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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0761

STEVEN O. DALE, ACTING COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Respondent Below, Petitioner

v.

DONALD OAKLAND,

Petitioner Below, Respondent.

BRIEF OF DONALD OAKLAND

Appeal from the Circuit Court of Marshall County, West Virginia,
Honorable David W. Hummel, Jr., Judge
Circuit Court Case No. 13-CAP-3

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III. NATURE OF PROCEEDINGS AND RULINGS BY TRIBUNAL BELOW

The instant appeal arises by virtue of the Notice of Appeal filed by the Commissioner of the West Virginia Division of Motor Vehicles (hereinafter "DMV" or "Petitioner") challenging the June 15, 2013, Order of the Circuit Court of Marshall County reversing the February 20, 2013, Order of the Office of Administrative Hearings ("OAH") upholding the DMV's January 7, 2011, Order of Revocation revoking Respondents' privileges to operate a motor vehicle. Said Order of Revocation was predicated on the contention that Respondent was driving under the influence of marijuana ("DUI").

The thrust of the instant appeal is predicated on Petitioner's erroneous contention that the circuit court, sitting in an appellate capacity, "ignored" all of the "evidence" that Respondent was operating a motor vehicle while under the influence of "controlled substances" (*sic*). These contentions are addressed in turn.

IV. COUNTERSTATEMENT OF FACTS OF THE CASE

Appellants' brief cites to specific portions of the record, primarily the self-serving ones, and otherwise fails to recount or emphasize other, salient facts important to the resolution of the instant question. Accordingly, with an eye toward striking a reasonable balance between accuracy and brevity, the following additional facts or amplification of facts already contained in Petitioner's brief are cited for the Court's review.

As noted by DMV in its Petition, Moundsville Police Department ("Moundsville PD") Officer Sean Wilhelm stopped Respondent's vehicle on October 12, 2010, for roll-stopping through a stop sign at the intersection of Grant Avenue and Third Street. App. at pp. 19, 215. In the universe of potential detection clues for determining whether a

motorist is engaging in a DUI-related offense (*e.g.* "weaving," "excessive speed," "tires on center marker," "swerving," *et cetera*, *see* App. at p. 19), no other improper driving was detected or noted by Officer Wilhelm on the West Virginia DUI Information Sheet completed by him in conjunction with his stop of Respondent or otherwise testified to. Wilhelm also conceded that no other traffic was present at the intersection where Respondent roll-stopped through the stop sign and that Respondent's actions did not interfere with other traffic. App. at p. 215.

Wilhelm noted the "strong odor of burned marijuana" and elicited from Respondent the admission that he had been driving around Moundsville smoking marijuana. App. at pp. 195, 199. Wilhelm searched the vehicle and located a green leafy substance. He admitted that he could not tell if the substance was marijuana from merely visually inspecting it. App. at p. 215. Wilhelm conceded, however, that the amount that Respondent appeared to have smoked "was a small amount." App. at pp. 218-219. Although Patrolman Steve Oliver of Moundsville PD, who arrived at the scene after Wilhelm's stop of Respondent's vehicle testified that he was "pretty sure we tested [the substance]" (although he noted that he, himself, did not), no evidence was offered as to any results of such possible test.

Although given only passing mention in Petitioner's factual recitation, Officer Wilhelm noted that Respondent exited his vehicle normally, walked normally, and stood normally. App. at p. 209. Wilhelm noted, further, that Respondent's speech was normal. Respondent then submitted to a battery of structured field sobriety tests ("SFSTs"). Wilhelm deemed Respondent to have passed the horizontal gaze nystagmus ("HGN") test.

