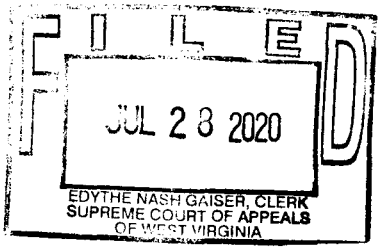
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0134



EVERETT J. FRAZIER, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES, **Petitioner**

vs.

NATHAN TALBERT, **Respondent**

REPLY BRIEF OF RESPONDENT, NATHAN TALBRT, TO BRIEF AND APPEAL OF PETITIONER, EVERETT J. FRAZIER, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES

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RESPONDENT'S RELY TO PETITIONER'S ASSIGNMENT OF ERROR

This Court's opinions in *Reed v. Hall* and *Reed v. Divita* should not be reversed because the Petitioner has not shown a reasonable basis to reconsider and reverse such decisions and to do so would significantly impact the Respondent's and others statutory and due process rights.

STATEMENT OF THE CASE

The Petitioner, Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV") initially revoked the Respondent's driver's license for allegedly driving a motor vehicle on June 20, 2015 while under the influence of alcohol. (App. at PP 94)

The Respondent made a timely request for a hearing before the OAH relating to this revocation and a hearing was held on February 25, 2016. (App. at PP 96 and 101)

The OAH eventually entered an Order, dated August 5, 2019, which reversed the Order of the DMV as a result of the denial of the Respondent's statutory and due process rights to have his blood independently analyzed after he had requested a blood test on three (3) separate occasions after he was arrested and charged with DUI. (App. at PP. 30-33 and 191-196)

The DMV filed an appeal in the Circuit Court of Kanawha County on September 4, 2019. (App. at PP. 205-233). On January 22, 2020, the Circuit Court entered its Final Order which denied the DMV's appeal. (App. at PP. 2-6). The Circuit Court upheld the OAH's Order by concluding that the "statutory right to a blood test for one suspected of driving under the influence of alcohol has existed since at least 1983, and the State Supreme Court has held since 1985 that denial of the right implicates due process". (App. at P. 7) The Circuit Court also found "that the right to a blood test for individuals suspected of driving under the influence is a well-established right in West Virginia. Additionally, the Court **FINDS** that the officer did not commit objectively reasonable mistakes of law when denying this right. Instead, as repeatedly

held by the State Supreme Court, this denial implicates the driver's due process rights and thus mandates reversal of the *Order of Revocation.*" *Id.* (emphasis in original). (App. at PP 5-6)

On February 21, 2020, the DMV filed the instant appeal with this Court.

In its Final Order, the OAH made various findings, none of which found or concluded that the Respondent drove a motor vehicle while under the influence of alcohol on June 20, 2015. This Order also made no findings regarding the specific results of any field sobriety testing including, but not limited to, a horizontal gaze nystagmus test, a walk and turn test, a one-leg stand test or a preliminary breath test. The OAH also made no finding regarding the result of any secondary chemical test.

At the administrative hearing before the OAH, the Investigating Officer initially testified that the Respondent had not requested a blood test but had merely inquired about such a test. (App. at PP 262) It was only after the submission of a video which unquestionably showed the Respondent requesting a blood test, on three (3) separate occasions, that the Investigating Officer finally admitted that the Respondent had, in fact, requested a blood test three (3) separate times. (App. at PP 262, 264-265 and 282 and App. at PP 30-33)

The Respondent disputed much of the evidence cited by the DMV regarding the Respondent's actions, and those of the Investigating Officer, relating to the events which led to the Respondent's arrest, such as the matter in which the Respondent drove, his performance of field sobriety testing and that he was under the influence of alcohol. The Respondent also presented unrebutted evidence of a serious injury to his lower leg and that this injury affected his ability to ambulate normally. (App. at PP 286-289) The Respondent also suffers from a lazy eye which results in one of his eyes being offset. (App. at PP 285-286)

The OAH and the Circuit Court found, based upon undisputed evidence, that the

Respondent requested a blood test, pursuant to West Virginia Code §17C-5-9, and that the Investigating Officer refused to allow the Respondent the opportunity to have his blood tested. The OAH then found that the failure of an officer to obtain a blood test analysis after said test was "demanded" by the driver was a denial of the driver's due process rights under W.Va. Code §17C-5-9, and reversed the DMV's Order of Revocation. The Circuit Court then affirmed the OAH's Final Order.

