Other _____

Delete / Vacate: (Insert Suspension / Conviction) _____

Limited driving privileges granted: From _____ To _____
 Ignition Interlock required

Driver permitted to: Renew Retest First time issuance (while under suspension)

Amend / Modify:

<input type="checkbox"/> Points	From _____	To _____
<input type="checkbox"/> Section Code	From _____	To _____
<input type="checkbox"/> BMV Offense Code	From _____	To _____
<input type="checkbox"/> Date of Offense	From _____	To _____
<input type="checkbox"/> Date of Conviction	From _____	To _____
<input type="checkbox"/> Delete Conviction	Reason _____	

Additional Case Information: *Please see Judgment Entry attached*

License Suspension: 07-11-13 to 07-11-14 is Class 4

ordered. Balance of license suspension is vacated as of

04-01-14.

*FYI: Offense date = 04-17-13
Conviction date: 07-11-13*

It is so ordered:

x *[Signature]*
AUTHORIZED SIGNATURE (CLERK, MAGISTRATE, JUDGE)

04-02-14
DATE

CLEVELAND MUNICIPAL COURT - JOURNAL ENTRY

Case Number: 2013 TRC 023649
 STATE OF OHIO / CITY OF CLEVELAND
 VS.
 WESTER, MICHELLE N
 AKA:

DOB: 10/08/1978
 SSN: XXX-XX-6180
 SCR Status: CLOSED
 Arresting Agency: OHIO STATE HIGHWAY PATROL

Event Date: 04/01/2014 11:30 am
 Event: HEARING
 Event Location: 15TH FLOOR COURTROOM A
 Event Judge: ADRINE, RONALD B.

Charge	Short Description	PNG	NGW	NC	PG	Amends Charge	FG	FNG	NOL	DWP	Fine	Days	Suspended	Fine	Days	Public Defender Fee	Time to Pay Until:	Indigency Hearing Had:	Found	Not Found	CWS in lieu of F & C	Hrs	Date	
M1 - 4511.19A1A	DRIV UNDER INFLUENCE OF ALC OR DRUG OR COMBINATION OF THE																							
M1 - 4511.19A1H	DRIV UNDER INFLUENCE OF ALC OR DRUG BREATHE: 17 HUNDR																							
M1 - 4511.20	RECKLESS OPERATION																							

Bond Set \$ _____
 Capias / BFC / Warrant to Issue
 Bond Forfeiture Vacated
 Warrant Block Release
 Defendant Advised of Rights
 W/BO I/A Demanded Days Held _____
 Cont. to: _____ at _____ am / pm Drug Court
 At: COPR CODR COCR Final SPW
 For: Pretrial Trial Jury Trial PFS PVH
 Trial Had Trial in Progress Jury Sworn Motion Hearing
 Interpreter Requested Language _____ Jury Waived
 Atty: _____ Public Defender
 Driver's License Suspended from Date of Arrest _____ or _____
 From _____ to _____ DUI # Within 6 Yrs _____
 Immobilization _____ Days Vehicle Forfeited TIP
 INS: Shown Not Shown N/A LDPG ALS Appeal ALS Term
 Motion (To) For: Mitigate susp sponte
 Granted Denied OSJ
 JUDGE / MAGISTRATE: Ronald B. Adrine

Found Indigent Costs Suspended
 Cost Satisfied
 Credit for _____ Days Served \$ _____
 Sentence Ordered Executed
 Sentence Stayed Until (Date / Time) _____
 Refer to Probation: PSI SIP: [S][P][C] CWS _____ Hrs _____ Date _____
 DV: [A][C] MHD: [S][P] Veteran's Docket: [S][P][C] DJP: [S][P][C]
 CAP DIET COP Get On Track Project HOPE
 Anger Mgmt Parenting ROCK: [P][C][H] Drug Court: [S][P][C]
 Probation Duration: MO _____ YRS Active Inactive Form 95 _____
 Probation Conditions: _____
 ATJ MADD # _____ SAT SA[A][C] AA _____ x per wk.
 Probation Violation Hearing: Had Waived Found Not Found SRS
 Probation Continued Until: _____ Probation / SIP Terminated
 Notes: Bel of SS.
Sal. ODL suspension is hereby ordered vacated.

OHIO BUREAU OF MOTOR VEHICLES
ALS COURT DISPOSITION NOTIFICATION

Case Number: 2013 TRC 023649

MICHELLE N NESTER

Date of Birth: 10/08/1978
Driver's License No: RP980572

Address:
2223 WASCANA AVE
LAKEWOOD, OH 44107

Conviction Date: 07/11/2013
Date of Offense: 04/17/2013

The appellant's ALS terminated as to the following:

- A. There was a test taken but no results
- B. They took the test and it was below the .10 (before 7/1/03)
- C. They took the test and it was below the .08 (7/1/03)
- D. The offense date has passed 90 days
- E. Plead no contest and was found guilty of a DUI
- F. ALS fee of \$405.00 waived (offense date on or after 9/16/98 to 11/2/00)
- G. ALS fee of \$425.00 waived (offense date on or after 11/3/00)
- H. ALS fee of \$475.00 waived (offense date on or after 12/1/08)
- I. Deft plead no contest and found guilty to Physical Control 433.011
- J. ALS TERMINATED
- K. Other _____

L. CLEVELAND, Chief Deputy Clerk
Date: February 16, 2014



CLEVELAND MUNICIPAL COURT - JOURNAL ENTRY

PD No. 39

Case Number: 2013 TRC 023649
 STATE OF OHIO / CITY OF CLEVELAND
 VS.
 NESTER, MICHELLE N
 AKA:

Event Date: 07/11/2013 8:30 am
 Event: SENTENCING HEARING
 Event Location: 15TH FLOOR COURTROOM C
 Event Judge: STOKES, ANGELA R.

Arresting Agency: OHIO STATE HIGHWAY PATROL

Charge	Short Description	PNG	NGW	NC	PG	Amends	Charge	FC	FNG	NOL	DWP	Suspended	Public Defender Fee
1 MI - 4511.19A1A	DRIV UNDER INFLUENCE ALCOHOL DRUG OR COMBINATION												
2 MI - 4511.19A1H	DRIV UNDER INFLUENCE OF ALCOHOL DRUG BREATH. 17 HUND												
3 MM - 4511.20	RECKLESS OPERATION												

JUDGEMENT ENTERED FOR JURY TRIAL

EARLE B. TUBNER, CLERK

Bond Set No Contact Personal Bond
 Warrant to Issue Capias Recalled
 Bond Forfeiture Vacated Original Bond Reinstated
 Warrant Block Release Warrant Fee Waived

3D Exam: W/BO H/BO Demanded Days Held
 Cont. to: _____ at _____ am/pm _____ Drug Court _____

AI: COPR CODR COCR Final SPW
 For: Pretrial Trial Jury Trial PFS
 Trial Had Trial in Progress Jury Sworn Motion Hearing
 Interpreter Requested Language _____ Jury Waived
 Atty: Sally Christman Public Defender

Driver's License Suspended from Date of Arrest _____ to _____
 From 7-11-2013 to 7-11-2014 Days 365 Vehicle Forfeited TIP
 INS LDPG ALS Appeal ALS Term

Motion To / For: _____
 Granted Denied
 JUDGE AT SIGNATURE: Angela R. Stokes

Found Indigent Costs Suspended
 Cost Satisfied
 Credit for 3 Days Served \$ _____
 Sentence Ordered Executed
 Sentence Stayed Until (Date / Time) _____ Mandatory Days _____

Refer to Probation PSI CWS
 SR: [S][I][P][C] MHD: [S][I][P] Veteran's Docket [S][I][P] DIP: [S][I][P]
 DV: [A][C] DIET COP Get On Track Project HOPE
 Anger Mgmt Parenting
 Probation Duration: _____ YRS Active Inactive

Probation Conditions: All Probation was attended from 6-20-13 to 6-23-2013.
 ATI MAADD # 5 SAT SA[A][C] AA x per wk.
 Probation Violation Hearing: Had Waived Found Not Found SRS
 Probation Continued Until: _____ Probation / SIP Terminated

Notes: Defendant will pay for all mineralis floting
see occupational therapy lastpage
idder

MEMORANDUM IN SUPPORT

Defendant Michelle Nester is a 34 year old women with NO previous record. On July 11, 2013, she entered a No Contest plea to a low tier, first lifetime offense OVI.

She has completed ALL conditions of probation, and the probation department will attest to her perfect compliance.

Defendant and counsel spent multiple 8 hour days before Judge Stokes attempting to secure driving privileges to no avail. Defendant is a successful student at Brown-Mackie College working toward an Associates Degree in Medical Assistant.

She resides by herself in Lakewood. She has endured the most difficult experience of her life with full acceptance of responsibility and mental fortitude to make it through this year. The lesson has been learned.

WHEREFORE, for all of the foregoing reasons, defendant seeks the termination of probation and her driver's license suspension.

Respectfully submitted,

Leif B. Christman
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the Office of the
Prosecutor, this _____ day of _____, 2014

Leif B. Christman
Attorney for Defendant

CCS – Driver Intervention Program

James R. Columbro, Director

JD., LICDC, ICRC

24726 Meadow Lane

Westlake, Ohio 44145-4948

Phone: (440) 979-0233 in house fax: (440) 979-1811

Email: olapiiii@ameritech.net

www.Columbroconsultationservices.net

June 24, 2013

Lief B. Christman, Esq.
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

Phone: 216-241-5019

Fax: 216-241-5022

REPORT WAS SENT TO CLEVELAND MUNICIPAL COURT

Re: Michelle N. Nester Cleveland Municipal Court 13 TRC 023649
CCS - Driver Intervention Program Program Id# 1806101 ODADAS Seq. # 11011
Arrest date 04/17/13 Convicted date 07/11/13 Program 06/20 to 06/23/13

Dear Mr. Christman:

Enclosed please find the completion report and recommendations, as it relates to the above caption client having completed the 72-hour Driver Intervention Program.

Thank you for the opportunity to provide this service to the court. This copy is for your records.

Very truly yours,

James R. Columbro lic.d.c.

James R. Columbro JD., LICDC

Enclosure

CC: Ms. Michelle N. Nester, 2223 Wascana Avenue, Lakewood, Ohio 44107

NOTICE TO RECIPIENT: This information has been disclosed to you from records protected by the Federal Confidentiality rules (42CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42CFR Part 2. A general authorization for the release of medical or other information is not sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse client.

CCS – Driver Intervention Program

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Westlake, Ohio 44145-4948

Phone: (440) 979-0233 in house fax: (440) 979-1811

Email: olapiiii@ameritech.net

June 24, 2013

Mr. Shamus Normile, PO Cleveland
The Justice Center
1200 Ontario Street, 6th Floor
Cleveland, Ohio 44113

Re: **Michelle N. Nester** Cleveland Municipal Court 13 TRC 023649
CCS - Driver Intervention Program Program Id# 1806101 ODADAS Seq. # 11011
Arrest date 04/17/13 Convicted date 07/11/13 Program 06/20 to 06/23/13

Dear Mr. Normile:

Enclosed please find a copy of that single page completion report and recommendations, if any, as it relates to the above caption client having completed the 72-hour Driver Intervention Program.

If the screening recommendations call for a referral, that referral will be followed up and contacted by this program the day after discharge.

Thank you for the opportunity to provide this service to the court.

Very truly yours,

James R. Columbro lic.d.c.

James R. Columbro JD., LICDC
Director, CCS – Driver Intervention Program

Enclosures

Cc: Ms. Michelle N. Nester, 2223 Wascana Avenue, Lakewood, Ohio 44107
Lief B. Christman, Esq., 2000 Standard Building, 1370 Ontario, Cleveland, Ohio 44113

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CCS - DIP Completion Report & Discharge Recommendations

Michelle Wester

Cleveland

June 20-23-2013

Client Name

Referral Source

Attendance Dates

The person named in this report participated in at least 21 hours of alcohol and drug addiction programming that included at a minimum:

1 hour of screening and individual contact; and

15 hours of client education on alcohol and drug abuse and addiction, including traffic safety education; and

5 hours of small group discussion.

A screening interview was conducted with the client named above in which the results of Screening instruments, Mast = 10 Mortimer Filken = 5 -recommendations and referrals made to the referring court were discussed. Yes No

Summary of client's participation: Client attended and participated in all class sessions-including discussion groups, lectures, presentations and videos. In addition, the client completed all O&A worksheets appropriately. Client complied with all the rules and regulations of the CCS - Driver Intervention Program.

Results and recommendations of the screenings: Based on the client's screening and interview results, along with the client's participation in class, this client's use of alcohol and the negative consequences that followed DOES NOT indicate a need for further recommendations at this time.

Disclosure of information form attached? Yes No

Referrals made to alcohol and drug addiction treatment programs and any referrals made to other organizations: No further referrals are necessary at this time. The client has completed the 72 Hours of Driver Intervention Program successfully.

Recommendations made to court or other organization: No further recommendations to the Court or any other organizations at this time. Should the client receive another OVI or alcohol/drug-related legal charge within a year of completing this class, the CCS - Driver Intervention Program would recommend that the Court consider ordering a full biopsychosocial assessment at that time to rule out AoD abuse/dependency.

James Columbus LICM
Signature & Credentials of Staff making recommendations.

6-23-13
Date

Client Agrees: Client Disagrees:

Client Signature: Michelle Wester Date: 6-23-13

Note: Your signature above is acknowledgment that a release has been executed and that you have been provided a copy of this program completion report for your records. This report will be sent to your referring source and that data contained herein may be supplied the Ohio Department of Alcohol and Drug Addiction Services for management information purposes and reports. Also note that the following disclosure statement accompanies all correspondence relative to your participation in the program.

NOTICE TO RECIPIENT: This information has been disclosed to you from records protected by the Federal Confidentiality rules (42CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42CFR Part 2. A general authorization for the release of medical or other information is not sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse client.

CCS – Driver Intervention Program

James R. Columbro, Director

JD., LICDC, ICRC, S.A.P.

24726 Meadow Lane

Westlake, Ohio 44145-4948

Phone: (440) 979-0233 in house fax: (440) 979-1811

Email: olapiiii@ameritech.net

June 24, 2013

Ms. Michelle N. Nester
2223 Wascana Avenue
Lakewood, Ohio 44107

REPORT WAS SENT TO CLEVELAND MUNICIPAL COURT

Re: Michelle N. Nester Cleveland Municipal Court 13 TRC 023649
CCS - Driver Intervention Program Program Id# 1806101 ODADAS Seq. # 11011
Arrest date 04/17/13 Convicted date 07/11/13 Program 06/20 to 06/23/13

Dear Ms. Nester:

Enclosed please find exactly what was sent to the court after completing the Driver Intervention Program at your request and with your written authorization.

It was a pleasure to provide you this service. If I can be of assistance in the future, do call.

Very truly yours,

James R. Columbro lic.d.c.

James R. Columbro JD., LICDC

Enclosure:

Cc: Lief B. Christman, Esq., 2000 Standard Building, 1370 Ontario, Cleveland, Ohio 44113

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3/28

NT

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
CLEVELAND MUNICIPAL COURT

2014 MAR 28 P 3:01

STATE OF OHIO,

Plaintiff,

v

MICHELLE NESTER

Defendant

#6

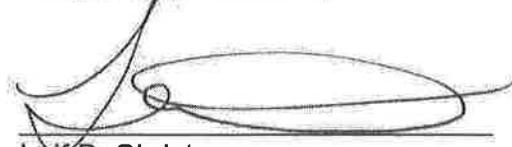
CASE NO. 2013TRC23649

JUDGE ANGELA STOKES

MOTION TO TERMINATE
PROBATION AND DRIVER'S
LICENSE SUSPENSION
(Oral Hearing Requested)

Now comes the Defendant, by and through undersigned counsel and respectfully requests and moves this Honorable Court to terminate her probation and license suspension. A Memorandum in Support of the Motion is attached hereto and incorporated herein by reference.

Respectfully submitted,



Leif B. Christman
Attorney for Defendant
1370 Ontario Street, Suite 2000
Cleveland, OH 44113-1726
(216) 241-5019
Fax (216) 241-5022
lbchristman@hotmail.com
Reg.No. 0070014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the Office of the
Prosecutor, this 28 day of March, 2014



Leif B. Christman
Attorney for Defendant

MEMORANDUM IN SUPPORT

Defendant Michelle Nester is a 34 year old women with NO previous record. On July 11, 2013, she entered a No Contest plea to a low tier, first lifetime offense OVI.

She has completed ALL conditions of probation, and the probation department will attest to her perfect compliance.

Defendant and counsel spent multiple 8 hour days before Judge Stokes attempting to secure driving privileges to no avail. Defendant is a successful student at Brown-Mackie College working toward an Associates Degree in Medical Assistant.

She resides by herself in Lakewood. She has endured the most difficult experience of her life with full acceptance of responsibility and mental fortitude to make it through this year. The lesson has been learned.

WHEREFORE, for all of the foregoing reasons, defendant seeks the termination of probation and her driver's license suspension.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Leif B. Christman', written over a horizontal line.

Leif B. Christman
Attorney for Defendant

CCS – Driver Intervention Program

James R. Columbro, Director

JD., LICDC, ICRC

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Westlake, Ohio 44145-4948

Phone: (440) 979-0233 in house fax: (440) 979-1811

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June 24, 2013

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Thank you for the opportunity to provide this service to the court. This copy is for your records.

Very truly yours,

James R. Columbro lic.d.c.

James R. Columbro JD., LICDC

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CC: Ms. Michelle N. Nester, 2223 Wascana Avenue, Lakewood, Ohio 44107

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June 24, 2013

Mr. Shamus Normile, PO Cleveland
The Justice Center
1200 Ontario Street, 6th Floor
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CCS - Driver Intervention Program Program Id# 1806101 ODADAS Seq. # 11011
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Very truly yours,

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James R. Columbro JD., LICDC
Director, CCS – Driver Intervention Program

Enclosures

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CCS - DIP Completion Report & Discharge Recommendations

Michelle Wester

Cleveland

June 20-23-2013

Client Name

Referral Source

Attendance Dates

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James Columbus LICC
Signature & Credentials of Staff making recommendations.

6-23-13
Date

Client Agrees: 1 Client Disagrees:

Client Signature: Michelle Wester Date: 6-23-13

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February 2007

CCS – Driver Intervention Program

James R. Columbro, Director

JD., LICDC, ICRC, S.A.P.

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Westlake, Ohio 44145-4948

Phone: (440) 979-0233 in house fax: (440) 979-1811

Email: olapiiii@ameritech.net

June 24, 2013

Ms. Michelle N. Nester
2223 Wascana Avenue
Lakewood, Ohio 44107

REPORT WAS SENT TO CLEVELAND MUNICIPAL COURT

Re: **Michelle N. Nester** Cleveland Municipal Court 13 TRC 023649
CCS - Driver Intervention Program Program Id# 1806101 ODADAS Seq. # 11011
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James R. Columbro JD., LICDC

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Case Number: 2013 TRC 023649
STATE OF OHIO / CITY OF CLEVELAND
VS.
NESTER, MICHELLE N
AKA:

DOB: 10/08/1978
SSN: XXX-XX-6180
SCR Status: CLOSED
Arresting Agency: OHIO STATE HIGHWAY PATROL

Event Date: 09/16/2013 1:30 pm
Event: MOTION HEARING
Event Location: 15TH FLOOR COURTROOM C
Event Judge: STOKES, ANGELA R.

dependent does not have any driving privileges

Charge	Short Description	PNG	NGW	NC	PG	Amends Charge	FG	FNG	NOL	DWP	Fine	Days	Suspended	Fine	Days	Public Defender Fee	Time to Pay Until:
1. MI - 4511.19A1A	DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THE																
2. MI - 4511.19A1H	DRIV UNDER INFLUENCE OF ALC OR DRUG BREATH: 17 HUND																
3. MM - 4511.20	RECKLESS OPERATION																

Richard Datt and Sean Jenkins have an agreement to protect Ms. Nester with the same terms as the previous case.

Bond Set \$ No Contact Personal Bond
 Capias / BFC / Warrant to Issue Capias Recalled
 Bond Forfeiture Vacated Original Bond Reinstated
 Warrant Block Release Warrant Fee Waived
 Defendant Advised of Rights

3D Exam: W / BO H / BO Demanded Days Held
Cont. to: at JUDGMENT ENTRY RECEIVED / pm Drug Court
At: COPR CODR COCR Final SPW
For: Pretrial Trial Jury Trial PFS
 Trial Had Trial in Progress Jury Sworn Motion Hearing

Interpreter Requested Language Jury Waived
 Atty: *Leij B. Chittman* Public Defender
Driver's License Suspended from Date of Arrest _____ or _____
From _____ to _____ DUI # Within 6 Yrs _____
Immobilization _____ Days Vehicle Forfeited TIP

INS LDGP ALS Appeal ALS Term
Motion of *dependent to renew dependent's school driving privileges for the basis that dependent failed to provide information regarding license*
 Granted Denied

JUDGE / MAGISTRATE: *Angela R. Stokes*
dependent, her license and driving privileges.
Page 1 of 1 which is needed to allow privileges.

Probation Conditions: *All other conditions remain in effect*
Probation Duration: *MO* YRS Active Inactive
Probation Violation Hearing: Had Waived Found Not Found SRS
Probation Continued Until: *7-11-2014* Probation / SIP Terminated

Notes: *Refer to Probation: PSI CWS MHD: [S][P] Veteran's Docket: [S][P] DJP: [S][P]*
Refer to Probation: SA[A][C] AA x per wk.
Refer to Probation: MADD # SAT COP Get On Track Project HOPE
Refer to Probation: ATJ MADD # SAT SA[A][C] AA x per wk.
Refer to Probation: Had Waived Found Not Found SRS
Refer to Probation: Probation / SIP Terminated

CLEVELAND MUNICIPAL COURT - JOURNAL ENTRY

PD No. 48

Case Number: 2013 TRC 023649
STATE OF OHIO / CITY OF CLEVELAND
VS.
NESTER, MICHELLE N
AKA:

Event Date: 09/06/2013 9:00 am
Event: SET FOR REVIEW
Event Location: 15TH FLOOR COURTROOM C
Event Judge: STOKES, ANGELA R.

A. STOKES SEP 09 2013

OHIO STATE HIGHWAY PATROL

Charge	Short Description	Prosecutor										Suspended Fine Days	Public Defender Fee			
		PNG	NGW	NC	PG	Amends Charge	FG	FNG	NOL	DWP	Fine			Days	Time to Pay Until:	
1	M1 - 4511.19A1A DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THE															
2	M1 - 4511.19A1H DRIV UNDER INFLUENCE OF ALC OR DRUG BREATHE: 17 HUND)															
3	MM - 4511.20 RECKLESS OPERATION															

Bond Set \$ _____ No Contact Personal Bond
 Capias / BFC / Warrant to Issue Capias Recalled
 Bond Forfeiture Vacated Original Bond Reinstated
 Warrant Block Release Warrant Fee Waived
 Defendant Advised of Rights

3D Exam: W/BO H/BO Demanded Days Held
 Cont. to: 9-16-2013 at 1:30 am (pm) Drug Court
 At: COPR CODR COCR Final SPW
 For: Pretrial Trial Jury Trial PFS
 Trial Had Trial in Progress Jury Sworn Motion Hearing

Interpreter Requested Language _____ Jury Waived
 Atty: _____ Public Defender
 Driver's License Suspended from Date of Arrest _____ or
 From _____ to _____ DUI # Within 6 Yrs _____
 Immobilization Days Vehicle Forfeited TIP
 INS LDPG ALS Appeal ALS Term
 Motion To / For: Granted Denied

Probation / SIP Terminated

Probation Conditions: *Waive. Defendant will be notified by Atty. Christman to submit - pay for & x per MVE to that before*

Probation Continued Until: 9-11-2014

Notes: *Case held to 9-9-2013 to reach Atty. Fay P. Christman who agreed to 9-16-2013 on 9-9-13*

JUDGE / MAGISTRATE *Angela R. Stokes*

Cleveland Municipal Court

Cuyahoga County, Ohio

STATE OF OHIO)
CITY OF CLEVELAND)
- VS -)

Michelle Nester)
Defendant)

CASE NO. 2013 TRC 023649

DATE: A. STOKES JUL 11 2013

OCCUPATIONAL DRIVING
PRIVILEGE ORDER

Defendant's license is suspended from July 11, 2013 to July 11, 2014

Defendant's Motion for Occupational Driving Privileges is denied
JUDGEMENT BY MOTION FOR JOURNALIZATION

Defendant's Motion for Occupational Driving Privileges is granted, subject to the following terms:

Earle B. Turner, Clerk
EMPLOYER'S NAME & ADDRESS Brown Mackie College
12301 Snow Road
Parma, Ohio

INSURANCE CO. American Family Insurance POLICY NO. 1922-8155-01-10 FPPA-0

COVERAGE March 10, 2013 to September 10, 2013

DRIVING PRIVILEGES GRANTED FROM July 11, 2013 TO September 10, 2013

DAYS Monday through Fridays TIMES 5:45 A.M. to 5:45 pm

SPECIAL CONDITIONS: Miss Nester has permission to
drive to: Brown Mackie College, 755
White Pond Drive, Akron, Ohio 44320 as
listed above

Defendant's Signature Michelle Nester 7/11/13 attached letter Angela Stokes
Judge

These driving privileges are subject to the limitations described above and to any court orders or BMV requirements imposed either prior to or subsequent to the issuance of this grant of privileges. To the extent that the terms of this grant are either in conflict with or inconsistent with any other order or requirement, this grant of privileges is null and void. Failure to maintain insurance and failure to pay fine and court costs in a timely manner renders this grant of privileges null and void.

THIS ORDER SHALL NOT TAKE EFFECT UNTIL IT IS CERTIFIED BY THE CLERK OF CLEVELAND MUNICIPAL COURT.



**CLEVELAND MUNICIPAL COURT
AGREEMENT FOR PAYMENT
OF FINE AND COURT COST
TIME TO PAY AUTHORIZATION**

2013 TRC 023649

July 11, 2013

After a hearing held by the Court, I, **MICHELLE N NESTER** being sentenced to a fine and court costs of **\$766.00** do hereby agree to pay the fine and/or court costs imposed on me in full by **07/31/2013**.

