No. 19-19-5252

IN THE
SUPREME COURT OF THE UNITED STATES

Jonathan Thomas Wright,

Petitioner.

vs.

State of West Virginia,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is a violation of the Hearsay Doctrine for one police officer coming on duty who has no personal knowledge of the events which occurred to swear to a Criminal Complaint before a judicial officer for another police officer whose shift has ended.

II. Whether an Appellate Court in hearing a *de novo* appeal can refuse to examine physical evidence, in this case a video, which forms the basis of an appeal argument and make a ruling based on the lower court's opinion of the evidence.

III. Whether the absence of an essential element of a criminal charge must be proven or can be assumed and, if it can be assumed, under what circumstances.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

JONATHAN THOMAS WRIGHT,

PETITIONER,

vs.

STATE OF WEST VIRGINIA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Jonathan Thomas Wright respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINION BELOW

The decision of the Supreme Court of Appeals of West Virginia, Memorandum Decision No. 18-0296 (2019) regarding *State of West Virginia v. Wright* 17-M-AP-5 filed and decided in

the Circuit Court of Wood County arising from Wood County Magistrate Court Case No. 16-M54M-02688, is reproduced in the appendix to this petition at Pet. App. 1-9.

JURISDICTION

The Supreme Court of Appeals of West Virginia issued its opinion and judgment (Pet. App. 1-9) on April 19, 2019. This Appeal is timely filed within the 90 day requirement. The jurisdiction of this Court is invoked under 28 U.S. Code § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides:

> No personal shall . . . be deprived of life, liberty, or property, without due process of law.

The Equal Protection Clause of the Fourteenth Amendment, Section 1, provides:

> nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After a one-day trial in the Magistrate Court of Wood County, the disabled Petitioner was found guilty of first offense driving under the influence. The petitioner was sentenced to a fine, court costs, and 48 hours jail time, "just based on how this case has progressed". The petitioner had pursued a vigorous defense including filing a Writ of Prohibition to have nonattorney Magistrate Robin Waters removed due to her personal friendship with the Prosecution's witness, Officer Shane A. Semones, and a judicial complaint for Magistrate Waters' gross violations of judicial conduct during the pre-trial hearings.

The Petitioner has a severe neurological disability which causes somnambulism (sleepwalking) and an altered mental state. Sleep Specialist, Dr. Richard Ko, informed the Court that incidents of somnambulism and altered mental state can occur despite the prescription medications given to the Petitioner. These medications can cause symptoms which could be mistaken for intoxication such as slurred speech and unsteady gait. The Supreme Court of Appeals of West Virginia in *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 287 (1996) at Syllabus Point 2 held that: '**Unconsciousness (or automatism) is not part of the insanity defense, but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt.**[Emphasis added]" The Prosecution has never proven voluntariness or even responded to the Petitioner's medical defense.The Petitioner's medical records and a letter from Dr. Richard Ko to the Court were introduced in the Petitioner's Motion to Dismiss in Magistrate Court. The medical defense issue was also raised in the Petitioner's Writ of Prohibition filed in the Circuit Court of Wood County. Both the Motion to Dismiss in Magistrate Court and the Writ of Prohibition in Circuit Court were denied.

On appeal of the Petitioner's conviction to the Circuit Court of Wood County, the Petitioner argued that the criminal complaint was invalid, there was no proof of driving, and the observation period prior to administration of the Intoximeter mandated by state code was violated as shown in the booking video. The conviction was upheld by Judge John D. Beane who also denied the Petitioner's Writ of Prohibition. The two remaining judges could not hear the case since Judge Robert Waters is Magistrate Robin Waters' husband and Judge Jason Wharton was the prosecutor when the Petitioner was charged.

On appeal to the Supreme Court of Appeals of West Virginia, the Petitioner's conviction was upheld through a Memorandum decision (Pet. App. 1-9)..

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE ISSUE OF PERSONAL KNOWLEDGE AS IT RELATES TO OATHS AND AFFIRMATIONS DURING THE ARRAIGNMENT PROCESS AS WELL AS THE OFFICIATION OF CRIMINAL COMPLAINTS BY A THIRD PARTY SIGNATURE.

The Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The petitioner argues that due process violations include the criminal prosecution of an individual without a Criminal Complaint attested to and signed by an officer with personal knowledge of the events which occurred since it is upon the Criminal Complaint that the judicial officer determines probable cause to proceed with criminal prosecution. Here, the Petitioner argued that the arresting officer, Shane A. Semones completed the West Virginia DUI Information Sheet, but did not sign it in accordance with West Virginia Code §17C-5A-1(b) which states,

> Any law-enforcement officer investigating a person for an offense described in section two, article five of this chapter . . . shall report to the Commissioner of the Division of Motor Vehicles by written statement within forty-eight hours of the conclusion of the investigation the name and address of the person believed to have committed the offense. The report shall include the specific offense with which the person is charged and, if applicable, a copy of the results of any secondary tests of blood, breath or urine. **The signing of the statement required to be signed by this subsection constitutes an oath or affirmation by the person signing the statement that the statements contained in the statement are true and that any copy filed is a true copy. The statement shall contain upon its face a warning to the officer signing that to willfully sign a statement containing false information concerning any matter or thing, material or not material, is false swearing and is a misdemeanor.** [Emphasis added]"

The officer's signature is required on the West Virginia DUI Information Sheet, Page 6, under the statement, "I submit the report pursuant to West Virginia Code §17C-5A-1, 17C-5-7, and/or 17E-1-15." This issue has consistently been raised on appeal to the Circuit Court of Wood County and the Supreme Court of Appeals of West Virginia and has never been refuted by the prosecution. In addition, the 911 Call Center Report showed that Officer Semones' written statements on both the unsigned Criminal Complaint form and the West Virginia DUI Information Sheet contained false information as to the events which occurred.

The Criminal Complaint was based on information contained in the unsigned West Virginia DUI Information Sheet regarding blood alcohol concentration and the results of Standard Field Sobriety tests. Since Officer Semones' shift was ending, he did not appear at the arraignment. Officer Michael Bosley who was coming on duty and had no personal knowledge of the events appeared at the arraignment, signed his own name to the Criminal Complaint (designated on the Criminal Complaint form as "Complainant 'who appears before magistrate' Shane A. Semones") and submitted the unsigned West Virginia DUI Information Sheet as evidence in this case. On Appeal, Judge John D. Beane of the Circuit Court of Wood County found,

> There is no requirement that the arresting police officer is the only officer who may present a criminal complaint to a magistrate . . . There is absolutely no requirement that an officer who presents and swears to or affirms a complaint before a magistrate shall have personally witnessed the alleged offense. Neither Rule 4 [of the West Virginia Rules of Criminal Procedure for Magistrate Courts] nor West Virginia Code § 62-1-1 mandates such a condition.

The Petitioner argued that the West Virginia Rules of Criminal Procedure for Magistrate Courts, Rule 5(1) states, . . .**[A]ny person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate** [Emphasis added] within the county where the arrest is made." West Virginia Code § 62-1-5(a)(a) and §62-1-5(b)(1) on which

the West Virginia Rules of Criminal Procedure for Magistrate Courts is based, states, ". . . **[A]ny person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate** [Emphasis added] of the county where the arrest is made."

West Virginia Rules of Criminal Procedure for Magistrate Courts, Rule 4 states,

> The complaint is a written statement of the essential facts constituting the offense charged. The complaint shall be presented to and sworn or affirmed before a magistrate in the county where the offense is alleged to have occurred. Unless otherwise provided by statute, the presentation and oath or affirmation shall be made by a prosecuting attorney or a law enforcement officer **showing reason to have reliable information and belief** [Emphasis added]. If from the facts stated in the complaint the magistrate finds probable cause, the complaint becomes the charging instrument initiating a criminal proceeding."

The case was appealed to the Supreme Court of Appeals of West Virginia on the grounds of the invalid criminal complaint, violation of the observation period prior to the Intoximeter test, and no proof of driving together with the Circuit Court's refusal to address the appeal of the Magistrate Court's denial of the Petitioner's Motion to Dismiss and the Circuit Court's denial of the Petitioner's Writ of Prohibition.