SUMMARY OF ARGUMENT

I. The Orders of the OAH and the Circuit Court were correct and appropriate as a result of this Honorable Court's prior decisions and the denial of the statutory and due process rights of the Respondent to have his blood tested after his arrest.

II. The administrative revocation of a licensee's driver's license is now subject to the disposition of such individual's criminal charges pursuant to W. Va. Code §17C-5-2, and consequently, there is no reason for the Court to reconsider its earlier rulings in *Reed v. Hall* and *Reed v. Divita.*

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument pursuant to Rule 20 of the West Virginia Rules of Appellant Procedure is not appropriate because the DMV has provided no basis to reconsider or reverse this Honorable Court's earlier rulings relating to the issues or issues presented and because the revocation of an individual's driver's license or driving privileges is now subject to administrative revocation pursuant to the provisions of West Virginia Code § 17C-5-2 and not an independent revocation by the OAH based upon the DMV's initial revocation. Oral argument is also not necessary because the facts and legal arguments are adequately presented in the briefs of the parties and the record and the decisional process will not be significantly aided by oral argument.

STANDARD OF REVIEW

A Circuit Court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4 (1998), which provides that:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision 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. W. Va. Code § 29A-5-4(g) (1998).

"The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syllabus Point 3, *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996). Syllabus Point 2, *Webb v. West Virginia Bd, of Medicine,* 212 W. Va. 149, 569 S.E.2d 225 (2002)." *Lilly v. Stump,* 217 W. Va. 313, 317, 617 S.E.2d 860, 864 (2005).

ARGUMENT

I. THE OAH AND THE CIRCUIT COURT CORRECTLY DECIDED THAT THE RESPONDENT'S STATUTORY AND DUE PROCESS RIGHTS WERE VIOLATED WHEN THE INVESTIGATING OFFICER REFUSED TO ALLOW THE RESPONDENT AN OPPORTUNITY TO HAVE A BLOOD TEST

The OAH and the Circuit Court correctly found that refusal of the Investigating Officer to obtain a blood test analysis after the test was demanded by the Respondent was a denial of the Respondent's statutory and due process of his rights under the West Virginia Code §17C-5-9 and

this Honorable Court's prior decisions requiring this result.

The OAH correctly concluded, in its Final Order reversing the Commissioner's Order of Revocation, that "[p]ursuant to *Reed v. Divita*, No. 14-1018 [*sic*] (Kanawha County 14-AA-45) (September 2015)(memorandum decision) the denial of the driver's due process rights under West Virginia Code §17C-5-9 is grounds for reversal of the Respondent's Order of Revocation." (App. at PP. 191-196).

A driver's right to have a blood test upon request is embodied in W.Va. Code §17C-5-9, which states:

> "Any person lawfully arrested for driving a motor vehicle in this state while under the influence of alcohol, controlled substances or drugs shall have the right to demand that a sample or specimen of his or her blood or breath to determine the alcohol concentration of his or her blood be taken within two hours from and after the time of arrest and sample or specimen of his or her blood or breath to determine the controlled substance or drug content of his or her blood, be taken within four hours from and after the time of arrest, and that a chemical test thereof be made. The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand."

When initially addressing the specific issue which is the subject of this appeal, this Honorable Court held, in *In re Burks*, 206 W.Va. 429, 525 S.E.2d 310 (1999), that a motorist in an impaired driving case who requests a blood test has a right to the test with the assistance of the investigating officer. According to *Burks*, the officer is not required to supply and furnish the results of the test following the completed testing. *Id.* at 433, 525 S.E.2d at 314. However, this Court noted "[o]f course, the arresting officer cannot pose an impediment to the driver's obtaining the results of and information about the test." *Id.*

In *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015), this Honorable Court recognized that Hall was denied the statutory and due process rights contained in West Virginia Code §17C-5-9 to have his blood tested independently. *Id.* at 333, 773 S.E.2d. 667-677.

