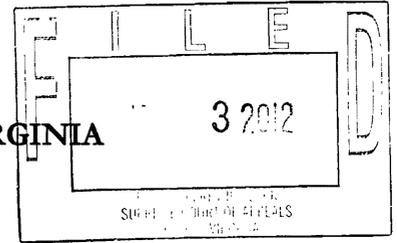


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 11-1292

**JOE E. MILLER**, Commissioner  
Division of Motor Vehicles,  
Petitioner,

V.)

**ALBERTO VETRI**,  
Respondent.

Appeal from a final order  
of the Circuit Court of Hancock  
County, (10-AA-1)

**PETITIONER'S BRIEF**

**Elaine L. Skorich #8097**  
**Assistant Attorney General**  
**Post Office Box 17200**  
**Charleston, West Virginia 25317-0010**  
**(304) 926-3498**  
**Elaine.L.Skorich@wv.gov**

**TABLE OF CONTENTS**

	<u>Page</u>
ASSIGNMENTS OF ERROR .....	1
1.    No statute, rule, or case law requires retrograde extrapolation evidence failing to address or cite West Virginia Code § 17C-5A-2(f) (2008). ....	1
2.    The Hearing Examiner properly credited the DUI Information Sheet over the driver’s testimony. ....	1
3.    The Circuit Court erred in applying administrative rules and case law that are no longer extant .....	1
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	3
1. No statute, rule, or case law requires retrograde extrapolation evidence .....	3
2. The Hearing Examiner credited the DUI Information Sheet over the driver’s testimony	3
3. The Circuit Court erred in applying statutory and case law that is no longer extant ....	4
STATEMENT REGARDING ORAL ARGUMENT .....	4
ARGUMENT .....	4
1.    No statute, rule, or case law requires retrograde extrapolation evidence. ....	4
A. Standard of Review .....	4
B. Statutes at Issue .....	5
C. Discussion .....	6
2.    The Hearing Examiner credited the DUI Information Sheet over the driver’s testimony .....	12
3.    The Circuit Court erred in applying statutory and case law that is no longer extant	15
CONCLUSION .....	18

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>FEDERAL CASES:</u></b>	
<u>Nalley v. Nalley</u> , 53 F.3d 649 (4TH Cir. 1995) .....	16
<u>United States v. DiSantis</u> , 565 F.3d 354 (7th Cir. 2009) .....	15
<u>United States v. Taylor</u> , 41 M.J. 701 (A.F. Ct. Crim. App. 1995) .....	15
 <b><u>STATE CASES:</u></b>	
<u>Albrecht v. State</u> , 173 W. Va. 268, 314 S.E.2d 859 (1984) .....	8
<u>Appalachian Power Co. v. State Tax Department</u> , 195 W. Va. 573, 466 S.E.2d 424 (1995) .....	4
<u>Calvert v. Scharf</u> , 217 W. Va. 684, 619 S.E.2d 197 (2005) .....	6
<u>Ewing v. Board of Ed.</u> , 202 W. Va. 228, 503 S.E.2d 541 (1998) .....	4
<u>Fuenning v. Superior Court</u> , 139 Ariz. 590, 680 P.2d 121 (1983) .....	12, 14
<u>Haas v. State</u> , 567 So. 2d 966 (Fla. Dist. Ct. App.1990), aff'd, 597 So. 2d 770 (Fla. 1992) .....	6
<u>Heydinger v. Adkins</u> , 178 W. Va. 463, 360 S.E.2d 240 (1987) .....	14
<u>In re K.M.B.</u> 148 S.W.3d 618, 621 (Tex. App. 2004) .....	17
<u>McDonald v. Cline</u> , 193 W. Va. 189, 455 S.E.2d 558 (1995) .....	16
<u>In re McKinney</u> , 218 W. Va. 557, 625 S.E.2d 319 (2005) .....	5
<u>Miller v. Hare</u> , 708 S.E.2d 531 (W. Va. 2011) .....	16, 17
<u>Miller v. McKeeever</u> , 11-0594 (W. Va. Dec. 2, 2011) .....	13
<u>Muscatell v. Cline</u> , 196 W. Va. 588, 474 S.E.2d 518 (1996) .....	3, 15
<u>Newhart v. Pennybacker</u> , 120 W. Va. 774, 200 S.E. 350 (1938) .....	4