The Supreme Court of West Virginia found,

> . . . Rule 4 of the Rules of Criminal Procedure for Magistrate Court provides that '[t]he finding of probable cause may be based upon hearsay evidence in whole or in part.' Here, the record shows that a shift change of officers occurred just prior to petitioner's arraignment in magistrate court. However, the Rules of Criminal Procedure for Magistrate Court authorize someone other than the arresting officer to swear to the criminal complaint. There was no evidence to indicate that Officer Bosley had unreliable information regarding the facts of the criminal complaint just because he was not the arresting officer or present at the scene of the alleged crime. Therefore, we find no error in the circuit court's finding that there is no requirement that an officer who presents and swears to a complaint before a magistrate must personally witness the alleged offense.

The Petitioner argues that there is a clear, legal obligation of law enforcement officials to have personal knowledge relating to criminal offenses and probable cause issues when attesting

to a criminal complaint which can initiate a criminal prosecution. In the present case, Officer Bosley had no direct contact with Officer Semones prior to the Petitioner's arraignment. He had only an unsigned and unattested West Virginia DUI Information Sheet and a Criminal Complaint filled out but not signed by Officer Semones when he appeared at the arraignment. Therefore, Officer Bosley had no reliable information on which to make an oath or affirmation regarding the Petitioner's alleged criminal behavior. Further, the exception to the Hearsay Doctrine allows police officers to attest to witness statements resulting from their investigation at the scene without having witnesses appear at the arraignment, but was not intended to allow one officer to attest to events another officer personally witnessed, especially when the attesting officer was not involved in the investigation of the alleged crime in any way.

The Supreme Court's allowance that any police officer can attest and swear to events he or she did not personally witness and to which he or she has no personal knowledge subverts the judicial requirements for honesty and integrity in the judicial process. The purpose of the oath or affirmation is to provide criminal grounds of "false swearing" if the officer is not truthful. By allowing one officer to make the oath for another, neither the arresting officer nor the attesting officer can be held responsible for false swearing. This ruling is a direct threat to due process protections for individuals who are charged with criminal offenses.

West Virginia Rules of Evidence, Rule 602 and West Virginia Rules of Evidence, Rule 603 which are taken from the Federal Rules of Criminal Procedure, Rules 602 and Rule 603 states, "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter . . ." and "Before testifying a witness must given an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." This standard also applies to oaths and

affirmations by police officers whose testimony is based on personal knowledge. Thus, the Supreme Court erred in determining that the Criminal Complaint was valid on its face.

The Supreme Court of Appeals of West Virginia also refused to address the denial of the Petitioner's Motion to Dismiss on the basis that no new Motion to Dismiss had been filed in Circuit Court which is violation of West Virginia Code § 50-5-12 and § 50-5-13. The judicial appeal procedure in West Virginia is that motions made during a Magistrate Court trial cannot be immediately appealed, but can only be appealed after conclusion of the trial. The Petitioner should not have to file a new motion to dismiss in Circuit Court as long as the previous Magistrate Court ruling denying the Motion is raised on appeal. The denial of the Petitioner's Motion to Dismiss by Magistrate Robin Waters was raised on appeal during oral arguments in Circuit Court. The Supreme Court of Appeals also refused to consider the appeal of the denial of the Petitioner's Writ of Prohibition denied by the Circuit Court of Wood County in violation of West Virginia Code § 53 which guarantees, "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers".

II. THIS COURT SHOULD RESOLVE THE QUESTION REGARDING APPELLATE RESPONSIBILTIES TO PERSONALLY REVIEW PHYSICAL EVIDENCE WHICH FORMS THE BASIS OF GROUNDS FOR APPEAL.

The Constitution's Due Process Clause under the Fifth and Fourteenth Amendments provides that no person shall be deprived of life, liberty, or property without due process of law. The petitioner argues that due process protections include the right to appeal and have arguments heard and evidence forming the basis of the appeal to be examined by a higher court, specifically in this case, the booking video. The Petitioner contended that the statutory 20 minute observation

period prior to performing the Intoximeter Test was violated thereby making the results of the test inadmissible. West Virginia Code § 64 C.S.R. 10-7.2(a) (2005), states,

> The law enforcement officer shall keep the person being tested under constant observation for a period of twenty minutes before the test is administered to insure that the person has nothing in his or her mouth at the time of the test and that he or she has had no food or drink or foreign matter in his or her mouth during the observation period." The purpose of the waiting period is to ensure that the person submitting to the test does not put any substances into his mouth "such as food, drink, or regurgitation by burping or by hiccoughing, that would have had a contaminating impact on the accuracy of the results, and to permit a sufficient lapse in time to allow such possible contaminants to clear." *Dale v. McCormick*, 231 W. Va. 628, 634, 749 S.E.2d 227, 233 (2013).

