

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNATHAN LOWELL MCCLANAHAN, RN,
Petitioner Below, Petitioner

v.

Docket No. 15-1014
(Kanawha County Circuit Court
Civil Action No. 15-AA-58)

WEST VIRGINIA BOARD OF EXAMINERS FOR
REGISTERED PROFESSIONAL NURSES,
Respondent Below, Respondent.

PETITIONER'S AMENDED **APPEAL BRIEF**

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I. ASSIGNMENTS OF ERROR

A. Respondent erred in suspending Petitioner's nursing license in view of the reliable, probative and substantial evidence on the whole record, as Order is in excess of statutory provisions and is arbitrary and capricious.

B. Respondent erred by acting beyond its statutory authority in concluding that Petitioner's single urine drug screen test (hereinafter "UDS"), which was reported as positive for Carboxy-THC (hereinafter "THC"), a compound found in marijuana, is sufficient to find that Petitioner's conduct was "unlawful."

C. Respondent erred, in violation of W. Va. Code § 30-7-11(c), in concluding that Petitioner's single positive UDS for THC, is sufficient to find that Petitioner is unfit or incompetent to practice registered professional nursing by reason of habits or other causes.

D. Respondent erred, in violation of W. Va. Code § 30-7-11(f), in concluding that Petitioner's single THC positive UDS, is sufficient to conclude that Petitioner is guilty of conduct derogatory to the morals or standing of the professional of registered nursing.

E. Petitioner's constitutional right of due process was violated by other error, in that Petitioner's attorney at hearing, was unprepared and utterly failed to protect his interests prior to, during and following the subject administrative hearing.

F. The Respondent erred by entering the *Final Order* and *Final Order Addition* imposing terms and conditions with such a broad scope and breadth that Petitioner's Constitutional due process and privacy rights were violated.

G. Respondent erred in not producing the entirety of its file to Petitioner's former counsel, prior to the Administrative Hearing, specifically including, but not limited to, the complete March 7, 2014 exculpatory report prepared by Binicki Shrewsbury, MS, LSW, LPC,

AADC of FMRS Health Systems, Inc., which reported that Petitioner had no need for alcohol or other drug treatment per the American Society for Addiction Medicine (“ASAM”) criteria.

H. Errors and deficits within the chain of custody for both the Aegis and Quest laboratories’ urine drug testing and related handling of the urine samples should have precluded Respondent’s admission of these testing results into evidence at hearing. W. Va. R.C.P. 104.

I. Respondent erred in admitting the reports and testimony of an expert witness without first determining that the underlying facts or data relied upon by the expert were conditionally relevant and credible, particularly those from Quest Diagnostics regarding the results of the alleged testing of “Sample B.” W. Va. R.C.P. 104.

J. Respondent erred, in violation of W.Va. C.S.R. §19-5-10.1, by waiting one hundred sixty-six (166) days to enter the Final Order, well beyond the requirement that such Order must be entered within forty-five (45) days following the submission of documents and materials.

II. STATEMENT OF THE CASE

A. Procedural History

This matter relates to disciplinary action Respondent is pursuing against the Petitioner, who is a West Virginia Registered Nurse and licensee of Respondent. This Appeal seeks relief from the *Final Order and Final Order Addition* entered by Respondent, on March 30, 2015, which suspended the nursing license of Petitioner for a period of one (1) year, but also stayed the suspension and placed his licensed on probation for two (2) years, with restrictive and draconian contingencies, which, in effect, have prevented Respondent from gainful employment in the nursing field, and which will likely continue indefinitely. At said administrative hearing, Petitioner was represented by attorney Sarah Smith.

On January 14, 2014, the Respondent sent a Notice of Complaint to Petitioner alleging violation of the rules and regulations applicable to West Virginia Registered Nurses, based upon Petitioner's single UDS, which was reported as positive for THC, a compound found in marijuana. Petitioner's responded denying all wrong-doing. (**Appendix 00001 – 00006**). At the Board's direction, on or about March 7, 2014, Petitioner subsequently underwent an addiction evaluation by Binicki Shrewsbury, MS, LSW, LPC, AADC of FMRS Health Systems, Inc. This evaluation found that Petitioner had no need for alcohol or other drug treatment. (**Appendix 00073 – 00086**.) Following disclosure of Ms. Shrewsbury's report finding no addiction, the sole settlement negotiations the Board agreed to was a single consent order, forwarded via correspondence dated March 18, 2014, prepared unilaterally by the Board, which Petitioner rejected, as he felt it would be dishonest to admit to a problem that he did not have, namely addiction.

Then, on June 30, 2014, the Respondent issued a Complaint and Notice of Hearing setting a hearing in this matter for August 7, 2014. A continuance was subsequently granted and the hearing was moved to October 9, 2014, with attorney Jack McClung presiding as the Respondent's designated Hearing Examiner. (**Appendix, 00007 – 00008**). The administrative disciplinary hearing took place on October 9, 2014. A transcript was prepared and hand-delivered to the Respondent on October 15, 2014. All exhibits entered as evidence at hearing, were attached to the transcript. (**Appendix 00009 – 00058**). The Final Order was subsequently entered by Respondent on March 30, 2015, one hundred sixty-six (166) days from the day the evidence was submitted. (**Appendix 00067 – 00071**).

Following this hearing, Petitioner retained the undersigned counsel to represent him in seeking relief from the aforementioned Final Order. On May 4, 2015, the Petitioner filed an administrative appeal

of the Final Order in the Circuit Court of Kanawha County, West Virginia, where it was assigned to the Honorable Louis Bloom. That same day, the Petitioner also filed a Writ of Prohibition with the West Virginia Supreme Court of Appeals seeking to prohibit Respondent from taking action against his license, based upon the lengthy delay between submission of the record and Respondent's entry of the subject Final Order. The administrative appeal pending in Circuit Court was subsequently stayed, awaiting the outcome of said Writ.

