

**FEBRUARY 2009  
MULTISTATE PERFORMANCE TEST (MPT)**

The MPT Question administered by the State Board of Law Examiners for the February 2009 bar examination was *Ronald v. Department of Motor Vehicles*. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website.

**Materials for an unsuccessful applicant:** An applicant who was unsuccessful on the February 2009 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the February 2009 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is June 30, 2009.

**Materials for anyone other than an unsuccessful applicant:** Anyone else may obtain the MPT Question and the “point sheet” only by purchasing them at the NCBE Online Store.

Use the following link to access the **NCBE Online Store**: [www.ncbex2.org/catalog/](http://www.ncbex2.org/catalog/)

**REPRESENTATIVE ANSWER 1**

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### **1. Officer Barry Thompson did not have a reasonable suspicion to stop Barbara Ronald on the morning of December 19, 2008.**

A police officer may make a traffic stop even when he has no probable cause to make an arrest. However, such a stop must be based on “specific and articulate facts” that give the officer reasonable suspicion. Taylor v DMV

A stop may be based on reasonable suspicion even if no single fact alone provides reasonable suspicion. State v. Kessler. The Court of Appeals has rejected any bright line rules that weaving within a single lane does or does not give rise to reasonable suspicion, but has held that a court must look at the totality of the circumstances in any particular case. Pratt v. MVB Bank, Inc

In this particular case, Ms. Ronald was observed weaving within her lane, but she never entered the other lane, nor was she speeding. The only additional fact that Officer Thompson can point to as giving him a reasonable suspicion was that the incident occurred at around the time the bars were closing.

The Pratt court noted that “bar time” could be a factor in giving rise to a reasonable suspicion. However, just those two observations that Ms. Ronald was weaving a bit in the lane, while violating no traffic laws, and the fact that it was a particular time of night do not add up to a reasonable inference that Ms. Ronald was driving while intoxicated.

### **2. The blood test report is not sufficient in this case to support a finding that Ms. Ronald was driving with a prohibited blood-alcohol concentration.**

The Franklin APA provides that hearing evidence such as the blood alcohol test results are admissible in administrative hearings. If the hearsay would be admissible under a hearing exception in court, it will be sufficient to support a finding in an administrative hearing. If it would not be admissible under a hearsay exception in court, it is admissible only to supplement or explain other evidence in an administrative hearing. Sec. 115, FAPA.

Irregularities in the administration of a blood alcohol test may render such evidence is admissible under the public records exception. See Schwartz v DMV, Rodriguez v DMV. In Rodriguez the Court of Appeals held that a blood alcohol test was inadmissible hearsay when the test did not conform to regulations in the Franklin Code of Regulations.

Section 121 of the Franklin Code of Regulations provides that forensic blood alcohol testing may be performed only by a forensic alcohol analyst who has been trained in accordance with the requirements of the Franklin Bureau of Investigation. The analysis must also be certified as authentic by the records custodian for the laboratory in which the analysis was performed. In this case, the test result was not actually signed by Forensic Alcohol Analyst Daniel Gans, but

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rather signed on his behalf by laboratory technician Charlotte Swain. This leads one to suppose that the test was not actually performed by Mr. Gans but rather by Ms. Swain who is presumably not trained and certified by the FBI. Therefore, although the report may be used to supplement the evidence, it cannot in itself support a finding that Ms. Ronald was driving with a prohibited blood alcohol concentration.

**3. In light of the flawed evidence introduced by the DMV, the DMV has not met its burden of proving by a preponderance of the evidence that Ms. Ronald was driving with a prohibited blood alcohol concentration.**

Officer Thompson did not have reasonable suspicion to stop Ms. Ronald in the first place, and due to irregularities in the blood alcohol test, it is insufficient to support a finding against Ms. Ronald.

In addition, Ms. Ronald has a reasonable explanation for her behavior that night, her fatigue and the tailgating by Officer Thompson caused her slightly erratic driving. Her fatigue, arthritis, high heels, and nervousness about being near speeding traffic explain her performance on the field sobriety test.

Therefore, the DMV has not met its burden of proving by a preponderance that Ms. Ronald was driving with an impaired blood alcohol concentration.

## REPRESENTATIVE ANSWER 2

1. Based on the totality of the Circumstances, Police Officer Barry Thompson did not have reasonable suspicion to stop Ms. Ronald.

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Officer Thompson pulled Ms. Ronald over after following her for approximately one mile on December 19, 2008. During the administrative hearing conducted on February 12, 2009, Officer Thompson was asked whether or not he had observed Ms. Ronald speeding or crossing out of her lane into other lanes of traffic while traveling on U.S. Highway 13. Officer Thompson testified that while he did not specifically recall if Ms. Ronald had been speeding, he probably would have noted it in his report. However, the police report does not mention or suggest that Ms. Ronald was speeding. See Exhibit 1.