<u>Nichols v. State</u> , 213 W. Va. 586, 584 S.E.2d 220 (2003) .....	16
<u>People v. Baylis</u> , 75 Misc. 2d 397, 347 N.Y.S.2d 892 (Co. Ct. 1973) .....	14
<u>Plumley v. Miller</u> , No. 101186, (W. Va. Feb. 11, 2011) .....	13, 17, 18
<u>Repass v. Work. Comp. Division</u> , 212 W. Va. 86, 569 S.E.2d 162 (2002) .....	18
<u>Stalnaker v. Roberts</u> , 168 W. Va. 593, 287 S.E.2d 166 (1981) .....	5
<u>Stanley v. Department of Tax and Rev.</u> , 217 W. Va. 65, 614 S.E.2d 712 (2005) .....	4
<u>State v. Ball</u> , 164 W. Va. 588, 264 S.E.2d 844 (1980) .....	8
<u>State v. Dinslage</u> , 280 Neb. 659, 789 N.W.2d 29 (Neb. 2010) .....	11
<u>State v. Dyer</u> , 177 W. Va. 567, 355 S.E.2d 356 (1987) .....	11
<u>State v. Greenwood</u> , 115 S.W.3d 527, 529 (Tenn. Ct. Crim. App. 2003)) .....	11
<u>State v. Knuckles</u> , 196 W. Va. 416, 473 S.E.2d 131 (1996) .....	12
<u>State v. Larson</u> , 429 N.W.2d 674 (Minn. Ct. App. 1988) .....	10
<u>State v. McGowan</u> , 332 Mont. 490, 139 P.3d 841 (Mont. 2006) .....	6, 9, 10, 11
<u>State v. Tischio</u> , 107 N.J. 504, 527 A.2d 388 (1987) .....	passim
<u>State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell</u> , No. 35738, 2011 WL 1486100 (W. Va. Apr. 1, 2011) .....	14

**STATUTES:**

W. Va. Code § 17C-5-8. ....	3
W.Va. Code § 17C-5-8(a)(3) .....	5, 11
W. Va. Code § 17C-5A-2(d) .....	1, 12, 17
W. Va. Code § 17C-5A-2(f) .....	passim
W. Va. Code § 17C-5A-2(j) .....	5

**OTHER:**

82 C.J.S. *Statutes* § 350 n.1 ..... 16

*N.J.S.A.* 39:4-50(a) ..... 6, 8

W. Va. R. Evid. 613(b) ..... 15

W. Va. R. Evid 801(d)(2) ..... 15

W. Va. C.S.R. § 91-1-3.7.2 ..... 15, 16, 17

W. Va. C.S.R. § 64-10-6.1 ..... 10

W. Va. C.S.R. § 64-10-7 ..... 10

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 11-1292

**JOE E. MILLER**, Commissioner  
Division of Motor Vehicles,  
Petitioner,

V.)

**ALBERTO VETRI**,  
Respondent.

Appeal from a final order  
of the Circuit Court of Hancock  
County, (10-AA-1)

---

**PETITIONER'S BRIEF**

---

**ASSIGNMENTS OF ERROR**

1. **No statute, rule, or case law requires retrograde extrapolation evidence failing to address or cite West Virginia Code § 17C-5A-2(f) (2008).**
2. **The Hearing Examiner properly credited the DUI Information Sheet over the driver's testimony.**
3. **The Circuit Court erred in applying administrative rules and case law that are no longer extant.**

**STATEMENT OF THE CASE**

At 1:43 a.m. on July 22, 2009, Weirton Police Officer S.M. Falbo stopped the Respondent who was driving a car. App'x 63. At 1:57 a.m., Officer Falbo arrested the Respondent for Driving under the Influence. App'x 62, 63. A secondary breath test was administered at 2:31 a.m which showed an alcohol concentration of .095%. App'x 62, 66. When asked if he was under the influence of alcohol or drugs, his answer was "[a] little bit." App'x 67.

The Respondent did not request the presence of the Investigating Officer, App'x 56, and at the time of the hearing West Virginia Code § 17C-5A-2(d) (2008) provided:

Any investigating officer who submits a statement pursuant to section one of this article that results in a hearing pursuant to this section shall not attend the hearing on the subject of that affidavit unless requested to do so by the party whose license is at issue in that hearing or by the commissioner. The hearing request form shall clearly and concisely inform a person seeking a hearing of the fact that the investigating officer will only attend the hearing if requested to do so and provide for a box to be checked requesting the investigating officer's attendance. The language shall appear prominently on the hearing request form. The Division of Motor Vehicles is solely responsible for causing the attendance of the investigating officers.

...

If the party whose license is at issue does not request the investigating officer to attend the hearing, the commissioner shall consider the written statement, test results and any other information submitted by the investigating officer pursuant to section one of this article in that officer's absence.

The Hearing Examiner found that the DUI Information Sheet stated that the Respondent was weaving, was slow to respond to traffic signals, almost struck another vehicle or object, turned with a wide radius, had the odor of alcohol on his breath, had slurred speech, bloodshot eyes, was slow to respond to directions, was unsteady while getting out of his car, standing, and walking, and failed the one legged stand and walk and turn test. App'x 24-25.<sup>1</sup> The Hearing Examiner's Order stated, "[t]he Respondent refuted the Investigating Officer's allegations made in reference to his manner of driving and his level of intoxication. However, the Respondent only stated that he did not do what the Investigating Officer stated, offering no other explanation of his manner of driving or why he was not intoxicated even though his blood alcohol concentration was ninety-five thousandths of one percent." App'x 28-29.

The Circuit Court reversed the revocation, App'x 1-11, finding that (1) the DMV did not prove the alcohol content of the Respondent at the time of driving; (2) that the Commissioner did

---

<sup>1</sup>Because the Respondent did not exhibit equal tracking of the eyes, the Hearing Examiner did not consider the Horizontal Gaze Nystagmus test. App'x 24.

not comply with *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996); and (3) that the failure of the Investigating Officer to appear required dismissal of the case. The Commissioner timely appealed.