With regard to the Writ, full briefing was submitted to the Court for consideration. No oral arguments were had. In a split decision, Petitioner's Writ was refused and the Court declined to issue a show cause order.

In the Petitioner's administrative appeal of the Final Order in Kanawha County, West Virginia Circuit Court, the matter was then fully briefed. Although requested by Respondent, no oral arguments were had. By *Final Order*, entered on September 17, 2015, the Circuit Court upheld Respondent's Final Order, which adopted the Respondent's Findings of Fact, Conclusions of Law, and Recommended Order (Decision), along with the Final Order Addendum. (**Appendix 00184 – 00194**). The Petitioner then filed the Notice of Appeal with regard to the instant matter, again seeking relief from Respondent's original Final Order entered by Respondent and upheld by the Kanawha County Circuit Court. (**Appendix 000195 – 000205**).

B. Statement of the Facts¹

1. Background Information

¹ Except as otherwise noted, Respondent presents these facts, as reflected in his hearing testimony, appeal to Circuit Court and Writ of Prohibition. See, transcript of administrative hearing; Writ of Prohibition and Appeal of Decision of the West Virginia Board of Examiners for Registered Professional Nurses to Kanawha County Circuit Court.

The Petitioner, Johnathan McClanahan, resides with his parents in Raleigh County, West Virginia. In 2009, Petitioner graduated from West Virginia University with a Bachelor of Science in Biology and a Bachelor of Arts in Philosophy. Petitioner continued with his education and graduated with a Bachelor of Science in Nursing from West Virginia University School of Nursing in 2013. Petitioner successfully passed his licensing exams in June 2013, and subsequently obtained his registered professional nursing (“RN”) license from the State of West Virginia, License No. 85945. Petitioner’s license was renewed in 2014, without restriction, until the Final Order was entered against him on or about March 30, 2015, as herein described.

From May 2013 until November 2013, Petitioner worked as a Graduate Nurse and then as a Registered Nurse at Ruby Memorial Hospital in Morgantown, West Virginia. Petitioner has been described by his supervisors and co-workers as a reliable, responsible and a compassionate nurse. He has not been subject to any complaints, reprimands, or discipline of any kind, other than the instant action. Petitioner has never been arrested, convicted nor charged with any criminal act. At all times relevant to the subject UDS, the Petitioner was NOT employed in the nursing field nor was he providing patient care. Respondent has made no allegations that the Petitioner was actually impaired by or under the influence of marijuana while working as a RN or while providing patient care.

2. Pre-Employment Drug Testing at Raleigh General Hospital

In October 2013, Petitioner resigned his position at Ruby Memorial Hospital to move back to his hometown of Beckley, West Virginia, to be nearer to his family, including his aging parents. Once relocated, Petitioner applied for a Registered Nurse position at Raleigh General Hospital. On November 18, 2013, as part of the hiring process, Petitioner consented to a pre-employment UDS. Having no reason to believe he would not pass this drug screen, Petitioner consented

immediately upon request and provided the requested single urine sample per the direction of the laboratory personnel at Raleigh General Hospital, specifically, Jessica Troche, a phlebotomist.

Ms. Troche provided testimony at hearing, in which she described the procedure she used to secure the restroom, prior to Petitioner depositing a urine sample in a single cup. Describing in great detail the steps taken with the urine sample from the time it was provided to her by Petitioner until she submitted it for shipping via Federal Express to Raleigh General's contracted toxicology lab, an "Aegis" facility located in Nashville, Tennessee. Raleigh General Hospital performed an initial screening immunoassay, which was positive for the presence of THC (**Appendix 00013 - 00016**). Both Ms. Troche and the record are silent as to the storing, handling, cleaning, sterility, and chain of custody of the specimen cup at issue, prior to it being given to Petitioner.

Subsequently, Raleigh General Hospital's certified "Medical Review Officer," Douglas Aukerman, MD, was notified by Aegis that Petitioner's initial urine drug screen (or "immunoassay" or "assay") had tested positive for THC. Dr. Aukerman resides and practices in Oregon. He does not hold an active license to practice medicine in the State of West Virginia. He is not employed by nor owners the laboratories at issue herein, namely Aegis and "Quest Diagnostic Laboratories" (hereinafter "Quest"). Likewise, Dr. Aukerman has no supervisory duties at either Aegis or Quest. He testified that these laboratories are "certified"; therefore, he is satisfied that all testing conducted and results reported by Aegis or Quest are accurate (**Appendix 00019**). Dr. Aukerman was never physically in the same location as Petitioner's urine sample, nor did he have any first-hand knowledge as to the laboratory processing of Respondent's UDS. (**Appendix 00018**).

3. Administrative Hearing

At the hearing on October 9, 2014, Dr. Aukerman testified that when Petitioner's urine sample was collected, Raleigh General Hospital performed an immunoassay test, which was positive for THC. The sample was then divided (or "split") between two (2) sample containers, labeled "Sample A" and "Sample B," respectively. Sample A was sent to the Aegis Lab in Nashville. **(Appendix 00018)** [Hearing Transcript at 38], when Raleigh General Hospital's initial screening immunoassay tested positive for the presence of THC. Dr. Aukerman testified if a screening assay is positive as in the instant matter, then another portion of Sample A undergoes a confirming GC-MS test. The GC-MS test provides the specific compound structure graph, indicating what substance is present and providing an exact amount of that substance in the sample. [Hearing Transcript at 43] **(Appendix 00019)**. The Aegis Laboratory report indicated that Petitioner's Sample A tested positive for THC and showed the level of THC to be 22 nanograms per milliliter. [Hearing Transcript at 42 – 44.] **(Appendix 00019)**. The Aegis' lab report for the second testing of Sample A, GC-MS graphs, was not produced at the hearing. It is not known if the second testing used an immunoassay screening test and/or mass spectrometry test. Dr. Aukerman did not state the amount of THC in the second testing.