Officer Thompson further testified that he followed Ms. Ronald “closely” with his high beams engaged. Moreover, Officer Thomson was evasive in his answer as to whether or not Ms. Ronald began to weave prior to or only after he began to tail her when he was asked on direct examination. Neither Officer Thompson’s report of the incident nor his testimony during the administrative hearing indicated that he had any other reason to pull Ms. Ronald over except for the fact that he had observed her “weaving and it was 1:00 a.m.”. In the case of Pratt v. Department of Motor Vehicles, the Franklin Court of Appeals explicitly rejected the position that “weaving within a single lane also gives rise to reasonable suspicion” that is sufficient to conduct an investigative stop. Rather, the Pratt court stated that the situation, based on the totality of the circumstances must be taken into account before weaving in one’s own traffic lane can lead to reasonable suspicion sufficient enough to justify a stop.

In the Pratt case, the court found that the defendant’s weaving between his lane and the parking lane, together with the time of day, and the arresting officer’s vivid description of the defendant’s erratic driving did provide enough reasonable inferences that the officer had reasonable suspicion to conduct an investigative stop. However, the details in the case at bar differ significantly from those in Pratt such that they do not and could not lead Officer Thompson to the same result as the arresting officer in the *Pratt* case. For example, in Pratt, the arresting officer observed the defendant’s vehicle traveling partially in his rightful driving lane and partly in the adjacent parking lane, whereas in the case at bar, Officer Thompson testified that Ms. Ronald remained in her lane the entire time that he observed her until he had her pull over.

Another important factual distinction between the case at bar and the Pratt case is that based on the evidence that has been presented, even if Ms. Ronald was weaving, it was only after she had been followed by Officer Ronald “closely” with his high beams on for a distance of 1.4 miles according to the police report. This type of a pursuit, late at night, is likely to make even the most unflappable driver a little nervous such that they weave a little while attempting to determine who is following them. Although some of the other factors between the case at bar and the Pratt case are similar such as the time of day that each defendant was stopped, these similarities do not provide enough reasonable inferences such that Officer Thompson could draw a cumulative conclusion that provided him with reasonable suspicion to stop Ms. Ronald.

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**2. The §353 Blood Alcohol Test Results Report cannot be used as the sole basis to find that Ms. Ronald was driving with a prohibited blood alcohol concentration because it contains hearsay and would be inadmissible under the Franklin Evidence Code.**

At the administrative hearing on February 23, 2009, the Department of Motor Vehicles (DMV) attempted to submit into evidence a Forensic Blood Alcohol Testing Report (hereinafter “the report”). The Report was not signed by Daniel Gans, a Forensic Alcohol Analyst, but rather by Charlotte Swain, a Senior Laboratory Technician. After signing for Gans, Swain added a notation indicating that she had signed for Gans. This statement is hearsay because it is an out of court statement (made by Swain) offered to prove the truth of the matter asserted (that she signed the Report at Gan’s request). Therefore, according to §1279 of the Franklin Evidence Code, this document would not be admissible. Therefore, according to §115 of the Franklin Administrative Procedure Act, since the Report would not be admissible under the Franklin Evidence Code, the Report is not sufficient in itself to support a finding that Ms. Ronald was driving with a prohibited blood alcohol concentration. Therefore, as §115 states, inadmissible hearsay may only be used “for the purpose of supplementing or explaining other evidence.”

As a result of the fact that the Report is inadmissible, further evidence is needed in order to support a finding that Ms. Ronald was driving with a prohibited blood alcohol concentration. The Franklin Court of Appeals addressed this very issue in the case of Rodriguez v. Department of Motor Vehicles. In Rodriguez, the DMV attempted to submit a Report that had been signed by someone other than a Forensic Alcohol Analyst. In its analysis, the Rodriguez court emphasized that “performance of forensic alcohol analysis is subject to strict regulation by §121 authorizes only “forensic alcohol analysts” to perform forensic alcohol analysis – and none others. (See Rodriguez) At the case at bar, although the Report claims to have been signed at the direction of a forensic alcohol analyst, it is based on a hearsay statement. Therefore, as pointed out in the case of Schwartz v. Department of Motor Vehicles, when the blood alcohol test does not meet the requirements for admissibility under §115 of the Administrative Procedural Act, the DMV must provide additional evidence in order to meet its burden of proof.

**3. The Department of Motor Vehicles has failed to prove by a preponderance of the evidence that Ms. Ronald was driving with a prohibited blood alcohol concentration.**

In the Rodriguez case, the Franklin Court of Appeals held that the DMV had failed to meet its burden to show that the defendant was guilty of having an excessive blood alcohol concentration when the DMV’s only evidence was based on a “police report that was void of detail and a blood test report that lacks proper foundation.” Based on the fact that the DMV relies on similar evidence in the case at bar as it did in the Rodriguez case, it stands to reason that the DMV has again failed to meet its burden of proof to show that Ms. Ronald was driving with a prohibited blood alcohol concentration. While Officer Thompson’s incident report does describe Ms. Ronald’s performance during the course of the field sobriety tests, testimony given by both Officer Thompson and Ms. Ronald during the administrative hearing presented evidence which tends to show that Ms. Ronald’s poor performance during the tests was a result of the fact that she performed them while wearing high heels. Moreover, neither the police report nor Officer Thompson’s testimony indicated that he

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detected the smell of alcohol, slurred speech or other tell tale signs that Ms. Ronald was driving with a prohibited blood alcohol concentration.

Therefore, the testimony, police report and inadmissible blood analyst report individually and collectively fail to provide the DMV with enough evidence to establish the necessary quantum of evidence that Ms. Ronald was driving with a prohibited blood alcohol concentration.