I also agree to make payments as ordered by the Judge/Magistrate until the fine and/or court costs are paid in full.

DO NOT RETURN TO COURT ON THE ABOVE DATE

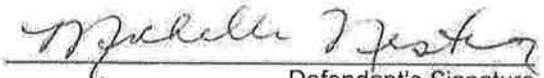
It is further understood by me that if I fail to meet the terms of this agreement without reasonable and just cause, I shall be subject to a Warrant for my arrest being issued, my license being forfeited, and a civil judgment being rendered against me. This will also result in a warrant block being issued from the BMV and any additional cost. **"WARNING": Failure to comply with the payment schedule or to complete your community service requirement may result in the blocking of your motor vehicle registration or transfer of registration!"**

License No. **RP980572**
Date of Birth: **10/08/1978**

L. CLEVELAND
Deputy Clerk

Address: **2223 WASCANA AVE
LAKEWOOD, OH 44107**

Phone: **()--**


Defendant's Signature

INFORMATION:

CLEVELAND MUNICIPAL COURT
OFFICE OF THE CLERK OF
COURTS
CRIMINAL DIVISION
(216) 664-4790

MAILING ADDRESS

CLEVELAND MUNICIPAL COURT
P.O. BOX 99639
CLEVELAND, OHIO 44199-0639

CASHIER HOURS

MONDAY-FRIDAY 8 A.M. - 11 P.M.
SAT- SUN 10 A.M. - 9 P.M.

Cleveland Municipal Court

Cuyahoga County, Ohio

STATE OF OHIO)
CITY OF CLEVELAND)
- VS -)

CASE NO. 2013 TR C 023649

DATE: A. STOKES JUN 05 2013

Michelle Nester)

Defendant

OCCUPATIONAL DRIVING
PRIVILEGE ORDER

* The ALS Suspension is pending

Defendant's license is suspended from _____ to _____

JUDGEMENT ENTRY RECEIVED
FOR JOURNALIZATION

JUN 06 2013

Defendant's Motion for Occupational Driving Privileges is denied

EARLE B. TURNER, Clerk

Defendant's Motion for Occupational Driving Privileges is granted, subject to the following terms:

EMPLOYER'S NAME & ADDRESS

Brown Mackie College
12301 Snow Road
Parma, Ohio 44130

INSURANCE CO.

American Family Insurance

POLICY NO.

1922-8155-01-70-FPPA-OH

COVERAGE

March 10, 2013 to September 10, 2013

DRIVING PRIVILEGES GRANTED FROM

June 6, 2013 TO July 11, 2013

DAYS

Mondays through Fridays

TIMES

5:45 A.M to 5:45 p.m.

SPECIAL CONDITIONS:

An interlock device shall be installed and maintained on the 2011 Nissan, VIN 1N4AASAPPBC8572713 at all times from 6-6-13 to 7-11-2013. See 6-5-13 Letter from Brown Mackie College, 6-5-13 letter + insurance information

Michelle Nester 6/5/13
Defendant's Signature

Judge

Earle B. Turner

Michelle Nester shall only operate the above listed 2011 Nissan.

These driving privileges are subject to the limitations described above and to any court orders or BMV requirements imposed either prior to or subsequent to the issuance of this grant of privileges. To the extent that the terms of this grant are either in conflict with or inconsistent with any other order or requirement, this grant of privileges is null and void. Failure to maintain insurance and failure to pay fine and court costs in a timely manner renders this grant of privileges null and void.

No one else shall operate the 2011 Nissan and Ms. Nester shall not operate any other vehicle. Every other Thursday in

THIS ORDER SHALL NOT TAKE EFFECT UNTIL IT IS CERTIFIED BY THE CLERK OF CLEVELAND MUNICIPAL COURT.

June and July 2013 (June 13, 2013 + June 27, 2013 and July 11, 2013) Ms. Nester had permission to drive to: Brown Mackie College, 1755 White Pond Dr., Akron, Ohio 44320 with the same HOEP#119 listed above.



Personal Attention. Professional Growth

June 5, 2013

Judge Angela R. Stokes,

Michelle Nester attends clinical for the next four months, as a requirement of the Surgical Technology program at Brown Mackie College. In fulfillment of the program, she must attend clinical site Monday through Friday from 7:00am 3:00 pm. Michelle will need to report to site by 6:30 am, and on every other Friday in the months of June and July; she will need to come to the Brown Mackie Campus in Akron. In the months of August and September she will need to report on Fridays to campus, plus attend her site Monday through Thursday. If you have any further questions, please feel free to contact me.

Thank you,

A handwritten signature in black ink that reads "Shelia Bratcher".

Shelia Bratcher, MBA, CST
Department Chair, Surgical Technology
330-869-3664
sbratcher@brownmackie.edu

June 5, 2013

In Re: Michelle Nester/2013TRC023649 -

Deft. Nester has requested the following schedule for Occupational Driving Privileges:

Monday through Friday leave home 5:45 a.m. to attend work/school (Brown Mackie College) in Parma, Ohio.

Return home by 5:45 p.m. No occupational driv. priv. for Sat. or Sun.

Every other Thursday in June and July, Ms. Nester will drive to/attend Brown Mackie College, Akron campus but in/out time remain the same.

Every Friday in August/September, Ms. Nester will drive to/attend Brown Mackie College, Akron campus but in/out time remain the same.

Below.

PLACE IN YOUR VEHICLE

AMERICAN FAMILY INSURANCE COMPANY
6000 American Pkwy • Madison, WI 53783

CLAIMS: 1-800-MYAMFAM (1-800-692-6326)
OHIO MOTOR VEHICLE
PROOF OF INSURANCE CARD

Policy No: 1922-8155-01-70-FPPA-OH

Effective Date: 3-10-2013 Expiration Date: 9-10-2013

2011 NISS MSV VIN: 1N4AA5AP8BC862713

Coverages: BIPD UMI UM ME COMP COLL ERS

NESTER, MICHELLE J
2223 WASCANA AVE
LAKEWOOD OH 44107-6133

Agent: American Family 047
Agent Phone: (330) 239-5500

This card must be carried in the insured motor vehicle
for production upon demand.
Important message on reverse side.



OHIO INTERLOCK

24-HR Electronic Monitoring Department

Ignition Interlock Enrollment Form

Office 866-616-3133 Fax 440-273-7421

DATE: 6-5-13

Court Information

Court: CEOW MUNI Probation Officer: A. ORITE

Defendants Information

First Name MICHELLE Last NESTEN

Home Phone# 216-228-6304 Cell Phone# 440-666-4332

Address

Street 2223 WASCANA City LAKESWOOD

State OH Zip Code 44107

Term of Ignition Interlock Program

Date Start 6/6/13 Date End 7/11/13

VIN#: 1N4AA5AP8BC852713

Automobile Information

Year 2011 Make Nissan Model MAXIMA

** PLEASE SEE ATTACHED JOURNAL ENTRY.
AND order of privileges*

piece

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO

Plaintiff,

v

MICHELLE NESTER,

Defendant

CASE NO. 2013TRC23649

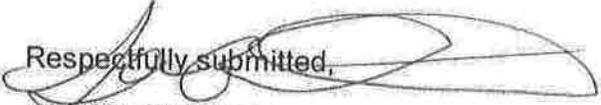
JUDGE ANGELA R. STOKES

MOTION TO EXTEND OCCUPATIONAL
DRIVING PRIVILEGES

Now comes the defendant, by and through undersigned counsel, and hereby respectfully requests that this Honorable Court extend her occupational driving privileges. On July 11, 2013, this Honorable Court granted the defendant occupational driving privileges from that date through the end of the policy term of her insurance, which was September 10, 2013. Defendant has renewed her auto insurance and requests that her driving privileges be extended through the end of the new policy term of September 10, 2013 to March 10, 2014, under the same terms as previously granted. See attached proof of insurance.

WHEREFORE, for the foregoing reasons, Defendant herein, by and through undersigned counsel hereby requests an extension of her occupational driving privileges.

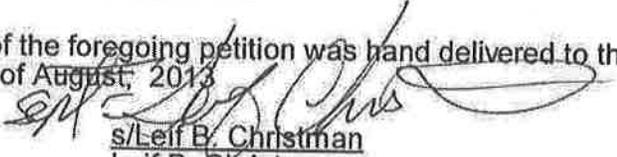
Respectfully submitted,


s/Leif B. Christman
Leif B. Christman Reg.No. 0070014
Attorney for Defendant
1370 Ontario Street, Suite 2000
Cleveland, OH 44113-1726
(216) 241-5019
Fax (216) 241-5022
Lbchristman@hotmail.com

CLERK OF CLEVELAND
MUNICIPAL COURT
CRIMINAL #14
SEP 13 11 27 AM '13

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition was hand delivered to the Office of the Prosecutor this 5 day of August, 2013.



s/Leif B. Christman
Leif B. Christman
Attorney for Defendant

AMERICAN FAMILY INSURANCE COMPANY
AMERICAN STANDARD INSURANCE COMPANY OF OHIO
CLAIMS: 1-800-MYAMFAM (1-800-692-6326)

OHIO MOTOR VEHICLE
PROOF OF INSURANCE CARD

Policy No 1922-8155-01-70-FPPA-OH

Effective Date 09-10-2013

Expiration Date 03-10-2014

Vehicle Description
2011 NISS MSV

Vehicle Ident Number
LN4AA5AP8BC852713

Coverages

BI-PD MED COMP COLL UM UIM ERS D&D RR

Agent

MARK SUNDRA

Agent Phone (216) 712-6444

NESTER, MICHELLE J
2223 WASCANA AVE
LAKEWOOD, OH 44107-6133

Use this card with your application for
registration of your vehicle.

AMERICAN FAMILY
INSURANCE COMPANY

OHIO BUREAU OF MOTOR VEHICLES
ALS COURT DISPOSITION NOTIFICATION

Case Number: 2013 TRC 023649

MICHELLE N NESTER

Date of Birth: 10/08/1978
Driver's License No: RP980572

Address:
2223 WASCANA AVE
LAKEWOOD, OH 44107

Conviction Date: 07/11/2013
Date of Offense: 04/17/2013

The appellant's ALS terminated as to the following:

- A. There was a test taken but no results
- B. They took the test and it was below the .10 (before 7/1/03)
- C. They took the test and it was below the .08 (7/1/03)
- D. The offense date has passed 90 days
- E. Plead no contest and was found guilty of a DUI
- F. ALS fee of \$405.00 waived (offense date on or after 9/16/98 to 11/2/00)
- G. ALS fee of \$425.00 waived (offense date on or after 11/3/00)
- H. ALS fee of \$475.00 waived (offense date on or after 12/1/08)
- I. Deft plead no contest and found guilty to Physical Control 433.011
- J. ALS TERMINATED
- K. Other _____

L. CLEVELAND, Chief Deputy Clerk

Date: February 16, 2014



CLEVELAND MUNICIPAL COURT - JOURNAL ENTRY

PD No. 39

Case Number: 2013 TRC 023649
STATE OF OHIO / CITY OF CLEVELAND
VS.
NESTER, MICHELLE N
AKA: OHIO STATE HIGHWAY PATROL

Event Date: 07/11/2013 8:30 am
Event: SENTENCING HEARING
Event Location: 15TH FLOOR COURTROOM C
Event Judge: STOKES, ANGELA R.

Charge	Short Description	PNG	NCW	NC	PG	Amends Charge	FG	FNG	NOL	DWP	Fine	Suspended	Public Defender Fee
1. MI - 4511.19A1A. DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF ALC/DRUG	JUDGEMENT ENTERED FOR JO										1015	180	1700
2. MI - 4511.19A1H. DRIV UNDER INFLUENCE OF ALC OR DRUG BREATHE - 17 HUND	FOR JO												Time to Pay Until: 7-31-2013
3. MM - 4511.20 RECKLESS OPERATION													Indigency Hearing Had: Found <input type="checkbox"/> Not Found <input type="checkbox"/>

EARLE B. TURNER, CLERK

Bond Set \$ No Contact Personal Bond

Warrant to Issue Capias Recalled

Bond Forfeiture Vacated Original Bond Reinstated

Warrant Block Release Warrant Fee Waived

Defendant Advised of Rights

3D Exam: W/BO H/BO Demanded Days Held _____

Cont. to: _____ at _____ am / pm Drug Court

At: COPR CODR COCR Final SPW

For: Prefrial Trial Jury Trial PFS

Trial Had Trial in Progress Jury Sworn Motion Hearing

Interpreter Requested Language _____ Jury Waived

Atty: *Lizy Christopher* Public Defender

Driver's License Suspended from Date of Arrest _____ to _____

Immobilization: *7-11-2013* Days Vehicle Forfeited TIP

INS LDPG ALS Appeal ALS Term

Motion To / For: Granted Denied

JUDGE / MAGISTRATE: *Angela R. Stokes*

Sentence Satisfied

Cost Partially Suspended \$ _____

Sentence Suspended _____ Days

Sentence Ordered Executed _____

Sentence Stayed Until (Date / Time) _____

Refer to Probation: PSI CWS Hrs _____ Date _____

SIP: [S][P][C] MHD: [S][P] Veteran's Docket: [S][P] DJP: [S][P]

DV: [A][C] DIET COP Get On Track Project HOPE

Anger Mgmt Parenting Probation Duration: *MO 1 YRS* Active Inactive

Probation Conditions: *ATF Program was attended*

from 6-20-13 to 6-23-2013

ATJ MADD # *5* SAT SA[A][C] AA _____ x per wk.

Probation Violation Hearing: Had Waived Found Not Found SRS

Probation Continued Until: _____ Probation / SIP Terminated

Notes: *Defendant will pay for all urinalysis testing*

See Occupational Driving Injuries order

COMMITMENT

ON FINAL TRIAL WORKHOUSE

2013 TRC 023649

THE STATE OF OHIO
CUYAHOGA COUNTY
CITY OF CLEVELAND

IN CLEVELAND MUNICIPAL COURT

To the keeper of the House of Corrections – GREETINGS:

WHEREAS, **MICHELLE N NESTER**

Date of Birth: **October 08, 1978**

Has been arrested upon a warrant founded upon complaint countersigned by the Prosecuting Attorney of the Municipal Court of said City, charging said defendant with:

4511.19A1A	DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM
4511.19A1H	DRIV UNDER INFLUENCE OF ALC OR DRUG BREATH: 17 HUNDREDTHS OF ONE GRAM OR MORE PER 200TH TEN LITERS
4511.20	RECKLESS OPERATION

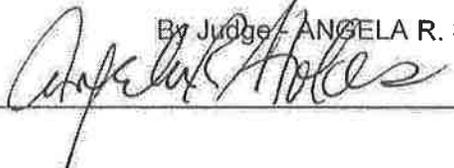
Committed in Cleveland, Cuyahoga County, State of Ohio, on July 11, 2013, and the said Defendant, having been duly tried and convicted on said charges on before the ANGELA R. STOKES Honorable Judge of Cleveland Municipal Court and sentenced by said Court to pay a fine of and costs, and to be imprisoned in the CLEVELAND HOUSE OF CORRECTIONS of said City, at labor, for a period of 3 days from the date thereof and thereafter to be imprisoned until said fine and costs are paid, or secured to be paid or he/she is otherwise discharged according to law.

Therefore, in the name of the State of Ohio you are commanded to receive the said defendant in your custody, in the jail of the county aforesaid, there to remain until he/she shall be discharged by due course of law.

**GIVEN UNDER MY HAND, AND SEAL OF SAID COURT, THIS DATE
EARLE B. TURNER, Clerk, Cleveland Municipal Court**

L. CLEVELAND, Deputy Clerk

By Judge ANGELA R. STOKES



SPECIAL PROVISIONS:

CREDIT FOR 3 DAYS SERVED

Case Number: 2013 TRC 023649 DOB: 10/08/1978 Event Date: 06/04/2013 9:00 am
 STATE OF OHIO / CITY OF CLEVELAND SSN: XXX-XX-6180 Event: CRIMINAL PRETRIAL
 NESTER, MICHELLE N. SCR Status: OPEN Event Location: 15TH FLOOR COURTROOM C

AKA: *6-4-2013 Defendant failed to understand to bring documentation of management*
 Charge: *Short Description* 1 M1 - 4511.19A1A DRIV UNDER INFLUENCE ALCOHOL OR DRUG BREATH: 17 HUNDI
 2 M1 - 4511.19A1H DRIV UNDER INFLUENCE OF ALCOHOL OR DRUG BREATH: 17 HUNDI
 3 NM1 - 4511.20 RECKLESS OPERATION

Charge	Short Description	PNG	NGW	MC	PG	Amends Charge	PG	FYE	NOL	DWP	Fine	Days	Fine	Days	Suspended	Public Defender Fee	Time to Pay Until:
1 M1 - 4511.19A1A	DRIV UNDER INFLUENCE ALCOHOL OR DRUG BREATH: 17 HUNDI	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>						<input type="checkbox"/>					
2 M1 - 4511.19A1H	DRIV UNDER INFLUENCE OF ALCOHOL OR DRUG BREATH: 17 HUNDI	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>						<input type="checkbox"/>	
3 NM1 - 4511.20	RECKLESS OPERATION	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>						<input type="checkbox"/>	

Please provide Defendant with copy of program information also
 Bond Set No Contact Personal Bond
 Capias / BFC / Warrant to Issue Capias Recalled
 Bond Forfeiture Vacated Original Bond Reinstated
 Warrant Block Release Warrant Fee Waived
 Defendant Advised of Rights

3D Exam: W/BO H/BO Demanded Days Held
 Cont to: *7-11-2013* at *8:30 am* pm Drug Court
 At: COPR CODR COCR Final SPW
 For: Pretrial Trial Jury Trial PFS
 Trial Had Trial in Progress Jury Sworn Motion Hearing
 Interpreter Requested Language Jury Waived
 Public Defender

Driver's License Suspended from Date of Arrest _____ to _____
 From _____ to _____
 DUI # Within 6 Yrs _____
 Immobilization _____ Days Vehicle Forfeited TIP
 INS LDPG ALS Appeal ALS Term
 Motion *to suspend* Granted Denied

Probation Continued Until: _____
 Notes: *Defendant still parole dependent with*
 Probation Violation Hearing: Had Waived Found Not Found
 Probation / SIP Terminated

Probation Conditions: *Defendant will pay for the violation*
 SIP: [S][P][I][C] MHD: [S][I][P] Veteran's Docket: [S][I][P] DIP: [S][I][P]
 DV: [A][I][C] DIET COP Get On Track Project HOPE
 Anger Mgmt Parenting
 Probation Duration: _____ MO _____ YRS _____
 Active Inactive

JUDGES / MAGISTRATES: *Judge David Stokes*
 FOR PSI Interview, Defendant report on 6-5-13 at 5 pm
 * Defendant needs alternative shelter
 Submitting same cost / information

JUDGEMENT RECEIVED FOR SENTENCE SUSPENSION

EARLE B. TURNER, CLERK

Stokes, Angela R.
 15th Floor Courtroom C

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

2013 MAY 29 P 2:21

#6

STATE OF OHIO

Plaintiff

-vs-

MICHELLE NESTER

Defendant

CASE NO.: 2013TRC23649

JUDGE: ANGELA R. STOKES

REQUEST FOR ORAL HEARING

As per local Rule 7.02 counsel requests an oral hearing at which [redacted] witnesses will be presented.

MOTION TO SUPPRESS AND/OR IN LIMINE

Now comes the defendant, through counsel, and hereby moves to suppress, or in the alternative for an order in limine prohibiting introduction of any and all evidence, obtained from the warrantless seizure of the defendant including but not limited to:

- A. Tests of Defendant's coordination and/or sobriety and/or alcohol and/or drug level, including but not limited to chemical tests of defendant's alcohol and/or drug level.
- B. Statements taken from or made by the defendant.
- C. The defendant's exercise of her right to remain silent.
- D. Observations and opinions of the police officer(s) who stopped the defendant and/or arrested and/or tested the defendant regarding defendant's sobriety and/or alcohol and/or drug level.
- E. Observations of the officer which import an unwarranted aura of scientific validity to the field sobriety tests.

The defendant submits that the burden is upon the state to justify the warrantless seizure of the defendant and evidence taken from the defendant and to show why the above evidence should not be suppressed due to the following grounds.

1. There was no lawful cause to stop or detain the Defendant, detain the Defendant, and/or probable cause to arrest the Defendant without a warrant.
2. The test or tests to determine the Defendant's alcohol or drug level were not taken voluntarily and were unconstitutionally coerced when obtained due to the threat of loss of license not sanctioned by the requirement of R.C. §4511.191 or §4511.192.
3. The individual administering the Defendant's test of alcohol did not conduct the test in accordance with the time limitation and regulations of the State of Ohio in R.C. §4511.19(D), §4506.17(B) and the Ohio Department of Health governing such testing and/or analysis, as set forth in chapter OAC §3701-53-02 of the Ohio Administrative Code, including the operator's checklist instructions issued by the Ohio Department of Health under OAC §3701-53-02(D) and the instrument display under in violation of OAC §3701-53-02(E).
4. The results of subject tests were not retained in a manner prescribed by the director of health as required by OAC 3701-53-02 (E) Nor were they retained for at least three years in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.
5. The results of all instrument checks, controls, certifications, calibration checks and records of service and repairs were not retained for no less than three years in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code
6. Results of instrument checks which were outside the range specified in OAC 3701-53-04(B) were not preserved, identified and retained pursuant to OAC 3701-53-04(G) and OAC 3401-53-01(A).
7. Results of certifications which were outside the range specified in OAC 3701-53-04(C) were not preserved, identified and retained pursuant to OAC 3701-53-04(G) and OAC 3401-53-01(A).
8. The Intoxilyzer 8000 used did not perform a dry gas control test before and after every subject test and instrument certification using a dry gas standard traceable to the national institute of standards and technology (NIST) in violation of OAC §3701-53-04(B).
9. Dry gas control results were not at or within five one-thousandths (0.005) grams per two hundred ten liters of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard. Nor did the testing machine abort

the subject test or instrument certification in progress in violation of OAC §3701-53-04(B).

10. Representatives of the director did not perform an instrument certification on approved evidential breath testing instruments listed under paragraph (A) (3) of rule OAC §3701-53-02 of the Administrative Code using a solution containing ethyl alcohol approved by the director of health according to the instrument display for the instrument being certified within each calendar year in violation of OAC §3701-53-04(C).
11. The instrument listed under paragraph (A) (3) of rule OAC §3701-53-02 was not certified at the earlier of either once every calendar year or when the dry gas standard on the instrument was replaced, in violation of OAC §3701-53-04(C).
12. The instrument certifications were not within five one-thousandths (0.005) grams per two hundred ten liters of the target value for the approved solution. Nor was the instrument removed from service until serviced or repaired in violation of OAC §3701-53-04(C).
13. An instrument check or certification was not made in accordance with paragraphs (A) and (C) of OAC §3701-53-04 when a new evidential breath testing instrument was placed in service or when the instrument was returned after service or repairs, but before the instrument was used to test subjects in violation of OAC §3701-53-04(D).
14. A bottle of approved solution was used either more than three months after its date of first use, or after the manufacturer's expiration date on the approved solution certificate in violation of OAC §3701-53-04(E).
15. The alcohol solution was not kept under refrigeration when not being used nor was the approved solution bottle retained for reference until that bottle of approved solution was discarded in violation of OAC §3701-53-04(E).
16. All instrument certifications on approved evidential breath testing instruments listed under paragraph (A)(3) of rule OAC §3701-53-02 of the Administrative Code were not performed by representatives of the director of the Department of Health in violation of OAC §3701-53-07(C).
17. The Intoxilyzer 8000 operator issued an operator access card under paragraph (C) of rule 3701-53-09 of the Administrative Code, was not subject to a proficiency examination once per calendar year in violation of OAC §3701-53-08(D).
18. The Intoxilyzer 8000 operator did not possess a valid operator access card under paragraph (D) and (E) of rule 3701-53-09 which was not revoked, suspended, or denied under rule 3701-53-10 of the Administrative Code. Ohio Administrative Code 3701-53-09(D) requires ODH to issue operator access cards "to individuals who qualify under the applicable provisions of Rule 3701-53-07..." The ODH

regulations have no specific applicable provisions in 3701-53-07 for qualifications for operator access cards. The Ohio Supreme Court requires strict compliance with Revised Code Section 3701.143 which mandates that the director of ODH shall ascertain the qualifications of individuals to conduct breath tests. In *State v. Ripple*, 70 OH St. 3d, 86 (1994)

The director is not permitted unlimited discretion to issue operator access cards. The qualifications must be established first. Without qualifications there is no basis for issuance of operator access cards. Because there are no standards there is also no basis for the ODH director to exercise discretion to issue an operator access card. Therefore Defendant's test was not performed by a qualified operator and the result must be suppressed.

19. OAC §3701-53-08(D) constitutes an abuse of discretion in that it requires no access cards or permits and imposes no standards or qualifications for those persons involved in alcohol testing who are the director's designees or individuals appointed by the director of health.
20. The operator operating the tester in the case at bar did not meet the qualification requirements specified in OAC §3701-53-07(D) and (E).
21. The operator's manual was not kept in the area where the tests were performed as required by OAC 3701-53-01(B) and *State vs. Douglas*, 2004 Ohio 5726; 2004 Ohio App. LEXIS 5167.
22. The operator's manual(s), was (were) not followed as required by *State vs. Schlegel*, 2004 Ohio 2535; 2004 Ohio App. LEXIS 2245.
23. Results of instrument checks, controls, certifications, calibration checks were outside the ranges and times specified in OAC 3701-53-04(A), (A)(1) and (A)(2).
24. Results of instrument checks, controls, certifications, calibration checks and records of service and repairs were not preserved, identified and retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code, OC as required by 3701-53-04(C) and OAC 3701-53-04(G).
25. By removing the forms in the appendix of the Ohio Administrative Code, the 2000 amendments to that code left this state without any officially approved procedure for administering breath tests. As such, suppression is warranted under *State v. Ripple*, 70 Ohio St.3d 86, 637 N.E.2d 304 (1994).
26. Alveolar or deep lung air was not sampled as required by OAC 3701-53-02 (C). The testing machine is not adequately designed and/or the regulations are not properly drafted so as to ensure that alveolar air is sampled.