At that point, pursuant to Raleigh General Hospital policy, Petitioner challenged the test results of Sample A and requested Sample B be tested at another lab. Sample B was sent for testing at Quest Diagnostics. This sample also allegedly underwent GC-MS testing, but no report was provided from Quest Diagnostics. The record merely reflects that a report prepared by Dr. Aukerman, on his business letterhead, indicated the subject Sample B was "positive" for THC, without the expected numerical results or graphs.

At hearing, no evidence was presented related to the Addiction/Psychological Evaluation

performed at the Respondent's request by Ms. Shrewsbury. Said report found that Petitioner had no addiction or dependency issues, and further, had no significant psychological illness that would impair his ability to practice nursing.

4. **The Aftermath**

The *Final Order* was entered by Respondent on March 30, 2015, adopting the *Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order (Decision)*, which suspended the nursing license of Petitioner for a period of one (1) year, which was, in turn, immediately stayed, was placed his license on probation for two (2) years, with such restrictive draconian provisions that Petitioner has not been able to secure the type and amount employment required to begin tolling of the probationary period. At said administrative hearing, Petitioner was represented by attorney Sarah Smith, Esquire.

Respondent herein was required to enter a final order within forty-five (45) days following submission of all documents and materials necessary for the proper disposition of the case. All such materials were within the custody and control of the Board by November 24, 2014, including the proposed findings of fact and conclusions of law from both the Petitioner and Respondent. Indisputably, the Board did not enter a Final Order in this matter until March 30, 2015, one hundred sixty-six (166) days after the submission of all necessary materials to the Board to reach a final decision.

Since the entry of this Order, Petitioner has not been able to secure employment in the field of nursing, due to the extremely burdensome requirements of the *Final Order* and *Final Order Addition*.

III. **SUMMARY OF ARGUMENT**

This case is before the Court upon the appeal of Johnathan Lowell McClanahan, Petitioner, from a September 17, 2015, Final Order of the Circuit Court of Kanawha County affirming the

decision of the Respondent, the West Virginia Board of Examiners for Registered Professional Nurses. The standard of review on appeal of an administrative order from a Circuit Court to this Court is set forth in Syllabus Point 1 *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). The Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(g), and reviews questions of law presented *de novo*. Findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

In this instant matter, it is proper for the Supreme Court to vacate the Final Order of Respondent, because the Petitioner has been so substantially prejudiced by the Respondent's errors, that he has effectively been prevented from earning a living practicing his chosen profession of nursing.

At the hearing, Petitioner consistently denied that he had used marijuana, which testimony the Hearing Examiner found to be "plausible." Nevertheless, in its *Final Order*, Respondent concluded that Petitioner was "unfit or incompetent" to practice his chosen profession, based solely upon the results of the contested pre-employment urine drug testing, reporting that Petitioner tested positive for THC, a compound found in marijuana. Respondent concluded that this THC positive test result, standing alone, was sufficient to conclude that Petitioner "unlawfully" used marijuana, with said illegal act being "derogatory to the morals and standing of the nursing profession." Additionally, without any further support, Respondent also ruled that Petitioner's unlawful use of marijuana rendered him "unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c)." Moreover, at the time of the subject UDS and for several weeks prior, Petitioner was in the process of relocating from Morgantown, West Virginia, to his hometown of Beckley, West Virginia. At all times relevant hereto Petitioner was not employed in the nursing field or

providing patient care. Respondent made no findings or conclusions that Petitioner was impaired by marijuana, while working as a nurse or while providing patient care.

McClanahan filed an appeal of the Final Order entered on March 30, 2015, of the West Virginia Board of Examiners for Registered Professional Nurses to the Circuit Court of Kanawha County, West Virginia, on May 4, 2015. This appeal was assigned to The Honorable Louis H. Bloom. Judge Bloom entered a Scheduling Order on June 16, 2015, setting a timeline for all briefs. Petitioner subsequently filed his Petition for Appeal, a Response to this Petition was filed by Respondent, and then Petitioner filed a Reply to this Response. Judge Bloom did not schedule oral argument, as requested by the Petitioner, and, instead, entered a Final Order on September 17, 2015, ruling in favor of Respondent, upholding the Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommended Order (Decision).

IV. STATEMENT REGARDING ORDER ARGUMENT AND DECISION

Petitioner requests that the Court set this case for oral argument under Rule 20 of the Revised Rules of Appellate Procedure. Although some of Respondent's errors arise under precedents of this Court, this case presents an issue of first impression relating to the scope and breadth of the powers of an administrative board, as well as, any limitations to that power. Moreover, the facts of this case present issues of fundamental public importance regarding whether: licensed professionals in West Virginia can lose their license and all ability to earn a living in their chosen calling, based solely upon the results of a single, arguably flawed urine drug screen, without any additional confirmation of that UDS, proof of illegal acts, patient harm, or a diagnosis of addiction or dependency-related mental illness. Finally, this case raises issues related to whether a state board must make a prima facie showing as to the conditional admissibility of certain scientific or technical evidence, and satisfying preliminary questions as to its authenticity.

At issue in this case, is the degree of proof required to show that the evidence is sufficient to determine that it is what the offering party claims it to be under Rule 104 of the *West Virginia Rules of Evidence*.

V. ARGUMENT

A. Standard for Review

This case is before the Court upon the appeal of Johnathan Lowell McClanahan, Petitioner, from the September 17, 2015, *Final Order* of the Circuit Court of Kanawha County affirming the decision of the Respondent, the West Virginia Board of Examiners for Registered Professional Nurses. The standard of review on appeal of an administrative order from a Circuit Court to this Court is set forth in Syllabus Point 1 *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). The Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(g) and reviews questions of law presented *de novo*. Findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

In Syllabus Point 2 of *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W.Va. Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983), this Court outlined statutory standards contained in West Virginia Code § 29A-5-4:

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In relation to the administrative agency's "Findings of Fact," the Circuit Court's review of the Board's findings, including evidentiary findings, is governed by the standards set forth in the West Virginia Administrative Procedures Act. See *West Virginia Division of Environmental Protection v. Kingwood Coal Co.*, 200 W.Va. 734, 746, 490 S.E.2d 823, 835 (1997). In syllabus point one of *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W.Va. 286, 517 S.E.2d 763 (1999), the West Virginia Supreme Court held:

Under the West Virginia Administrative Procedures Act, W.Va.Code ch. 29A, appellate review of a circuit court's affirmance of agency action is *de novo*, with any factual findings made by the lower court in connection with alleged procedural defects being reviewed under a clearly erroneous standard."