In *Reed v. Hill*, 235 W.Va. 1 (2015), the West Virginia Supreme Court addressed specific regulatory requirements and determined that it "does not limit the period of constant observation to constant visual observation and a law enforcement officer can ensure that a person has nothing in his or her mouth without fixedly staring at the person for the entire twenty-minute period. In addition to visually observing, an officer who is in close proximity may rely on his other senses, including hearing and smell, to maintain a constant observation of the test subject." @12.

The Petitioner moved to have the Intoximeter Test suppressed due to the fact that the video showed at one point that, while Officer Semones was out of the room and talking to another officer, the Petitioner covered his mouth and waved his arm in an attempt to get the officers' attention in response to what appeared to be regurgitation. Officer Powers was in the room, talking on his cell phone during this time. Officer Powers has never testified in this case. However, Officer Semones testified that Officer Powers saw no sign of regurgitation by the Petitioner while he (Semones) was out of the room. An objection to this heresay testimony was overruled. The video shows that neither officer responded to the Petitioner's attempts to get their attention; thus, the Petitioner contends that he was not observed constantly during the

observation period. The Magistrate Court denied the Petitioner's Motion to Suppress. This issue was raised on appeal to the Circuit Court of Wood County. Judge John D. Beane found,

> . . . The defendant is not ever alone in the processing room and two or three officers are present with him for almost the entire processing period . . . At 24 minutes 37 seconds into the video Officer Semones leaves the room and returns 10 seconds later . . . During this 10 second period another officer is present with the defendant but is on the phone and for at least several seconds has his back to the seated defendant. While on the phone the officer is no more than two or three feet from the defendant ***who makes no movement or gesture indicative of regurgitation*** [Emphasis added]. . . After its review of the record, including a video recording of the relevant time period, the Court finds that the observation requirement under West Virginia Code § 64 C.S.R. 10-7.2(a) was satisfied. Officer Semones' brief exit from the small room where defendant was sitting in order to obtain plastic gloves in an immediately adjacent room with no barrier and only a door-less space between them, did not violate the observation requirement. While Officer Semones was out of the room another officer remained in the room and though he was on the phone and had his back to the defendant he was so close to the defendant to be able to detect through his senses of hearing and smell whether the defendant had food, drink or foreign matter in his mouth or had regurgitated partly digested food or beverage. Moreover, upon returning to the intoximeter room and again being in very close proximity to the defendant, Officer Semones' sense of smell sufficiently verified that defendant had not regurgitated.

This ruling was appealed to the Supreme Court of Appeals of West Virginia under an abuse of discretion standard. *State v. Guthrie* 194 W.VA.657 (1995) instructs that when reviewing the sufficiency of the evidence in a criminal case, the applicable standard is whether "any rational jury could have found the defendant guilty beyond a reasonable doubt." @667. The Supreme Court of Appeals of West Virginia found,

> . . . We have held that '[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Guthrie, 194 W. Va. 657 461 S.E.2d 163 (1995)* (quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983)). In the matter at hand, the circuit court stated that 'the magistrate hearing [p]etitioner's motion to suppress [the Intoximeter results] made a credibility determination respecting Officer Semones' testimony which together with her view of the video recording caused her to determine that the required observation period had been satisfied.' We have held that '[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.' *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388,

497 S.E.2d 531, 538 (1997). **The circuit court reviewed the video recording as well as the testimony and ultimately concluded that the observation requirement was satisfied. Based upon the evidence discussed above, we find no error in the circuit court's finding that the observation requirement was satisfied.** [Emphasis added]"

The Supreme Court of Appeals of West Virginia did not examine the video, but relied solely on the opinion of the Circuit Court of Wood County in making its decision. This belies the purpose of the appeal especially regarding an abuse of discretion issue which can easily be resolved by the objective physical evidence which stands alone from Officer Semones' testimony.