27. Results of instrument checks, controls, certifications, calibration checks and records of service and repairs were not retained for three years as required by OAC 3701-53-01(A) and OAC 3401-53-04(G)
28. The December 14, 1998 memorandum from the Ohio Department Of Health regarding the need to wait 20 minutes following an invalid sample was not complied with.
29. The Director of the Department of Health abused his discretion by not providing for a sufficient two test system or by failing to take other adequate measures to ensure that only deep lung or alveolar air is sampled.
30. The breath test should be excluded because the traditional safeguards for admitting scientific evidence have been abandoned in favor of the current Ohio regulatory process. This process changes and shifts the burden of proof, violates the sixth amendment, denies the defendant's right to due process of law and fails to ensure that the test is either scientifically accurate or reliable.
31. Statements from the defendant were obtained in violation of his Fifth Amendment right against self-incrimination and both his Fifth and Sixth Amendment right to counsel as applicable under the Fourteenth Amendment and in violation of similar rights under the Ohio Constitution.
32. The field sobriety tests administered to the Defendant by the arresting officer were not administered in accordance with the training the officer received in the administration of field sobriety tests and/or the policies and procedures of the arresting officer's department.
33. NHTSA field tests were not performed in accordance with the "testing standards ... in effect at the time the tests were administered," as required by ORC §4511.19(D)(4)(b).
34. The Ohio Administrative Code and Ohio Rev. Code §4511.19 themselves violate the Modern Courts Amendment to the Ohio Constitution, Const. Art. IV, §5, insofar as they purport to set forth rules for the admissibility of evidence. As such, any test or tests should be suppressed unless a proper foundation is laid independent of any such requirements.
35. According to the NHTSA manuals, with the exception of vertical nystagmus, the field sobriety tests are correlated with a prohibited concentration of alcohol only. There is no claim that they can predict drug or alcohol impairment and thus are irrelevant to drug or cases alleging impairment by alcohol.
36. A chemical test is inadmissible absent retrograde extrapolation to the time of the offense based upon sufficient evidence to make such calculations.

37. Documents may not be used against the defendant without affording him his right to confront witnesses against him under *Crawford vs. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and without violating Evid R 803 (8).
38. An outdated form 2255 was used in this case which had incorrect information as to the lengths of the suspensions which vitiated any action taken by the defendant in response to such information.

Respectfully Submitted,



LEIF B. CHRISTMAN (0070014)
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
Telephone: (216) 241-5019
Facsimile: (216) 363-6013
Email: lbchristman@hotmail.com

Attorney for Defendant

MEMORANDUM

Probable Cause

The magic words theory of probable cause is not the law and should not be applied in this case. It is sometimes assumed that the state's burden in a motion hearing is so slight that all that is required for the burden to be met is for the officer to mention a few well known phrases such "strong odor of alcohol". This is the magic words theory of probable cause and it is not the law.

The law as set forth by the Ohio Supreme Court is as follows: "Probable cause to believe a driver is operating a vehicle while intoxicated arises from readily discernable indicia under the *totality of the circumstances*." *State v. Gustafson*, 76 Ohio St.3d 425, 450, 668 N.E.2d 435, 453, 1996-Ohio-425 (Ohio, Jul 30, 1996), emphasis added.

Consequently, contrary to popular belief, once the magic words are uttered, the case is not over. All of the other facts and circumstances are relevant and are the proper subject of inquiry. To put it simply, the court cannot just say I have three things consistent with probable cause and I have heard enough. If there are 57 things inconsistent with probable cause and only three things consistent with probable cause, under the totality of the circumstances requirement, there is not probable cause.

Likewise, if the court has heard the three things favoring probable cause but not the 57 things inconsistent with it, the court has not considered the totality of the circumstances. All 60 are relevant and must be considered even if the three have been proven. The inquiry does not end after the magic words are spoken nor is it proper to reach a decision at that point. All factors must be considered.

It is submitted that the evidence will show that there was no valid reason to stop or detain the defendant. Evidence flowing from an illegal stop, detention and/or arrest cannot be used to convict the defendant. *State vs. Chatton*, 11 Ohio St. 3d 59, 463 N.E. 2d 1237 (1984); *State vs. Timson*, 38 Ohio St. 2d 122, 311 N.E. 2d 16 (1974); *State vs. Walters*, Hamilton App. No. C-80413 (March 27, 1985) unreported.

Parenthetically, it should also be noted that since the court file disclosed that this was a warrantless arrest, the prosecution bears both the burden of proof and the burden

of going forward on all issues raised in this motion pursuant to the cases of *Euclid vs. Giordano*, 9 Ohio St. 2d 140 (1967) and *Xenia vs. Wallace*, 37 Ohio St. 2d 216 (1988).

FACTS

On or about April 17, 2013, the Defendant, Michelle Nester, was arrested and detained by agents of the State of Ohio, to wit, officers of the Ohio State Highway Patrol and based on information and belief, allegedly charged with criminal and/or traffic offenses.

The facts leading to this arrest were as follow:

On or about April 17, 2013, an officer of the Ohio State Highway Patrol detained the Defendant on West 140th Street in Linndale for allegedly speeding. There was no erratic driving. The officer had no reason to believe the Defendant was guilty any traffic violation and thus had no probable cause to detain her even momentarily.

The officer then approached the vehicle in question. The officer identified the operator of the vehicle as the Defendant. The officer then allegedly detected an odor of alcohol as well as other possible indication of intoxication.

Thereafter, the officer required that the Defendant perform several field sobriety tests. These tests included but were not limited to, the One Leg Stand, the Walk and Turn, HGN (Horizontal Gaze Nystagmus) Test. The Defendant cooperated with the demands of the arresting officer. The Defendant performed said field sobriety tests adequately though they were not administered within strict and/or substantial compliance with guidelines of the National highway Traffic and Safety Administration. The Defendant allegedly performed said tests to the subjective dissatisfaction of the arresting officer and was subsequently arrested.

Thereafter, the Defendant was transported to the Linndale Police Department. At the station, the officers required that the Defendant submit to a measurement of her blood alcohol level, to which she submitted. The test was coerced; the Defendant was not properly informed of the rights and the consequences in taking, or refusing to take such a test. Moreover, the machine used to test the Defendant's breath was not calibrated properly pursuant to the Ohio Administrative Code. The result of said test was allegedly at .210.

Specifically it is submitted that the evidence will be insufficient to show that the officer had reasonable suspicion to believe that the defendant committed a speeding violation and that there was no other valid reason for stopping the defendant or for arresting her for OVI. Furthermore, a speeding violation alone does not provide probable cause to arrest for OVI where there were not enough other signs of intoxication to constitute probable cause for that offense under *State vs. Finch*, 24 Ohio App 3d 38 (1985).

See also *State vs. Taylor*, 3 Ohio App. 3d, 197 (1981) holding that speed alone and a mere odor of alcohol is insufficient to constitute probable cause. Nor can the prosecution bootstrap the probable cause issue with field tests or other subsequent evidence: "...absent reasonable suspicion that the subject is intoxicated, the officer cannot require the motorist to submit to sobriety tests *State vs. Weaver*, 87CA40, 1988 WL 88390 (unreported 7th District, 1988). See also *State vs. Dixon*, 2000 WL 1760664 (2d Dist. Dec 1,2000). As the United States Supreme Court put it, the detention of a person: "...must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

Thus, any detention beyond that necessary to cite the defendant for the speeding violation was illegal. The officer must have reasonable suspicion to believe the

defendant was under the influence before he can be detained for field tests. Even if it is assumed *arguendo* that the defendant may not have performed perfectly on the field "tests", the officer had no legal authority to administer those tests in the first place.

Thus, the issue is not whether [the officer] had the right to take [the defendant] into custody, *but whether he had the right to administer field sobriety tests*. If he did, we recognize that the results of those tests afforded probable cause for the subsequent administration of a breath alcohol test.

We cannot distinguish this case from *State v. Spillers* (March 24, 2000), Darke App. No. 1504, unreported, in which we held that "de minimus" lane violations, combined with a slight odor of an alcoholic beverage and the admission to having consumed "a couple" of beers, were not sufficient to justify the administration of field sobriety tests.

The mere detection of an odor of alcohol, unaccompanied by any basis, drawn from the officer's experience or expertise, for correlating that odor with a level of intoxication that would likely impair the subject's driving ability, is not enough to establish that the subject was driving under the influence. Nor is the subject's admission that he had had one or two beers.

State vs. Dixon, 2000 WL 1760664 page 2 (2d Dist. Dec 1, 2000) emphasis added.

By asking questions irrelevant to the purpose of the stop, the officer impermissibly expanded the length and the scope of the investigative stop. Because the scope of the detention was not carefully tailored to its underlying justification, subsequent evidence was obtained in violation of the Fourth Amendment. See *State v. Brown*, 183 Ohio App.3d 337, 916 N.E.2d 1138, 2009-Ohio-3804 (Ohio App. 6 Dist. Jul 31, 2009).

"We note that this probable cause determination, like all probable cause determinations, is fact-dependent and will turn on what the officer knew at the time he made the stop. Under this test, it is clear that the courts may not determine whether there was probable cause by looking at events that occurred after the stop.

Dayton v. Erickson, 76 Ohio St.3d 3, 10; 665 N.E.2d 1091, 1096; 1996-Ohio-431 (1996).

Compliance with §4511.191

The provisions of Ohio Rev. Code §4511.191 are not applicable unless the defendant was validly arrested by an officer having reasonable grounds to believe the defendant was operating a vehicle while under the influence of alcohol and/or drugs of abuse and was properly advised of the Ohio implied consent provisions. The warning, documentation and other provisions of Ohio Rev. Code §4511.191 must also be complied with. When implied consent warnings are misstatements of the law, consent is involuntary and such evidence is unconstitutionally obtained under the Fourth Amendment. Therefore the defendant's alcohol test must be suppressed. *State vs. Taggart*, Washington App. No. 86 CA 21 (August 29, 1987) unreported. .

Breath Test

Before the results of a breath alcohol test given a defendant are admissible in evidence, it is incumbent upon the state to show that the sample was withdrawn by a qualified individual, that it was analyzed in accordance with the Ohio Department of Health Regulations and that it was withdrawn within the three hour testing limitations of the Ohio Rev. Code §4511.19(D); *City of Newark vs. Lucas*, 40 Ohio St. 3d 100 (1988); *Aurora vs. Kepley*, 60 Ohio St. 2d 73 (1979); *Cincinnati vs. Sand*, 43 Ohio St. 2d 79 (1975); *State vs. McCloy*, Hamilton App. Nos. C-830965, C-830966, C-830967 (October 10, 1984).

It is also submitted that the evidence will be insufficient to show that the officer requested the defendant to submit to the chemical testing within two hours as required by Ohio Rev. Code §4511.192. (A). Note that under the preceding subsection, while the time for withdrawing the sample was change to three hours, the office must still request the defendant to take the test within two hours. This is so because the defendant must submit to the officer's request within two hours. This cannot be done unless the officer requests the defendant to test within two hours.

Note also that in the case of commercial driver's license holders (even those in private vehicles), the time limit is still two hours for withdrawing the sample under §4506.17(B).

Specifically, all of the requirements of the above numbered paragraphs must be met, which paragraphs are incorporated by reference here. Furthermore, under *State v. Burnside*, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372 (2003):

A court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required. Such an infringement places the court in the position of the Director of Health for the precise purpose of second-guessing whether the regulation with which the state has not complied is necessary to ensure the reliability of the alcohol-test results.

To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial-compliance standard set forth in *Plummer* to excusing only errors that are *clearly de minimis*. Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as "minor procedural deviations."

Id., 100 Ohio St.3d 159, 797 N.E.2d 77 (emphasis added).

Record Retention

All breath testing records must be retained. OAC 3701-53-02 (E) provides:

Breath samples using the instrument listed under paragraph (A)(3) of this rule [the 8000] shall be analyzed according to the instrument display for the instrument being used. The results of subject tests *shall be retained in a manner prescribed by the director of health* and shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

Id., (emphasis added). OAC 3701-53-04 (G) provides that:

Results of instrument checks, controls, certifications, calibration checks and records of service and repairs shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

Id, (emphasis added). OAC 3701-53-01 (A) in turn provides in part that: "The results of the tests shall be retained for not less than three years."

Under the new regulations, there is no log book requirement. While there is the web site, in past cases, the Department of Health has submitted that the printout spit out by the machine are the only evidential records in the case, not the online web site database. One problem with this rationale is that if the web site is not the official repository for these records, then there is none. No other method has been specified by the director as required by the above regulations.

If the prosecution disagrees, let them show the prescription that indicates how records are to be retained. If there is no officially prescribed retention method, then *State v. Ripple*, 70 Ohio St.3d 86, 637 N.E.2d 304 (1994) becomes relevant. In *Ripple*, the director failed to specify methods in the context of drug testing. The supreme court found this to be a fatal flaw. "Chemical analysis purporting to indicate presence of drug in an accused is inadmissible in prosecution for driving while under influence of drug of abuse *absent approval of methods by Director of Health* pertaining to testing of bodily substances for drugs." *Id*, 86 (emphasis added). If there is no method, then the regulations are impossible to comply with and the test is inadmissible.

Furthermore, should the prosecution now wish to contend that the web site is not the official method, then it has the duty to produce in discovery the real records for the last three years on the testing machine used in this case. If the real records have not been produced, then the test should be suppressed for failure to comply with discovery.

Retrograde Extrapolation

ORC §4511.19(A)(1) makes it clear that it is the defendant's alcohol level "at the time of the operation" which is relevant. The test result only shows the level at the time of testing. It is undisputed from a scientific standpoint that alcohol in the stomach can be digested between the time of operation and the time of testing. Unless testimony is presented to perform retrograde extrapolation back to the time of operation, the test result, without more, should be irrelevant because it is not evidence of the level at the time of operation. For an excellent analysis of these issues see *Mata v. State*, 13 S.W.3d 1 (Tex. App.--San Antonio 1999), rev'd, 46 S.W.3d 902 (Tex. Crim. App. 2001), opinion on remand, 75 S.W.3d 499 (Tex. App.--San Antonio 2002), vacated, 122 S.W.3d 813 (Tex. Crim. App. 2003).

Outdated BMV Form 2255

An outdated form 2255 was used in this case rather than the current "BMV 2255 7/10". The old forms have incorrect information as to the lengths of the suspensions which vitiates any action taken by the defendant in response to such information. See *Eastlake v. Komes*, 2010 WL 2171145, 2010-Ohio-2411 (Ohio App. 11 Dist. May 28, 2010). When a person is erroneously advised regarding the consequences of refusing to submit to a chemical test for alcohol, the person's consent is involuntary, and the chemical test is inadmissible. See, *State v. Szalai* (Ashtabula 1983), 13 Ohio Misc.2d 6; *State v. Chard* (6th Dist. 1984), unreported, 1984 WL 7788; *State v. Gottfried* (6th Dist. 1993), 86 Ohio App.3d 106. While *Bryan v. Hudson* 77 Ohio St.3d 376 (1997) held that reading language on top of 2255 is sufficient to inform the defendant of consequences, the issue of an outdated form was not involved there, but rather a current one which was incorrect as applied to the defendant in that case. Even so, the court in *Komes*, cited *Hudson* and did not believe that it dictated a different result.

*Machine Malfunctions and the Conflict Between
Ohio's Regulatory Process and the Constitution*

The scientific validity of the foundational regulations for breath testing in Ohio has never been subject to the test of cross examination. Never. Not once. The scientific validity of the breath testing machine used in the case at bar has never been subject to the test of cross examination in any court in Ohio. Never. Not once. If these statements are not absolutely true, let the prosecution produce one single case where this has been allowed.

The breath test result should be suppressed until and unless the Sixth Amendment is complied with. As is further set forth below, scientific evidence is not exempt from compliance with the Sixth Amendment. See The June 25, 2009 decision United States Supreme Court in See *Melendez-Diaz v. Massachusetts*, --- U.S. ----, 129 S.Ct. 2527, 174 L.Ed.2d 314, (U.S.Mass. Jun 25, 2009) and *Bullcoming v. New Mexico*, --- U.S. ----, 131 S.Ct. 2705, 180 L.Ed.2d 610, (U.S.N.M. Jun 23, 2011)

Ohio has abandon the traditional all encompassing safeguards which protect defendants against conviction based upon junk science. See *State vs. Luke*, 2006-Ohio-2306, 2006 WL 1280899 (Ohio App. 10 Dist.). In its place, Ohio has substituted the much more limited "regulatory compliance" standard as the method for determining scientific reliability and accuracy. The problem is that the regulations are not even close to being all encompassing and they contain glaring deficiencies. Real scientific defects which are not contemplated by the rules are officially ignored. In OVI cases, Ohio has abandoned *Daubert* in favor of what could fairly be called the ostrich view of scientific evidence: If we don't see it, it doesn't exist. The United States Supreme Court has said Ohio has to pull its' head out of the sand. It has to listen to the other side.

The abandonment of the traditional standard for the admission of scientific evidence relieved the state of its burden of proof and shifted it to the defendant. The state has never had the burden of proving that the regulations ensure the scientific reliability of the test. Instead, the scientific reliability of the test, and thus the defendant's guilt, is presumed with an abuse of discretion standard applying *to the defendant*.

As such, in Ohio, the alleged scientific reliability of the breath test has never been established through the adversarial process. The purported scientific reliability of the breath test is based upon bureaucratic fiat, not evidence. The Ohio Department of Health, and indirectly the legislature, assert that the device and the procedure to be used to convict the defendant are scientifically valid. These assertions are submitted to the trier of fact without benefit of confrontation. This is a factual claim and it is being offered to assist the prosecution without ever having been tested by confrontation.

It would be disingenuous to claim that the ODH and the legislature are not vouching for the scientific reliability of the testing machine and the foundational requirements in the regulations. If such a thing were to be seriously contended, then the remedy would be simple. Bar the test because scientific reliability has not been established.

The law on confrontation is no less clear than the lack of confrontation, especially after the recent United States Supreme Court Decision in *Melendez-Melendez, supra*.

...U.S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses-those against the defendant and those in his favor. The prosecution must produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

Melendez, supra, 5 (emphasis in original).

Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is "prone to

distortion or manipulation," and the testimony at issue here, which is the "result[t] of neutral, scientific testing." Brief for Respondent 29. Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value because "one would not reasonably expect a laboratory professional ... to feel quite differently about the results of his scientific test by having to look at the defendant."

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Melendez, supra., 7.

The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor's part. 226 P.3d, at 8–9. We have already explained that Caylor certified to more than a machine-generated number. See *supra*, at 2710 – 2711. In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the "obviou[s] reliab[ility]" of a testimonial statement does not dispense with the Confrontation Clause. 541 U.S., at 62, 124 S.Ct. 1354; see *id.*, at 61, 124 S.Ct. 1354 (Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination"). Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa." *Melendez-Diaz*, 557 U.S., at —, n. 6, 129 S.Ct., at 2537, n. 6.

Bullcoming, supra., 131 S.Ct. 2708.

It should also be noted that following it's decision in *Melendez-Diaz* the United States Supreme Court reversed a recent Ohio Supreme Court case due to want of confrontation. See *Crager v. Ohio*, 129 S.Ct. 2856, 174 L.Ed.2d 598, 77 USLW 3709 (U.S.Ohio Jun 29, 2009).

If the legislature and the Ohio Department of Health are to be allowed to offer scientific evidence against the defendant, then they must be subject to cross examination. If not, their conclusions must be barred. The only real issue is whether

the confrontation clause is going to be followed. Will justice be restored to OVI defendants or will Ohio continue to be alone among the states in denying defendants the right to question the scientific validity of what in many cases is the only real evidence against them?

It is important to stress at this juncture that the issue is not whether the regulations have been complied with, but whether the regulations themselves are valid scientifically. The question is whether the defendant is entitled to cross examine on the issue of scientific validity, not just on the issue of regulatory compliance. The courts of Ohio (and only the courts of Ohio) have ceded their judicial authority on this issue and given exclusive control of the question to a retired police officer lacking in scientific credentials, to wit: Dean Ward, the head of the Ohio Department of Health's alcohol testing division.

It is nonsense to contend that regulatory compliance ensures a valid test. The only reason such nonsense has not been exposed is that Ohio has turned a deaf ear to evidence to the contrary. If contrary evidence is not allowed in the record, then, of course, the breath tester is going to appear to be an excellent device.

Some examples of the problems with the regulations are anticipated to arise under the facts of the case at bar. The Intoxilyzer 8000 has a self diagnostic function in which the components of the machine are self tested.

The way the regulations are written, even if the Intoxilyzer 8000 fails every single diagnostic test the breath test is still admissible. It should also be noted that the regulations do not even require running this check in the first place. Thus it is nonsense to claim that regulatory compliance ensures scientific reliability.

Temperature is generally crucial in the area of breath testing. Under the regulations, even if the temperature registered at absolute zero, the test result still is admissible. Likewise if the test result were so high that the defendant would have to be dead to test that high, the test would still come in as scientifically reliable. The regulations simply do not contemplate all possible errors. As such, compliance with the regulations simply does not insure scientific reliability. The courts of Ohio should stop pretending otherwise.

Regardless of the validity of the claim that the regulations are deficient, that is not the real issue. The real issue is whether the defendant has a right to confrontation. Even if the regulations are wholly valid from a scientific standpoint, they cannot be used as a substitute for confrontation. Similarly, the test of bureaucratic fiat (i.e. bureaucratic approval of the Intoxilyzer 8000) also could not be substituted for the test of confrontation on the issue of the Intoxilyzer 8000's scientific validity even if it were perfect. While courts historically have taken judicial notice of scientific issues at some point, even this is improper where testimony has *never* been adduced on the issue. The defendant asks that either he be afforded his constitutional right to confrontation or that the test be barred.

Confrontation vs. Unsworn Documents

There are certain assumptions we make when we deny the right to confront the government official who performed the instrument certification. Such assumptions are rarely, if ever, examined to determine whether or not they are true or even make any sense to assume. At a minimum, the following must be assumed before it is at all just to deny the right of confrontation:

1. No certification official ever makes a mistake.
2. If a certification official makes a mistake he always knows it.
3. If a certification official makes a mistake, he always makes a written record of it and puts it in a place where all defense attorneys will find it.
4. No certification official is ever reluctant to record his mistakes in writing where his supervisor could find them.
5. No certification official is ever reluctant to indicate in his records that he made a mistake that might compromise the result in a number of court cases.
6. Unsworn witnesses concerned about the matters in paragraphs 4 & 5 could never possibly be tempted to be evasive or stretch things when not actually under oath.
7. Errors in the instrument check process are always apparent from the records.
8. It is not possible for there to be errors in the instrument check process which can be learned of through cross examination alone.

Even if it is assumed *arguendo* that the right to confrontation can be constitutionally denied, at a minimum, this should only be done where the right is unnecessary to obtaining justice. To be unnecessary, the result should be the same whether or not confrontation is provided. This can only happen, at a minimum, if all of the above statements are true. If it would be unwise to bet one's pension that all of the above are true, then it is unconscionable to bet the defendant's freedom on that same thing.

It might be argued that defense counsel also would not bet his pension that errors would in fact be discovered through cross examination. This is a false argument. The defense need not know what a witness will say before the right to confrontation exists. Clairvoyance is not a condition precedent to the right to cross examine. If confrontation can be dispensed with because it is always unnecessary, then all of the above statements must always be true. Otherwise, it is necessary. Those who claim it can be dispensed with are, in reality assuming that they possess the power of clairvoyance

whether they have thought about it that way or not. They assume that none of the above things could ever happen. Otherwise confrontation would be necessary rather than unnecessary.

The *Melendez* case also has a more specific application to this particular case. *Melendez* held that the introduction of testimonial statements of witnesses violates the right of confrontation. It is anticipated that the state will attempt to use unsigned, unsworn, unauthenticated forms from a website that disclaims their accuracy in lieu of actual testimony. Such documents are particularly suspect in light of the disclaimer on the web site where they are stored (<http://publicapps.odh.ohio.gov/BreathInstrument/>):

The information contained within this web site is deemed to be public information and is generated from computerized records maintained by the Ohio Department of Health and Alcohol and Drug Testing. While every effort is made to assure the data is accurate and current, it must be accepted and used by the recipient with the understanding that *no warranties, expressed or implied, concerning the accuracy, reliability or suitability of this data have been made.* The Ohio Department of Health, Alcohol and Drug Testing, their agents, and the developers of this web site assume no liability whatsoever associated with the use or misuse of the data contained herein.

By accessing or using this web site you agree to the terms.

Id., emphasis added. People should not be convicted based upon information whose accuracy is disclaimed.

The breath test documents are nothing if not testimonial. Their sole purpose is to be used in evidence against the defendant. It is the functional equivalent of claiming that the following statement can supplant the constitution. "I did everything right. No need to cross examine me." It should also be noted that unlike testimony in court it is not even made under oath.

{¶ 21} In *Melendez-Diaz*, the court held that a lab analyst's "certificate" was the functional equivalent of an "affidavit," and thus constituted testimonial

evidence. The certificate showed the results of the forensic analysis performed on substances seized from the defendant, reported the weight of the substance, and was sworn to before a notary public. The *Melendez-Diaz* court held that under these circumstances, the " 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' " *Id.* at 2532, quoting *Davis v. Washington (2006)*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224. The court thus determined that because the analyst's statements contained in the "certificates" constituted testimonial statements, absent a showing that the analyst was unavailable to testify at trial *and* that the defendant had a prior opportunity to cross-examine the analyst, the defendant was entitled to confront the analyst at trial. *Id.* at 2532.

State v. Woods, 2009 WL 4021382, 4; 2009-Ohio-6169 (Ohio App. 4 Dist. Nov 19, 2009), emphasis added.

It might be thought that there is no need for actual testimony from the certification official since, the documents purportedly show everything was done right. It is worth reiterating in this context Justice Scalia's admonition in *Melendez*:

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Melendez, supra., 7.