Wilhelm claimed that Respondent failed both the walk-and-turn ("WAT") and one-leg stand ("OLS") tests. App. at p. 200. According to Wilhelm, Respondent received two decisional points on the OLS test, and two or more decisional points constitutes failure of that test. App. at p. 255. Wilhelm testified that one of the points assessed against Respondent was for raising his arms from his side, although he conceded on cross examination that he could not recall the distance that Respondent raised his arms and that the standard prescribed by the National Highway Transportation Safety Administration ("NHTSA") manual for the administration of SFSTs allows a subject to raise his arms up to six inches without failing that portion of the test. App. at p. 213. Although he claimed to have learned the administration of SFSTs at the West Virginia State Police Academy, the revelation that there is an allowance for a subject to raise her or his arms up to six inches from her or his side without failing the OLS test came as a "surprise" to Wilhelm. App. at pp. 25-26.

Subsequently, Respondent was presented with an implied consent form pursuant to W. Va. Code § 17C-5-7(a) that was hand-redacted by Officer Wilhelm, who gratuitously crossed out the word "breath" on the form and wrote in the word "blood." App. at pp. 205-206, 258. Apparently laboring under the erroneous belief created through the unlawful actions of Officer Wilhelm that he would risk suspension of his operator's privileges for refusing to submit to a secondary chemical test of his blood, Respondent dutifully consented to the offensive and invasive, albeit illegal, blood draw. To the date of this writing, the results of that test have never been revealed.

Summarily, following his traffic stop for roll-stopping through a stop sign at an intersection at which no other traffic was present and which did not interfere with any

other motorists, Respondent exited the vehicle normally, walked normally, stood normally, and spoke normally. Of the three SFSTs administered to him, he passed one (HGN), failed one (WAT), and, as to the third, insufficient evidence exists to state whether he passed or failed (OLS). He admitted to smoking marijuana. However, no evidence was offered or otherwise introduced reflecting any admission by Respondent that he was under the influence of marijuana. Moreover, the indicia of the substance he smoked as seized by officers (a partially burned joint) was characterized by the police as being a small amount. No evidence was presented that, even if the substance was field-tested, it was marijuana. No results of the improperly and illegally seized blood evidence was presented. Moreover, no evidence was offered by any officer as to how, exactly, failing an SFST (the WAT) constitutes evidence of impairment. Finally, and of overwhelming significance, Officer Wilhem acknowledged that ***Respondent was not then, nor has he ever been since, arrested for driving under the influence of drugs or any other offense***. App. at p. 201.

V. SUMMARY OF ARGUMENT

The circuit court's Order reversing OAH was properly predicated on its finding that the hearing examiner clearly erroneously concluded that Respondent was "under the influence" of marijuana in the absence of any proof of the same. As well, because the order of revocation emanated out of thin air *without any underlying arrest whatsoever (before or since)*, and because a lawful arrest is a mandatory, statutory prerequisite to the issuance of an order of revocation, DMV was without jurisdiction to suspend Respondent's license. Accordingly, this Court should affirm the circuit court's decision.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits that, upon an application of the criteria set forth in Rules 16(d)(6) and 18(a)(4), W. Va. Rev. R. App. P., although the facts and legal arguments are adequately presented in this brief and accompanying Appendix, this Court's decisional process would be significantly aided by oral argument. Specifically, Petitioner maintains that a Rule 20, W. Va. Rev. R. App. P., argument is warranted, because the underlying issue involves an apparent question of first impression, *i.e.*, whether an order of revocation can issue in the absence of a predicate arrest and/or criminal charge alleging that the operator was under the influence of alcohol and/or controlled substances. Accordingly, Respondent's counsel believes that oral argument is necessary to fully air out the issues raised herein and would aid this Court in correcting the underlying error.

VII. POINTS AND AUTHORITIES OF LAW AND ARGUMENT IN SUPPORT OF AFFIRMING THE CIRCUIT COURT'S ORDER REVERSING OAH'S DECISION UPHOLDING REVOCATION OF RESPONDENT'S LICENSE

A. Standard Of Review.

This Court has held that

> [u]pon 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.' " Syllabus point 2, *Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights,* 172 W.Va.