### SUMMARY OF ARGUMENT

**1. No statute, rule, or case law requires retrograde extrapolation evidence.**

The Circuit Court imposed on the DMV an obligation to present retrograde extrapolation evidence. Most other courts have rejected this requirement applying the same rules of interpretation and statutory language as contained in West Virginia statutes and rules. There is no obligation to present such evidence, especially where the Secondary Chemical Test is administered within two hours of driving or arrest as required by West Virginia Code § 17C-5-8.

**2. The Hearing Examiner credited the DUI Information Sheet over the driver's testimony.**

At the time of the hearing in this case, West Virginia Code § 17C-5A-2(d) (2008) provided:

Any investigating officer who submits a statement pursuant to section one of this article that results in a hearing pursuant to this section shall not attend the hearing on the subject of that affidavit unless requested to do so by the party whose license is at issue in that hearing or by the commissioner. The hearing request form shall clearly and concisely inform a person seeking a hearing of the fact that the investigating officer will only attend the hearing if requested to do so and provide for a box to be checked requesting the investigating officer's attendance. The language shall appear prominently on the hearing request form. The Division of Motor Vehicles is solely responsible for causing the attendance of the investigating officers.

...

If the party whose license is at issue does not request the investigating officer to attend the hearing, the commissioner shall consider the written statement, test results and any other information submitted by the investigating officer pursuant to section one of this article in that officer's absence.

The Hearing Examiner recognizes that the Respondent refuted the DUI Information Sheet. However, the Hearing Examiner's use of the term "refuted" was another way of stating that the Respondent contradicted the DUI Information Sheet. A complete reading of the Final Order shows that the Hearing Examiner credited the DUI Information Sheet over the Respondent's contradictory testimony.

**3. The Circuit Court erred in applying statutory and case law that is no longer extant.**

The Circuit Court quotes a C.S.R. provision that no longer exists.

**STATEMENT REGARDING ORAL ARGUMENT**

This case should be set for Rule 19 argument. It is not suitable for summary treatment.

**ARGUMENT**

**1. No statute, rule, or case law requires retrograde extrapolation evidence.**

**A. Standard of Review.**

This issue presents a matter of statutory interpretation. "Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

"The general rule for interpreting differing statutory sections is that courts should attempt to harmonize them, if possible." *Stanley v. Department of Tax and Rev.*, 217 W. Va. 65, 71, 614 S.E.2d 712, 718 (2005). "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938). Further "[a] statute should be read to make it harmonize with other statutory enactments[.]" Syl. Pt. 7, *Ewing v. Board of Ed.*, 202 W.

Va. 228, 503 S.E.2d 541 (1998), and “[t]he purpose of this State’s administrative driver’s license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible[.]” Syl. Pt. 3, *In re McKinney* 218 W. Va. 557, 625 S.E.2d 319 (2005), for the “protection for the innocent public[.]” *Stalaker v. Roberts*, 168 W. Va. 593, 599, 287 S.E.2d 166, 169 (1981).

**B. Statutes at Issue**

West Virginia Code § 17C-5A-2(j) (2009) provides, in pertinent part:

If the commissioner finds by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol . . . or did drive a motor vehicle while having an alcohol concentration in the person’s blood of eight hundredths of one percent or more, by weight, . . . the commissioner shall revoke the person’s license . . . .

West Virginia Code § 17C-5-8(a)(3) provides, in pertinent part:

[u]pon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person’s blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged. The evidence gives rise to the following presumptions or has the following effect:

. . .

Evidence that there was, at that time, eight hundredths of one percent or more, by weight, of alcohol in his or her blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

### C. Discussion

The Circuit Court in this case imposed upon the DMV the requirement to show the Respondent's BAC at the time of driving. This retrograde extrapolation, *State v. McGowan*, 332 Mont. 490, 495, 139 P.3d 841, 845 (Mont. 2006) ("Retrograde extrapolation represents the technique through which experts estimate alcohol concentration at some earlier time based on the test results at some later time."), is found nowhere in the West Virginia Code and is an erroneous construction of West Virginia law.

Even in criminal cases it is "the majority view that expert testimony on retrograde extrapolation is not required by the state[,]" STEVEN OBERMAN, *DUI: CRIME AND CONSEQUENCE IN TENNESSEE* § 6:5 (2011-2012), and only a minority of states require retrograde extrapolation in criminal cases. See *Haas v. State*, 567 So.2d 966, 970 (Fla. Dist. Ct. App.1990), *aff'd*, 597 So.2d 770 (Fla. 1992). A review of cases from other jurisdictions supports adoption of the majority rule. *Calvert v. Scharf*, 217 W. Va. 684, 691, 619 S.E.2d 197, 204 (2005) ("In deciding whether we will follow the majority rule, we will examine decisions of other jurisdictions.").