While Mendez is thought to have left open the question of whether a state can require the defense to demand the testimony of the expert as a prerequisite to the right of confrontation, this is not at issue in the case at bar. First of all, the state has not served the defense with any of paperwork triggering such a demand process. Second, such a demand was in fact included by the defense in its discovery demand filed with this court. In that document it was stated: "The defendant specifically objects to the use of any report, affidavit, or other document in lieu of live testimony." Third, lest there still be any question on the issue, the defense hereby demands the live testimony of the certification official and objects to anything less than that.

Even if we assume *arguendo* that *Melendez* can somehow be ignored. It is submitted that cross examination of such officers is not as unnecessary as might be believed. A good example of the need for confrontation is provided in the recent Licking County case of *State v. Dimitri Hatzimbis* (Licking County Municipal Court Case No. 07-TRC-07470). While *Hatzimbis* is unreported, it is discussed in some detail in *State v. Raleigh*, 2008-Ohio-6843.

In *Hatzimbis*, Deputy Doelker testified that no records of instrument check results which indicated that the results were outside the acceptable limits were retained; rather, he threw those out. Specifically, Deputy Doelker testified that he discarded print-outs of instrument check results outside of the required .005 tolerance level for the target value of the solution for two years prior to the hearing date of December 4, 2007. (*Hatzimbis* Supp. Hrg. Tr., p. 9).

Additionally, in *Hatzimbis*, Deputy Doelker testified that the same bottle of calibration (instrument check) solution is used when an instrument check result is outside the range specified. (*Hatzimbis* Supp. Hrg. Tr., p. 9.) in violation of OAC 3701-53-04(A)(2). The fact that the same bottle of solution was used for subsequent instrument checks after an instrument check result was out of tolerance was a second ground for suppressing the test in *Hatzimbis*. Moreover, the fact that Deputy Doelker was discarding instrument check results which were out of tolerance and not changing the bottle of solution renders it impossible to discover the non-compliance with OAC 3701-53-04(2)(E) by simply reviewing the records. See also *State v. George*, 2000 WL 1408 (Ohio App. 5 Dist. Dec 15, 1999).

In the Judgment Entry issued in the *Hatzimbes* case, the Licking County Municipal Court specifically found that no records of instrument checks where the results were outside the acceptable limits were retained by the Sheriff's Department. The Court reasoned that this procedure is in direct conflict with ODH Regulation 3701-53-01(A) and 3701-53-04(E) and suppressed the results of the BAC Datamaster test.

So how does this relate to the issues in this case? It shows that, not all issues can be determined from discovery or from a form filled out by the certification official. If a record has been destroyed, it is not going to be there to discover in the first instance. The defense simply cannot learn everything that is necessary from discovery. Nor did the prosecution in *Hatzimbes* disclose that agents of the state were destroying records. This was learned through cross examination. Counsel did not know that this was happening until he heard the answer in court.

It also would have made absolutely no sense to say that the defense was required to predict in advance what the deputy would say on cross in order for the right of confrontation to arise in the first instance. Only the clairvoyant would be afforded their constitutional right to confront their accusers.

If the court in *Hatzimbes* had allowed a form to substitute for testimony, the practice of destroying evidence would be continuing in Licking County to this day. Does requiring live testimony constitute what is sometimes dismissively referred to as a fishing expedition? Maybe so. Even if this is true, it should be remembered that the founding fathers had another name for "fishing expeditions". They called it the constitutional right to confront accusers.

State vs. Wang

It might be thought that *State vs. Wang* 2008 WL 1932305, 2008 -Ohio- 2144 (5 Dist., 2008) is dispositive of the issues raised here. It is submitted that it is not for two reasons. First, the law has changed. Second, even assuming arguendo that it has not, *Wang* will be distinguishable on the facts.

Wang stands for the proposition that unsworn documents prepared by the police may be used in evidence against a defendant in a criminal case without the need of testimony of any witness. In other words, *Wang* holds that there can be evidence helpful to the prosecution but not subject to confrontation. The problem with this is that since *Wang*, the United States Supreme Court has held to the contrary. As Justice Scalia put it: "Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Melendez, supra*, 5.

It should be noted that *Melendez* specifically dealt with a case where records prepared for use in trial were admissible without testimony. The court found that the business records exception relied upon in *Wang* was inapplicable:

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford*: "Most of the hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy." 541 U.S., at 56, 124 S.Ct. 1354. Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because-having been created for the administration of an entity's affairs and not for *2540 the purpose of establishing or proving some fact at trial-they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here-prepared specifically for use at petitioner's trial-were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Melendez, supra, 129 S.Ct. 2539-2540,

Once the law upon which a policy is based changes, the policy must change as well. If the law changes but the policy does not, we no longer have the rule of law but rather just blind conformity to prevailing practice. The issue in this case is not hearsay, it is confrontation. If unsworn forms are to be allowed to substitute for testimony, the question is when is the right to confrontation to be honored in an OVI case. Under the aforementioned circumstances, the answer is never. The questions then becomes whether, in light of recent changes in the law, there is any longer any justification for this policy.

While it may very well be that the rules of evidence do not apply at motion hearings, it is a radically different proposition to claim that the constitution does not apply at motion hearings. Unfortunately, the justification for the allowing documents without witnesses is no better than claiming that the constitution does not apply.

It should also be noted that, for reasons that aren't particularly clear in the opinion, the Fifth Appellate District has decided, post *Melendez*, and post *Crager* that OVI defendants still do not have the right to confrontation regarding the test. See *State vs. Collins* 2010 WL 4345727 which holds that BAC records are not testimonial and thus not subject to confrontation. There is, however, a conflict between the jurisdictions on this point. In a case decided after *Collins*, the Second District Court of Appeals upheld the right of confrontation. "...[T]he results of a test of those same body fluids, and statements by the persons conducting the testing, are testimonial..." *State vs. Syx*, 2010-Ohio-5880 (2ed Dist, December 3, 2010).

The court in *Melendez* held that include among those things which are testimonial are: "...pretrial statements that declarants would reasonably expect to be used prosecutorially...". *Melendez, supra*, 129 S.Ct. 2531. Also included were: "...statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*, 129 S.Ct. 2531. It is hard to see how anyone can seriously contend that alcohol testing records are not prepared for this purpose.

Another potential justification for the policy in *Wang* is waiver. The court in *Wang* noted that:

At the hearing on her motion to suppress, appellant did not challenge the admissibility of the pre- and post breath test instrument check forms. (State's Exhibit Nos. 2; 4). (T. at 71-72). The appellant likewise did not object to the admission into evidence of the senior operator permit for the calibrating officer. (State's Exhibit 4). The Lot or Batch number certificate for the Instrument Check Solution, as well as a photocopy of the individual bottle label, was admitted without objection. (State's Exhibit 6). Accordingly, the addendum utilized by the trooper in the case at bar is merely cumulative to the extent that it recites information admitted into evidence through the aforementioned State's Exhibits.

Wang, supra, WL 1932305 3-4, ¶ 18.

While a waiver theory may have justified the result in that case, it will not justify the result in this one. Defendant specifically hereby objects and will object in court, to the introduction of any documents if the foundation for their introduction is not supported by the testimony of the appropriate witness. In short, *Wang*, will be factually distinguishable from the case at bar as well.

Statements of the Defendant

The defendant further contends that custodial statements taken from defendant were obtained in violation of his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and *Miranda vs.*

Arizona, 348 U.S. 436 (1966); *Berkemer vs. McCarty*, 468 U.S. 240, 104 S. Ct. 3138 (1984); *State vs. Buckholz*, 11 Ohio St. 3d 24, 462 N.E. 2d 1222 (1984); and *State vs. Leach*, 102 Ohio St.3d 135, 807 N.E.2d 335, (2004). It is further submitted that any such statements also violate the corpus delectit rule. *State vs. Ralston*, 67 Ohio App 2d 81 (1979). Nor can the defendant's silence be used against him even if it happens before there is an arrest under *State v. Leach*, 102 Ohio St.3d 135, 807 N.E.2d 335, 2004-Ohio-2147 (Ohio May 12, 2004).

Field Sobriety Exercises

In the event that this case proceeds solely on an impaired charge without a per se charge it is submitted that the horizontal gaze nystagmus test as well as the other so called field tests must be suppressed. The case normally cited in support of the admissibility of the horizontal gaze nystagmus test is *State vs. Bresson*, 51 Ohio St. 3d 123 (1990). It should be noted that *Bresson*, unlike the case at bar, was a *per se* case. The syllabus specifically provides that "... testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of R.C. 4511.19(A)(2), (3) or (4)." *Id.*, 123.

The NHTSA manual indicates that "Research shows that if four or more [HGN] clues are evident, it is likely that the suspects blood alcohol concentration is above 0.10. The reliability of this four-or-more clues criterion is 77%." *DWI Detection And Standardized Field Sobriety Testing, Student Manual* at VII-6 (1995). See also page VII-6 of the 2000 and Chapter VIII p11 last ¶ of the 2002 manual to the same effect.

Similarly, the training manuals tie passing or failing the one leg stand test to a likelihood of exceeding the .100 and .08 per se level. See 1995 Manual VIII 24 3d ¶ from bottom], 2000 Manual VIII-14 middle, 2002 VIII p14 3rd ¶ from bottom. Likewise,

with the walk and turn tests. See 1995 Manual. VIII 21 paragraph 2, 2000 Manual, VIII-12 ¶3, and 2002 VIII p11 ¶7.

The NHTSA scientists who did the research upon which the manual is based also agree that performance on the the FST's is not indicative of impairment:

Many individuals, including some judges, believe that the purpose of a field sobriety test is to measure driving impairment. For this reason, they tend to expect tests to possess "face validity," that is, tests that appear to be related to actual driving tasks. Tests of physical and cognitive abilities, such as balance, reaction time, and information processing, have face validity, to varying degrees, based on the involvement of these abilities in driving tasks; that is, the tests seem to be relevant "on the face of it." Horizontal gaze nystagmus lacks face validity because it does not appear to be linked to the requirements of driving a motor vehicle. The reasoning is correct, but it is based on the *incorrect assumption that field sobriety tests are designed to measure driving impairment.*

Stuster, Jack and Burns, Marcelline "Validation of the Standardized Field Sobriety Test Battery t BAC's Below 0.10 Percent" Final Report Submitted to: U.S. Department of Transportation, National Highway Traffic Safety Administration, emphasis added. (Reprinted in the Appendix of the 2004 and 2006 NHTSA instructor's manuals in Session VIII)

Ohio courts have refused to recognize that exceeding the per se levels provides any evidence as to impairment. If exceeding the per se levels is not relevant to an impaired charge, then a test designed to guess at the per se levels should not be relevant either.

This issue normally arises in the context of the per se case. In cases such as *State vs. Boyd*, 18 Ohio St. 3d 30 (1985) and *Whitehall vs. Lee*, (September 30, 1993) 93AP-548 unreported, (1993 opinions 4256) the courts have held that evidence of a defendant's sobriety is inadmissible in a per se case to challenge the result produced by a breath testing machine. The rationale expressed in these cases is that in a *per se* case whether or not one is under the influence is not in issue. The defendant is merely charged with having a prohibited concentration of alcohol in his or his system. As such, evidence of sobriety is irrelevant to a *per se* charge because it does not have any

bearing on a matter in issue in the case. Being under the influence is not an element of the offense and the state does not have to prove this.

In so ruling, the courts must of necessity tacitly refuse to take judicial notice that a person with an alcohol level meeting or exceeding .100 would be impaired. If the courts took judicial notice that one testing over the *per se* limit would show symptoms of impairment, then evidence of sobriety would raise questions as to whether the machine yielded the correct result and would thus be directly relevant evidence (if all persons at or over .100 show signs of impairment and if the defendant shows no sign of impairment, then the machine must be wrong). A change in this position would mean that defendants could challenge test results with evidence of sobriety.

Thus, even in the most optimistic case for the prosecution, HGN testimony if admitted in a *per se* case at best indicates that the defendant has a 77% chance of testing above 0.100. Since this fact, even if proven by a breath test, is, without more legally irrelevant in a impaired case under *Boyd*. and since no more specific information as to level is admissible under *Bresson*, the only possible conclusion is that HGN evidence is legally irrelevant in an impaired case.

It is submitted that the results of the so called "field sobriety tests" should not be admitted. In the first syllabus of *State v. Homan* , 89 Ohio St.3d 421 (2000), the Ohio Supreme Court held that:

1. In order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures.

Id., 421. The court also acknowledged that the National Highway Traffic Safety Administration manuals "...form the basis for manuals used by state law enforcement agencies across the country. *Id.*, 424 footnote 4.

Until and unless the prosecution can demonstrate that each and every alleged field sobriety test was administered in the prescribed manner, all such evidence must be

suppressed under *Homan*. Note also that it is the prosecution's burden to prove that any tests "...were conducted in a standardized manner as provided by the National Highway Traffic Safety Administration." *State v. Nickelson*, 2001 WL 1028878 p. 9 (Ohio App. 6 Dist., Jul 20, 2001) . See also *State v. Pingor*,) (NO. 01AP-302) 2001 WL 1463774 (Ohio App. 10 Dist., Nov 20, 2001) where *Nickelson* was cited favorably by the Franklin County Court of Appeals. To the same effect, see also *State v. Shepard*, 2002 WL 506674 (Ohio App. 2 Dist., Apr 05, 2002) (NO. 2001-CA-34). Note that the anti-homan legislation is discussed below.

There is absolutely no logical reason for admitting the HGN at trial in an impaired case. As was mentioned above, the NHTSA research expressly disclaims that the HGN has any relation to impairment, but rather only to the probability of the defendant testing above a prohibited level. Under these circumstances, the HGN is simply not relevant to an impaired case. Furthermore, under *State v. Grizovic*, 177 Ohio App.3d 161, 894 N.E.2d 100, 2008-Ohio-3162 (Ohio App. 1 Dist. Jun 27, 2008) even the manual statement cannot be given to the jury. While the defendant's performance on other FST's may be of some common sense value to a juror, the same cannot be said of the HGN.

"The manifestation of nystagmus under different circumstances is also a scientific theory that would not be known by the average person. HGN testing is based on a scientific principle not generally known by lay jurors."

State v. Robinson, 160 Ohio App.3d 802, 812-813, 828 N.E.2d 1050, 2005-Ohio-2280 (Ohio App. 5 Dist. May 05, 2005).

If the HGN is admitted in an impaired case, this can be nothing more than an invitation to the jury to speculate. What are they supposed to think that this means. They don't have any common sense understanding and we won't tell them what the

manual says. If the jury is told that the defendant got 6 wrong out of 6 or even 4 out of 6, the juror's thought process is probably something like this: Since the judge let us hear this, it must mean something. Since the officer arrested him after doing the test, he must have failed. If you get 6 wrong out of 6 that is failing on any test I have ever seen. Therefore the jury probably thinks defendant has scientifically been proven impaired. There simply is no rationale for admitting the HGN in an impaired case.

Unfortunately, in the early days of FST's, the Ohio Supreme Court included some language in an opinion which makes no sense. The following citation is probably dicta and is also probably factually distinguishable in an impaired case, since the citation below was made in a per se case. Nevertheless, it should be noted that the court indicated that:

"We hold that the HGN test has been shown to be a reliable test, especially when used in conjunction with other field sobriety tests and an officer's observations of a driver's physical characteristics, in determining whether a person is under the influence of alcohol."

State v. Bresson, 51 Ohio St.3d 123, 129, 554 N.E.2d 1330 (Ohio May 30, 1990). The problem with this quote is that the notion that the HGN is has any bearing on impairment was apparently pulled out of thin air. NHTSA scientists expressly disclaim this. *Bresson* is dicta based upon a mistake of fact. The supreme court assumed without any proof and contrary to the science of the matter that the HGN provides proof of impairment. It then elevated this unscientific assumption at least to the level of dicta.

The language of the NHTSA scientists quoted above bears repeating. It is an: "... *incorrect assumption that field sobriety tests are designed to measure driving impairment.*", *supra*.

Insofar as trial evidence is concerned, once an officer testifies to smelling an odor of alcohol, admitting the FST's to prove "consumption" is cumulative evidence and has little to no additional probative value. Under these circumstances, the real reason for seeking to admit the FST's is to lend a false aura of scientific reliability to otherwise marginal evidence. It should also be kept in mind that drinking and driving is legal and that proving a smell of alcohol establishes nothing illegal. Any slight probative value on the issue of consumption is vastly outweighed by the prejudicial effect of the jury being lead to believe that impairment has been scientifically determined. Thus the HGN is inadmissible under Evidence Rule 403(A).

Daubert and Miller vs. Bike

It is further submitted that under the particular facts and circumstances of this case, both the so called field tests and the chemical test(s) are unreliable and therefore inadmissible under the standard set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993), and *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607 (1998). Under these cases, the court must assume an expanded role as gatekeeper over questionable scientific evidence. While it is true that the 10th district found that *Vega* made *Daubert* inapplicable to OVI cases in *State v .Luke*, (May 11, 2006), Franklin App. No. 05AP-371, 2006 WL 1280899; it is submitted that the *Luke* decision is erroneous and that the rational of the Ohio Supreme Court and the United States Supreme Court is correct.

§4511.19(D) Is Unconstitutional On Equal Protection Grounds

The equal protection clauses of both the Ohio and the United States Constitutions are flagrantly violated by §4511.19(D) [SB 163, eff. 4/9//03]. Amended §4511.19(D)(4)(b) (ii) provides as follows:

The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

In its rush to satisfy the Prosecuting Attorney's association, the lame duck legislature abandon all pretense of fairness. The obvious defect here is that only the prosecution is allowed to introduce the result of the test. In a substantial compliance case, if the defendant passes the test and the prosecutor does not seek to introduce the test result, the defendant is not given the same right as the prosecution to introduce the result. The bill gives the prosecution, but not the defense, the right to introduce exculpatory evidence.

§4511.19(D) Is Unconstitutional On Due Process Grounds

The due process clauses of both the Ohio and the United States Constitutions are also violated by §4511.19(D) [SB 163, eff. 4/9//03]. As was set forth above, the Ohio Supreme Court in *Homan* held that: "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *State v. Homan* (2000), 89 Ohio St.3d 421, 424.

A statute which purports to make "inherently unreliable" evidence admissible is fundamentally unfair and a due process violation.

Improper Attribution Of Scientific Reliability To Field Exercises

Even if the results of the so called "field tests" are admitted, they should not be referred to as tests. These "tests" consisted of one or more of the following: walking heel to toe, standing on one leg, touching the finger to the nose, and reciting the ABC's.

It is anticipated that the prosecution will attempt to expressly or by implication cause the jury to believe that these physical exercises are scientifically valid tests, that the defendant failed the test, and that, as such, it has been scientifically demonstrated that the defendant was under the influence of alcohol.

A review of the case law in Ohio reveals a thread of decisions supporting the proposition that field sobriety tests' are admissible as *nonscientific* evidence because they involve observations within the common experience of the ordinary citizen. *State vs. Nagel* 30 Ohio App.3d 80 (1986).

While the while the aforementioned "tests" may be admissible as nonscientific evidence, the prosecution should be prohibited from attempting to attach significance to the defendant's performance on these exercises which go beyond the common experiences of the ordinary citizen. To permit the prosecution or the officer to make reference to the exercises by using terms such as 'test', "pass", "fail", "clues", or "points", creates a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment. Such terms give these lay observations an aura of scientific validity which has not been demonstrated to the court through proper expert scientific testimony. To allow the prosecution to imply an unproven scientific validity to these tests would violate Evidence Rule 403(A) since it would mislead the jury and since the danger of unfair prejudice would be outweighed by the probative value of using such terms.

In the State of Florida, extensive hearings were conducted in 350 consolidated cases on this exact issue. See *Florida vs. Meador*, 674 So.2d (1996). Expert testimony on field sobriety testing was admitted by the defense and the state. The state public

defender's office consolidated all of its DUI cases on the issue as well. On May 15, 1996, the District Court of Appeals of Florida unequivocally concluded that:

While psychomotor tests are admissible, we agree with the defendants that any attempt to attach significance to defendants' performance on these exercises beyond that attributable to any of the other observations of a defendant's, conduct at the time of arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value.

Id., at 832. Therefore, the aforementioned terms must be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment.

In short, while it may be argued that field sobriety exercises fall within the ambit of a juror's common observations, the prosecution should not be permitted to attach an aura of science to his or her observations by using enhancing terms such as "test", "fail", "pass", "clues", "results", "points" or words of similar import.

Specificity of Motion

The actual motion which was *approved* by the Ohio Supreme Court in *State vs. Shindler*, 70 Ohio St. 3d 54 (1994) is attached and the averments therein are hereby incorporated. It is far less specific than this motion. If the prosecution makes a representation to this court that the motion in this case is less specific than the one allowed in *Shindler*, it is only right that the prosecution should show the court what part of the attached motion is more specific than the one in this case. Since the attached motion has been incorporated, by definition, this should be impossible. Accordingly, any prosecution objections should, by definition, be without merit.

Similarly, a ruling for the prosecution would, of necessity require this court to overrule the Ohio Supreme Court. Since the motion the Supreme Court approved has been incorporated, this court cannot do what the government asks without making a finding which is diametrically opposed to that in *Shindler*.

It should also be noted here that at the time this motion was required to be filed, full discovery had not been provided thereby making a complete motion impossible. This is the fault of the government, not the defendant. The defendant should not be penalized for a problem created by the state. Furthermore, the basis for this motion is the Fourth Amendment to the Constitution. While a specificity objection might seem like a clever tactical maneuver, such an objection is at best rule based. If the Constitution is to be disregarded based on a tactical maneuver, the prosecution should first point out what part of the Constitution allows the Fourth Amendment to be overridden by rule of court.

In addition, even if it is assumed *arguendo* that this motion is insufficient, the state waives this argument by failing to file a memorandum contra: "While Crim.R. 47 requires a defendant to state his grounds for a motion to suppress "with particularity," the state waives this issue if it is not raised in opposition to a defendant's motion to suppress. *State v. Mayl*, 154 Ohio App.3d 717, 2003-Ohio-5097, 798 N.E.2d 1101, ¶ 22." *State v. O'Neill*, 175 Ohio App.3d 402, 411; 887 N.E.2d 394, 2008-Ohio-818, ¶33 (Ohio App. 6 Dist. Feb 29, 2008). Presumably any such memorandum contra must also be specific as well.


LEIF B. CHRISTMAN (0070014)

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Driving Privileges was sent on this 28th day of May, 2013 by regular U.S. mail to:

City of Cleveland Prosecutor
601 Lakeside Avenue Room 106
Cleveland, Ohio 44114


LEIF B. CHRISTMAN (0070014)
Attorney for Defendant

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IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO

Plaintiff,

v

MICHELLE NESTSER,

Defendant

CASE NO. 2013TRC23649

JUDGE ANGELA R. STOKES

MOTION FOR OCCUPATIONAL
DRIVING PRIVILEGES

Now comes the defendant, by and through undersigned counsel, hereby respectfully requests occupational driving privileges during the pendency of this matter, pursuant to Ohio Rev. Code 4507.16. Defendant's license was suspended on April 17, 2013 and said suspension would seriously affect the petitioner's ability to continue attending school

Ms. Nester is currently a surgical technician student at Brown Mackie College, 755 White Pond Dr Akron, OH 44320. She attends classes on Monday, Tuesday and Thursday, and picks up extra lab time in between classes. She must travel from her residence in Lakewood to Akron to attend class. A copy of defendant's insurance information is attached.

WHEREFORE, for the foregoing reasons, Defendant herein, by and through undersigned counsel hereby requests occupational driving privileges.

Respectfully submitted,

s/Leif B. Christman
Leif B. Christman Reg.No. 0070014
Attorney for Defendant
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Cleveland, OH 44113-1726
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LEIF B. CHRISTMAN, CLERK
CUYAHOGA MUNICIPAL COURT

2013 MAY -7 P 12:45

1

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition was hand delivered to the Office of the Prosecutor this ____ day of May, 2013

s/Leif B. Christman
Leif B. Christman
Attorney for Defendant

EARLE B. TURNER CLERK
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#6

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO

Plaintiff

-vs-

MICHELLE NESTER

Defendant

CASE NO.: 2013TRC23649

JUDGE: ANGELA R. STOKES

REQUEST FOR ORAL HEARING

As per local Rule 7.02 counsel requests
an oral hearing at which [redacted] witnesses
will be presented.

MOTION TO SUPPRESS AND/OR IN LIMINE

Now comes the defendant, through counsel, and hereby moves to suppress, or in the alternative for an order in limine prohibiting introduction of any and all evidence, obtained from the warrantless seizure of the defendant including but not limited to:

- A. Tests of Defendant's coordination and/or sobriety and/or alcohol and/or drug level, including but not limited to chemical tests of defendant's alcohol and/or drug level.
- B. Statements taken from or made by the defendant.
- C. The defendant's exercise of her right to remain silent.
- D. Observations and opinions of the police officer(s) who stopped the defendant and/or arrested and/or tested the defendant regarding defendant's sobriety and/or alcohol and/or drug level.
- E. Observations of the officer which import an unwarranted aura of scientific validity to the field sobriety tests.

The defendant submits that the burden is upon the state to justify the warrantless seizure of the defendant and evidence taken from the defendant and to show why the above evidence should not be suppressed due to the following grounds.

1. There was no lawful cause to stop or detain the Defendant, detain the Defendant, and/or probable cause to arrest the Defendant without a warrant.
2. The test or tests to determine the Defendant's alcohol or drug level were not taken voluntarily and were unconstitutionally coerced when obtained due to the threat of loss of license not sanctioned by the requirement of R.C. §4511.191 or §4511.192.
3. The individual administering the Defendant's test of alcohol did not conduct the test in accordance with the time limitation and regulations of the State of Ohio in R.C. §4511.19(D), §4506.17(B) and the Ohio Department of Health governing such testing and/or analysis, as set forth in chapter OAC §3701-53-02 of the Ohio Administrative Code, including the operator's checklist instructions issued by the Ohio Department of Health under OAC §3701-53-02(D) and the instrument display under in violation of OAC §3701-53-02(E).
4. The results of subject tests were not retained in a manner prescribed by the director of health as required by OAC 3701-53-02 (E) Nor were they retained for at least three years in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.
5. The results of all instrument checks, controls, certifications, calibration checks and records of service and repairs were not retained for no less than three years in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code
6. Results of instrument checks which were outside the range specified in OAC 3701-53-04(B) were not preserved, identified and retained pursuant to OAC 3701-53-04(G) and OAC 3401-53-01(A).
7. Results of certifications which were outside the range specified in OAC 3701-53-04(C) were not preserved, identified and retained pursuant to OAC 3701-53-04(G) and OAC 3401-53-01(A).
8. The Intoxilyzer 8000 used did not perform a dry gas control test before and after every subject test and instrument certification using a dry gas standard traceable to the national institute of standards and technology (NIST) in violation of OAC §3701-53-04(B).
9. Dry gas control results were not at or within five one-thousandths (0.005) grams per two hundred ten liters of the alcohol concentration on the manufacturer's certificate of analysis for that dry gas standard. Nor did the testing machine abort

the subject test or instrument certification in progress in violation of OAC §3701-53-04(B).