627, 309 S.E.2d 342 (1983).

Syl. pt. 3, *Dale v. Dingess*, --- S.E.2d ----, 2013 WL 5814117 (W.Va.) (Slip. Op. 12-1273, October 17, 2013) (*per curiam*).

This Court has further held that "a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, [and] a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations." Syllabus point 2, in part, *Cahill v. Mercer County Board of Education,* 208 W.Va. 177, 539 S.E.2d 437 (2000).

B. The Marshall County Circuit Court properly concluded that the hearing examiner was clearly wrong in concluding that Respondent was under the influence of marijuana.

In its brief, DMV properly notes that a circuit court is required to pay deference to the fact-finder's assessment of the evidence. *See* Petitioner's brief at p. 4. However, a circuit court is not required to don blinders in reviewing the factual record, and reversal of an administrative agency's decision is warranted when its "findings, inferences, conclusions, decisions or order are . . . [c]learly wrong in view of the reliable, probative and substantial evidence on the whole record . . . ." Syl. pt. 2 (in part), *Shepherdstown V.F.D. v. State of West Virginia ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). It is when a circuit court reverses an administrative agency's decision by substituting its judgment for the hearing examiner's as to "*credibility* findings" that this rule is affronted. *Dingess*, -- S.E.2d – 2013 WL 5814117 (Slip. Op. 12-1273, October 17, 2013).

In the matter at Bar, the Marshall County Circuit Court did not engage in any

substitution of judgment. In its order, the circuit court did not take issue with the hearing examiner's assessment of the credibility of the DMV's evidence or witnesses. Rather, the circuit court's order was rooted in its conclusion that the "**material** findings of fact upon which the adverse legal consequences [were] based are **without any basic** foundational support." App. at p. 3. The circuit court correctly noted there was no factual evidence presented as to whether the substance in issue was actually marijuana. In fact, Officer Wilhlem admitted that he could not "tell that a substance is marijuana from merely looking at it[.]" App. at p. 215. While there may or may not have been a "field test" of the substance to determine if it was marijuana, App. at p. 47, no evidence was offered by DMV as to whether any such test confirmed that the substance was, in fact, marijuana.

Assuming *arguendo* that the substance in issue was, in fact, marijuana, the circuit court correctly noted that no evidence was offered substantiating how, if at all, the administration of SFSTs proved that Respondent was under the influence of a controlled substance, to-wit: marijuana. Petitioner, citing both *White v. Miller*, 228 W. Va. 797, 724 S.E.2d 768 (2012), and *Dale v. McCormick*, -- W. Va. --, 749 S.E.2d 227 (2013), maintains that the burden rests on Respondent to inquire of the arresting officer as to his training, whether SFSTs were administered in accordance with the NHTSA standards, and the officer's assessment of the results, *i.e.*, did the operator pass or fail the tests. This contention is accurate.1

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1 The only SFST proven by Petitioner through Wilhelm's testimony to have been failed by Respondent was the WAT test. Although Wilhelm claimed that Petitioner had failed the OLS, Wilhelm could not recall what distance Respondent raised his arms. Given that an allowable distance of up to six inches is permitted relative to a subject

However, what neither *White* nor *McCormick* provide is that the *DMV*, as the party carrying the burden of proof, is relieved of the obligation of eliciting from the officer how, exactly, the purported failure of any field sobriety test constitutes proof that the operator is under the influence. Stated otherwise, *nothing in* White *or* Miller *states that the officer may simply state that an operator has failed an SFST test without also relating how such failure constitutes proof of the operator's impairment.* In the matter *sub judice*, arresting Officer Wilhelm neglected to state how, exactly, failing an SFST constitutes evidence of being under the influence of drugs. Inasmuch as DMV carries the burden of proof regarding the suspension in issue, it was incumbent on DMV to prove that smoking (an admittedly small amount of) marijuana equates to being under the influence of drugs or that failing a single SFST translates into a finding of impairment, particularly when coupled with an abundance of other, salient evidence tending to establish that Respondent was *not* under the influence (*e.g.*, speaking normally, exiting the vehicle normally, walking normally, and standing normally).