The Supreme Court of West Virginia also stated, "Next, petitioner argues that the circuit court erred finding that the twenty-minute waiting period prior to petitioner's Intoximeter test was satisfied. . ." Footnote 3 states, "Again, petitioner raises additional arguments in support of this assignment of error that were not raised on appeal to circuit court. These arguments will not be considered. See *Haines,* 221 W. Va. at 268, 654, at 590." However, this issue was raised on appeal as shown.

III. WHETHER THE ABSENCE OF AN ESSENTIAL ELEMENT OF A CRIMINAL CHARGE MUST BE PROVEN OR CAN BE ASSUMED AND, IF IT CAN BE ASSUMED, UNDER WHAT CIRCUMSTANCES.

The Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution guarantees certain protections from being falsely accused without due process of law. The Petitioner argues that a criminal charge, conviction, and appellate upholding of a conviction in the absence of supporting evidence of an essential aspect to the crime is a violation of his due process rights. According to the Wood County 911 Call Center Report, the Petitioner called 911 about suspicious drug activity while walking on the street. He sat in his parent's vehicle and waited for police to arrive. The vehicle was legally parked on a public street, but not in the Petitioner's neighborhood. The Petitioner told the police officer that he was there to meet a

friend. Twelve minutes after arriving on the scene according to the 911 report, Officer Shane Semones arrested the Petitioner for first offense driving under the influence and the vehicle was impounded. The Petitioner presented a Motion to Dismiss in Wood County Magistrate Court under, *Carte v.Cline, 200 W. Va. 488 S.E.2d 437 (1997), Syl. Pt. 3* which held that the offense does not require a police officer actually see or observe a person operating a motor vehicle before the officer can charge the person "...**so long as all the surrounding circumstances indicate that the vehicle could not otherwise be located where it is unless it was driven there by that person** [Emphasis added]". During the pre-trial motion hearing, Officer Semones testified that the vehicle could have gotten where it was by numerous means other than the Petitioner driving it there while intoxicated including someone else driving and parking the vehicle or the Petitioner driving and parking the vehicle several hours earlier. Officer Semones also admitted that he did not know how long the vehicle had been parked at that location, he never witnessed the Petitioner drive the vehicle, and there were no witnesses of the Petitioner driving.

In accordance with West Virginia Code §17C-5-2(e), the Driving Under the Influence (DUI) criminal charge contains two elements: the individual must be driving a motor vehicle on a public street or highway and under the influence of alcohol or drugs to the extent of impairment. The prosecution failed to prove the Petitioner drove while impaired based on their only witness's testimony. It should be mentioned that Officer Semones testified that it is the Parkersburg Police Department's policy not to use dashboard or body cameras, that the Petitioner could have been medically impaired although he chose not to take the Petitioner to the hospital, and that Parkersburg police officers are not permitted to have blood tests performed at the

> are more than sufficient to justify the trial court's denial of defendant's motion to dismiss on grounds that no officer had seen the defendant drive a motor vehicle."

The burden of proof in criminal cases falls to the prosecution. A reliance on the Petitioner to vindicate himself belies the responsibility of the prosecution. Therefore, the Circuit Court erred in giving weight to Officer Semones' claims that the Petitioner, ". . .gave no explanation as to how he and the vehicle got to the location. . . The defendant said nothing about any other person being with him . . . He . . . said nothing about any other person driving him or even being with him." The remaining evidence of a legally parked vehicle in a neighborhood other than an individual's own with no other individuals present and no alcoholic containers in the car or the area is not sufficient to prove the Petitioner drove a motor vehicle while severely impaired under the influence of alcohol. Thus, the driving portion of the charge has not been proven.

This matter was appealed to the Supreme Court of Appeals of West Virginia based on abuse of discretion. The Petitioner argued that the record shows the Petitioner was walking on the street when he called 911; that a legally parked vehicle in a neighborhood other than the owners does not prove the Petitioner drove the vehicle while intoxicated; and the absence of other individuals on the scene and alcoholic containers in or around the vehicle does not prove the Petitioner drove under the influence of alcohol. The facts on which the Circuit Court decision was based are insufficient under a "totality of the circumstances" standard and the standard under *Carte v.Cline, 200 W. Va. at 163, 488 S.E.2d at 438, Syl. Pt. 3,*