In *State v. Tischio*, 107 N.J. 504, 506, 527 A.2d 388, 389 (1987), *appeal dismissed for lack of a substantial federal question*, 484 U.S. 1038, 108 S. Ct. 768 (1988), the New Jersey Supreme Court was required to interpret *N.J.S.A.* 39:4-50(a) which made it unlawful to operate "a motor vehicle ... with a blood alcohol concentration of 0.10% or more by weight of alcohol in the [person's] blood." *Id.*, 527 A.2d at 389-90. The issue as phrased by the court was "whether it is the blood-alcohol level at the time of the breathalyzer test or at the time of the operation of the motor vehicle that is essential in establishing the statutory offense." *Id.*, 527 A.2d at 390. The court held "a defendant may be convicted under *N.J.S.A.* 39:4-50(a) when a breathalyzer test that is

administered within a reasonable time after the defendant was actually driving his vehicle reveals a blood-alcohol level of at least 0.10%.” *Id.*, 527 A.2d 390. The court further held “extrapolation evidence is not probative of this statutory offense and hence is not admissible.” *Id.* 527 A.2d at 390.

In *Tischio*, Tischio was stopped and arrested. About sixty minutes after being stopped, Tischio’s blood-alcohol was .11% as measured by a breath test. Tischio was convicted of driving with a .10%. Tischio appealed arguing that the State had a duty to present evidence relating his BAC from the test to the time of driving. The New Jersey Supreme Court disagreed.

The court began its analysis with the statute at issue which read:

A person who operates a motor vehicle while under the influence of intoxicating liquor ... or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant’s blood ... shall be subject [to penalties.]

The Court noted that the “language literally defines the offense as involving two necessary elements—a prohibited blood-alcohol level and the operation of a motor vehicle—and seemingly requires that both occur together. While the coincidence of the two statutory elements arguably is required to establish the offense, other considerations militate against such an interpretation.” *Tischio*, 107 N.J. at 509, 527 A.2d at 390. Specifically, the Court noted that (1) the statute was not facially plain and unambiguous; (2) the legislative intent and purpose are contrary to the interpretation Tischio advanced, (3) the overall legislative scheme for the enforcement of drunk-driving laws would be impeded by such an interpretation, (4) that the history of the legislation directs a different interpretation, and (5) overriding considerations of public policy would be disserved by such an interpretation. *Id.*, 527 A.2d at 390.

The New Jersey Court found that the statute was ambiguous and could not be literally applied. *Id.*, 527 A.2d at 390. “The statute expressly contemplates the administration of a

breathalyzer test to determine blood-alcohol concentration. Indeed, the determination of blood-alcohol levels through chemical or breathalyzer tests is the linch pin of New Jersey's drunk-driving statutes." *Id.*, 527 A.2d at 390.<sup>2</sup> The court went on to observe that

[a]lthough the statute does not refer to the time of testing, it is obvious that a breathalyzer test cannot be administered while a defendant is driving his motor vehicle. Thus, the blood-alcohol level determined by a breathalyzer test can never automatically coincide with the time of the defendant's actual operation of his motor vehicle, as suggested by the literal language of the statute. This raises at least two possible interpretations of the statutory offense. One is that a .10% blood-alcohol level determined by a breathalyzer test made within a reasonable time of defendant's operation alone satisfies the statute. The other is that some evidentiary process-not discernible on the face of the statute-must be invoked to relate breathalyzer test results to the time when the defendant was actually driving. The question is which interpretation comports with the true meaning of the statute.

*Id.*, 527 A.2d at 390-91 (footnote omitted). In making this determination, the court observed "[t]he primary purpose behind New Jersey's drunk-driving statutes is to curb the senseless havoc and destruction caused by intoxicated drivers." *Id.* at 512, 527 A.2d at 392. The court went on:

In construing *N.J.S.A.* 39:4-50(a), we must also consider the entire gamut of statutory and regulatory law dealing with the societal dilemma of drunk-driving. This examination reflects the traditional interpretative guide to construe the terms of a statute in context, in *pari materia*. The overall scheme of these laws reflects the dominant legislative purpose to eliminate intoxicated drivers from the roadways of this State. To this end, the Legislature, working in tandem with the courts, has consistently sought to streamline the implementation of these laws and to remove the obstacles impeding the efficient and successful prosecution of those who drink and drive.

*Id.* at 514, 527 A.2d at 393. The court went on to recognize the whole point of a per se offence "was to streamline the administration of the penal and regulatory laws in this area by eliminating the necessity for expert testimony at trial." *Id.* at 517, 527 A.2d at 394. *See also State v. Ball*, 164 W.

---

<sup>2</sup>This Court has recognized that "[a] chemical test is obviously necessary to establish the concentration of alcohol in a person's blood when that is the intended basis for revocation." *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984).

Va. 588, 264 S.E.2d 844, 846 (1980) (noting that the purpose of the .10% presumption “simply removes the necessity of providing an expert at each trial. . . .”) (quoted in *Tischio*, 107 N.J. at 517, 527 A.2d at 394). Thus, the court held:

the statute prescribes an offense that is demonstrated solely by a reliable breathalyzer test administered within a reasonable period of time after the defendant is stopped for drunk driving, which test results in the proscribed blood-alcohol level. Prosecution for this particular offense neither requires nor allows extrapolation evidence to demonstrate the defendant's blood-alcohol level while actually driving.

*Id.* at 522, 527 A.2d at 397.