This Honorable Court later recognized that the only appropriate remedy, when a DUI suspect requests a blood test and such request is denied, is to reverse any Order revoking such suspect's driver's license and reiterated that West Virginia Code §17C-5-9 (2013) requires that an individual arrested for a DUI has a right to demand and receive a blood test within two (2) hours of his arrest. *Reed v. Divita,* No. 14-11018 (2015) WL 5514209 (W.Va. September 18, 2015). This Court further recognized that the right to have an individual's blood tested is "a statutory right and is hardly a new development. The DMV was reminded that historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. "To deny this right would be to deny due process of law because such a denial would bar the accused from obtaining evidence necessary to his defense. The defendant's right to request and receive a blood test is an important procedural right that goes directly to a Court's truth-finding function." *Id.*

In its Final Order, the Circuit Court also correctly relied on this Court's decision in *State v. York,* 175 W.Va. 740, 338 S.E.2d 219 (1985):

> Rather, W. Va. Code 17C-5-9 (1983) accords an individual arrested for driving under the influence of alcohol, controlled substances, or drugs a right to demand and receive a blood test within two hours of his arrest. Furthermore, **this statutory right is hardly a new development**. Historically, one charged with intoxication has enjoyed a constitutional right to summon a physician at his own expense to conduct a test for alcohol in his system. **To deny this right would be to deny due process of law** because such a denial would bar the accused from obtaining evidence necessary to his defense. The defendant's right to request and receive a blood test is an important procedural right that goes directly to a court's truth-finding function.

Although an administrative license revocation proceeding is distinct from a criminal DUI proceeding, West Virginia Code §17C-5-9 applies equally to administrative proceedings. See, *Reed v. Hall* and *Hall v. Divita*, supra. The DMV's argument that the Court's holding in *Hall* and *Divita*, is solely a criminal exclusionary rule is misplaced. W. Va. Code §17C-5-9 does not limit its application for criminal proceedings. The Legislature has had ample opportunity to limit the application of this statute to criminal proceedings and has chosen not to do so. This Court should therefore not now

reconsider its earlier holdings which appropriately recognized that the only available remedy for the denial of the individual's statutory and due process rights to have their blood independently tested after being arrested for DUI was to reverse any Order of Revocation relating to the revocation of a licensee's driver's license.

The DMV's argument that a dismissal or acquittal of an individual in a criminal proceeding has no preclusive effect on a subsequent administrative proceeding to revoke the driver's license of such individual, while correct, ignores the clear statutory and due process rights of an individual to have his or her blood tested at the only time available to such individual to obtain exculpatory evidence.

DMV also incorrectly argues that there was unrebutted evidence that the Respondent committed an offense of aggravated DUI. The Respondent disputed much of the evidence presented by the arresting officer, including, but not limited to, that he was under the influence of alcohol when the drove a motor vehicle on June 20, 2015. Considering the arresting officer's refusal to acknowledge the Respondent's request for a blood test on three (3) separate occasions until he was confronted with undisputed video evidence to the contrary makes the investigating officer's testimony regarding the facts which lead to the Respondent's arrest extremely suspect. This is especially true when there was undisputed evidence that the Respondent had a significant injury to his leg which affected his ability to ambulate and balance and an abnormality in one of the Respondent's eyes which could have had an effect on the result of the horizontal gaze nystagmus test. It also is vital to note that OAH's Order made no finding regarding the Respondent's blood alcohol level. Thus, the DMV's contention that there was unrebutted evidence that the Respondent committed the offense of aggravated DUI is not supported by the record.