See also *Stewart v. Board of Examiners for Nurses*, 197 W.Va. 386, 389, 475 S.E.2d 478, 481 (1996) (recognizing that "clearly wrong" standard applies to review of administrative evidentiary findings).

B. Discussion

1. Rules and Regulation Violations

Respondent failed to meet the appropriate burden of proof in this case by a preponderance of the evidence, when concluding that the Petitioner is "unfit or incompetent" to perform his duties as a Registered Professional Nurse in West Virginia; therefore, Respondent's decision to suspend Petitioner's license is: beyond Respondent's statutory authority; clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and/or, arbitrary and capricious.

2. Constitutional Challenges - Due Process and Right to Privacy

Pursuant to the Final Order and its Addition, Petitioner was ordered to submit to unannounced, witnessed drug-screening tests. The Petitioner is required to drop his pants to the

floor and lift his shirt to his shoulders while giving each witnessed urine sample for each UDS. Said tests shall be on demand and to the specifications of the Board and at McClanahan's expense. Petitioner must also call the Board's drug screening company DAILY between the hours of 5:00 a.m. through 2:30 p.m. to see if he is selected to test that day. Petitioner cannot leave the State or even his immediate geographical area, in fear of not being close enough to an approved testing facility (with a same sex laboratory worker/witness), should he be required to submit to an UDS on any given day. All Petitioner's UDS results have been negative for marijuana or other non-prescribed controlled substances, to-date.

Petitioner's constitutional right of due process was violated and/or the decision of Respondent was affected by other error of law, in that Attorney Sarah Smith, Petitioner's attorney at hearing, provided ineffective assistance of counsel and failed to adequately protect the interests of the Petitioner prior to, during and following the subject administrative hearing. The terms and conditions of the *Final Order* also violate his due process rights.

3. Respondent's Failure to Produce the Entirety of Shrewsbury's Report and Proceed with Addiction Theory Without Reasonable Basis.

Respondent did not produce the entirety of its file to McClanahan's former counsel, Sarah Smith, Esquire, before the Administrative Hearing that was held on October 9, 2014, specifically the entirety of an exculpatory report prepared, at the Respondent's direction, by Binicki Shrewsbury, MS, LSW, LPC, AADC of FMRS Health Systems, Inc. This report reflected the results of a psychological addiction evaluation of the Petitioner, performed at Respondent's direction, on or about March 7, 2014. This evaluation found that Petitioner had no need for alcohol or other drug treatment per the American Society for Addiction Medicine ("ASAM") criteria. There is no evidence that either the Hearing Examiner or a quorum of the Board were made aware

of the entirety of this report, prior to entry of the Final Order. Therefore, Respondent's decision to suspend Petitioner's license is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; is in excess of statutory provisions; and/or, is arbitrary and capricious.

Petitioner has continuously denied any improper or unlawful use of illegal drugs, including marijuana. Moreover, other than a one-time urine drug screen, the Respondent produced no evidence whatsoever relating to any such improper use or abuse of drugs, including marijuana, by the Petitioner. Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relationship to any wrongdoing, including particularly the unlawful possession or use of marijuana or other controlled or illegal drugs. Petitioner has never been treated by any medical provider or participated in any other form of counseling for any improper use or abuse of drugs or alcohol. No reasonable basis is present and no law is cited to support Respondent's conclusion that Petitioner "unlawfully used marijuana" or that a positive urine drug test, from a single collection, when taken alone, is sufficient to conclude that the Petitioner is "unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c)".

4. Chain of Custody and Laboratory Testing

Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relationship to any wrongdoing, including particularly the unlawful possession or use of drugs. Petitioner has never been treated by any medical provider or participated in any other form of counseling for any improper use or abuse of drugs.

Errors and deficits within the chain of custody for both the Aegis and Quest laboratories' urine drug testing should have precluded the admission of these testing

results into evidence at hearing and for consideration in the Respondent's Final Order, because no reliable, non-hearsay evidence was offered to validate the chain of custody once said samples left Raleigh General Hospital; therefore, the Respondent acted in excess of its statutory authority, was clearly wrong and/or was arbitrary and capricious in admitting scientific testing results, without the appropriate foundation, authentication; supporting documentation; or, witness testimony.

Respondent qualified Dr. Aukerman as an expert witness based on his knowledge, skill, experience, training, or education. The testimony of an expert witness, such as Dr. Aukerman, must be based on sufficient facts or data. Dr. Aukerman's testimony should have been the product of reliable principles and methods. Dr. Aukerman was required to reliably apply the principles and methods to the facts of the case. Dr. Aukerman could not testify as to his "subjective belief" or based upon unsupported speculation. The opinions of Dr. Aukerman are not reliable based on the single report from Aegis. Respondent and/or Dr. Aukerman did not produce a laboratory report from Aegis reporting the results from the second testing of Sample A, as required by hospital policy.

Respondent also failed to produce the alleged laboratory report from Quest reflecting the alleged testing of Petitioner's urine, "Sample B". Dr. Aukerman did not receive nor did he oversee or process the results of the drug screens sent to Aegis and/or Quest Laboratories. There was no evidence at the hearing explaining the procedures to be followed by Aegis Laboratory and/or Quest Diagnostics in their testing of Petitioner's urine samples. There was also no evidence establishing that the procedures and/or protocol used by these laboratories were reliable or based upon proper standardized procedures. There was no evidence produced at the hearing showing that Aegis Laboratory and Quest Diagnostics used mass spectrometry testing on the subject urine samples, as

no numerical results, which is indicative of GC-MS testing were produced, reported or testified to by Dr. Aukerman. Thus, the Respondent did not provide reliable scientific evidence to validate the results of the urine samples of McClanahan; therefore, Respondent acted in excess of its statutory authority, was clearly wrong, and/or was arbitrary and capricious in admitting scientific testing results, without the appropriate foundation, authentication, supporting documentation, or witness testimony.