Similarly, in *State v. McGowan*, 332 Mont. 490, 139 P.3d 841 (2006), McGowan was administered a secondary breath test roughly 50 minutes after he was stopped which showed a BAC of .092%. *Id.* at 492, 139 P.3d at 843. After he was convicted, McGowan argued on appeal that the per se statute “require[d] the State to prove that his alcohol concentration was above .08 while he was driving [and] that the results of the Intoxilyzer 5000 test taken 50 minutes after he was initially pulled over cannot prove what his alcohol concentration was at the time he was driving.” *Id.*, 139 P.3d at 843. The Montana Supreme Court rejected this argument applying the same rules of interpretation as followed in this Court, i.e., statutes should not be read to reach absurd results, the Legislature would not pass meaningless legislation, and statutes should be harmonized, *see McGowan*, 332 Mont. at 494, 139 P.3d at 844, the court affirmed.

The Montana Supreme Court observed:

Reading [the DUI Per Se statute] to require law enforcement officers to determine a person’s alcohol concentration while driving would lead to an absurd result, as it would be impossible for an officer to administer a test while the suspect was driving. Proper procedure requires an officer to pull the person over, observe the person and initiate a DUI investigation, determine to place a person under arrest based on the investigation, transport the person to a detention center or other approved testing facility, observe the person for the mandatory fifteen minute deprivation period, and

then administer the breath test. Breath tests administered within a reasonable amount of time after the alleged act are therefore consistent with the DUI Per Se statute. Interpreting the DUI Per Se statute to allow for the admissibility of breath tests administered within a reasonable amount of time after the alleged act of driving while under the influence represents a reasonable interpretation of the statutory language, comports with the legislature's intent, and avoids an absurd result.

*Id.* at 494-95, 139 P.3d at 844-45 (citations omitted).<sup>3</sup> The court then went on to

recognize the impossible burden that requiring retrograde extrapolation evidence would place on the state. Retrograde extrapolation would require evidence that the state would rarely be able to acquire because of a defendant's constitutional right to remain silent. Specifically, the state would need to ascertain information wholly within the defendant's knowledge, such as when, and in what amounts, the defendant consumed alcohol before driving. Further, the rate of absorption of alcohol varies greatly among individuals, with studies indicating that a person reaches their peak blood alcohol level anywhere from 14 to 138 minutes after drinking. Additionally, the amount of food consumed by the defendant affects the rate of absorption. We therefore agree with other jurisdictions that have concluded that the legislature "could not have intended to place such impossible roadblocks in the way of the State in prosecuting [DUI per se] cases."

*Id.* at 496, 139 P.3d at 845-46 (citations omitted).

Similarly, in *State v. Larson*, 429 N.W.2d 674, 675 (Minn. Ct. App. 1988), Larson had a secondary chemical test administered 77 minutes after she was found in her parked car. She was convicted of a per se DUI and on appeal "argue[d] that since no evidence (via expert testimony) was presented at trial as to her blood alcohol concentration level at the time of driving or control, her conviction cannot stand." *Id.* The Minnesota Court of Appeals rejected this argument explaining:

In DWI cases, there is always some lag time between arrest and testing. Even where the lag time is only a few minutes, the jury necessarily must make some conclusions as to the level of intoxication of the accused at the time of driving or control. As long as the delay between apprehension and testing is reasonable, special expert testimony is unnecessary and the jury should be allowed to make its own determination of guilt or innocence.

---

<sup>3</sup>The Montana requirements for administering a Secondary Breath Test are similar to West Virginia's. W. Va. C.S.R. §§ 64-10-6.1 & 7.

*Id.* at 676-77.

Here the test was administered less than one hour after the Respondent was stopped. App'x 62, 63. Testing done less than one hour or less after stop has been found reasonable and evidence of a specific driving BAC. *See, e.g., McGowan*, 332 Mont. at 492, 139 P.3d at 843 (.092% fifty minutes after driving proof of .08% BAC while driving); *State v. Dinslage*, 280 Neb. 659, 664, 789 N.W.2d 29, 34 (Neb. 2010) (.20% BAC fifty minutes after stop reasonable time; proof of .15% at time of driving); or one hour, *State v. Greenwood*, 115 S.W.3d 527, 529 (Tenn. Ct. Crim. App. 2003) (.12% BAC one hour after stop proof of .10% at time of stop). Moreover, West Virginia Code § 17C-5-8(a)(3) provides, in pertinent part:

[u]pon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged

Thus, West Virginia Code § 17C-5-8(a)(3) recognizes that a blood test taken within two hours of driving is prima facie evidence of the amount of alcohol in one's system at the time driving. 2. This reading is supported by *State v. Dyer*, 177 W. Va. 567, 573, 355 S.E.2d 356, 362 (1987) where this Court held that a blood test administered more than two hours after the arrest or the driving was admissible—not to prove the level of alcohol in the blood—but to prove that the defendant had consumed substantial quantities of alcohol. Thus, this Court has impliedly found that two hours

is the critical time frame for admissibility of evidence relating to quantified BAC levels to satisfy the burden of showing the BAC level at the time of driving.<sup>4</sup> The circuit court should be reversed.