10. Representatives of the director did not perform an instrument certification on approved evidential breath testing instruments listed under paragraph (A) (3) of rule OAC §3701-53-02 of the Administrative Code using a solution containing ethyl alcohol approved by the director of health according to the instrument display for the instrument being certified within each calendar year in violation of OAC §3701-53-04(C).
11. The instrument listed under paragraph (A) (3) of rule OAC §3701-53-02 was not certified at the earlier of either once every calendar year or when the dry gas standard on the instrument was replaced, in violation of OAC §3701-53-04(C).
12. The instrument certifications were not within five one-thousandths (0.005) grams per two hundred ten liters of the target value for the approved solution. Nor was the instrument removed from service until serviced or repaired in violation of OAC §3701-53-04(C).
13. An instrument check or certification was not made in accordance with paragraphs (A) and (C) of OAC §3701-53-04 when a new evidential breath testing instrument was placed in service or when the instrument was returned after service or repairs, but before the instrument was used to test subjects in violation of OAC §3701-53-04(D).
14. A bottle of approved solution was used either more than three months after its date of first use, or after the manufacturer's expiration date on the approved solution certificate in violation of OAC §3701-53-04(E).
15. The alcohol solution was not kept under refrigeration when not being used nor was the approved solution bottle retained for reference until that bottle of approved solution was discarded in violation of OAC §3701-53-04(E).
16. All instrument certifications on approved evidential breath testing instruments listed under paragraph (A)(3) of rule OAC §3701-53-02 of the Administrative Code were not performed by representatives of the director of the Department of Health in violation of OAC §3701-53-07(C).
17. The Intoxilyzer 8000 operator issued an operator access card under paragraph (C) of rule 3701-53-09 of the Administrative Code, was not subject to a proficiency examination once per calendar year in violation of OAC §3701-53-08(D).
18. The Intoxilyzer 8000 operator did not possess a valid operator access card under paragraph (D) and (E) of rule 3701-53-09 which was not revoked, suspended, or denied under rule 3701-53-10 of the Administrative Code. Ohio Administrative Code 3701-53-09(D) requires ODH to issue operator access cards "to individuals who qualify under the applicable provisions of Rule 3701-53-07..." The ODH

regulations have no specific applicable provisions in 3701-53-07 for qualifications for operator access cards. The Ohio Supreme Court requires strict compliance with Revised Code Section 3701.143 which mandates that the director of ODH shall ascertain the qualifications of individuals to conduct breath tests. In *State v. Ripple*, 70 OH St. 3d, 86 (1994)

The director is not permitted unlimited discretion to issue operator access cards. The qualifications must be established first. Without qualifications there is no basis for issuance of operator access cards. Because there are no standards there is also no basis for the ODH director to exercise discretion to issue an operator access card. Therefore Defendant's test was not performed by a qualified operator and the result must be suppressed.

19. OAC §3701-53-08(D) constitutes an abuse of discretion in that it requires no access cards or permits and imposes no standards or qualifications for those persons involved in alcohol testing who are the director's designees or individuals appointed by the director of health.
20. The operator operating the tester in the case at bar did not meet the qualification requirements specified in OAC §3701-53-07(D) and (E).
21. The operator's manual was not kept in the area where the tests were performed as required by OAC 3701-53-01(B) and *State vs. Douglas*, 2004 Ohio 5726,; 2004 Ohio App. LEXIS 5167.
22. The operator's manual(s), was (were) not followed as required by *State vs. Schlegel*, 2004 Ohio 2535; 2004 Ohio App. LEXIS 2245.
23. Results of instrument checks, controls, certifications, calibration checks were outside the ranges and times specified in OAC 3701-53-04(A), (A)(1) and (A)(2).
24. Results of instrument checks, controls, certifications, calibration checks and records of service and repairs were not preserved, identified and retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code, OC as required by 3701-53-04(C) and OAC 3701-53-04(G).
25. By removing the forms in the appendix of the Ohio Administrative Code, the 2000 amendments to that code left this state without any officially approved procedure for administrating breath tests. As such, suppression is warranted under *State v. Ripple*, 70 Ohio St.3d 86, 637 N.E.2d 304 (1994).
26. Alveolar or deep lung air was not sampled as required by OAC 3701-53-02 (C). The testing machine is not adequately designed and/or the regulations are not properly drafted so as to ensure that alveolar air is sampled.

27. Results of instrument checks, controls, certifications, calibration checks and records of service and repairs were not retained for three years as required by OAC 3701-53-01(A) and OAC 3401-53-04(G)
28. The December 14, 1998 memorandum from the Ohio Department Of Health regarding the need to wait 20 minutes following an invalid sample was not complied with.
29. The Director of the Department of Health abused his discretion by not providing for a sufficient two test system or by failing to take other adequate measures to ensure that only deep lung or alveolar air is sampled.
30. The breath test should be excluded because the traditional safeguards for admitting scientific evidence have been abandoned in favor of the current Ohio regulatory process. This process changes and shifts the burden of proof, violates the sixth amendment, denies the defendant's right to due process of law and fails to ensure that the test is either scientifically accurate or reliable
31. Statements from the defendant were obtained in violation of his Fifth Amendment right against self-incrimination and both his Fifth and Sixth Amendment right to counsel as applicable under the Fourteenth Amendment and in violation of similar rights under the Ohio Constitution.
32. The field sobriety tests administered to the Defendant by the arresting officer were not administered in accordance with the training the officer received in the administration of field sobriety tests and/or the policies and procedures of the arresting officer's department.
33. NHTSA field tests were not performed in accordance with the "testing standards ... in effect at the time the tests were administered," as required by ORC §4511.19(D)(4)(b).
34. The Ohio Administrative Code and Ohio Rev. Code §4511.19 themselves violate the Modern Courts Amendment to the Ohio Constitution, Const. Art. IV, §5, insofar as they purport to set forth rules for the admissibility of evidence. As such, any test or tests should be suppressed unless a proper foundation is laid independent of any such requirements.
35. According to the NHTSA manuals, with the exception of vertical nystagmus, the field sobriety tests are correlated with a prohibited concentration of alcohol only. There is no claim that they can predict drug or alcohol impairment and thus are irrelevant to drug or cases alleging impairment by alcohol.
36. A chemical test is inadmissible absent retrograde extrapolation to the time of the offense based upon sufficient evidence to make such calculations.

37. Documents may not be used against the defendant without affording him his right to confront witnesses against him under *Crawford vs. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and without violating Evid R 803 (8).
38. An outdated form 2255 was used in this case which had incorrect information as to the lengths of the suspensions which vitiated any action taken by the defendant in response to such information.

Respectfully Submitted,



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MEMORANDUM

Probable Cause

The magic words theory of probable cause is not the law and should not be applied in this case. It is sometimes assumed that the state's burden in a motion hearing is so slight that all that is required for the burden to be met is for the officer to mention a few well known phrases such "strong odor of alcohol". This is the magic words theory of probable cause and it is not the law.

The law as set forth by the Ohio Supreme Court is as follows: "Probable cause to believe a driver is operating a vehicle while intoxicated arises from readily discernable indicia under the *totality of the circumstances*." *State v. Gustafson*, 76 Ohio St.3d 425, 450, 668 N.E.2d 435, 453, 1996-Ohio-425 (Ohio, Jul 30, 1996), emphasis added.

Consequently, contrary to popular belief, once the magic words are uttered, the case is not over. All of the other facts and circumstances are relevant and are the proper subject of inquiry. To put it simply, the court cannot just say I have three things consistent with probable cause and I have heard enough. If there are 57 things inconsistent with probable cause and only three things consistent with probable cause, under the totality of the circumstances requirement, there is not probable cause.

Likewise, if the court has heard the three things favoring probable cause but not the 57 things inconsistent with it, the court has not considered the totality of the circumstances. All 60 are relevant and must be considered even if the three have been proven. The inquiry does not end after the magic words are spoken nor is it proper to reach a decision at that point. All factors must be considered.

It is submitted that the evidence will show that there was no valid reason to stop or detain the defendant. Evidence flowing from an illegal stop, detention and/or arrest cannot be used to convict the defendant. *State vs. Chatton*, 11 Ohio St. 3d 59, 463 N.E. 2d 1237 (1984); *State vs. Timson*, 38 Ohio St. 2d 122, 311 N.E. 2d 16 (1974); *State vs. Walters*, Hamilton App. No. C-80413 (March 27, 1985) unreported.

Parenthetically, it should also be noted that since the court file disclosed that this was a warrantless arrest, the prosecution bears both the burden of proof and the burden

of going forward on all issues raised in this motion pursuant to the cases of *Euclid vs. Giordano*, 9 Ohio St. 2d 140 (1967) and *Xenia vs. Wallace*, 37 Ohio St. 2d 216 (1988).

FACTS

On or about April 17, 2013, the Defendant, Michelle Nester, was arrested and detained by agents of the State of Ohio, to wit, officers of the Ohio State Highway Patrol and based on information and belief, allegedly charged with criminal and/or traffic offenses.

The facts leading to this arrest were as follow:

On or about April 17, 2013, an officer of the Ohio State Highway Patrol detained the Defendant on West 140th Street in Linndale for allegedly speeding. There was no erratic driving. The officer had no reason to believe the Defendant was guilty any traffic violation and thus had no probable cause to detain her even momentarily.

The officer then approached the vehicle in question. The officer identified the operator of the vehicle as the Defendant. The officer then allegedly detected an odor of alcohol as well as other possible indication of intoxication.

Thereafter, the officer required that the Defendant perform several field sobriety tests. These tests included but were not limited to, the One Leg Stand, the Walk and Turn, HGN (Horizontal Gaze Nystagmus) Test. The Defendant cooperated with the demands of the arresting officer. The Defendant performed said field sobriety tests adequately though they were not administered within strict and/or substantial compliance with guidelines of the National highway Traffic and Safety Administration. The Defendant allegedly performed said tests to the subjective dissatisfaction of the arresting officer and was subsequently arrested.

Thereafter, the Defendant was transported to the Linndale Police Department. At the station, the officers required that the Defendant submit to a measurement of her blood alcohol level, to which she submitted. The test was coerced; the Defendant was not properly informed of the rights and the consequences in taking, or refusing to take such a test. Moreover, the machine used to test the Defendant's breath was not calibrated properly pursuant to the Ohio Administrative Code. The result of said test was allegedly at .210.

Specifically it is submitted that the evidence will be insufficient to show that the officer had reasonable suspicion to believe that the defendant committed a speeding violation and that there was no other valid reason for stopping the defendant or for arresting her for OVI. Furthermore, a speeding violation alone does not provide probable cause to arrest for OVI where there were not enough other signs of intoxication to constitute probable cause for that offense under *State vs. Finch*, 24 Ohio App 3d 38 (1985).

See also *State vs. Taylor*, 3 Ohio App. 3d, 197 (1981) holding that speed alone and a mere odor of alcohol is insufficient to constitute probable cause. Nor can the prosecution bootstrap the probable cause issue with field tests or other subsequent evidence: "...absent reasonable suspicion that the subject is intoxicated, the officer cannot require the motorist to submit to sobriety tests *State vs. Weaver*, 87CA40, 1988 WL 88390 (unreported 7th District, 1988). See also *State vs. Dixon*, 2000 WL 1760664 (2d Dist. Dec 1,2000). As the United States Supreme Court put it, the detention of a person: "...must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

Thus, any detention beyond that necessary to cite the defendant for the speeding violation was illegal. The officer must have reasonable suspicion to believe the

defendant was under the influence before he can be detained for field tests. Even if it is assumed arguendo that the defendant may not have performed perfectly on the field "tests", the officer had no legal authority to administer those tests in the first place.

Thus, the issue is not whether [the officer] had the right to take [the defendant] into custody, *but whether he had the right to administer field sobriety tests*. If he did, we recognize that the results of those tests afforded probable cause for the subsequent administration of a breath alcohol test.

We cannot distinguish this case from *State v. Spillers* (March 24, 2000), Darke App. No. 1504, unreported, in which we held that "de minimus" lane violations, combined with a slight odor of an alcoholic beverage and the admission to having consumed "a couple" of beers, were not sufficient to justify the administration of field sobriety tests.

The mere detection of an odor of alcohol, unaccompanied by any basis, drawn from the officer's experience or expertise, for correlating that odor with a level of intoxication that would likely impair the subject's driving ability, is not enough to establish that the subject was driving under the influence. Nor is the subject's admission that he had had one or two beers.

State vs. Dixon, 2000 WL 1760664 page 2 (2d Dist. Dec 1, 2000) emphasis added.

By asking questions irrelevant to the purpose of the stop, the officer impermissibly expanded the length and the scope of the investigative stop. Because the scope of the detention was not carefully tailored to its underlying justification, subsequent evidence was obtained in violation of the Fourth Amendment. See *State v. Brown*, 183 Ohio App.3d 337, 916 N.E.2d 1138, 2009-Ohio-3804 (Ohio App. 6 Dist. Jul 31, 2009).

"We note that this probable cause determination, like all probable cause determinations, is fact-dependent and will turn on what the officer knew at the time he made the stop. Under this test, it is clear that the courts may not determine whether there was probable cause by looking at events that occurred after the stop.

Dayton v. Erickson, 76 Ohio St.3d 3, 10; 665 N.E.2d 1091, 1096; 1996-Ohio-431 (1996).

Compliance with §4511.191

The provisions of Ohio Rev. Code §4511.191 are not applicable unless the defendant was validly arrested by an officer having reasonable grounds to believe the defendant was operating a vehicle while under the influence of alcohol and/or drugs of abuse and was properly advised of the Ohio implied consent provisions. The warning, documentation and other provisions of Ohio Rev. Code §4511.191 must also be complied with. When implied consent warnings are misstatements of the law, consent is involuntary and such evidence is unconstitutionally obtained under the Fourth Amendment. Therefore the defendant's alcohol test must be suppressed. *State vs. Taggart*, Washington App. No. 86 CA 21 (August 29, 1987) unreported. .

Breath Test

Before the results of a breath alcohol test given a defendant are admissible in evidence, it is incumbent upon the state to show that the sample was withdrawn by a qualified individual, that it was analyzed in accordance with the Ohio Department of Health Regulations and that it was withdrawn within the three hour testing limitations of the Ohio Rev. Code §4511.19(D); *City of Newark vs. Lucas*, 40 Ohio St. 3d 100 (1988); *Aurora vs. Kepley*, 60 Ohio St. 2d 73 (1979); *Cincinnati vs. Sand*, 43 Ohio St. 2d 79 (1975); *State vs. McCloy*, Hamilton App. Nos. C-830965, C-830966, C-830967 (October 10, 1984).

It is also submitted that the evidence will be insufficient to show that the officer requested the defendant to submit to the chemical testing within two hours as required by Ohio Rev. Code §4511.192. (A). Note that under the preceding subsection, while the time for withdrawing the sample was change to three hours, the office must still request the defendant to take the test within two hours. This is so because the defendant must submit to the officer's request within two hours. This cannot be done unless the officer requests the defendant to test within two hours.

Note also that in the case of commercial driver's license holders (even those in private vehicles), the time limit is still two hours for withdrawing the sample under §4506.17(B).

Specifically, all of the requirements of the above numbered paragraphs must be met, which paragraphs are incorporated by reference here. Furthermore, under *State v. Burnside*, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372 (2003):

A court infringes upon the authority of the Director of Health when it holds that the state need not do that which the director has required. Such an infringement places the court in the position of the Director of Health for the precise purpose of second-guessing whether the regulation with which the state has not complied is necessary to ensure the reliability of the alcohol-test results.

...
To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial-compliance standard set forth in *Plummer* to excusing only errors that are *clearly de minimis*. Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as "minor procedural deviations."

Id., 100 Ohio St.3d 159, 797 N.E.2d 77 (emphasis added).

Record Retention

All breath testing records must be retained. OAC 3701-53-02 (E) provides:

Breath samples using the instrument listed under paragraph (A)(3) of this rule [the 8000] shall be analyzed according to the instrument display for the instrument being used. The results of subject tests *shall be retained in a manner prescribed by the director of health* and shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

Id., (emphasis added). OAC 3701-53-04 (G) provides that:

Results of instrument checks, controls, certifications, calibration checks and records of service and repairs shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code.

Id, (emphasis added). OAC 3701-53-01 (A) in turn provides in part that: "The results of the tests shall be retained for not less than three years."

Under the new regulations, there is no log book requirement. While there is the web site, in past cases, the Department of Health has submitted that the printout spit out by the machine are the only evidential records in the case, not the online web site database. One problem with this rationale is that if the web site is not the official repository for these records, then there is none. No other method has been specified by the director as required by the above regulations.

~~If the prosecution disagrees, let them show the prescription that indicates how records are to be retained. If there is no officially prescribed retention method, then *State v. Ripple*, 70 Ohio St.3d 86, 637 N.E.2d 304 (1994) becomes relevant. In *Ripple*, the director failed to specify methods in the context of drug testing. The supreme court found this to be a fatal flaw. "Chemical analysis purporting to indicate presence of drug in an accused is inadmissible in prosecution for driving while under influence of drug of abuse absent approval of methods by Director of Health pertaining to testing of bodily substances for drugs." *Id*, 86 (emphasis added). If there is no method, then the regulations are impossible to comply with and the test is inadmissible.~~

Furthermore, should the prosecution now wish to contend that the web site is not the official method, then it has the duty to produce in discovery the real records for the last three years on the testing machine used in this case. If the real records have not been produced, then the test should be suppressed for failure to comply with discovery.

Retrograde Extrapolation

ORC §4511.19(A)(1) makes it clear that it is the defendant's alcohol level "at the time of the operation" which is relevant. The test result only shows the level at the time of testing. It is undisputed from a scientific standpoint that alcohol in the stomach can be digested between the time of operation and the time of testing. Unless testimony is presented to perform retrograde extrapolation back to the time of operation, the test result, without more, should be irrelevant because it is not evidence of the level at the time of operation. For an excellent analysis of these issues see *Mata v. State*, 13 S.W.3d 1 (Tex. App.--San Antonio 1999), rev'd, 46 S.W.3d 902 (Tex. Crim. App. 2001), opinion on remand, 75 S.W.3d 499 (Tex. App.--San Antonio 2002), vacated, 122 S.W.3d 813 (Tex. Crim. App. 2003).

Outdated BMV Form 2255

An outdated form 2255 was used in this case rather than the current "BMV 2255 7/10". The old forms have incorrect information as to the lengths of the suspensions which vitiates any action taken by the defendant in response to such information. See *Eastlake v. Komes*, 2010 WL 2171145, 2010-Ohio-2411 (Ohio App. 11 Dist. May 28, 2010). When a person is erroneously advised regarding the consequences of refusing to submit to a chemical test for alcohol, the person's consent is involuntary, and the chemical test is inadmissible. See, *State v. Szalai* (Ashtabula 1983), 13 Ohio Misc.2d 6; *State v. Chard* (6th Dist. 1984), unreported, 1984 WL 7788; *State v. Gottfried* (6th Dist. 1993), 86 Ohio App.3d 106. While *Bryan v. Hudson* 77 Ohio St.3d 376 (1997) held that reading language on top of 2255 is sufficient to inform the defendant of consequences, the issue of an outdated form was not involved there, but rather a current one which was incorrect as applied to the defendant in that case. Even so, the court in *Komes*, cited *Hudson* and did not believe that it dictated a different result.

*Machine Malfunctions and the Conflict Between
Ohio's Regulatory Process and the Constitution*

The scientific validity of the foundational regulations for breath testing in Ohio has never been subject to the test of cross examination. Never. Not once. The scientific validity of the breath testing machine used in the case at bar has never been subject to the test of cross examination in any court in Ohio. Never. Not once. If these statements are not absolutely true, let the prosecution produce one single case where this has been allowed.

The breath test result should be suppressed until and unless the Sixth Amendment is complied with. As is further set forth below, scientific evidence is not exempt from compliance with the Sixth Amendment. See The June 25, 2009 decision United States Supreme Court in See *Melendez-Diaz v. Massachusetts*, --- U.S. ----, 129 S.Ct. 2527, 174 L.Ed.2d 314, (U.S.Mass. Jun 25, 2009) and *Bullcoming v. New Mexico*, --- U.S. ----, 131 S.Ct. 2705, 180 L.Ed.2d 610, (U.S.N.M. Jun 23, 2011)

Ohio has abandon the traditional all encompassing safeguards which protect defendants against conviction based upon junk science. See *State vs. Luke*, 2006-Ohio-2306, 2006 WL 1280899 (Ohio App. 10 Dist.). In its place, Ohio has substituted the much more limited "regulatory compliance" standard as the method for determining scientific reliability and accuracy. The problem is that the regulations are not even close to being all encompassing and they contain glaring deficiencies. Real scientific defects which are not contemplated by the rules are officially ignored. In OVI cases, Ohio has abandoned *Daubert* in favor of what could fairly be called the ostrich view of scientific evidence: If we don't see it, it doesn't exist. The United States Supreme Court has said Ohio has to pull its' head out of the sand. It has to listen to the other side.

The abandonment of the traditional standard for the admission of scientific evidence relieved the state of its burden of proof and shifted it to the defendant. The state has never had the burden of proving that the regulations ensure the scientific reliability of the test. Instead, the scientific reliability of the test, and thus the defendant's guilt, is presumed with an abuse of discretion standard applying *to the defendant*.

As such, in Ohio, the alleged scientific reliability of the breath test has never been established through the adversarial process. The purported scientific reliability of the breath test is based upon bureaucratic fiat, not evidence. The Ohio Department of Health, and indirectly the legislature, assert that the device and the procedure to be used to convict the defendant are scientifically valid. These assertions are submitted to the trier of fact without benefit of confrontation. This is a factual claim and it is being offered to assist the prosecution without ever having been tested by confrontation.

It would be disingenuous to claim that the ODH and the legislature are not vouching for the scientific reliability of the testing machine and the foundational requirements in the regulations. If such a thing were to be seriously contended, then the remedy would be simple. Bar the test because scientific reliability has not been established.

The law on confrontation is no less clear than the lack of confrontation, especially after the recent United States Supreme Court Decision in *Melendez-Melendez, supra*.

...U.S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution must produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

Melendez, supra, 5 (emphasis in original).

Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is "prone to

distortion or manipulation,” and the testimony at issue here, which is the “result[t] of neutral, scientific testing.” Brief for Respondent 29. Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value because “one would not reasonably expect a laboratory professional ... to feel quite differently about the results of his scientific test by having to look at the defendant.”

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Melendez, supra., 7.

The New Mexico Supreme Court stated that the number registered by the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor's part. 226 P.3d, at 8–9. We have already explained that Caylor certified to more than a machine-generated number. See *supra*, at 2710 – 2711. In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the “obviou[s] reliab[ility]” of a testimonial statement does not dispense with the Confrontation Clause. 541 U.S., at 62, 124 S.Ct. 1354; see *id.*, at 61, 124 S.Ct. 1354 (Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination”). Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess “the scientific acumen of Mme. Curie and the veracity of Mother Teresa.” *Melendez-Diaz*, 557 U.S., at —, n. 6, 129 S.Ct., at 2537, n. 6.

Bullcoming, supra., 131 S.Ct. 2708.

It should also be noted that following it's decision in *Melendez-Diaz* the United States Supreme Court reversed a recent Ohio Supreme Court case due to want of confrontation. See *Crager v. Ohio*, 129 S.Ct. 2856, 174 L.Ed.2d 598, 77 USLW 3709 (U.S.Ohio Jun 29, 2009).

If the legislature and the Ohio Department of Health are to be allowed to offer scientific evidence against the defendant, then they must be subject to cross examination. If not, their conclusions must be barred. The only real issue is whether

the confrontation clause is going to be followed. Will justice be restored to OVI defendants or will Ohio continue to be alone among the states in denying defendants the right to question the scientific validity of what in many cases is the only real evidence against them?

It is important to stress at this juncture that the issue is not whether the regulations have been complied with, but whether the regulations themselves are valid scientifically. The question is whether the defendant is entitled to cross examine on the issue of scientific validity, not just on the issue of regulatory compliance. The courts of Ohio (and only the courts of Ohio) have ceded their judicial authority on this issue and given exclusive control of the question to a retired police officer lacking in scientific credentials, to wit: Dean Ward, the head of the Ohio Department of Health's alcohol testing division.

It is nonsense to contend that regulatory compliance ensures a valid test. The only reason such nonsense has not been exposed is that Ohio has turned a deaf ear to evidence to the contrary. If contrary evidence is not allowed in the record, then, of course, the breath tester is going to appear to be an excellent device.

Some examples of the problems with the regulations are anticipated to arise under the facts of the case at bar. The Intoxilyzer 8000 has a self diagnostic function in which the components of the machine are self tested.

The way the regulations are written, even if the Intoxilyzer 8000 fails every single diagnostic test the breath test is still admissible. It should also be noted that the regulations do not even require running this check in the first place. Thus it is nonsense to claim that regulatory compliance ensures scientific reliability.

Temperature is generally crucial in the area of breath testing. Under the regulations, even if the temperature registered at absolute zero, the test result still is admissible. Likewise if the test result were so high that the defendant would have to be dead to test that high, the test would still come in as scientifically reliable. The regulations simply do not contemplate all possible errors. As such, compliance with the regulations simply does not insure scientific reliability. The courts of Ohio should stop pretending otherwise.