Petitioner challenged the test results of Sample A and requested that the Sample B test be performed at a different lab. Dr. Aukerman testified that the Sample B was kept in a freezer at Aegis Sciences. Sample B was sent to Quest Diagnostics after [Hearing Transcript at 44 - 45.] **(Appendix 00018 – 00019)**. Again, the alleged lab report of Quest Diagnostic with numerical results of the second testing of Sample B was not produced at the hearing. It is not known if the second testing used an immunoassay screening test and/or mass spectrometry test, as Dr. Aukerman did not state the amount of THC in the second testing. Likewise, the Respondent also failed to produce the same reports related to Petitioner's Sample B.

5. Criminality

No evidence regarding the criminality of smoking or ingesting marijuana was introduced at hearing or referred to in Respondent's Final Order. Likewise, no corroborating evidence was admitted which would support the conclusion that Petitioner's alleged marijuana "use" was knowing, intentional, in violation of West Virginia law, or was otherwise illegal.

Respondent's conclusions failed to consider that Petitioner may have innocently and unknowingly ingested marijuana in some beverage or food product. No evidence was presented by Respondent at hearing regarding the criminality of smoking or ingesting marijuana. Likewise, no corroborating evidence was admitted which would support the conclusion that Petitioner's alleged

marijuana “use” was intentional, violated West Virginia law or was otherwise illegal. Therefore, the Respondent’s conclusion that Petitioner’s positive test result for THC is sufficient to find that Petitioner’s conduct was “unlawful” is beyond the Respondent’s statutory authority, clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Board presented no evidence that Petitioner has ever been arrested, charged or convicted of any crime, including those involving illegal drugs.

There was no reasonable basis presented by the Board to support the conclusion that “[Mr.] McClanahan unlawfully used marijuana and that such use of an illegal substance renders [Mr.] McClanahan unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c),” other than the Complaint (**Appendix 00007 – 00008**). Therefore, the Respondent’s decision to suspend Petitioner’s license is clearly wrong and/or arbitrary and capricious. Respondent’s conclusion that Petitioner’s single, lone positive drug test result for THC is sufficient to find that Petitioner’s conduct was somehow “unlawful” is beyond Respondent’s statutory authority; clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and/or, is arbitrary and capricious to reach such a conclusion, particularly in light of expert psychological opinion that Petitioner is not an addict and in combination with the Hearing Examiner’s conclusions that Petitioner’s testimony, in which he denied using marijuana, was “plausible” but for “his failure to rebut or discredit the positive test results of record and Dr. Aukerman’s testimony.” (**Appendix 00064**). Therefore, Respondent’s decision to suspend Petitioner’s license is clearly wrong in view of the reliable, probative and substantial evidence on the whole record is in excess of statutory provisions; and/or, is arbitrary and capricious.

No reasonable basis is present and no law cited to support Respondent's conclusion that Petitioner "unlawfully used marijuana" or that a positive urine drug test, from a single collection, is in and of itself sufficient to conclude that Petitioner is "guilty of conduct derogatory to the morals or standing of the professional of registered nursing, in violation of W. Va. Code § 30-7-11(f)." Therefore, Respondent's decision to suspend Petitioner's license is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; is in excess of statutory provisions, and/or is arbitrary and capricious.

Subsequently, Raleigh General Hospital's certified "Medical Review Officer," Douglas Aukerman, MD was notified by Aegis that Petitioner's initial urine drug screen (or immunoassay) had tested positive for THC. Dr. Aukerman resides and practices in Oregon. He has no ownership or supervisory duties or role at the Aegis (or Quest Diagnostic) laboratories. He never personally handles a sample and is merely provided with the results of the assay and the Gas Chromatograph-Mass Spectrometry (hereinafter "GC-MS") was performed at Aegis or that any testing was performed by Quest, assay or by GC-MS. Although Dr. Aukerman testified that the chain of custody was intact, he admitted that he had no personal knowledge as to the chain of custody, merely recognized that the toxicology laboratories involved are SAMSHA certified to conduct drug testing. Given the unsupported assertions as to the uninterrupted chain of custody of the urine drug sample, other than those areas to which Ms. Troche could personally attest, there is no reliability of the chain of evidence, when taken as a whole, including the sample(s) at issue, not to mention the individuals and equipment used to conduct such crucial testing, especially with both the reputation and livelihoods of licensees are at stake.

It was unclear from Dr. Aukerman's testimony, and from the hearing record, if Dr. Aukerman was ever provided with documents from the Aegis laboratory reflecting its second GC-

MS testing of Petitioner's urine. Likewise, it is unclear from Dr. Aukerman's testimony and from the hearing record, if Dr. Aukerman was ever provided with documents from the Quest laboratory reflecting their GC-MS testing of Petitioner's urine, although he admitted preparing the Aukmed report, identified as Exhibit 3. Although, Dr. Aukerman reports both subsequent GC-MS tests as being "positive," he does not provide the actual numerical readings, which should have been generated from these second and third GC-MS tests' readings, nor does he testify as to the process or data he relied upon in reaching the conclusion in his reports.