**2. The Hearing Examiner credited the DUI Information Sheet over the driver's testimony.**

In this case, the Respondent did not request the presence of the arresting officer at the Administrative License Revocation Hearing App'x 56, and at the time of the hearing West Virginia Code § 17C-5A-2(d) (2008) provided:

Any investigating officer who submits a statement pursuant to section one of this article that results in a hearing pursuant to this section shall not attend the hearing on the subject of that affidavit unless requested to do so by the party whose license is at issue in that hearing or by the commissioner. The hearing request form shall clearly and concisely inform a person seeking a hearing of the fact that the investigating officer will only attend the hearing if requested to do so and provide for a box to be checked requesting the investigating officer's attendance. The language shall appear

---

<sup>4</sup>Whether or not a defendant may rebut or argue that he or she was not .08% at the time of driving need not be decided here because the Respondent did not produce any expert testimony. *Compare Tischio*, 107 N.J. at 522, 527 A.2d at 397 (minority rule, evidence of retrograde extrapolation not admissible when offered by either party) *with* 5 DAVID L. FAIGMAN, ET AL., MODERN SCIENTIFIC EVIDENCE § 41:7 (2011-12) (footnote omitted) ("Tests done within the relevant time period are presumptively admissible, but may be rebutted by defense expert testimony."). At best the Respondent produced an outdated DMV driver handbook. App'x 34; ALT TR. 11-12. This chart does not take into account the personal characteristics of the driver such as gender, age, medical condition, time of last meal, or contents of last meal, and the kind of alcohol consumed. *See, e.g., Fuenning v. Superior Court*, 139 Ariz. 590, 597 n.5, 680 P.2d 121, 128 n.5 (1983) ("[W]hile the . . . chart might specify that an individual weighing 180 pounds could safely have five drinks in the space of an hour without exceeding a level of .09%, that person might well reach .10% or more if he drank on an empty stomach. Comparison of the chart attached as an exhibit to the amicus brief of the prosecutor with the facts contained in the matter submitted as exhibits to the defenders' brief reveals considerable potential for inaccuracy in using the chart."). For example, the chart takes it that the hypothetical driver is medically fit, but a driver whose liver is not functioning properly would not fall under the chart. *See, e.g., State v. Knuckles*, 196 W. Va. 416, 423, 473 S.E.2d 131, 138 (1996).

Moreover, the Respondent told the police he had a "small glass of wine," ALR Tr. 5. *See also* App'x 67 (Respondent stated he had half a glass of wine). The Respondent testified he had stopped drinking 30 to 45 minutes before he was stopped. ALR Tr. 9. There was a 48 minute period between the Respondent being stopped and the Secondary Breath Test which showed a BAC of .095%. App'x 62-63. According to the chart, if one drink is excreted from the body every hour, and the last drink the Respondent had was a small glass of wine or half a glass of wine, roughly an hour and a half before his BAC test then—applying the BAC chart—he should have had a BAC of .000% and not a BAC of .095%, a BAC level he never contested.

prominently on the hearing request form. The Division of Motor Vehicles is solely responsible for causing the attendance of the investigating officers.

...

If the party whose license is at issue does not request the investigating officer to attend the hearing, the commissioner shall consider the written statement, test results and any other information submitted by the investigating officer pursuant to section one of this article in that officer's absence.

In *Plumley v. Miller*, No. 101186, slip op. at 2-3 (W. Va. Feb. 11, 2011) (Memorandum Decision), the Court concluded:

Mr. Plumley argues that he was denied his constitutional and statutory rights to due process because of the DMV's and the circuit court's incorrect construction of both West Virginia Code §29A-5-2(b), which essentially provides for the DMV's file to be made part of the record in the administrative proceeding, and West Virginia Code §17C-5A-2(d), which provides that where a party does not request the attendance of the investigating officer, the Commissioner shall consider the written statements, test results, and any other information submitted by the investigating officer. There has not been a denial of due process. Mr. Plumley did **not** request the appearance of the investigating officer at the administrative hearing. Accordingly, under West Virginia Code §17C-5A-2(d), the Commissioner appropriately considered the evidence that was submitted and made a part of the record by the Investigating Officer. *Id.* Further, the Commissioner acknowledged Mr. Plumley's evidence, as reflected in the Commissioner's Final Order, but found it to be less convincing than that of the Investigating Officer.

*But see Miller v. McKeever*, 11-0594 (W. Va. Dec. 2, 2011) (Memorandum Decision) (once driver testifies at ALR, the Commissioner can no longer rely on the DUI Information Sheet).<sup>5</sup> The Hearing Examiner's Order stated, "[t]he Respondent refuted the Investigating Officer's allegations made in reference to his manner of driving and his level of intoxication. However, the Respondent only stated that he did not do what the Investigating Officer stated, offering no other explanation of his manner of driving or why he was not intoxicated even though his blood alcohol concentration was

---

<sup>5</sup>A Petition for Rehearing has been filed in *McKeever*.