Regardless of the validity of the claim that the regulations are deficient, that is not the real issue. The real issue is whether the defendant has a right to confrontation. Even if the regulations are wholly valid from a scientific standpoint, they cannot be used as a substitute for confrontation. Similarly, the test of bureaucratic fiat (i.e. bureaucratic approval of the Intoxilyzer 8000) also could not be substituted for the test of confrontation on the issue of the Intoxilyzer 8000's scientific validity even if it were perfect. While courts historically have taken judicial notice of scientific issues at some point, even this is improper where testimony has *never* been adduced on the issue. The defendant asks that either he be afforded his constitutional right to confrontation or that the test be barred.

Confrontation vs. Unsworn Documents

There are certain assumptions we make when we deny the right to confront the government official who performed the instrument certification. Such assumptions are rarely, if ever, examined to determine whether or not they are true or even make any sense to assume. At a minimum, the following must be assumed before it is at all just to deny the right of confrontation:

1. No certification official ever makes a mistake.
2. If a certification official makes a mistake he always knows it.
3. If a certification official makes a mistake, he always makes a written record of it and puts it in a place where all defense attorneys will find it.
4. No certification official is ever reluctant to record his mistakes in writing where his supervisor could find them.
5. No certification official is ever reluctant to indicate in his records that he made a mistake that might compromise the result in a number of court cases.
6. Unsworn witnesses concerned about the matters in paragraphs 4 & 5 could never possibly be tempted to be evasive or stretch things when not actually under oath.
7. Errors in the instrument check process are always apparent from the records.
8. It is not possible for there to be errors in the instrument check process which can be learned of through cross examination alone.

Even if it is assumed *arguendo* that the right to confrontation can be constitutionally denied, at a minimum, this should only be done where the right is unnecessary to obtaining justice. To be unnecessary, the result should be the same whether or not confrontation is provided. This can only happen, at a minimum, if all of the above statements are true. If it would be unwise to bet one's pension that all of the above are true, then it is unconscionable to bet the defendant's freedom on that same thing.

It might be argued that defense counsel also would not bet his pension that errors would in fact be discovered through cross examination. This is a false argument. The defense need not know what a witness will say before the right to confrontation exists. Clairvoyance is not a condition precedent to the right to cross examine. If confrontation can be dispensed with because it is always unnecessary, then all of the above statements must always be true. Otherwise, it is necessary. Those who claim it can be dispensed with are, in reality assuming that they possess the power of clairvoyance

whether they have thought about it that way or not. They assume that none of the above things could ever happen. Otherwise confrontation would be necessary rather than unnecessary.

The *Melendez* case also has a more specific application to this particular case. *Melendez* held that the introduction of testimonial statements of witnesses violates the right of confrontation. It is anticipated that the state will attempt to use unsigned, unsworn, unauthenticated forms from a website that disclaims their accuracy in lieu of actual testimony. Such documents are particularly suspect in light of the disclaimer on the web site where they are stored (<http://publicapps.odh.ohio.gov/BreathInstrument/>):

The information contained within this web site is deemed to be public information and is generated from computerized records maintained by the Ohio Department of Health and Alcohol and Drug Testing. While every effort is made to assure the data is accurate and current, it must be accepted and used by the recipient with the understanding that *no warranties, expressed or implied, concerning the accuracy, reliability or suitability of this data have been made.* The Ohio Department of Health, Alcohol and Drug Testing, their agents, and the developers of this web site assume no liability whatsoever associated with the use or misuse of the data contained herein.

By accessing or using this web site you agree to the terms.

Id., emphasis added. People should not be convicted based upon information whose accuracy is disclaimed.

The breath test documents are nothing if not testimonial. Their sole purpose is to be used in evidence against the defendant. It is the functional equivalent of claiming that the following statement can supplant the constitution. "I did everything right. No need to cross examine me." It should also be noted that unlike testimony in court it is not even made under oath.

{¶ 21} In *Melendez-Diaz*, the court held that a lab analyst's "certificate" was the functional equivalent of an "affidavit," and thus constituted testimonial

evidence. The certificate showed the results of the forensic analysis performed on substances seized from the defendant, reported the weight of the substance, and was sworn to before a notary public. The *Melendez-Diaz* court held that under these circumstances, the " 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' " *Id.* at 2532, quoting *Davis v. Washington (2006)*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224. The court thus determined that because the analyst's statements contained in the "certificates" constituted testimonial statements, absent a showing that the analyst was unavailable to testify at trial *and* that the defendant had a prior opportunity to cross-examine the analyst, the defendant was entitled to confront the analyst at trial. *Id.* at 2532.

State v. Woods, 2009 WL 4021382, 4; 2009-Ohio-6169 (Ohio App. 4 Dist. Nov 19, 2009), emphasis added.

It might be thought that there is no need for actual testimony from the certification official since, the documents purportedly show everything was done right. It is worth reiterating in this context Justice Scalia's admonition in *Melendez*.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Melendez, supra., 7.

While Mendez is thought to have left open the question of whether a state can require the defense to demand the testimony of the expert as a prerequisite to the right of confrontation, this is not at issue in the case at bar. First of all, the state has not served the defense with any of paperwork triggering such a demand process. Second, such a demand was in fact included by the defense in its discovery demand filed with this court. In that document it was stated: "The defendant specifically objects to the use of any report, affidavit, or other document in lieu of live testimony." Third, lest there still be any question on the issue, the defense hereby demands the live testimony of the certification official and objects to anything less than that.

Even if we assume *arguendo* that *Melendez* can somehow be ignored. It is submitted that cross examination of such officers is not as unnecessary as might be believed. A good example of the need for confrontation is provided in the recent Licking County case of *State v. Dimitri Hatzimbis* (Licking County Municipal Court Case No. 07-TRC-07470). While *Hatzimbis* is unreported, it is discussed in some detail in *State v. Raleigh*, 2008-Ohio-6843.

In *Hatzimbis*, Deputy Doelker testified that no records of instrument check results which indicated that the results were outside the acceptable limits were retained; rather, he threw those out. Specifically, Deputy Doelker testified that he discarded print-outs of instrument check results outside of the required .005 tolerance level for the target value of the solution for two years prior to the hearing date of December 4, 2007. (*Hatzimbis* Supp. Hrg. Tr., p. 9).

Additionally, in *Hatzimbis*, Deputy Doelker testified that the same bottle of calibration (instrument check) solution is used when an instrument check result is outside the range specified. (*Hatzimbis* Supp. Hrg. Tr., p. 9.) in violation of OAC 3701-53-04(A)(2). The fact that the same bottle of solution was used for subsequent instrument checks after an instrument check result was out of tolerance was a second ground for suppressing the test in *Hatzimbis*. Moreover, the fact that Deputy Doelker was discarding instrument check results which were out of tolerance and not changing the bottle of solution renders it impossible to discover the non-compliance with OAC 3701-53-04(2)(E) by simply reviewing the records. See also *State v. George*, 2000 WL 1408 (Ohio App. 5 Dist. Dec 15, 1999).

In the Judgment Entry issued in the *Hatzimbes* case, the Licking County Municipal Court specifically found that no records of instrument checks where the results were outside the acceptable limits were retained by the Sheriff's Department. The Court reasoned that this procedure is in direct conflict with ODH Regulation 3701-53-01(A) and 3701-53-04(E) and suppressed the results of the BAC Datamaster test.

So how does this relate to the issues in this case? It shows that, not all issues can be determined from discovery or from a form filled out by the certification official. If a record has been destroyed, it is not going to be there to discover in the first instance. The defense simply cannot learn everything that is necessary from discovery. Nor did the prosecution in *Hatzimbes* disclose that agents of the state were destroying records. This was learned through cross examination. Counsel did not know that this was happening until he heard the answer in court.

It also would have made absolutely no sense to say that the defense was required to predict in advance what the deputy would say on cross in order for the right of confrontation to arise in the first instance. Only the clairvoyant would be afforded their constitutional right to confront their accusers.

If the court in *Hatzimbes* had allowed a form to substitute for testimony, the practice of destroying evidence would be continuing in Licking County to this day. Does requiring live testimony constitute what is sometimes dismissively referred to as a fishing expedition? Maybe so. Even if this is true, it should be remembered that the founding fathers had another name for "fishing expeditions". They called it the constitutional right to confront accusers.

State vs. Wang

It might be thought that *State vs. Wang* 2008 WL 1932305, 2008 -Ohio- 2144 (5 Dist., 2008) is dispositive of the issues raised here. It is submitted that it is not for two reasons. First, the law has changed. Second, even assuming *arguendo* that it has not, *Wang* will be distinguishable on the facts.

Wang stands for the proposition that unsworn documents prepared by the police may be used in evidence against a defendant in a criminal case without the need of testimony of any witness. In other words, *Wang* holds that there can be evidence helpful to the prosecution but not subject to confrontation. The problem with this is that since *Wang*, the United States Supreme Court has held to the contrary. As Justice Scalia put it: "Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Melendez, supra*, 5.

It should be noted that *Melendez* specifically dealt with a case where records prepared for use in trial were admissible without testimony. The court found that the business records exception relied upon in *Wang* was inapplicable:

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford*: "Most of the hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy." 541 U.S., at 56, 124 S.Ct. 1354. Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because-having been created for the administration of an entity's affairs and not for *2540 the purpose of establishing or proving some fact at trial-they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here-prepared specifically for use at petitioner's trial-were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Melendez, supra, 129 S.Ct. 2539-2540,

Once the law upon which a policy is based changes, the policy must change as well. If the law changes but the policy does not, we no longer have the rule of law but rather just blind conformity to prevailing practice. The issue in this case is not hearsay, it is confrontation. If unsworn forms are to be allowed to substitute for testimony, the question is when is the right to confrontation to be honored in an OVI case. Under the aforementioned circumstances, the answer is never. The question then becomes whether, in light of recent changes in the law, there is any longer any justification for this policy.

While it may very well be that the rules of evidence do not apply at motion hearings, it is a radically different proposition to claim that the constitution does not apply at motion hearings. Unfortunately, the justification for the allowing documents without witnesses is no better than claiming that the constitution does not apply.

It should also be noted that, for reasons that aren't particularly clear in the opinion, the Fifth Appellate District has decided, post *Melendez*, and post *Crager* that OVI defendants still do not have the right to confrontation regarding the test. See *State vs. Collins* 2010 WL 4345727 which holds that BAC records are not testimonial and thus not subject to confrontation. There is, however, a conflict between the jurisdictions on this point. In a case decided after *Collins*, the Second District Court of Appeals upheld the right of confrontation. "...[T]he results of a test of those same body fluids, and statements by the persons conducting the testing, are testimonial..." *State vs. Syx*, 2010-Ohio-5880 (2ed Dist, December 3, 2010).

The court in *Melendez* held that include among those things which are testimonial are: "...pretrial statements that declarants would reasonably expect to be used prosecutorially...". *Melendez, supra*, 129 S.Ct. 2531. Also included were: "...statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*, 129 S.Ct. 2531. It is hard to see how anyone can seriously contend that alcohol testing records are not prepared for this purpose.

Another potential justification for the policy in *Wang* is waiver. The court in *Wang* noted that:

At the hearing on her motion to suppress, appellant did not challenge the admissibility of the pre- and post breath test instrument check forms. (State's Exhibit Nos. 2; 4). (T. at 71-72). The appellant likewise did not object to the admission into evidence of the senior operator permit for the calibrating officer. (State's Exhibit 4). The Lot or Batch number certificate for the Instrument Check Solution, as well as a photocopy of the individual bottle label, was admitted without objection. (State's Exhibit 6). Accordingly, the addendum utilized by the trooper in the case at bar is merely cumulative to the extent that it recites information admitted into evidence through the aforementioned State's Exhibits.

Wang, supra, WL 1932305 3-4, ¶ 18.

While a waiver theory may have justified the result in that case, it will not justify the result in this one. Defendant specifically hereby objects and will object in court, to the introduction of any documents if the foundation for their introduction is not supported by the testimony of the appropriate witness. In short, *Wang*, will be factually distinguishable from the case at bar as well.

Statements of the Defendant

The defendant further contends that custodial statements taken from defendant were obtained in violation of his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and *Miranda vs.*

Arizona, 348 U.S. 436 (1966); *Berkemer vs. McCarty*, 468 U.S. 240, 104 S. Ct. 3138 (1984); *State vs. Buckholz*, 11 Ohio St. 3d 24, 462 N.E. 2d 1222 (1984); and *State vs. Leach*, 102 Ohio St.3d 135, 807 N.E.2d 335, (2004). It is further submitted that any such statements also violate the corpus delectit rule. *State vs. Ralston*, 67 Ohio App 2d 81 (1979). Nor can the defendant's silence be used against him even if it happens before there is an arrest under *State v. Leach*, 102 Ohio St.3d 135, 807 N.E.2d 335, 2004-Ohio-2147 (Ohio May 12, 2004).

Field Sobriety Exercises

In the event that this case proceeds solely on an impaired charge without a *per se* charge it is submitted that the horizontal gaze nystagmus test as well as the other so called field tests must be suppressed. The case normally cited in support of the admissibility of the horizontal gaze nystagmus test is *State vs. Bresson*, 51 Ohio St. 3d 123 (1990). It should be noted that *Bresson*, unlike the case at bar, was a *per se* case. The syllabus specifically provides that "... testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of R.C. 4511.19(A)(2), (3) or (4)." *Id.*, 123.

The NHTSA manual indicates that "Research shows that if four or more [HGN] clues are evident, it is likely that the suspects blood alcohol concentration is above 0.10. The reliability of this four-or-more clues criterion is 77%." *DWI Detection And Standardized Field Sobriety Testing, Student Manual* at VII-6 (1995). See also page VII-6 of the 2000 and Chapter VIII p11 last ¶ of the 2002 manual to the same effect.

Similarly, the training manuals tie passing or failing the one leg stand test to a likelihood of exceeding the .100 and .08 *per se* level. See 1995 Manual VIII 24 3d ¶ from bottom], 2000 Manual VIII-14 middle, 2002 VIII p14 3rd ¶ from bottom. Likewise,

with the walk and turn tests. See 1995 Manual, VIII 21 paragraph 2, 2000 Manual, VIII-12 ¶3, and 2002 VIII p11 ¶7.

The NHTSA scientists who did the research upon which the manual is based also agree that performance on the the FST's is not indicative of impairment:

Many individuals, including some judges, believe that the purpose of a field sobriety test is to measure driving impairment. For this reason, they tend to expect tests to possess "face validity," that is, tests that appear to be related to actual driving tasks. Tests of physical and cognitive abilities, such as balance, reaction time, and information processing, have face validity, to varying degrees, based on the involvement of these abilities in driving tasks; that is, the tests seem to be relevant "on the face of it." Horizontal gaze nystagmus lacks face validity because it does not appear to be linked to the requirements of driving a motor vehicle. The reasoning is correct, but it is based on the *incorrect assumption that field sobriety tests are designed to measure driving impairment.*

Stuster, Jack and Burns, Marcelline "Validation of the Standardized Field Sobriety Test Battery t BAC's Below 0.10 Percent" Final Report Submitted to: U.S. Department of Transportation, National Highway Traffic Safety Administration, emphasis added. (Reprinted in the Appendix of the 2004 and 2006 NHTSA instructor's manuals in Session VIII)

Ohio courts have refused to recognize that exceeding the per se levels provides any evidence as to impairment. If exceeding the per se levels is not relevant to an impaired charge, then a test designed to guess at the per se levels should not be relevant either.

This issue normally arises in the context of the per se case. In cases such as *State vs. Boyd*, 18 Ohio St. 3d 30 (1985) and *Whitehall vs. Lee*, (September 30, 1993) 93AP-548 unreported, (1993 opinions 4256) the courts have held that evidence of a defendant's sobriety is inadmissible in a per se case to challenge the result produced by a breath testing machine. The rationale expressed in these cases is that in a *per se* case whether or not one is under the influence is not in issue. The defendant is merely charged with having a prohibited concentration of alcohol in his or his system. As such, evidence of sobriety is irrelevant to a *per se* charge because it does not have any

bearing on a matter in issue in the case. Being under the influence is not an element of the offense and the state does not have to prove this.

In so ruling, the courts must of necessity tacitly refuse to take judicial notice that a person with an alcohol level meeting or exceeding .100 would be impaired. If the courts took judicial notice that one testing over the *per se* limit would show symptoms of impairment, then evidence of sobriety would raise questions as to whether the machine yielded the correct result and would thus be directly relevant evidence (if all persons at or over .100 show signs of impairment and if the defendant shows no sign of impairment, then the machine must be wrong). A change in this position would mean that defendants could challenge test results with evidence of sobriety.

Thus, even in the most optimistic case for the prosecution, HGN testimony if admitted in a *per se* case at best indicates that the defendant has a 77% chance of testing above 0.100. Since this fact, even if proven by a breath test, is, without more legally irrelevant in a impaired case under *Boyd*. and since no more specific information as to level is admissible under *Bresson*, the only possible conclusion is that HGN evidence is legally irrelevant in an impaired case.

It is submitted that the results of the so called "field sobriety tests" should not be admitted. In the first syllabus of *State v. Homan* , 89 Ohio St.3d 421 (2000), the Ohio Supreme Court held that:

1. In order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures.

Id., 421. The court also acknowledged that the National Highway Traffic Safety Administration manuals "...form the basis for manuals used by state law enforcement agencies across the country. *Id.*, 424 footnote 4.

Until and unless the prosecution can demonstrate that each and every alleged field sobriety test was administered in the prescribed manner, all such evidence must be

suppressed under *Homan*. Note also that it is the prosecution's burden to prove that any tests "...were conducted in a standardized manner as provided by the National Highway Traffic Safety Administration." *State v. Nickelson*, 2001 WL 1028878 p. 9 (Ohio App. 6 Dist., Jul 20, 2001) . See also *State v. Pingor*,) (NO. 01AP-302) 2001 WL 1463774 (Ohio App. 10 Dist., Nov 20, 2001) where *Nickelson* was cited favorably by the Franklin County Court of Appeals. To the same effect, see also *State v. Shepard*, 2002 WL 506674 (Ohio App. 2 Dist., Apr 05, 2002) (NO. 2001-CA-34). Note that the anti-homan legislation is discussed below.

There is absolutely no logical reason for admitting the HGN at trial in an impaired case. As was mentioned above, the NHTSA research expressly disclaims that the HGN has any relation to impairment, but rather only to the probability of the defendant testing above a prohibited level. Under these circumstances, the HGN is simply not relevant to an impaired case. Furthermore, under *State v. Grizovic*, 177 Ohio App.3d 161, 894 N.E.2d 100, 2008-Ohio-3162 (Ohio App. 1 Dist. Jun 27, 2008) even the manual statement cannot be given to the jury. While the defendant's performance on other FST's may be of some common sense value to a juror, the same cannot be said of the HGN.

"The manifestation of nystagmus under different circumstances is also a scientific theory that would not be known by the average person. HGN testing is based on a scientific principle not generally known by lay jurors."

State v. Robinson, 160 Ohio App.3d 802, 812-813, 828 N.E.2d 1050, 2005-Ohio-2280 (Ohio App. 5 Dist. May 05, 2005).

If the HGN is admitted in an impaired case, this can be nothing more than an invitation to the jury to speculate. What are they supposed to think that this means. They don't have any common sense understanding and we won't tell them what the

manual says. If the jury is told that the defendant got 6 wrong out of 6 or even 4 out of 6, the juror's thought process is probably something like this: Since the judge let us hear this, it must mean something. Since the officer arrested him after doing the test, he must have failed. If you get 6 wrong out of 6 that is failing on any test I have ever seen. Therefore the jury probably thinks defendant has scientifically been proven impaired. There simply is no rationale for admitting the HGN in an impaired case.

Unfortunately, in the early days of FST's, the Ohio Supreme Court included some language in an opinion which makes no sense. The following citation is probably dicta and is also probably factually distinguishable in an impaired case, since the citation below was made in a per se case. Nevertheless, it should be noted that the court indicated that:

"We hold that the HGN test has been shown to be a reliable test, especially when used in conjunction with other field sobriety tests and an officer's observations of a driver's physical characteristics, in determining whether a person is under the influence of alcohol."

State v. Bresson, 51 Ohio St.3d 123, 129, 554 N.E.2d 1330 (Ohio May 30, 1990). The problem with this quote is that the notion that the HGN is has any bearing on impairment was apparently pulled out of thin air. NHTSA scientists expressly disclaim this. *Bresson* is dicta based upon a mistake of fact. The supreme court assumed without any proof and contrary to the science of the matter that the HGN provides proof of impairment. It then elevated this unscientific assumption at least to the level of dicta.

The language of the NHTSA scientists quoted above bears repeating. It is an: "... *incorrect assumption that field sobriety tests are designed to measure driving impairment.*", *supra*.

Insofar as trial evidence is concerned, once an officer testifies to smelling an odor of alcohol, admitting the FST's to prove "consumption" is cumulative evidence and has little to no additional probative value. Under these circumstances, the real reason for seeking to admit the FST's is to lend a false aura of scientific reliability to otherwise marginal evidence. It should also be kept in mind that drinking and driving is legal and that proving a smell of alcohol establishes nothing illegal. Any slight probative value on the issue of consumption is vastly outweighed by the prejudicial effect of the jury being lead to believe that impairment has been scientifically determined. Thus the HGN is inadmissible under Evidence Rule 403(A).

Daubert and Miller vs. Bike

It is further submitted that under the particular facts and circumstances of this case, both the so called field tests and the chemical test(s) are unreliable and therefore inadmissible under the standard set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993), and *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607 (1998). Under these cases, the court must assume an expanded role as gatekeeper over questionable scientific evidence. While it is true that the 10th district found that *Vega* made *Daubert* inapplicable to OVI cases in *State v .Luke*, (May 11, 2006), Franklin App. No. 05AP-371, 2006 WL 1280899; it is submitted that the *Luke* decision is erroneous and that the rational of the Ohio Supreme Court and the United States Supreme Court is correct.

§4511.19(D) Is Unconstitutional On Equal Protection Grounds

The equal protection clauses of both the Ohio and the United States Constitutions are flagrantly violated by §4511.19(D) [SB 163, eff. 4/9/03]. Amended §4511.19(D)(4)(b) (ii) provides as follows:

The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

In its rush to satisfy the Prosecuting Attorney's association, the lame duck legislature abandon all pretense of fairness. The obvious defect here is that only the prosecution is allowed to introduce the result of the test. In a substantial compliance case, if the defendant passes the test and the prosecutor does not seek to introduce the test result, the defendant is not given the same right as the prosecution to introduce the result. The bill gives the prosecution, but not the defense, the right to introduce exculpatory evidence.

§4511.19(D) Is Unconstitutional On Due Process Grounds

The due process clauses of both the Ohio and the United States Constitutions are also violated by §4511.19(D) [SB 163, eff. 4/9//03]. As was set forth above, the Ohio Supreme Court in *Homan* held that: "When field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." *State v. Homan* (2000), 89 Ohio St.3d 421, 424.

A statute which purports to make "inherently unreliable" evidence admissible is fundamentally unfair and a due process violation.

Improper Attribution Of Scientific Reliability To Field Exercises

Even if the results of the so called "field tests" are admitted, they should not be referred to as tests. These "tests" consisted of one or more of the following: walking heel to toe, standing on one leg, touching the finger to the nose, and reciting the ABC's.

It is anticipated that the prosecution will attempt to expressly or by implication cause the jury to believe that these physical exercises are scientifically valid tests, that the defendant failed the test, and that, as such, it has been scientifically demonstrated that the defendant was under the influence of alcohol.

A review of the case law in Ohio reveals a thread of decisions supporting the proposition that field sobriety tests' are admissible as *nonscientific* evidence because they involve observations within the common experience of the ordinary citizen. *State vs. Nagel* 30 Ohio App.3d 80 (1986).

While the while the aforementioned "tests" may be admissible as nonscientific evidence, the prosecution should be prohibited from attempting to attach significance to the defendant's performance on these exercises which go beyond the common experiences of the ordinary citizen. To permit the prosecution or the officer to make reference to the exercises by using terms such as 'test', "pass", "fail", "clues", or "points", creates a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment. Such terms give these lay observations an aura of scientific validity which has not been demonstrated to the court through proper expert scientific testimony. To allow the prosecution to imply an unproven scientific validity to these tests would violate Evidence Rule 403(A) since it would mislead the jury and since the danger of unfair prejudice would be outweighed by the probative value of using such terms.

In the State of Florida, extensive hearings were conducted in 350 consolidated cases on this exact issue. See *Florida vs. Meador*, 674 So.2d (1996). Expert testimony on field sobriety testing was admitted by the defense and the state. The state public

defender s office consolidated all of its DUI cases on the issue as well. On May 15, 1996. the District Court of Appeals of Florida unequivocally concluded that:

While psychomotor tests are admissible, we agree with the defendants that any attempt to attach significance to defendants' performance on these exercises beyond that attributable to any of the other observations of a defendant's, conduct at the time of arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value.

Id., at 832. Therefore. the aforementioned terms must be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment.

In short, while it may be argued that field sobriety exercises fall within the ambit of a juror's common observations, the prosecution should not be permitted to attach an aura of science to his or her observations by using enhancing terms such as "test", "fail", "pass", "clues", "results", "points" or words of similar import.

Specificity of Motion

The actual motion which was *approved* by the Ohio Supreme Court in *State vs. Shindler*, 70 Ohio St. 3d 54 (1994) is attached and the averments therein are hereby incorporated. It is far less specific than this motion. If the prosecution makes a representation to this court that the motion in this case is less specific than the one allowed in *Shindler*, it is only right that the prosecution should show the court what part of the attached motion is more specific than the one in this case. Since the attached motion has been incorporated, by definition, this should be impossible. Accordingly, any prosecution objections should, by definition, be without merit.

Similarly, a ruling for the prosecution would, of necessity require this court to overrule the Ohio Supreme Court. Since the motion the Supreme Court approved has been incorporated, this court cannot do what the government asks without making a finding which is diametrically opposed to that in *Shindler*.