Dr. Aukerman was qualified as an expert witness at the hearing. Dr. Aukerman is the founder and president of AukMed, Incorporated ("Aukmed"), a company that provides medical review services for employer drug programs. Dr. Aukerman, through his company, AukMed, has a contract with LifePoint Hospital Systems ("LifePoint"), the parent company of RGH, to serve as the medical review officer and to review and analyze drug screens for all hospitals owned by LifePoint, including RGH. Dr. Aukerman stated that a certified medical review officer is a licensed physician who is responsible for receiving and processing the results of a drug screen from a testing laboratory, and making a final determination as to the reasons, if any, for drug screens that reflect a positive result. In this proceeding, Dr. Aukerman did not receive or process the results of the drug screens that were sent to Aegis and Quest laboratory. There was no evidence presented at the hearing explaining the procedures followed by the labs, and there was no evidence establishing that the procedures used by the labs that processed the two samples were reliable.

At the hearing on October 9, 2014, Dr. Aukerman testified that Sample A is what is tested by the lab the first time as a screening test. If the sample fails the screening test, it gets tested with a confirmation test. So the Sample A has already been tested twice. [Hearing transcript at 47]. The alleged Aegis' lab report of the results of the second testing of Sample A was not produced at

the hearing

Petitioner McClanahan challenged the test results of Sample A and requested that the Sample B test be performed at a different lab. Dr. Aukerman testified that the Sample B was kept in a freezer at Aegis Sciences. The Sample B was allegedly sent to Quest Diagnostics. [Hearing Transcript at 44 - 45.] Again, the alleged lab report from Quest Diagnostic, containing the results of the second testing of Sample A was not produced at the hearing. It is not known if the second testing used an immunoassay screening test and/or mass spectrometry test and Dr. Aukerman did not state the amount of THC in the second testing. This last sentence is on page 19.

Dr. Aukerman never personally handles a sample and is merely provided with the results of the assay and GC-MS testing performed in other states. Although Dr. Aukerman testified that the chain of custody was intact, he admitted that he had no personal knowledge as to the chain of custody, and merely recognized that the toxicology laboratories involved are SAMSHA certified to conduct the testing. Given the unsupported assertions as to the uninterrupted chain of custody of the urine drug sample, other than those areas to which Ms. Troche could personally attest, there is no reliability of the chain of evidence, when taken as a whole, including the sample(s) at issue, not to mention the individuals and equipment used to conduct such crucial testing, with both the reputation and livelihoods at stake.

It was unclear from Dr. Aukerman's testimony and from the hearing record, if Dr. Aukerman was ever provided with documents from the Aegis laboratory reflecting its second GC-MS testing of Petitioner's urine. Likewise, it is unclear from Dr. Aukerman's testimony and from the hearing record, if Dr. Aukerman was ever provided with documents from the Quest laboratory reflecting their GC-MS testing of Petitioner's urine, although he admitted preparing the Aukmed report, identified as Exhibit 3. Although, Dr. Aukerman reports both subsequent GC-MS tests as

being “positive,” he does not provide the actual numerical readings, which should have been generated from these second and third GC-MS tests’ readings, nor does he testify as to the process or data he relied upon in reaching the conclusion in his reports.

It should be noted that current literature, including *the American College of Occupational and Environmental Medicine Guidelines for Marijuana in the Workplace: Guidance for Occupational Health Professional and Employers*, that the GC-MS testing targets the inactive THC-COOH metabolite, which can be present for weeks after use, and has no correlation with acute impairment. J A Phillips, et. al., *JOEM*, Vol. 57, No. 4, (April 2015).

Raleigh General Hospital subsequently notified Respondent of the positive THC testing results. On January 14, 2014, Respondent sent a Notice of Complaint to Petitioner, to which he responded denying all wrong-doing. At Respondent’s direction, on or about March 7, 2014, Petitioner subsequently underwent an addiction evaluation by Binicki Shrewsbury, MS, LSW, LPC, AADC of FMRS Health Systems, Inc. an independent certified addictions specialist. This evaluation concluded that Petitioner had no issues with addiction and did not need alcohol or drug treatment. Thus, Respondent has no reasonable basis and provided no specific testimony or law to support the conclusion that Petitioner is “unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c).”

The sole settlement negotiations being conducted at the time this correspondence was sent, Respondent provided to Petitioner a single consent agreement, via correspondence dated March 18, 2014, prepared unilaterally by Respondent, in which the Petitioner was required to admit that he had an addiction problem, receive treatment and comply with related provisions for said addiction monitoring by Respondent. Petitioner rejected this Proposed Order, as he believed

it would be dishonest to admit to a problem that he did not have, namely addiction, just to make the complaint and UDS report disappear. The Final Order and Addendum is punitive, given the pre-hearing proposed consent order.

On June 30, 2014, Respondent issued a Complaint and Notice of Hearing setting the hearing in this matter for August 7, 2014. A continuance was subsequently granted and the hearing was moved to October 9, 2014, with attorney, Jack McClung as Respondent's designated single choice of Hearing Examiner. The Hearing took place as scheduled on October 9, 2014. A transcript was prepared and the hand-delivered to Respondent on October 15, 2014. All exhibits entered as evidence at hearing, were attached to the transcript. Both the Petitioner and Respondent prepared and submitted their proposed findings of facts and conclusions of law to Respondent on or before November 24, 2014.

Petitioner has continuously denied any improper or unlawful use of illegal drugs, including marijuana. Moreover, other than a one-time urine drug screen, the Respondent produced no evidence whatsoever relating to any such improper use or abuse of drugs, including marijuana, by the Petitioner. Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relationship to any wrongdoing, including particularly the unlawful possession or use of marijuana or other controlled or illegal drugs. Petitioner has never been treated by any medical provider or participated in any other form of counseling for any improper use or abuse of drugs or alcohol. No reasonable basis is present and no law cited to support Respondent's conclusion that Petitioner "unlawfully used marijuana" or that a positive urine drug test, from a single collection, when taken alone, is sufficient to conclude that Petitioner is "unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c)".