ninety-five thousandths of one percent.” App’x 28-29. Admittedly, this statement is somewhat inconsistent on a first reading. But, “[w]hen interpreting a court’s order, we apply the same rules of construction as we use to construe other written instruments.” Syl. Pt. 6, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, No. 35738, 2011 WL 1486100 (W. Va. Apr. 1, 2011). “To afford the lower court’s order its true effect, we must further consider the precise words used by the lower tribunal in rendering its ruling.” *Id.* at \* 14. The Hearing Examiner here did not use the word “rebutted,” but “refuted.” “Rebuttal evidence is a term of art.” *People v. Baylis*, 75 Misc.2d 397, 399, 347 N.Y.S.2d 892, 894 (Co. Ct. 1973). There is apparently no such thing as a “refusal witness.” The Hearing Examiner’s use of the term “refuted” was simply a recognition that the Respondent testified at trial and contradicted the DUI Information Sheet. And, the fact that the Hearing Examiner found that the DMV had proved DUI is significant in deciding what the Hearing Examiner actually meant.

Additionally, the Respondent was asked after his arrest whether he was “under the influence of alcohol, controlled substances or drugs,” he answered a “little bit.” App’x 67.<sup>6</sup> At his hearing, the Respondent testified that he was not under the influence or impaired or drunk. ALR Tr. 5, 11. He did not, however, deny making the statement that he was a “little bit” under the influence and, indeed, testified that he answered the question “accurately to the best of [his] ability[.]” ALR Tr. 11. *See Heydinger v. Adkins*, 178 W. Va. 463, 468, 360 S.E.2d 240, 245 (1987) (“Presumably, a party would not admit or state anything against his or her interest unless it was true; nevertheless, if the statement is inaccurate, the party may deny it altogether or explain why he/she made it.”).

---

<sup>6</sup>Stating he was a little bit under the influence should be read against the recognition that “those who drink tend to underestimate the degree to which their abilities have been impaired.” *Fuenning*, 139 Ariz. At 597 n.4, 680 P.2d at 128 n.4.

The Rules of Evidence plainly distinguish between the prior inconsistent statements of non-party witnesses and of party-opponents like DiSantis. The former are admissible as non-hearsay, substantive evidence only if “subject to cross-examination” and “given under oath.” The latter are admissible as substantive evidence even if not given under oath.

*United States v. DiSantis*, 565 F.3d 354, 360 (7<sup>th</sup> Cir. 2009) (internal citations omitted).

Consequently, as a statement of a party-opponent, the statement that he was a “little bit” under the influence is admissible as substantive evidence of being under the influence. W. Va. R. Evid. 613(b) (prior inconsistent statements of parties governed by West Virginia Rule of Evidence 801(d)(2)); *United States v. Taylor*, 41 M.J. 701, 703 (A.F. Ct. Crim. App. 1995) (“To be admissible substantively under Mil. R. Evid. 801(d)(2), the statements must have been the admission of a party-opponent or his agent.”); *DiSantis*, 565 F.3d at 360 (“DiSantis’s prior inconsistent statements in his police report qualified as party admissions, and the district court committed no error in instructing the jury that they could consider those statements for their truth.”).

The Respondent’s admission that he was under the influence of alcohol (even if only a “little bit”), coupled with the fact that he did have alcohol in his system, and that he drove, is sufficient to prove he was DUI.

Finally, if there is a question about the consideration of evidence under *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996), App’x 4-5, as *Muscatell* itself makes clear, the remedy is not to dismiss the case, but to remand back to the Commissioner to address the conflict in the evidence. *Id.* at 598-99, 474 S.E.2d at 528-29.

### **3. The Circuit Court erred in applying statutory and case law that is no longer extant.**

The Circuit Court quotes W. Va. C.S.R. § 91-1-3.7.2 that “In a DUI hearing, the Division shall dismiss the revocation or suspension if the arresting officer fails to appear without obtaining

a continuance . . . .” App’x 6. However, W. Va. C.S.R. § 91-1-3.7.2 (2005)—which is the controlling C.S.R. provision here, provides:

The failure of an arresting officer to appear at a DUI hearing does not relieve the licensee from the obligation to appear at the hearing or from the provisions of Subsection 3.7.1 of this rule. Provided, That, where the arresting officer fails to appear at the hearing, but the licensee appears, the revocation or suspension of license may not be based solely on the arresting officer's affidavit or other documentary evidence submitted by the arresting officer.

The Circuit Court cited to C.S.R. language which simply no longer exists. And, in finding no impermissibility with having a driver forfeit a license if he or she does not appear, but not dismissing a case if the officer does not appear, this Court explained *Miller v. Hare*, 708 S.E.2d 531, 534 (W. Va. 2011) (that is, in finding W. Va. C.S.R. § 91-1-3.7.2 (2005) permissible), this Court explained:

[R]ather than contesting the uneven application of *continuance* policies, Respondent is actually taking issue with the differing *effect* of the failure to appear of a licensee versus a police officer. Second, the reinstatement of a previously revoked license . . . which operates as a matter of law when the licensee fails to show for a hearing he/she requested, is not the equivalent of an outright dismissal of the license revocation for the officer’s failure to appear. In the former instance, the non-appearance of the licensee amounts to an effective dismissal or waiver of the revocation challenge and in the latter instance, the officer's non-appearance has no bearing on the Commissioner’s intention of pursuing the license revocation.