The DMV's reliance upon *Miller v. Toler*, 229 W.Va. 302, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W.Va. 478, 729 S.E.2d 800 (2012) is also misplaced. These cases dealt with the exclusionary rule relating to a Fourth Amendment violation, when a suspect was stopped without

probable cause, and not the violation of a statutory and due process rights. While this Honorable Court found that the Court exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension provision, these cases did not address the violation of a statutory mandate. These cases were also decided prior to *Hall* and *Divita*, supra, which specifically held that the decisions of the OAH in the Circuit Court were entirely proper. The present case does not involve evidence being "excluded", but rather involves the remedy for a denial of the statutory right of an individual charged with being suspected of driving while impaired. The DMV's argument that an exclusionary rule was applied by the OAH and the Circuit Court, based upon this Court's earlier holdings, is not completely accurate. The tribunals below merely applied the only appropriate remedy available based upon the undisputed facts. To adopt the position of the DMV would result only in the violation of the rights afforded to every citizen in the same position as the Respondent being considered solely in a criminal context and then ignore the privilege of driving, a clearly protected property interest.

The potentially exculpatory evidence which could be obtained by a blood test was denied to the Respondent by the Investigating Officer, thus denying the Respondent clear due process rights. As this Court held in *Divita,* supra, **the due process of law,** within the meaning of this State and Federal Constitutional provisions, **extends to actions of administrative officers** and tribunals, as well as the judicial branches of government. *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960); *McJunkin Corp. v. West Virginia Human Rights Commission*, 179 W.Va. 417, 369 S.E.2d 720 (1988) and *Divita, supra, at 3* (emphasis added).

The DMV does correctly assert that "Stare Decisis is the policy of the Court to stand by precedent". *Banker v. Banker*, 196 W.Va. 535, n. 13, 474 S.E.2d 465, 476 n. 13 (1996). That is, [a]s a general rule, the principal of stare decisis directs us to adhere ... to the holdings of our prior cases [.]" *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting). Moreover, "[s]tare decisis rests upon the information

principle that the law by which people are governed should be 'fixed, definite, and known,' and not subject to frequent modification in the absence of compelling reasons " *Bradshaw v. Soulsby,* 210 W. Va. 682, 690, 558 S.E.2d 681, 689 (2001) (Maynard, J., dissenting) (quoting *Booth v. Sims*, 193 W.Va. 323, 350 no. 14, 456 S.E.2d 167, 194 no. 14 (1995)).

Because "[a]n appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote, certainty, stability and uniformity in the law." Syl. Pt. 4, *Musick v. Univ. Parl at Evansdale, LLC*, 241 W.Va. 194, 820 S.E.2d 901 (2018), this Honorable Court should continue to adhere to its earlier holdings in *Hall* and *Divita.* Police misconduct should not be rewarded in an administrative proceeding which may result in a revocation of a person's privilege to operate a motor vehicle in this state any less than the result of such misconduct in a criminal proceeding.

The uncertainty which would result in a reversal of established law, in the context of the issue at hand, requires this Honorable Court to not revisit its earlier decisions which were clearly considered and have a reasoned and appropriate basis for their holdings.

II. THE ADMINISTRATIVE REVOCATION PROCEDURES WHICH ARE THE SUBJECT OF THIS APPEAL ARE NOT NOW IN EFFECT BECAUSE THE EXCLUSIVE BASIS FOR THE REVOCATION OF AN INDIVIDUAL'S DRIVER'S LICENSE FOR DUI IS NOW EMBODIED IN WEST VIRGINIA CODE §17C-5-2.

West Virginia Code §17C-5-2 was amended in 2020 by the Legislature. This code section is now the exclusive means by which an individual's driver's license can be revoked for an offense of allegedly driving under the influence of alcohol. Consequently, this Honorable Court should not reconsider *Hall* or *Divita* because to do so would serve only to confuse litigants and the bar regarding future revocations of individuals driver's licenses under the newly amended West Virginia Code §17C-5-2, which now serves as the basis for such revocation based upon a conviction for driving under the influence of alcohol.