Upon information and belief, following conclusion of the hearing, the Respondent herein is required to enter a *Final Order* within forty-five (45) days following submission of all documents and materials necessary for the proper disposition of the case. All such materials were within the custody and control of Respondent by November 24, 2014, including both the proposed findings of fact and conclusions of law from both the Petitioner and Respondent. Failure to issue such an Order one hundred sixty-six (166) days after the submission of all necessary materials to reach a final decision violates W.Va. C.S.R. §19-5-10.1 provides in pertinent part:

Any *Final Order* entered by Respondent following a hearing conducted pursuant to these rules shall be made pursuant to the provisions of W.Va. Code §29A-5-3 and 30-1-8(d). Such orders shall be entered within forty-five (45) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts, and shall contain findings of fact and conclusions of law.

Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relationship to any wrongdoing, including particularly the unlawful possession or use of drugs. Petitioner has never been treated by any medical provider or participated in any other form of counseling for any improper use or abuse of drugs.

Errors with chain of custody for both the Aegis and Quest laboratory urine samples should have precluded their admission into evidence, as no testimony was offered as to the origin of the urine collection container, its storage, cleanliness or what if any protocols were in place to prevent cross-contamination of the urine collection containers, prior to the initiation of the collection procedures, nor was any reliable non-hearsay evidence offered to address the chain of custody at either the Aegis or Quest testing laboratories. . No employee of Aegis or Quest and no witness with any personal knowledge as to the testing or storage of the samples was offered into evidence.

Errors with chain of custody for both the Aegis and Quest laboratory urine sample testing should have precluded their admission into evidence, as no reliable, non-hearsay evidence was offered to validate the chain of custody/source of the original urine collection container at Raleigh General Hospital. Likewise, no reliable, non-hearsay evidence was offered by any employee or witness with first-hand knowledge of the testing performed at the out-of-state Aegis or Quest testing laboratory facilities. Finally, no documents were even offered to corroborate that the second Gas Chromatograph-Mass Spectrometry (hereinafter "CG-MS") was performed at Aegis or that any testing was performed by Quest. Thus, Respondent was clearly wrong and/or arbitrary and capricious in admitting scientific testing results, without the appropriate foundation, authentication or supporting documents or witness testimony, including, but not limited to, admission of Board Exhibit No. 2 and Board Exhibit No. 3.

The Respondent has failed to meet the appropriate burden of proof; in this case by a preponderance of the evidence, in concluding, that Petitioner is "unfit or incompetent" to perform his duties as a Registered Professional Nurse in West Virginia; therefore, Respondent's decision to suspend Petitioner's license is: beyond Respondent's statutory authority, clearly wrong in view of the reliable, probative and substantial evidence on the whole record, and/or, is arbitrary and capricious.

No reasonable basis is present to support the conclusion the Mr. "McClanahan unlawfully used marijuana and that such use of an illegal substance renders McClanahan unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c)". Therefore, their decision to suspend Petitioner's license is clearly wrong and/or arbitrary and capricious.

The Respondent's decision is further clearly wrong in view of the reliable, probative and substantial evidence on the whole record and/or is affected by other area of law, in that Attorney Sarah Smith, Petitioner's attorney at Hearing, provided ineffective assistance of counsel and failed to adequately protect the interests of Petitioner prior to and at hearing. Ms. Smith is a Legal Aide attorney and was unfamiliar with this administrative forum. She was wholly unprepared for hearing in this matter, having prepared no pre-hearing motions, retained no expert witnesses, called no fact or expert witnesses at the hearing (other than the Petitioner), prepared no exhibits and otherwise failed to adequately protect the administrative record for appeal or to protect the Petitioner's license; thereby violating the Petitioner's due process rights in this administrative forum. Likewise, the terms and conditions required by Respondent's *Final Order* are virtually impossible for Petitioner to conform, despite his extraordinary attempts to do so. Such a punitive *Final Order* far exceeds the scope of authority of Respondent, and thereby, violates Petitioner's constitution due process rights.

The Board concluded that this THC positive test result, standing alone, was sufficient to conclude that Petitioner unlawfully used marijuana, with said illegal act being "derogatory to the morals and standing of the nursing profession." The Board has failed to prove that the Petitioner was guilty of conduct derogatory to the morals or standing of the profession of registered nursing in violation of W. Va. Code § 30-7-11(f). The definition of immorality is "contrary to good morals; inconsistent with the rules and principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise. *Black's Law Dictionary*. When one is immoral they are morally evil; impure; obscene; unprincipled; vicious; or dissolute. *U.S. v. One Book, Entitled "Contraception"*, D.F.N.Y., 51 F.2d 525, 527.

There was no evidence presented at the hearing on October 9, 2014, that Petitioner knowingly and intentionally smoked marijuana. The Board also failed to produce any evidence to show that McClanahan may have innocently and unknowingly ingested marijuana in some food product. No evidence was presented by the Board regarding the criminality of smoking or ingesting marijuana introduced at hearing or referred to in the Board's Final Order. Likewise, no corroborating evidence was admitted which would support the conclusion that Petitioner's alleged marijuana "use" was intentional, violated West Virginia law, or was otherwise illegal. Therefore, the Board's conclusion that Petitioner's positive test result for THC is sufficient to find that Petitioner's conduct was "unlawful" is beyond the Board's statutory authority; and is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Board presented no evidence that McClanahan has ever been charged or convicted of any crime involving any illegal drug. There was no reasonable basis presented by the Board to support the conclusion that Mr. "McClanahan unlawfully used marijuana, and that such use of an illegal substance renders Petitioner unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c)". Therefore, the decision to suspend Petitioner's license is clearly wrong and/or arbitrary and capricious.

In a similar case, the Alabama Supreme Court found that a lone UDS testing positive for THC, was not sufficient to conclude, standing on its own, that a licensee was addicted to a habit-forming drug. *Thornton v Alabama Board of Nursing*, 973 So. 2d 1079 (Ala. Civ. App., 2007). In that case, the Court found that the Alabama Board of Nursing presented no evidence, other than a lone positive drug test for THC, at hearing to support its position that its licensee was in violation of the addiction provisions of their rules and regulations. The Court then concluded that this lone positive drug test was not sufficient to prove their licensee

“had ever suffered an addiction to a habit-forming drug, much less that she had an ongoing substance-abuse problem at the time of the hearing.” *Id.* at 1084.