It should also be noted here that at the time this motion was required to be filed, full discovery had not been provided thereby making a complete motion impossible. This is the fault of the government, not the defendant. The defendant should not be penalized for a problem created by the state. Furthermore, the basis for this motion is the Fourth Amendment to the Constitution. While a specificity objection might seem like a clever tactical maneuver, such an objection is at best rule based. If the Constitution is to be disregarded based on a tactical maneuver, the prosecution should first point out what part of the Constitution allows the Fourth Amendment to be overridden by rule of court.

In addition, even if it is assumed *arguendo* that this motion is insufficient, the state waives this argument by failing to file a memorandum contra: "While Crim.R. 47 requires a defendant to state his grounds for a motion to suppress "with particularity," the state waives this issue if it is not raised in opposition to a defendant's motion to suppress. *State v. Mayl*, 154 Ohio App.3d 717, 2003-Ohio-5097, 798 N.E.2d 1101, ¶ 22." *State v. O'Neill*, 175 Ohio App.3d 402, 411; 887 N.E.2d 394, 2008-Ohio-818, ¶33 (Ohio App. 6 Dist. Feb 29, 2008). Presumably any such memorandum contra must also be specific as well.


LEIF B. CHRISTMAN (0070014)

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Driving Privileges was sent on this 28th day of May, 2013 by regular U.S. mail to:

City of Cleveland Prosecutor
601 Lakeside Avenue Room 106
Cleveland, Ohio 44114


LEIF B. CHRISTMAN (0070014)
Attorney for Defendant

Charge	Short Description	Prosecutor				Suspended		Public Defender Fee					
		PNG	NGW	NC	PG	Amends Charge	FG		FNG	NOL	DWP	Fine	Days
1 M1 - 4511.19A1A	DRIV UNDER INFLUENCE OF ALC OR DRUG OR COMBINATION OF THE	<input type="checkbox"/>											
2 M1 - 4511.19A1H	DRIV UNDER INFLUENCE OF ALC OR DRUG BREATHE: 17 HUNDI	<input type="checkbox"/>											
3 MM - 4511.20	RECKLESS OPERATION	<input type="checkbox"/>											

Bond Set \$ _____
 Capias / BFC / Warrant to Issue
 Bond Forfeiture Vacated
 Warrant Block Release
 Personal Bond
 Capias Recalled
 Original Bond Reinstated
 Warrant Fee Waived
 Defendant Advised of Rights
 H/BO
 H/BO
 Demanded
 Days Held
 W/BO
 H/BO
 Demanded
 Days Held
 9:00 at 6-4-2013
 CODR
 COCR
 Jury Trial
 PFS
 Trial Had
 Trial in Progress
 Jury Sworn
 Motion Hearing
 Interpreter Requested
 Language
 Jury Waived
 Atty: Lily Christman
 Public Defender
 Driver's License Suspended from Date of Arrest _____ or _____
 From _____ to _____
 DUI # Within 6 Yrs _____
 Immobilization _____ Days _____ Vehicle Forfeited _____ TIP _____
 INS
 LDPG
 ALS Appeal
 ALS Term
 Motion of Defendant for Occupational Driving Privilege _____
 Granted
 Denied
 JUDGE / MAGISTRATE: Angela R. Stokes

Found Indigent Costs Suspended
 Cost Satisfied
 Credit for _____ Days Served \$ _____
 Sentence Ordered Executed
 Sentence Stayed Until (Date / Time) _____
 Found Indigent Costs Satisfied
 Cost Partially Suspended \$ _____
 Sentence Suspended
 Fine _____ Days
 Mandatory Days _____
 3D Exam: W/BO H/BO Demanded Days Held
 Cont. to: 6-4-2013 at 9:00 am pm Drug Court
 AT: COPR CODR COCR Final SPW
 For: Pretrial Trial Jury Trial PFS
 Trial Had Trial in Progress Jury Sworn Motion Hearing
 Interpreter Requested Language Jury Waived
 Atty: Lily Christman Public Defender
 Driver's License Suspended from Date of Arrest _____ or _____
 From _____ to _____
 DUI # Within 6 Yrs _____
 Immobilization _____ Days _____ Vehicle Forfeited _____ TIP _____
 INS LDPG ALS Appeal ALS Term
 Motion of Defendant for Occupational Driving Privilege _____
 Granted Denied
 JUDGE / MAGISTRATE: Angela R. Stokes

Found Indigent Costs Suspended
 Cost Satisfied
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 Sentence Ordered Executed
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 Atty: Lily Christman Public Defender
 Driver's License Suspended from Date of Arrest _____ or _____
 From _____ to _____
 DUI # Within 6 Yrs _____
 Immobilization _____ Days _____ Vehicle Forfeited _____ TIP _____
 INS LDPG ALS Appeal ALS Term
 Motion of Defendant for Occupational Driving Privilege _____
 Granted Denied
 JUDGE / MAGISTRATE: Angela R. Stokes

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO

Plaintiff,

v

MICHELLE NESTSER,

Defendant

CASE NO. 2013TRC23649

JUDGE ANGELA R. STOKES

MOTION FOR OCCUPATIONAL
DRIVING PRIVILEGES

Now comes the defendant, by and through undersigned counsel, hereby respectfully requests occupational driving privileges during the pendency of this matter, pursuant to Ohio Rev. Code 4507.16. Defendant's license was suspended on April 17, 2013 and said suspension would seriously affect the petitioner's ability to continue attending school

Ms. Nester is currently a surgical technician student at Brown Mackie College, 755 White Pond Dr Akron, OH 44320. She attends classes on Monday, Tuesday and Thursday, and picks up extra lab time in between classes. She must travel from her residence in Lakewood to Akron to attend class. A copy of defendant's insurance information is attached.

WHEREFORE, for the foregoing reasons, Defendant herein, by and through undersigned counsel hereby requests occupational driving privileges.

LEIF B. CHRISTMAN
COURT CLERK

MAY -7 P 12:45



Respectfully submitted,


s/Leif B. Christman

Leif B. Christman Reg.No. 0070014
Attorney for Defendant
1370 Ontario Street, Suite 2000
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(216) 241-5019
Fax (216) 241-5022
Lbchristman@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition was hand delivered to the Office of the Prosecutor this 7 day of May, 2013



s/Leif B. Christman
Leif B. Christman
Attorney for Defendant

SAVE FOR FUTURE REFERENCE

AMERICAN FAMILY INSURANCE COMPANY
6000 American Pkwy • Madison, WI 53783

CLAIMS: 1-800-MYAMFAM (1-800-692-6326)
OHIO MOTOR VEHICLE
PROOF OF INSURANCE CARD

Policy No: 1922-8155-01-70-FPPA-OH

Effective Date: 3-10-2013 Expiration Date: 9-10-2013

2011 NISS MSV VIN: 1N4AA5AP8BC852713

Coverages: BIPD UM UIM ME COMP COLL ERS

NESTER, MICHELLE J
2223 WASCANA AVE
LAKEWOOD OH 44107-6133

Agent: American Family 047
Agent Phone: (330) 239-5500



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registration of your vehicle.

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO

Plaintiff,

v

MICHELLE NESTSER,

Defendant

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Leif B. Christman Reg.No. 0070014
Attorney for Defendant
1370 Ontario Street, Suite 2000
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Lbchristman@hotmail.com

EARLE R. TURNER CLERK
CLEVELAND MUNICIPAL COURT

2013 MAY -7 P 12:45

41

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition was hand delivered to the Office of the Prosecutor this ____ day of May, 2013

s/Leif B. Christman
Leif B. Christman
Attorney for Defendant

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DRIVING PRIVILEGES

Now comes the defendant; by and through undersigned counsel, hereby respectfully requests occupational driving privileges during the pendency of this matter, pursuant to Ohio Rev. Code 4507.16. Defendant's license was suspended on April 17, 2013 and said suspension would seriously affect the petitioner's ability to continue attending school

Ms. Nester is currently a surgical technician student at Brown Mackie College, 755 White Pond Dr Akron, OH 44320. She attends classes on Monday, Tuesday and Thursday, and picks up extra lab time in between classes. She must travel from her residence in Lakewood to Akron to attend class. A copy of defendant's insurance information is attached.

WHEREFORE, for the foregoing reasons, Defendant herein, by and through undersigned counsel hereby requests occupational driving privileges.

Respectfully submitted,

s/Leif B. Christman
Leif B. Christman Reg.No. 0070014
Attorney for Defendant
1370 Ontario Street, Suite 2000
Cleveland, OH 44113-1726
(216) 241-5019
Fax (216) 241-5022
Lbchristman@hotmail.com

EARLE B. TURNER CLERK
MUNICIPAL COURT

2013 MAY -7 P 12:45

41

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition was hand delivered to the Office of the Prosecutor this ____ day of May, 2013

s/Leif B. Christman
Leif B. Christman
Attorney for Defendant

SAVE FOR FUTURE REFERENCE

AMERICAN FAMILY INSURANCE COMPANY
8000 American Pkwy • Madison, WI 53783

CLAIMS: 1-800-MYAMFAM (1-800-692-6328)
OHIO MOTOR VEHICLE
PROOF OF INSURANCE CARD

Policy No. 1922-8155-01-70-FPPA-OH

Effective Date: 9-10-2013 Expiration Date: 9-10-2013

2011 NISS MSV VIN: 1N4AA5AP8BC852713

Coverages: BIPD UM UIM ME COMP COLL ERS

NESTER, MICHELLE J
2228 WASCANA AVE
LAKEWOOD OH 44107-6133

Agent: American Family 047

Agent Phone: (330) 239-5500



Use this card with your application for
registration of your vehicle.



**REPORT OF LAW ENFORCEMENT OFFICER ADMINISTRATIVE LICENSE SUSPENSION/
NOTICE OF POSSIBLE CDL DISQUALIFICATION/IMMOBILIZATION/FORFEITURE**

A. NAME NESTER, MICHELLE		DRIVER LICENSE # RP980572		CLASS D	STATE OH
CURRENT STREET ADDRESS (AS VERIFIED BY OFFICER) 2223 WASCANA AVE					
CITY LAKEWOOD		OHIO COUNTY OF RESIDENCE CUYAHOGA		STATE OH	ZIP CODE 44107
DATE OF BIRTH 10/08/1978	SOCIAL SECURITY # 6180		4 DIGIT COURT CODE 1822	COUNTY OF VIOLATION CUYAHOGA	
DATE OF VIOLATION 04/17/2013	TIME OF VIOLATION 00:16 <input checked="" type="checkbox"/> AM <input type="checkbox"/> PM		PLACE OF TEST S	VIN 1N4AASAD8BC8S2713	
DATE OF REFUSAL OR TEST 04/17/2013	TIME OF REFUSAL OR TEST 01:24 <input checked="" type="checkbox"/> AM <input type="checkbox"/> PM		YEAR 2011	MAKE NISSAN	LICENSE PLATE # NON3420
VEHICLE OWNER'S NAME NESTER, MICHELLE		DATE OF BIRTH 10/08/1978	TYPE PLATE P		STATE OH
CITY LAKEWOOD	STATE OH		STREET ADDRESS 2223 WASCANA AVE		ZIP CODE 44107
VEHICLE STORED AT (STREET ADDRESS) 3775 RIDGE RD (KUFNER TOWING)		CITY CLEVELAND			

B. Officer to Complete for All OVI / Physical Control Arrests:
Circle arrest type: OVI Physical Control

The driver:

- Refused to submit to test (s).
- Submitted to test (s): 0.210 % alcohol test result
- Circle test type for which results were reported:
Whole Blood, Breath, Urine, Blood Serum, or Blood Plasma
- Was placed under an Administrative License Suspension (4511.191)
- License was seized
- Offender was provided a copy of this form at the time of arrest.

I requested the driver, by reading advice on the back, to submit to a chemical test (s) for alcohol and/or for the presence of any controlled substance or metabolite. My reasonable grounds for OVI/Physical Control arrest before test were: *RECKLESS DRIVING (4511.20) LANE CHANGING (4511.20) 60661000*

- Subject tested for controlled substance or metabolite. Circle test type for which controlled substance or metabolite results were reported: Urine, Whole Blood, Blood Serum, or Blood Plasma.
- Specify controlled substance and/or metabolite results: _____
- Subject tested positive for prohibited level of marihuana metabolite _____ (specify amount)
- Subject tested positive for prohibited level of alcohol and/or a drug of abuse.
- Alcohol, controlled substance or metabolite test result received on _____ Subject served with notice of Administrative License Suspension on _____
- Reasonable means officer used to ensure offender submitted to a chemical test were: _____

C. Officer to Complete Applicable Vehicle Sanctions:

- License plate(s) seized
- Vehicle seized under 4511.195 (OVI)

- Vehicle seized under 4510.41 only (DUS or wrongful entrustment of a motor vehicle) If so, Do not mail this form to the BMV
- Vehicle subject to immobilization
- Vehicle subject to forfeiture

D. Officer to Complete if Offender was Operating a Commercial Vehicle:

- Read and showed advice to offender (4506.17)
- Refused to submit to test(s)
- Submitted to test(s) 0. _____ % alcohol test result
(Circle One) Whole Blood, Breath, Urine, Blood Serum, or Blood Plasma
- Prohibited Alcohol Content without OVI charge
- Prohibited Alcohol Content with OVI charge

- Commercial vehicle per definition (4506.01(E))
- 24-hour out-of-service order
- CDL to be disqualified
- CDL seized
- Hazardous material
- Operated a commercial vehicle under the influence of a controlled substance

E. The advice on the back of this form was read to me and I have received a copy of this form.

X *[Signature]* REFUSED TO SIGN
DRIVER'S SIGNATURE

F. Complete Below Only for an OVI / Physical Control ARREST:

We, the undersigned, certify that the advice prescribed by the General Assembly (under 4511.191 and 4511.192), was shown to the person under arrest and read to him or her in the presence of the arresting officer and one other person.

[Signature]
ARRESTING OFFICER'S SIGNATURE

[Signature]
WITNESS'S SIGNATURE

OHIO HIGHWAY PATROL
ENFORCEMENT AGENCY
5225 WEST 140TH ST
OFFICER'S BUSINESS STREET ADDRESS
BROOKPARK
CITY

OH HP18
N.C.I.C. #
OH 44142
STATE ZIP CODE

COMPLETE BELOW ONLY ON OVI ARREST, PHYSICAL CONTROL ARREST, OR ARREST INVOLVING COMMERCIAL VEHICLE. AFFIDAVIT OF ARRESTING OFFICER:

I certify I arrested the person, having had reasonable grounds to believe the person was operating a vehicle upon a highway, or upon public or private property used by the public for vehicular travel or parking in the State of Ohio, under the influence of alcohol and/or drugs of abuse, in physical control of a vehicle while under the influence of alcohol and/or drugs of abuse, or with a prohibited concentration of alcohol in the whole blood, blood serum, blood plasma, breath, or urine, I advised the person in the prescribed manner of the consequences of a refusal or a test. The person either refused the test, or was under arrest for OVI and took the test and had a prohibited concentration of alcohol in the whole blood, blood serum, blood plasma, breath, or urine as described above). In the case of a commercial vehicle (if applicable) I had reasonable grounds to believe the person was driving a commercial motor vehicle in the State of Ohio in violation of section 4506.15 of the Ohio Revised Code. The information contained on this form is true to the best of my knowledge and belief.

ARRESTING OFFICER SIGNATURE
on or before me this *22nd* day of *April* 20 *13*
[Signature]
DUTY CLERK OF COURT'S SIGNATURE

X
PEACE OFFICER SIGNATURE
X
NOTARY PUBLIC'S SIGNATURE

CRIMINAL PRETRIAL

IN THE CASE OF
STATE OF OHIO
CUYAHOGA COUNTY
CITY OF CLEVELAND

CLEVELAND MUNICIPAL COURT
CRIMINAL SUBPOENA

TO: Tpr. Jason Turner
Post 18 of OSH P
Unit 706

v.

MICHELLE NESTER
13 TRC 023649
45119 A1a

* Please bring video # SP-537 *
before this pre-trial.

You are **COMMANDED** to appear before the Cleveland Municipal Court to testify as a witness in the case of the City of Cleveland/State of Ohio versus the above named defendant.

If you have any questions concerning the **COURT APPEARANCE**, please contact
Prosecutor LOPEZ (216) 664-4844.

DATE: 6/14/2013

PLACE: Courts Tower – Justice Center
1200 Ontario Street, Cleveland, OH
15TH FLOOR COURTROOM C

TIME: 9:00 am

JUDGE STOKES, ANGELA R.

Your failure to appear in Court may be deemed as **CONTEMPT OF COURT** and a **WARRANT** may be issued for your **ARREST**.

ORDER TO RECEIVE YOUR WITNESS FEE, BRING THIS SUBPOENA WITH YOU. PLEASE HAVE THIS FORM STAMPED BY THE BAILIFF IN THE COURTROOM.



Earle B. Turner
Clerk, Cleveland Municipal Court
City of Cleveland

By: Yvette Wyck
Chief Deputy Clerk –
Criminal Division

4/16/2013 1:45 PM

CLEVELAND MUNICIPAL COURT SERVICE INFORMATION

- Personal Service
 Residence Service

- Address Incorrect
 Address Not Located
 Person Has Moved
 No Such Person At This Address
 Other

with _____

Deputy Bailiff

CRIMINAL # 11
CLEVELAND MUNICIPAL COURT
2013 MAY 15 P 12:53
FILED BY: EARLE B. TURNER

CRIMINAL PRETRIAL

IN THE CASE OF
STATE OF OHIO
CUYAHOGA COUNTY
CITY OF CLEVELAND

CLEVELAND MUNICIPAL COURT
CRIMINAL SUBPOENA

TO: Tpr. Jason Turner
Post 18 of OSHP
Unit T06

v.

MICHELLE NESTER
13 TRC 023649
45119 A1a

* Please bring video # SP-537 *
before this pre-trial.

You are **COMMANDED** to appear before the Cleveland Municipal Court to testify as a witness in the case of the City of Cleveland/State of Ohio versus the above named defendant.

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Prosecutor LOPEZ (216) 664-4844.

DATE: 6/14/2013

PLACE: Courts Tower – Justice Center
1200 Ontario Street, Cleveland, OH
15TH FLOOR COURTROOM C

TIME: 9:00 a.m.

JUDGE STOKES, ANGELA R.

Your failure to appear in Court may be deemed as **CONTEMPT OF COURT** and a **WARRANT** may be issued for your **ARREST**.

ORDER TO RECEIVE YOUR WITNESS FEE, BRING THIS SUBPOENA WITH YOU. PLEASE HAVE THIS FORM STAMPED BY THE BAILIFF IN THE COURTROOM.



Earle B. Turner
Clerk, Cleveland Municipal Court
City of Cleveland

By: *Yvette Wynn*

Chief Deputy Clerk –
Criminal Division

4/16/2013 1:45 PM

CLEVELAND MUNICIPAL COURT SERVICE INFORMATION

- Personal Service
- Residence Service

with _____

- Address Incorrect
- Address Not Located
- Person Has Moved
- No Such Person At This Address
- Other

FILED
By: EARLE B. TURNER
2013 MAY 15 P 12:54
CLEVELAND MUNICIPAL COURT
CRIMINAL #11

Deputy Bailiff

**Welcome To The Cleveland Municipal Court
Courtroom 15-C
Judge Angela R. Stokes**

**Sign-In Sheet
For
Attorneys**

A. STOKES MAY 14 2013

Name of Attorney Leif Christman

Name of Defendant Michelle West

Please submit to the nearest bailiff.

Thank You For Your Assistance

Welcome To The Cleveland Municipal Court
Courtroom 15-C
Judge Angela R. Stokes

Sign-In Sheet
For
Attorneys

Name of Attorney

Leif Christman

Name of Defendant

Michelle Foster

Please submit to the nearest bailiff.

Thank You For Your Assistance

Welcome To The Cleveland Municipal Court
Courtroom 15-C
Judge Angela R. Stokes

Sign-In Sheet
For
Attorneys

A. STOKES JUN 04 2013

Name of Attorney Leif Christman

Name of Defendant Michelle Xoxa

Please submit to the nearest bailiff.

Thank You For Your Assistance

Court Journal



CLEVELAND MUNICIPAL COURT
 Office of the Clerk of Court
 Earle B. Turner
 Justice Center • Level Three
 1200 Ontario Street • Cleveland, Ohio 44113-1669
CRIMINAL DIVISION

Date: 08/21/2014

Cleveland Municipal Court Journal

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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

Case Number
2013 TRC 023649

Status
CLOSED

Judge
STOKES, ANGELA R.

Defendant Name
NESTER, MICHELLE N

Date of Birth
10/08/1978

Opened
04/22/2013

Case Disposition
(I) GLTY/NO CONT TO
ORIGINAL CHARGE

Case Type
TRC - TRAFFIC-DUI

CHARGE

<u>Charge Code</u>		<u>Degree of Offense</u>	<u>Speed</u>	<u>Zone</u>
4511.19A1A	DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF	M1		
Amended Charge:	Description:			
Plea:	No Contest	Decision: GUILTY		
Charge Disposition:	FOUND GUILTY (REPORT TO BMV)	Charge Disposition Date:		07/11/2013

SENTENCE

Fine Amt:	1,075.00	Cost Amt:		Traffic Points:	6
License Suspended Days:	366	Spnd Start Date:	07/11/2013	Spnd End Date:	07/11/2014
Jail Number of Days:	180	Jail Start Date:		Jail End Date:	

SUSPENDED SENTENCE

Fine Amt:	700.00	Cost Amt:		Jail Number of Days:	
License Suspended Days:					

PROBATION

Type:	ACTIVE SUPERVISION	Probation Officer:	
Probation Days:		Prob. Start Date:	
Probation Comments:		Prob. End Date:	

CHARGE

<u>Charge Code</u>		<u>Degree of Offense</u>	<u>Speed</u>	<u>Zone</u>
4511.19A1H	DRIV UNDER INFLUENCE OF ALC OR DRUG BREATH: 17 F	M1		
Amended Charge:	Description:			
Plea:	No Contest	Decision: NOLLE		
Charge Disposition:	NOLLE	Charge Disposition Date:		06/04/2013

SENTENCE

Fine Amt:		Cost Amt:		Traffic Points:	6
License Suspended Days:		Spnd Start Date:		Spnd End Date:	
Jail Number of Days:		Jail Start Date:		Jail End Date:	

SUSPENDED SENTENCE



CLEVELAND MUNICIPAL COURT
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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

Fine Amt: Cost Amt: Jail Number of Days:
 License Suspended Days:

PROBATION

Type: Probation Officer:
 Probation Days: Prob. Start Date: Prob. End Date:
 Probation Comments:

CHARGE

<u>Charge Code</u>		<u>Degree of Offense</u>	<u>Speed</u>	<u>Zone</u>
4511.20	RECKLESS OPERATION	MM		
Amended Charge:	Description:			
Plea:	No Contest	Decision: NOLLE		
Charge Disposition:	NOLLE	Charge Disposition Date:		06/04/2013

SENTENCE

Fine Amt: Cost Amt: Traffic Points: 4
 License Suspended Days: Spnd Start Date: Spnd End Date:
 Jail Number of Days: Jail Start Date: Jail End Date:

SUSPENDED SENTENCE

Fine Amt: Cost Amt: Jail Number of Days:
 License Suspended Days:

PROBATION

Type: Probation Officer:
 Probation Days: Prob. Start Date: Prob. End Date:
 Probation Comments:

No.	Date of	Pleadings Filed, Orders and Decrees	Amount Owed/ Amount Dismissed	Balance Due
1	01/01/1900	BACK FILED IMAGES		
2	04/22/2013	COMPLAINT HAS BEEN RECEIVED AND IS HEREBY FILED Charge #3: RECKLESS OPERATION		
3	04/22/2013	COMPLAINT HAS BEEN RECEIVED AND IS HEREBY FILED Charge #2: DRIV UNDER INFLUENCE OF ALC OR DRUG BREATH: 17 HUNDREDTHS OF ONE GRAM OR MORE PER 200TH TEN LITERS		
4	04/22/2013	COMPLAINT HAS BEEN RECEIVED AND IS HEREBY FILED		



CLEVELAND MUNICIPAL COURT

Office of the Clerk of Court

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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

		Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM		
5	04/22/2013	BASIC COURT COSTS Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM Receipt: 479790 Date: 07/22/2013	141.00	0.00
6	04/22/2013	HEARING SCHEDULED: Event: TRAFFIC ARRAIGNMENT (AFTERNOON) Date: 04/23/2013 Time: 1:30 pm Judge: CRIMINAL, JUDGE/MAGISTRATE Location: 3RD FLOOR COURTROOM B		
7	04/23/2013	DEFENDANT HAVING BEEN ADVISED OF HIS/HER RIGHTS, ENTERS A PLEA OF NOT GUILTY. Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM		
8	04/23/2013	DEFENDANT HAVING BEEN ADVISED OF HIS/HER RIGHTS, ENTERS A PLEA OF NOT GUILTY. Charge #2: DRIV UNDER INFLUENCE OF ALC OR DRUG BREATH: 17 HUNDREDTHS OF ONE GRAM OR MORE PER 200TH TEN LITERS		
9	04/23/2013	DEFENDANT HAVING BEEN ADVISED OF HIS/HER RIGHTS, ENTERS A PLEA OF NOT GUILTY. Charge #3: RECKLESS OPERATION		
10	04/23/2013	CASE ASSIGNED TO THE PERSONAL DOCKET OF: Participant(s): Judge ANGELA R. STOKES		
11	04/23/2013	HEARING SCHEDULED: Event: CRIMINAL PRETRIAL Date: 05/14/2013 Time: 8:30 am Judge: STOKES, ANGELA R. Location: 15TH FLOOR COURTROOM C		
12	04/23/2013	THE DEFENDANT HAS BEEN ADVISED IN REGARD TO ELIGIBILITY TO FILE FOR AN ADMINISTRATIVE LICENSE SUSPENSION APPEAL.	50.00	0.00
			50.00	
13	04/23/2013	DEFENDANT, HAVING BEEN INFORMED OF HIS/HER CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WITHIN THE STATUTORY PERIOD OF (1) 90 DAYS FOR A MISDEMEANOR OF THE FIRST OR SECOND DEGREE, (2) 45 DAYS FOR A MISDEMEANOR OF THE THIRD OR FOURTH DEGREE, AND (3) 30 DAYS FOR A MINOR MISDEMEANOR, AS PRESCRIBED BY THE OHIO REVISED CODE SECTION 2945.71, THE DEFENDANT HAS ALSO BEEN ADVISED THAT FOR EACH DAY HE/SHE WAS/IS		



CLEVELAND MUNICIPAL COURT
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Cleveland Municipal Court Journal

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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

HELD IN JAIL IN LIEU OF BOND ON THE PENDING
CHARGE COUNTS FOR THREE DAYS FOR THE PURPOSE
OF SPEEDY TRIAL.