> . . . West Virginia Code §17C-5A-1a(a) (1994) does not require that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person. *Carte v.Cline, 200 W. Va. at 163, 488 S.E.2d at 438, Syl. Pt. 3* Syl. Pt. 3. The record shows that Officer Semones testified that he did not witness petitioner drive the car and did not know how long the car was parked in that location before he found petitioner in the vehicle. Officer Semones

> explained that petitioner did not admit to driving and he did not remember driving. The officer also testified that there were numerous possible ways that petitioner's car could have come to be parked on Chestnut Street. However, he clarified that those possibilities were unlikely due to the surrounding circumstances. The totality of the circumstances demonstrates that the vehicle could not have been on Chestnut Street unless it was driven by petitioner. It is clear that petitioner drove the vehicle in an impaired state because when Officer Semones arrived on the scene, there were no other occupants in the car and no other individuals in the area at that time. Officer Semones observed petitioner in the driver's seat of the vehicle with the key in the ignition and the engine running. When Officer Semones questioned petitioner, petitioner seemed disoriented and confused and stated that he was in the area to see a friend, but could not remember his friend's name. Officer Semones also smelled an odor of alcohol on petitioner and did not observe any alcohol containers in the vehicle. Because there were no alcohol containers in the vehicle, Officer Semones reasoned that it was unlikely that petitioner consumed alcohol after arriving to Chestnut Street. Officer Semones testified that petitioner demonstrated impaired balance, bloodshot eyes, and slurred speech. After exiting the vehicle, petitioner failed three field sobriety tests and later, the Intoximeter test indicated that petitioner's blood-alcohol content was .132. Based on the evidence presented, we find that the circuit court did not err in finding that the totality of the circumstances was sufficient to arrest petitioner for DUI.

After admitting that the vehicle could have gotten where it was by numerous means other than the Petitioner driving it there while intoxicated, the Court then relies on Officer Semones' belief that the numerous other possibilities were "unlikely" due to the "surrounding circumstances". The surrounding circumstances were that the vehicle was legally parked on a street other than the Petitioner's own and there were no other individuals or alcoholic containers in the area. The Court's finding that "the totality of the circumstances demonstrated that the vehicle could not have been on Chestnut Street unless it was driven by petitioner" is erroneous since the prosecution's sole witness testified that it could have been driven there by someone else or by the Petitioner several hours prior to that time. No conclusive proof was presented by the prosecution, such as witnesses or street camera footage, to prove that the Petitioner drove the vehicle to that location while impaired. The Court decision that, "It is clear that petitioner drove the vehicle in an impaired state because when Officer Semones arrived on the scene, there were

no other occupants in the car and no other individuals in the area at that time" is erroneous as well. The fact that there were no other occupants in the vehicle or in the area is insufficient to prove that the Petitioner drove the vehicle in an impaired state when an officer did not witness driving. On the basis that there were no alcoholic containers in the vehicle, Officer Semones reasoned that "it was unlikely" the Petitioner consumed alcohol after arriving to Chestnut Street. Officer Semones' "unlikely" opinions do not meet the legal threshold of proof beyond a reasonable doubt.

The burden of proof standard in criminal cases is on the prosecution. This standard requires the prosecution to show that the only logical explanation that can be derived from the facts is that the defendant committed the alleged crime, and that no other logical explanation can be inferred or deduced from the evidence. The United States Supreme Court in *Victor v. Nebraska,* 511 U.S. 1 (1994), described this standard as "such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof . . . . What is required is not an absolute or mathematical certainty, but a moral certainty." Therefore, the Supreme Court of Appeals of West Virginia erred in upholding the Petitioner's conviction based on evidence that did not meet the prosecution's burden of proof standard.

CONCLUSION

Even though this case involves a first offense misdemeanor and would not normally reach an appeal with the Supreme Court of Appeals of the United States, the issues at hand involve egregious due process violations within the judicial system against a disabled defendant whose medical condition was mistaken for driving under the influence of alcohol. In addition, the apparent retaliation by Magistrate Waters granting 48 hours jail time with no time-served

credit for a first offense, non-aggravated DUI is excessive. The petitioner's neurological disability and diagnosed medical condition will be severely exacerbated by incarceration. The Petitioner faces a permanent record of a criminal conviction for which he should not have been convicted. This can affect his acceptance to graduate school programs and international travel, as well as many other facets of life. The Petitioner respectfully asks the Court to grant this petition for certiorari.

Respectfully submitted,
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