DMV tacitly acknowledges the infirmity in its argument when it notes that even if the results of the SFSTs should have been deemed inadmissible, ample evidence exists to substantiate that Respondent was under the influence, because he admitted to smoking marijuana, had glassy (but not red) eyes, and roll-stopped through a stop sign. However, *no evidence was offered to substantiate that smoking a* de minimus amount

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raising his or her arms, that one of the two failing points assessed against Respondent was for raising his arms, and (sadly, but most importantly) that this fact came as a "surprise" to Wilhelm, there exists a substantial possibility that Respondent passed this phase of the test. App. at pp. 211-213. Petitioner certainly did not prove that he failed the WAT test.

of marijuana translates into a finding of impairment.2 Even employing the deferential standard accorded to a fact-finder at the administrative level, OAH clearly erred in concluding that that Respondent was "under the influence."

C. The DMV was without jurisdiction to enter an order suspending Respondent's operator's privileges in the absence of any accompanying arrest, because a lawful arrest is a prerequisite to the issuance of any order of suspension.

DMV ignores the significance of the white elephant in the room in the underlying proceeding, *i.e.*, the fact that ***Respondent was never arrested for any driving offense***. Although the circuit court's Order reversing the OAH decision did not address the "non-arrest" issue, Respondent raised it vigorously at the underlying hearing and, again, in both his Petition for Judicial Review and his Brief and Memorandum of Law seeking appellate review by the circuit court of OAH's decision. App. at, respectively, pp. 9. 54, and 242.

This Court has held that, in order "'[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.'" *Miller v. Toler,* fn. 2, 229 W. Va. 302, fn. 2, 729 S.E.2d 137 (2012), *quoting* Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). Thus, while the circuit court's Order failed to address the "non-arrest" issue, Respondent asserts that it was, nevertheless, amply preserved for purposes

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2 Oddly, Petitioner cites, *inter alia*, Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984) as support for the proposition that suspension is warranted where a motor vehicle operator exhibits symptoms of intoxication and has consumed alcoholic beverages. Petitioner's Brief at p. 11. However, nothing in *Albrecht* or the other authorities cited addressed marijuana, only alcohol.

of this appeal both at the OAH hearing level and on appeal to circuit court. While neither the circuit court, in its order, nor Petitioner, in his brief, addressed the issue, Respondent is not constrained from raising it, because he has taken all steps necessary and required of him to this point to preserve the error.[3] In fact, Respondent simply could not have raised this issue at any time prior this instant submission, because he prevailed in the underlying circuit court review, albeit on different grounds.[4]

Of course, OAH cannot have been expected to raise the non-arrest issue on appeal when that issue did not formulate a part of the circuit court's order. But Respondent should not be limited from raising it as a ground upon which to argue for affirming the circuit court's decision when Respondent has done everything necessary to raise and preserve the non-arrest issue and cannot have raised it before this proceeding.

Turning now to the substance of the "non-arrest" issue, it is plain that the commissioner lacked jurisdiction to enter an order of revocation giving rise to the underlying proceeding because no arrest had taken place, although his initial ignorance as to the absence of an underlying arrest is to be forgiven based upon what was

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3 The circuit court's order *did* note that Respondent raised other meritorious issues in favor of reversing OAH's order in his petition for review, which were characterized as "holding water," but the court felt it unnecessary to address them given that it believed that the reason for reversal stated in its Order was sufficient standing alone. App. at p. 4.