The issue now before the Court is moot relating to future administrative revocations of the driver's license of an individual charged with driving under the influence of alcohol. This Honorable Court should exercise its discretion and decline to address the issue presented. Three factors are to be considered in deciding whether to address technically moot issues: (1) the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; (2) while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and the public; and (3) issues which may be presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided. *Gallery v West Virginia Secondary Schools Activities Com'n, 205 W. Va. 364, 517 S.E.2d 368 (1999).* To revisit and reconsider *Hall* and *Divita* would not provide guidance to future litigants and the bar since the issue presented is now exclusively based on considerations which are no longer present, to-wit: whether the remedy provided for in *Hall* and *Divita* regarding administrative revocations of driver's licenses is appropriate. Any reliance by the DMV on the difference in the administrative and criminal nature of the mandate requiring reversal of an order revoking a licensee's driver's license to urge this Court to reverse its earlier holdings no longer applies under the existing statutes relating to driver's license revocations for DUI. The requirement that a blood test be provided when requested by a DUI suspect in a criminal proceeding is unquestionable. To now reexamine the remedy for the failure to afford this clear statutory and due process right to a suspect in the present context could, and likely will, serve only to confuse litigants, the bar and the judicial officials charged with implementing this Court's mandates and the present statute, thus potentially resulting in inconsistent outcomes. Therefore, the issue presented should be determined to be moot and not the subject of reconsideration. In considering whether the issue presented is moot, this Court should consider the crux of the DMV's argument that "this Court has previously recognized that administrative proceedings and criminal proceedings are two separate and distinct proceedings". *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 741, 619 S.E.2d 246 , 254 (2005) While this may be true, this Court has also held that "if the

Legislature had wanted to so intertwine the criminal and civil aspects of DUI law as to automatically void related administrative driver's license suspensions when DUI criminal charges are dropped or unproven, the Legislature could have clearly done so – but it did not." *Mullen v. Division of Motor Vehicles*, 216 W.Va. 731, 613 S.E.2d 98, 101 (2005). The Legislature has now combined the criminal and civil aspects of DUI law related to the revocation of a driver's license with the newly enacted West Virginia Code §17C-5-2 (2020). The current version of this statute, which is now in effect, combines the administrative punishment for DUI to the criminal penalties associated with conviction of a related offense, thus applying uniformity in both the criminal and administrative sanctions. This Court should now recognize that the Legislature has clearly pronounced its intent to provide for consistent results regarding the resolution of DUI cases. Consequently, the issue before the Court is now moot and to reexamine *Hall* and *Divita* would serve no useful purpose.

CONCLUSION

The Respondent respectfully prays that this Honorable Court find that the issues presently before it be moot and affirm the Order of the Circuit Court of Kanawha County, West Virginia dated January 22, 2020. Alternatively, the Respondent respectfully prays that this Honorable Court affirm the Circuit Court's Order of January 22, 2020, in its entirety, along with OAH's Order of August 5, 1019 and deny the appeal of the Petitioner. The Respondent further prays for such further and general relief as the Court may deem proper.

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v.

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CERTIFICATE OF SERVICE

I, Gregory W. Sproles, counsel for the Respondent, Nathan Talbert, do hereby certify that I have served the foregoing Reply Brief of Respondent, Nathan Talbert, to Brief and Appeal of Petitioner, Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles upon the Petitioner by mailing a true copy thereof to the following, by United States mail, duly addressed and postage prepaid on this the 24th day of July, 2020:

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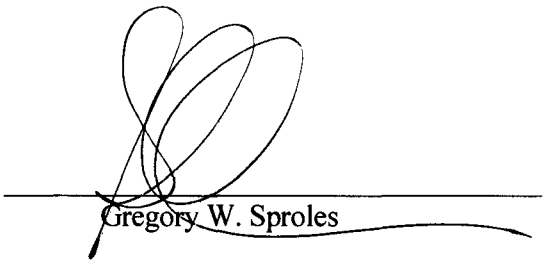

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