Neither this Court nor the parties (nor any party) can resurrect statutory language repealed or significantly changed through proper amendment by the legislature. 82 C.J.S. *Statutes* § 350 n.1. Thus, the controlling language is that contained in the 2005 version of the C.S.R., not the 2002 version quoted by the Circuit Court.<sup>7</sup>

---

<sup>7</sup>“When the wording of an amended statute differs in substance from the wording of the statute prior to amendment, we can only conclude that Congress intended the amended statute to have a different meaning.” *Nalley v. Nalley*, 53 F.3d 649, 652 (4<sup>TH</sup> Cir. 1995). It is for this reason that *McDonald v. Cline*, 193 W. Va. 189, 455 S.E.2d 558 (1995) and *Nichols v. State*, 213 W. Va. 586, 584 S.E.2d 220 (2003) are

Additionally, while W. Va. C.S.R. § 91-1-3.7.2 does provide, “where the arresting officer fails to appear at the hearing, but the licensee appears, the revocation or suspension of license may not be based solely on the arresting officer’s affidavit or other documentary evidence submitted by the arresting officer,” this provision is inconsistent with West Virginia Code § 17C-5A-2(d) (2008) (emphasis added) which provided:

Any investigating officer who submits a statement pursuant to section one of this article that results in a hearing pursuant to this section shall not attend the hearing on the subject of that affidavit unless requested to do so by the party whose license is at issue in that hearing or by the commissioner. The hearing request form shall clearly and concisely inform a person seeking a hearing of the fact that the investigating officer will only attend the hearing if requested to do so and provide for a box to be checked requesting the investigating officer’s attendance. The language shall appear prominently on the hearing request form. The Division of Motor Vehicles is solely responsible for causing the attendance of the investigating officers.

...

**If the party whose license is at issue does not request the investigating officer to attend the hearing, the commissioner shall consider the written statement, test results and any other information submitted by the investigating officer pursuant to section one of this article in that officer’s absence.**

*See also Miller v. Hare*, 708 S.E.2d at 534 n.3. And in *Plumley v. Miller*, No. 101186, slip op. at 2-3 (Feb. 11, 2011) (Memorandum Decision):

Mr. Plumley argues that he was denied his constitutional and statutory rights to due process because of the DMV’s and the circuit court’s incorrect construction of both West Virginia Code §29A-5-2(b), which essentially provides for the DMV’s file to be made part of the record in the administrative proceeding, and West Virginia Code §17C-5A-2(d), which provides that where a party does not request the attendance of the investigating officer, the Commissioner shall consider the written statements, test

---

of little value here. *See, e.g., Hicklin v. WBH Evansville, Inc.*, No. EV 00–0248–C–T/H, 2001 WL 1708827, at \*2 (S.D. Ind. Dec. 14, 2001) (“Language in the statute has been amended since that decision. This case is of little guidance as to how the statute—now amended—should be interpreted.”). *See also In re K.M.B.* 148 S.W.3d 618, 621 (Tex. App. 2004) (footnote omitted) (“Because the new statutory language applies to this case, this court’s prior decision in *In re J.R.*”).

results, and any other information submitted by the investigating officer. There has not been a denial of due process. Mr. Plumley did **not** request the appearance of the investigating officer at the administrative hearing. Accordingly, under West Virginia Code §17C-5A-2(d), the Commissioner appropriately considered the evidence that was submitted and made a part of the record by the Investigating Officer. *Id.* Further, the Commissioner acknowledged Mr. Plumley's evidence, as reflected in the Commissioner's Final Order, but found it to be less convincing than that of the Investigating Officer.

Thus, the 2005 C.S.R. provision is trumped by the 2008 statute. *Repass v. Work. Comp. Div.*, 212 W. Va. 86, 102, 569 S.E.2d 162, 178 (2002) ("There is no question that when the rules of an agency come into conflict with a statute that the statute must control[.]"). The Circuit Court erred in relying on regulatory language that legally does not exist.

#### CONCLUSION

The Circuit Court should be reversed.

Respectfully submitted,

JOE E. MILLER, Commissioner,  
Division of Motor Vehicles,  
By Counsel,

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



Elaine L. Skorich #8097  
Assistant Attorney General  
DMV - Office of the Attorney General  
Post Office Box 17200  
Charleston, West Virginia 25317-0010  
(304) 926-3874

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1292

**JOE E. MILLER**, Commissioner  
Division of Motor Vehicles,  
Petitioner,

V.)

Appeal from a final order  
of the Circuit Court of Hancock  
County, (10-AA-1)

**ALBERTO VETRI**,  
Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General and counsel for Joe E. Miller, Commissioner of the Division of Motor Vehicles, Petitioner, hereby certify that on the 3rd day of January, 2012, I served the foregoing *Petitioner's Brief* upon the following by depositing true and correct copies thereof in the United States Mails, First Class Postage Prepaid addressed as follows:

Robert G. McCoid, Esquire  
McCamic, Sacco, Pizzuti  
& McCoid, PLLC  
Post Office Box 151  
56-58 Fourteenth Street  
Wheeling, WV 26003

  
ELAINE L. SKORICH