4 Respondent raised multiple bases for reversing DMV's revocation order both before OAH and on appeal to circuit court. The circuit court's order reversed OAH's decision on one basis without addressing the others. Respondent asserts that one of those grounds, the "non-arrest" issue, is at least as meritorious as the one on which the circuit court based its reversal. Respondent has scoured, unsuccessfully, this Court's authorities looking for any procedurally analogous opinion, *i.e.*, one in which a party raised and preserved an issue at the agency level, lost, raised the issue on appeal to circuit court, won *for different reasons*, then raised the issue in this Court *as respondent*.

submitted to him by Officer Wilhelm.5 A review of the relevant Code sections proves instructive in reaching these conclusions.

The West Virginia Code provides, in relevant part, that

> [i]f upon examination of the written statement of the officer and the test results described in subsection (b) of this section, the commissioner shall determine that a person was arrested for an offense described in [W. Va. Code § 17C-5-2] . . . and that . . . at the time the person was arrested he or she was under the influence of . . . controlled substances or drugs, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state.

West Virginia Code § 17C-5A-1(c) (in relevant part).

Other relevant sections of the Code make clear that the Legislature contemplated that an actual *arrest* for driving under the influence of alcohol or drugs is a mandatory prerequisite to the issuance of any order of suspension. *See, e.g.*: W. Va. Code §§ 17C-5-4(c) (addressing a secondary chemical test "incidental to a lawful arrest" administered at the direction of the "arresting law-enforcement officer") and (g) (speaking to contingency when "arresting officer" lacks training in administration of secondary chemical test); 17C-5-7(a) (addressing officer's duties following "arrest" when the person "under arrest" refuses to submit to a secondary chemical test); 17C-5-8 (noting that blood, breath or urine sample results are admissible if taken within two hours "from and after the time of arrest"); 17C-5-9 (codifying right of person "lawfully arrested" to demand a chemical test of her or his blood, breath or urine); 17C-5A-2(f) (speaking to hearing examiner's duties in determining whether the person was "lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering

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5 Wilhelm submitted his Statement of *Arresting* Officer pursuant to W. Va. Code §§ 17C-

a secondary test: *Provided,* That this element shall be waived in cases *where no arrest occurred due to driver incapacitation*). (Emphasis added). Thus, only when a driver is so incapacitated that an arrest is simply impractical is the OAH hearing examiner relieved of the duty of finding that DMV has proven the element of a lawful arrest before an order of suspension will be upheld.

This Court in Syl. pt. 4, *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012) (overruling Syl. Pt. 3, *Choma v. W. Va. Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001)), held that the disposition of the criminal case in a DUI arrest is irrelevant to, and has no preclusive effect concerning, any administrative license revocation proceeding. However, it is not the *disposition* of any criminal case that Respondent contends is relevant here; rather, it is the very absence of the existence of any criminal case at any time that is relevant. No DUI-related opinion of this Court has been identified by counsel where an arrest did not precede an order of revocation by DMV, and, in the considerable experience of undersigned counsel and their colleagues statewide, no such case has ever occurred before the instant one.

Reference to W. Va. Code § 17C-5A-2(f) makes clear that the following elements are a *mandatory* prerequisite to OAH upholding an order of suspension: (1) that there was a lawful "arrest" of the driver; or (2) that the "driver was lawfully taken into custody *for the purpose of administering a secondary test*." (Emphasis added). These elements may be waived only if arrest was impossible due to "driver incapacitation." There is, of course, no suggestion that Respondent was incapacitated; indeed, the objective evidence was that he acted perfectly normally. As well, given the admission of Officer Wilhelm

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5A-1, 17C-5-7, and 17E-1-15.

that no arrest occurred, a fact that DMV concedes (*see* Petitioner's Brief at p. 2),6 OAH's order upholding DMV's revocation cannot have been proper. This leaves only the question of whether Respondent was *lawfully* taken into custody. Even a cursory analysis of the applicable standards indicates that he was not.

West Virginia Code § 17C-5-4(d) provides that

> [t]he law enforcement agency that employs the law-enforcement officer shall designate which type of secondary test is to be administered: Provided, That if the test designated is a blood test and the person arrested refuses to submit to the blood test, then the law enforcement officer making the arrest shall designate either a breath or urine test to be administered.