Petitioner has continuously denied any improper or unlawful use of illegal drugs, including marijuana. Moreover, other than a lone, one-time urine drug screen, the Respondent can produce no evidence whatsoever relating to any such improper use or abuse of drugs by the Petitioner.

Petitioner has never been accused, investigated, or arrested by any law enforcement agency in relationship to any wrongdoing, including particularly the unlawful possession or use of drugs. Petitioner has never been treated by any medical provider or participated in any other form of counseling for any improper use or abuse of drugs.

6. Delay in Entry of Final Order and Final Order Addendum

Following conclusion of the administrative hearing, the Respondent herein is required to enter a final order within forty-five (45) days following submission of all documents and materials necessary for the proper disposition of the case pursuant to the provisions of *W.Va. Code* §29A-5-3 and 30-1-8(d). All such materials were within the custody and control of the Board by November 24, 2014, including the proposed findings of fact and conclusions of law from both the Petitioner and Respondent. **Appendix pg. 00120 – 00127.** Nonetheless, Respondent failed to issue an Order until one hundred sixty-six (166) days after the submission of all necessary materials. The Respondent’s failure to reach a timely decision violates *W.Va. C.S.R.* §19-5-10.1 provides in pertinent part:

Any final order entered by the Board following a hearing conducted pursuant to these rules shall be made pursuant to the provisions of *W.Va. Code* §29A-5-3 and 30-1-8(d). Such orders shall be entered within forty-five (45) days following the submission of all documents and materials necessary for the proper disposition of the case, including transcripts, and shall contain findings of fact and conclusions of law.

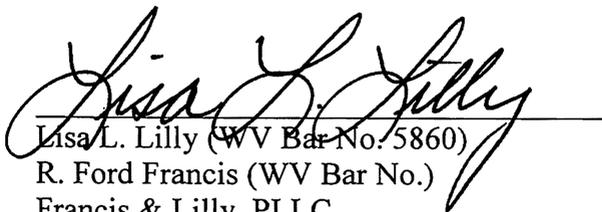
Without consent, justification or excuse, the Board has violated W.Va. C.S.R. §19-5-10.1 in this case. The Respondent's conduct is representative of a pattern and course of action by the Respondent that creates a hardship for the licensee, the intent of which is seemingly to force nurses against whom complaints have been lodged to sign a consent order disposing of the complaint, "voluntarily", thus, effectively depriving them of their due process rights, including an opportunity to be promptly heard and defend the allegations against them. *State ex rel. Fillinger v. Rhodes*, 230 W.Va. 560, 741 S.E.2d 118 (2013); *SER Lisa Miles v. W.Va. Board of Registered Professional Nurses*, Case No. 15-0131 (09/17/2015).

V. CONCLUSION

WHEREFORE, the Petitioner respectfully prays that this Honorable Court vacate the *Final Order* of the Respondent and direct the Respondent to reinstate Petitioner's license to Practice Registered Professional Nursing within the State of West Virginia, without the cloud of discipline, as well as, attorney fees and costs, and any other relief that the Court deems fair and just.

Respectfully Submitted,

Petitioner, by counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNATHAN LOWELL MCCLANAHAN, RN,
Petitioner Below, Petitioner

v.

Docket No. 15-1014
(Kanawha County Circuit Court
Civil Action No. 15-AA-58)

WEST VIRGINIA BOARD OF EXAMINERS FOR
REGISTERED PROFESSIONAL NURSES,
Respondent Below, Respondent.

AMENDED APPENDIX

Submitted by:

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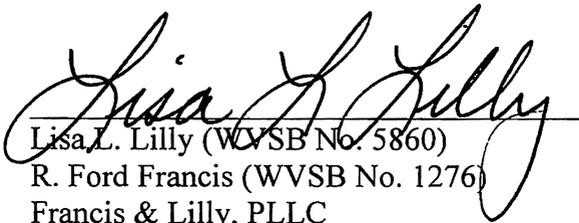
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CERTIFICATION

I, Lisa L. Lilly, counsel for the Petitioner, hereby certify that the contents of this Amended Appendix are true and accurate copies of the items contained in the records of the Kanawha County Clerk filed in the case of *Johnathan Lowell McClanahan, RN, v. West Virginia Board of Examiners for Registered Professional Nurses*, Civil Action No. 15-AA-58.

I further certify that I have conferred in good faith with counsel for West Virginia Board of Examiners for Registered Professional Nurses, to determine the documents submitted in this Amended Appendix, and that all parties agree that the documents contained herein comprise the Appendix in its entirety.



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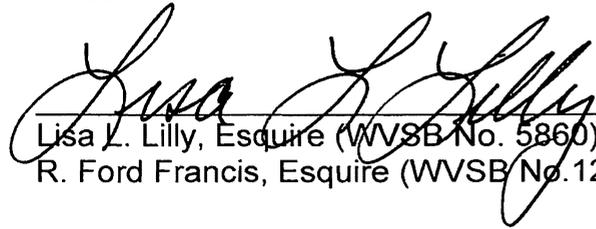
WEST VIRGINIA BOARD OF EXAMINERS FOR
REGISTERED PROFESSIONAL NURSES,
Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, Lisa L. Lilly, counsel for Petitioner, Johnathan Lowell McClanahan, hereby certify that I served a true copy of the foregoing **“Petitioner’s Motion For Leave to File Reply to Respondent’s Response In Opposition To Petitioner’s Motion For Leave To File an Amended Appeal Brief, Amended Appendix, Table of Contents For [Amended] Appeal Brief, Table of Contents for Amended Appendix and Table of Authorities, or, In The Alternative, Petitioner’s Motion to File, Out of Time, an Amended Appeal Brief, Amended Appendix, Table of Contents For Amended Appeal Brief, Table of Contents for Amended Appendix and Table of Authorities”** upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, and via e-mail, on this 5th day of February, 2016:

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