HAVING BEEN SO ADVISED BY THE COURT THE
DEFENDANT KNOWINGLY WAIVES SUCH STATUTORY
AND CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL AND
CONSENT TO A CONTINUANCE OF THE CASE BEYOND
THE STATUTORY PERIOD.

14	05/07/2013	DEFENDANT HAS FILED A MOTION A MOTION REQUESTING LIMITED DRIVING PRIVILEGES. Receipt: 479790 Date: 07/22/2013	50.00	0.00
15	05/15/2013	ATTORNEY OF RECORD LEIF CHRISTMAN		
16	05/15/2013	MOTION OF DEFENDANT FOR OCCUPAITONAL DRIVING PRIVILEGES DENIED		
17	05/15/2013	JOURNAL ENTRY NOTE: DISCOVERY IS ON GOING- PROSECUTOR LOPEZ WILL SUBPOENA WITNESSES		
18	05/15/2013	HEARING SCHEDULED: Event: CRIMINAL PRETRIAL Date: 06/04/2013 Time: 9:00 am Judge: STOKES, ANGELA R. Location: 15TH FLOOR COURTROOM C		
19	05/15/2013	CONTINUED AT DEFENDANTS REQUEST The following event: CRIMINAL PRETRIAL scheduled for 05/14/2013 at 8:30 am has been resulted as follows: Result: CONT. AT DEFENDANT'S REQUEST Judge: STOKES, ANGELA R. Location: 15TH FLOOR COURTROOM C Receipt: 479790 Date: 07/22/2013	10.00	0.00
20	05/15/2013	SUMMARY OF COURT ACTIONS: The following event: CRIMINAL PRETRIAL scheduled for 05/14/2013 at 8:30 am has been resulted as follows: Result: CONT. AT DEFENDANT'S REQUEST Events Added: CRIMINAL PRETRIAL has been scheduled with STOKES, ANGELA R. on 06/04/2013 from 9:00 am to 9:00 am Event Notes:		
21	05/29/2013	MOTION FILED BY DEFENDANT/ REQUEST FOR ORAL HEARING Attorney: CHRISTMAN ESQ, LEIF B (70014) Receipt: 479790 Date: 07/22/2013	5.00	0.00



CLEVELAND MUNICIPAL COURT

Office of the Clerk of Court

Earle B. Turner

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CRIMINAL DIVISION

Date: 08/21/2014

Cleveland Municipal Court Journal

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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

- 22 06/04/2013 ON THE PROSECUTOR'S MOTION, THIS MATTER MARKED NOLLE PROSEQUI. DEFENDANT IS DISCHARGED ACCORDINGLY.
Charge #3: RECKLESS OPERATION
- 23 06/04/2013 ON THE PROSECUTOR'S MOTION, THIS MATTER MARKED NOLLE PROSEQUI. DEFENDANT IS DISCHARGED ACCORDINGLY.
Charge #2: DRIV UNDER INFLUENCE OF ALC OR DRUG BREATH: 17 HUNDREDTHS OF ONE GRAM OR MORE PER 200TH TEN LITERS
- 24 06/04/2013 DEFENDANT WITHDRAWS PREVIOUSLY ENTERED PLEA OF NOT GUILTY.
Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM
- 25 06/04/2013 PASSED FOR SENTENCE
- 26 06/04/2013 PROBATION CONDITION JOURNAL TEXT -DEFENDANT WILL PAY FOR HER URINALYSIS TEST WHICH SHALL BE DONE NOW WITH A RUSH REGARDING REQUEST FOR OCCUPATIONAL DRIVING PRIVILEGES
- 27 06/04/2013 DEFENDANT IS REFERRED TO THE PROBATION/COMMUNITY CONTROL DEPARTMENT FOR INTERVIEW AND INSTRUCTION.
- 28 06/04/2013 PFS: PRE-SENTENCE INVESTIGATION SET FOR 07 11 2013
- 29 06/04/2013 SUMMARY OF COURT ACTIONS:

Charges:

Party Name: NESTER, MICHELLE N - DEFENDANT

Charge Number: 1

Action Code: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM

Charge Dscr:

Degree of Offense: Misdemeanor 1st Degree

Indicted Charge:

Amended Charge:

Amended DGOF:

Action Change Date: # of Counts:

Speed Limit: Speed:

Payable: No ITN #:

Plea Code: No Contest Plea Date: 06/04/2013

Decision Code: GUILTY (PASSED FOR SENTENCE)

Decision Date: 06/04/2013

Dispositions:

Code: FOUND GUILTY PASSED FOR SENTENCING (NOT REPORTING) Date: 06/04/2013



CLEVELAND MUNICIPAL COURT
Office of the Clerk of Court
Earle B. Turner
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CRIMINAL DIVISION

Date: 08/21/2014

Cleveland Municipal Court Journal

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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

Party Charge Comments:

Sentencing:

Fine: Costs Amt: Costs Incl: No
Traffic Points: 6 Ins Proof: Req. Drivers Ed.: No
Driving School:
DUI School:
Lic. Susp. Days: Susp. Start Date: Susp. End Date:
Modification Start: Modification End:
Narrative Code:

Jail:

Days in Jail: Start Date: End Date:
House Arrest Days: Days Served:
Credit Days:

Probation:

Type: Days:
Start Date: End Date:

Suspend:

Fine: Costs Amt: Lic Suspend Days:
Days in Jail: Jail Time:

Restriction Text:

Party Name: NESTER, MICHELLE N - DEFENDANT
Charge Number: 2
Action Code: DRIV UNDER INFLUENCE OF ALC OR
DRUG BREATH: 17 HUNDREDTHS OF ONE GRAM OR
MORE PER 200TH TEN LITERS

Charge Dscr:
Degree of Offense: Misdemeanor 1st Degree
Indicted Charge:
Amended Charge:
Amended DGOF:
Action Change Date: # of Counts:
Speed Limit: Speed:
Payable: No ITN #:
Plea Code: No Contest Plea Date: 06/04/2013
Decision Code: NOLLE Decision Date: 06/04/2013
Dispositions:
Code: NOLLE Date: 06/04/2013
Party Charge Comments:

Sentencing:

Fine: Costs Amt: Costs Incl: No
Traffic Points: 6 Ins Proof: Req. Drivers Ed.: No
Driving School:
DUI School:
Lic. Susp. Days: Susp. Start Date: Susp. End Date:



CLEVELAND MUNICIPAL COURT
Office of the Clerk of Court
Earle B. Turner
Justice Center • Level Three
1200 Ontario Street • Cleveland, Ohio 44113-1669
CRIMINAL DIVISION

Date: 08/21/2014

Cleveland Municipal Court Journal

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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

Modification Start: Modification End:
Narrative Code:

Jail:

Days in Jail: Start Date: End Date:
House Arrest Days: Days Served:
Credit Days:

Probation:

Type: Days:
Start Date: End Date:

Suspend:

Fine: Costs Amt: Lic Suspend Days:
Days in Jail: Jail Time:

Restriction Text:

Party Name: NESTER, MICHELLE N - DEFENDANT

Charge Number: 3

Action Code: RECKLESS OPERATION

Charge Dscr:

Degree of Offense: Minor Misdemeanor

Indicted Charge:

Amended Charge:

Amended DGOF:

Action Change Date: # of Counts:

Speed Limit: Speed:

Payable: No ITN #:

Plea Code: No Contest Plea Date: 06/04/2013

Decision Code: NOLLE Decision Date: 06/04/2013

Dispositions:

Code: NOLLE Date: 06/04/2013

Party Charge Comments:

Sentencing:

Fine: Costs Amt: Costs Incl: No

Traffic Points: 4 Ins Proof: Req. Drivers Ed.: No

Driving School:

DUI School:

Lic. Susp. Days: Susp. Start Date: Susp. End Date:

Modification Start: Modification End:

Narrative Code:

Jail:

Days in Jail: Start Date: End Date:

House Arrest Days: Days Served:

Credit Days:

Probation:

Type: Days:



CLEVELAND MUNICIPAL COURT
Office of the Clerk of Court
Earle B. Turner
Justice Center • Level Three
1200 Ontario Street • Cleveland, Ohio 44113-1669
CRIMINAL DIVISION

Date: 08/21/2014

Cleveland Municipal Court Journal

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2013 TRC 023649

STATE OF OHIO/CITY OF CLEVELAND VS. NESTER, MICHELLE N

Start Date: End Date:

Suspend:

Fine: Costs Amt: Lic Suspend Days:

Days in Jail: Jail Time:

Restriction Text:

- 30 06/04/2013 THE DEFENDANT HAS BEEN ADVISED OF HIS/HER CONSTITUTIONAL RIGHT TO AN ATTORNEY FOR REPRESENTATION ON THIS CASE
- 31 06/04/2013 JOURNAL ENTRY NOTE: RICHARD ORIITA SHALL PROVIDE DEFENDANT WITH INTERLOCK COMPANIES INFORMATION TODAY
- 32 06/04/2013 MOTION GRANTED FOR: OF DEFENDANT TO WITHDRAW MOTION TO SUPPRESS AND/OR IN LIMINE
- 33 06/04/2013 HEARING SCHEDULED:
Event: SENTENCING HEARING
Date: 07/11/2013 Time: 8:30 am
Judge: STOKES, ANGELA R. Location: 15TH FLOOR COURTROOM C
- 34 06/04/2013 CONTINUED AT DEFENDANTS REQUEST 10.00 0.00
The following event: CRIMINAL PRETRIAL scheduled for 06/04/2013 at 9:00 am has been resulted as follows:

Result: CONT. AT DEFENDANT'S REQUEST
Judge: STOKES, ANGELA R. Location: 15TH FLOOR COURTROOM C Receipt: 479790 Date: 07/22/2013
- 35 06/04/2013 SUMMARY OF COURT ACTIONS:

The following event: CRIMINAL PRETRIAL scheduled for 06/04/2013 at 9:00 am has been resulted as follows:
Result: CONT. AT DEFENDANT'S REQUEST

Events Added:

SENTENCING HEARING has been scheduled with STOKES, ANGELA R. on 07/11/2013 from 8:30 am to 8:30 am
Event Notes:
- 36 06/04/2013 JOURNAL ENTRY NOTE: THIS CASE WAS DELAYED FOR HOURS-ON 06 04 13, DEFENDANT & HER ATTORNEY FAILED TO UNDERSTAND TO BRING DOCUMENTATION OF EMPLOYMENT & SCHOOL ATTENDANCE- PLEASE PROVIDE DEFENDANT WITH ATJ PROGRAM INFORMATION ALO & VERIFY ATJ PROGRAM ATTENDED I DEFENDANT NEEDS CONTINOUS ALCOHOL



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MONITORING DEVICE COST/INFORMATION- FOR PSI
 INTERVIEW, DEFNEADNT WILL REPORT ON 06 05 13 AT
 5PM

- | | | | | |
|----|------------|---|----------|------|
| 37 | 06/06/2013 | REQUEST FOR DRIVING PRIVILEGES IS HEREBY GRANTED. THE ALS SUSPENSION IS PENDING; SUBJECT TO FOLLOWING TERMS ; EMPLOYER-BROWN MACKIE COLLEGE (12301 SNOW ROAD) PARMA, OH 44130 INSURANCE COMPANY-AMERICAN FAMILY POLICY #1922-8155-01-70-FPPA-OH COVERAGE MARCH 10/2013 TO SEPTEMBER 10.2013. DRIVING PRIVELEGES FROM JUNE 6/2013 TO JULY 11.2013-MONDAYS THRU FRIDAYS TIMES; 5:45 AM TO 5:45 PM. AN INTERLOCK DEVICE SHALL BE INSTALLED AND MAINTAINED ON THE 2011 NISSAN, VIN# 1N4AA5AP8BC8572713 AT ALL TIMES FROM 6/6/2013 TO 7/11/2013. MICHELLE SHALL ONLY OPERATE THE ABOVE LISTED 2011 NISSAN. SEE OCCUPATIONAL DRIVING PRIVILEGE ORDER FOR MORE DETAILS | | |
| 38 | 07/11/2013 | HAVING BEEN FOUND GUILTY, THE DEFENDANT IS SENTENCED TO 180 DAYS OF INCARCERATION AT THE CLEVELAND HOUSE OF CORRECTIONS. 176 DAYS OF INCARCERATION ARE HEREBY SUSPENDED.
Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM | | |
| 39 | 07/11/2013 | IT IS ORDERED THAT \$ 700 OF THE FINE IMPOSED IS HEREBY SUSPENDED
Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM | | |
| 40 | 07/11/2013 | FINE AMOUNT DUE
Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM Receipt: 479790 Date: 07/22/2013 | 1,075.00 | 0.00 |
| | | | 1,075.00 | |
| 41 | 07/11/2013 | DEFENDANT WITHDRAWS PREVIOUSLY ENTERED PLEA OF NOT GUILTY.
Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM | | |
| 42 | 07/11/2013 | DEFENDANT IN COURT, ENTERS A PLEA OF NO CONTEST AND CONSENTS TO A FINDING OF GUILTY.
Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM | | |
| 43 | 07/11/2013 | DEFENDANT IS HEREBY GRANTED TIME TO PAY THE FINE/COSTS ASSESSED PRIOR TO 7/31/13
Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM Receipt: 479790 Date: 07/22/2013 | 15.00 | 0.00 |



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44	07/11/2013	FINE AMOUNT DUE Charge #1: DRIV UNDER INFLUENCE ALC/DRUG OR COMBINATION OF THEM	1,075.00	0.00
			700.00	
45	07/11/2013	THE DEFENDANT IS GIVEN CREDIT FOR <u>3</u> DAY(S) SERVED		
46	07/11/2013	THE DEFENDANT HAS PROVIDED PROOF OF COMPLIANCE WITH OHIO'S FINANCIAL RESPONSIBILITY LAW.		
47	07/11/2013	AS A CONDITION OF SENTENCE, DEFENDANT MUST ATTEND A 72 HOUR ALTERNATIVE TO JAIL PROGRAM.		
48	07/11/2013	PROBATION CONDITION JOURNAL TEXT - ATJ PROGRAMS WAS ATTENDED FROM 6/20/13 TO 6/23/13		
49	07/11/2013	DEFENDANT IS PLACED ON ACTIVE PROBATION FOR A PERIOD OF 1 YR . Receipt: 479790 Date: 07/22/2013	150.00	0.00
50	07/11/2013	FOR GOOD CAUSE SHOWN THE ADMINISTRATIVE LICENSE SUSPENSION IS HEREBY TERMINATED.		
51	07/11/2013	DEFENDANT'S OHIO DRIVERS LICENSE IS HEREBY SUSPENDED FOR A PERIOD OF MONTHS/DAYS EFFECTIVE 7/11/2013 UNTIL 7/11/2014 .		
52	07/11/2013	ATTORNEY OF RECORD LEIF CHRISTMAN		
53	07/11/2013	DEFENDANT'S SENTENCE ORDERED INTO EXECUTION AS TO 3 DAYS OF INCARCERATION AT THE CLEVELAND HOUSE OF CORRECTIONS.		
54	07/11/2013	AS A CONDITION OF PROBATION, DEFENDANT IS ORDERED TO PARTICIPATE IN THE MOTHERS AGAINST DRUNK DRIVING (MADD) DIP PROGRAM. THE DEFENDANT IS TO ATTEND 5 MANDATORY MEETINGS.		
55	07/11/2013	SUBSTANCE ABUSE TEST ORDERED (URINALYSIS TESTING)		
56	07/11/2013	PROBATION CONDITION JOURNAL TEXT - DEFENDANT WILL PAY FOR HER URINALYSIS TESTING		
57	07/11/2013	JOURNAL ENTRY NOTE: SEE OCCUPATIONAL DRIVING PRIVELEGES ORDER		
58	07/11/2013	DEFENDANT IS REFERRED TO THE PROBATION/COMMUNITY CONTROL DEPARTMENT FOR INTERVIEW AND INSTRUCTION.		



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59 07/11/2013 SUMMARY OF ACTIONS IN COURT:

Charges:
Party Name: NESTER, MICHELLE N - DEFENDANT
Charge Number: 1
Action Code: DRIV UNDER INFLUENCE ALC/DRUG
OR COMBINATION OF THEM
Charge Dscr:
Degree of Offense: Misdemeanor 1st Degree
Indicted Charge:
Amended Charge:
Amended DGOF:
Action Change Date: # of Counts:
Speed Limit: Speed:
Payable: No ITN #:
Plea Code: No Contest Plea Date: 07/11/2013
Decision Code: GUILTY Decision Date: 07/11/2013
Dispositions:
Code: FOUND GUILTY (REPORT TO BMV) Date:
07/11/2013
Party Charge Comments:

Sentencing:
Fine: 1,075.00 Costs Amt: Costs Incl: No
Traffic Points: 6 Ins Proof: T Req. Drivers Ed.: No
Driving School:
DUI School:
Lic. Susp. Days: Susp. Start Date: 07/11/2013 Susp.
End Date: 07/11/2014
Modification Start: Modification End:
Narrative Code:

Jail:
Days in Jail: 180 Start Date: End Date:
House Arrest Days: Days Served:
Credit Days: 3

Probation:
Type: ACTIVE SUPERVISION Days:
Start Date: End Date:

Suspend:
Fine: 700.00 Costs Amt: Lic Suspend Days:
Days in Jail: 176 Jail Time:

Restriction Text:

Monies Dismissed: \$50



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The following event: SENTENCING HEARING scheduled for
07/11/2013 at 8:30 am has been resulted as follows:
Result: GUILTY / NO CONTEST TO ORIGINAL CHARGE(S)

Monies Dismissed: \$700

- | | | | | |
|----|------------|---|-------|------|
| 60 | 07/11/2013 | COMMITMENT PAPER ISSUED: DEFT IMPRISONED | 10.00 | 0.00 |
| | | FINAL TRIAL PAPERS
Sent on: 07/11/2013 16:21:18.60 Receipt: 479790 Date:
07/22/2013 | | |
| 61 | 07/11/2013 | JOURNAL ENTRY NOTE: OCCUPATIONAL DRIVING
PRIVELEGE ORDER; EMPLOYER-BROWN MACKIE
COLLEGE-12301 SNOW ROAD PARMA OHIO INSURANCE
COMPANY - AMERICAN FAMILY POLICY NO.
1922-8155-01-70-FPPA-OH COVERAGE MARCH 10.2012
TO SEPTEMBER10,2013 DRIVING PRIVILEGES GRANTED
FRFROM JULY 11,2013 TO SEPTEMBER 10,2013 MONDAY
THRU FRIDAYS DRIVE TO BROWN MACKIE COLLEGE
755 WHITEBOND DRIVE, AKRON OHIO 44320 AS LISTED
ABOVE. SEE ORDER IN CASE FILE | | |
| 62 | 07/22/2013 | FINE AND/OR COURT COSTS HAVE BEEN PAID. | | |
| 63 | 09/03/2013 | MOTION TO EXTEND OCCUPATIONAL DRIVING
PRIVILEGES
Attorney: CHRISTMAN ESQ, LEIF B (70014) | | |
| 64 | 09/04/2013 | HEARING SCHEDULED:
Event: SET FOR REVIEW
Date: 09/06/2013 Time: 9:00 am
Judge: STOKES, ANGELA R. Location: 15TH FLOOR
COURTROOM C

Result: CONT. AT DEFENDANT'S REQUEST | | |
| 65 | 09/09/2013 | DEFENDANT IS REFERRED TO THE
PROBATION/COMMUNITY CONTROL DEPARTMENT FOR
INTERVIEW AND INSTRUCTION. | | |
| 66 | 09/09/2013 | PROBATION CONDITION JOURNAL TEXT -UPDATE
NEEDED!! DEFENDANT WILL BE NOTIFIED BY ATTY
CHRISTMAN TO SUBMIT & PAY FOR URINALYSIS TEST
BEFORE 09 16 13 | | |
| 67 | 09/09/2013 | PROBATION TO CONTINUE UNTIL 07 11 2014 ACTIVE | | |
| 68 | 09/09/2013 | JOURNAL ENTRY NOTE: CASE HELD TO 09 09 13 TO
REACH ATTY LEIF B CHRISTMAN WHO AGREED TO 09 16
13 ON 09 09 13 | | |



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Case No.	Date	Description	Amount	Amount
69	09/09/2013	CONTINUED AT DEFENDANTS REQUEST The following event: SET FOR REVIEW scheduled for 09/06/2013 at 9:00 am has been resulted as follows: Result: CONT. AT DEFENDANT'S REQUEST Judge: STOKES, ANGELA R. Location: 15TH FLOOR COURTROOM C	10.00	10.00
70	09/09/2013	HEARING SCHEDULED: Event: MOTION HEARING Date: 09/16/2013 Time: 1:30 pm Judge: STOKES, ANGELA R. Location: 15TH FLOOR COURTROOM C		
71	09/09/2013	SUMMARY OF ACTIONS IN COURT: The following event: SET FOR REVIEW scheduled for 09/06/2013 at 9:00 am has been resulted as follows: Result: CONT. AT DEFENDANT'S REQUEST Events Added: MOTION HEARING has been scheduled with STOKES, ANGELA R. on 09/16/2013 from 1:30 pm to 1:30 pm Event Notes:		
72	09/19/2013	PROBATION CONDITION JOURNAL TEXT -ALL OTHER CONDITIONS REMAIN IN EFFECT		
73	09/19/2013	JOURNAL ENTRY NOTE: DEFENDANT DOES NOT HAVE ANY DRIVING PRIVILEGES RICHARD ORITI AND DEAN JENKINS WERE INFORMED TO ASSIST MS NESTER WITH THIS ISSUE AND THEY STATED SHE HAS NOT PROVIDED THE KAISER DOCUMENTATION DEFENDANT HER FIANCE AND ATTY WERE RUDE		
74	09/19/2013	PROBATION TO CONTINUE UNTIL 07 11 2014 ACTIVE		
75	09/19/2013	MOTION OF DEFENDANT TO RENEW OCCUPATIONAL/SCHOOL DRIVING PRIVILEGES DENIED ON TH E BASES THAT DEFENDANT FAILED TO PROVIDE DOCUMENTATON REGARDING KAISER WHIHC IS NEEDED TO ALLOW PRIVILEGES		
76	09/19/2013	DEFENDANT IS REFERRED TO THE PROBATION/COMMUNITY CONTROL DEPARTMENT FOR INTERVIEW AND INSTRUCTION.		
77	09/19/2013	SUMMARY OF ACTIONS IN COURT: The following event: MOTION HEARING scheduled for 09/16/2013 at 1:30 pm has been resulted as follows:		



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Result: HEARING HELD - PREVIOUSLY SENTENCED

78 02/16/2014 ADMINISTRATIVE LICENSE SUSPENSION IS TERMINATED
HAS BEEN SENT TO THE OHIO BUREAU OF MOTOR
VEHICLES.

ALS COURT DISPOSITION NOTIFICATION
Sent on: 02/16/2014 12:13:08.15

79 03/25/2014 HEARING SCHEDULED:
Event: HEARING
Date: 03/28/2014 Time: 9:00 am
Judge: ADRINE, RONALD B. Location: 15TH FLOOR
COURTROOM A

80 03/28/2014 MOTION FILED BY DEFENDANT/ MOTION TO TERMINATE
PROBATION AND DRIVER'S LICENSE SUSPENSION
Attorney: CHRISTMAN ESQ, LEIF B (70014) 5.00 5.00

81 04/01/2014 CASE SET TO BE REOPENED
The following event: HEARING scheduled for 03/28/2014 at
9:00 am has been resulted as follows:

Result: CASE RESCHEDULED FOR HEARING
Judge: ADRINE, RONALD B. Location: 15TH FLOOR
COURTROOM A

82 04/01/2014 HEARING SCHEDULED:

The following event: HEARING scheduled for 03/28/2014 at
9:00 am has been rescheduled as follows:

Event: HEARING
Date: 04/01/2014 Time: 11:30 am
Judge: ADRINE, RONALD B. Location: 15TH FLOOR
COURTROOM A

Result: HEARING HELD - PREVIOUSLY SENTENCED

83 04/01/2014 PROBATION CONDITION JOURNAL TEXT - INACTIVE

84 04/01/2014 BALANCE OF SENTENCE SUSPENDED

85 04/01/2014 DEFENDANTS MOTION TO MITIGATE SENTENCE IS
GRANTED. SUA SPONTE

86 04/01/2014 JOURNAL ENTRY NOTE: BALANCE OF ODL SUSPENSION
IS HEREBY ORDERED VACATED

87 04/01/2014 SUMMARY OF COURT ACTIONS:

The following event: HEARING scheduled for 04/01/2014 at



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11:30 am has been resulted as follows:
 Result: HEARING HELD - PREVIOUSLY SENTENCED

88 04/02/2014 JOURNAL ENTRY NOTE:
 ~AN AMENDED REPORT WAS FAXED TO THE COLUMBUS
 BMV TO REFLECT THE JUDGES' ORDER: VACATE THE
 BALANCE OF THE LICESNE SUSPENSION

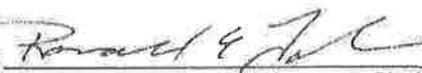
Totals By:	BASIC COURT COST (F)	141.00	0.00
	COSTS	200.00	15.00
	FEE	115.00	0.00
	FINE	2,150.00	0.00

*** End of Report ***

I, Earle B. Turner, Clerk of the Cleveland Municipal Court hereby certify that the above and foregoing is truly taken and copied from the original docket in Case No. **2013 TRC 023649** now on file in the Office of the Clerk of Court.

Witness my hand and seal of Cleveland Municipal Court this 21 day of August 2014.

EARLE B. TURNER, CLERK

By: 
 Chief Deputy Clerk