Moundsville PD, "the law enforcement agency" has designated "breath" as its test of choice. App. at p. 207. Accordingly, Wilhelm, "the law-enforcement officer" "employ[ed" by that agency, was without authority to require Respondent to submit to a blood test under threat of suspension of his license by hand-editing the implied consent form, take him into custody to do so, and otherwise lacked any authority to engage in an *ad hoc* modification/designation of Moundsville's designated secondary test. Because the secondary chemical test Wilhelm required Respondent to take was not a legal one, Respondent cannot have been lawfully been taken into custody for purposes of administering a secondary chemical test within the meaning of W. Va. Code § 17C-5A-2(f).

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6 In his brief at p. 2, Petitioner notes that Wilhelm "was waiting for the results of the blood test before placing Mr. Oakland under arrest for a criminal offense." We're still waiting. Although Respondent was stopped over three years ago, he has never been arrested for any offense related to the events of October 12, 2010, DUI-involved or otherwise. Given that the misdemeanor statute of limitations is one year, *see* W. Va. Code § 61-11-9, it is fairly certain that Respondent will never be arrested. His non-arrest, however, raises a very real question of whether his blood results contained any inculpatory evidence.

Summarily, an arrest is a non-negotiable prerequisite to the DMV commissioner issuing an order of suspension. No textual basis exists in the Code to support a contrary proposition, and no authority from this Court has recognized a contrary position. Indeed, all relevant sections of the Code make plain that an arrest event is a mandatory precursor to any order of suspension issuing, and the absence of any arrest of Respondent in the instant matter is fatal to Petitioner's position. Accordingly, the OAH hearing examiner should have rescinded the Order of revocation, and the Marshall County Circuit Court properly reversed the OHA decision.

VII. CONCLUSION AND RELIEF REQUESTED

The circuit court below properly ordered that the decision of the OAH be reversed based upon its conclusion that Petitioner failed to prove under a preponderance of the evidence that Respondent was under the influence of marijuana. Although the circuit court never reached the issue (which was well-preserved at the administrative level and argued on appeal to circuit court by Respondent) of whether a lawful arrest is a prerequisite to a license suspensions, the absence of such an arrest also furnishes sound grounds for affirming the circuit court's decision. For these reasons, and any others which may be apparent to this Court, your Respondent, Donald Oakland, respectfully requests that this Court **affirm** the Order of the Marshall County Circuit Court.

Respectfully submitted,

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Respondent and Petitioner below,

By: _____
Of Counsel

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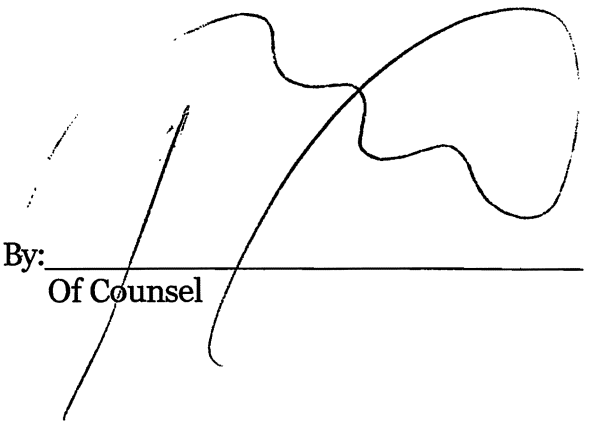
IX. CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF OF DONALD OAKLAND** was had upon the following by mailing to them a true and correct copy thereof via First Class United States Mail, postage prepaid, to their last known address, this 2nd day of December, 2013.

Hon. Patrick Morrisey
Elaine L. Skorich, Esq.
DMV-OFFICE OF THE ATTORNEY GENERAL
Post Office Box 17200
Charleston, WV 25317-0010



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