IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0225
(Circuit Court Civil Action No. 19-AA-106)

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

Petitioner,

v.

DOUGLAS H. NULL,

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

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ASSIGNMENTS OF ERROR

1. **Mr. Null did not demand a blood test, and in so finding, the circuit court substituted its judgment for that of the fact finder and improperly demonstrated a preference for testimonial evidence over documentary evidence.**

2. **This court's judicially created remedy for violations of W. Va. Code § 17C-5-9 (2013) in *Reed v. Hall* and *Reed v. Divita* should be reversed because it thwarts the purpose of the administrative sanctions for DUI and lets impaired drivers avoid license revocations by excluding all relevant evidence of DUI.**

STATEMENT OF THE CASE

On May 26, 2014, at approximately 5:24 p.m., Trooper First Class J. S. Pauley, formerly of the West Virginia State Police, the Investigating Officer in this matter, observed a blue Ford Contour traveling 60 miles per hour ("mph") in a posted 50 mph zone on Route 60 in the Spring Hill area of Kanawha County, West Virginia. (App[1]. at P. 142.) The Investigating Officer stopped the Ford and identified the driver as Douglas H. Null, the Respondent herein. *Id.* Mr. Null had normal speech, had bloodshot eyes, was normal exiting the vehicle, was unsteady while walking to the roadside, was unsteady while standing, admitted to smoking a bowl of marijuana and had a bowl with burnt residue inside his vehicle. (App. at P. 143.)

The Investigating Officer explained and administered the Horizontal Gaze Nystagmus Test to Mr. Null. *Id.* Prior to administering the test, the Investigating Officer conducted a medical assessment of Mr. Null's eyes which indicated that Mr. Null was a viable candidate for the test because he had equal pupils, no resting nystagmus, and equal tracking of his eyes. *Id.* During the test, Mr. Null exhibited lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to an angle of 45 degrees in both eyes. *Id.* The Investigating Officer

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[1] App. refers to the *Appendix* filed contemporaneously with the *Brief of the Division of Motor Vehicles.*

administered the Vertical Nystagmus Test, and Mr. Null exhibited impairment on this test because he exhibited distinct and sustained nystagmus at maximum elevation. *Id.*

The Investigating Officer explained and demonstrated the Walk-and-Turn Test to Mr. Null. *Id.* During the instruction stage, Mr. Null could not keep his balance and started the test too soon. *Id.* During the test, Mr. Null exhibited impairment because he stepped off the line, made an improper turn, and raised his arms to balance. *Id.* The Investigating Officer explained and demonstrated the One Leg Stand Test. (App., at P. 144.) Mr. Null exhibited impairment on this test because he swayed while balancing, used his arms to balance, hopped, and put his foot down. *Id.*

The Investigating Officer had reasonable grounds to believe that Mr. Null was DUI, arrested him, and transported him to Thomas Memorial Hospital for a blood draw at the request of the Investigating Officer. (App. at P. 145.) Mr. Null submitted to the Investigating Officer's request, and at 5:55 p.m., phlebotomist Lindsey Edmond drew a sample of Mr. Null's blood which the Investigating Officer submitted to the West Virginia State Police Laboratory for analysis. (App. at PP. 145, 147.)

After the blood draw, the Investigating Officer transported Mr. Null to the West Virginia State Police Detachment in South Charleston for processing. (App. at P. 146.) Mr. Null voluntarily completed a post-arrest interview during which he admitted to operating a vehicle and being under the influence of drugs, namely: marijuana. *Id.* Mr. Null signed the interview form after it was completed. *Id.*

On June 24, 2014, the Division of Motor Vehicles ("DMV") sent Mr. Null an *Order of Revocation* for DUI of alcohol, controlled substances and/or drugs. (App. at P. 62.) On July 16, 2014, the Office of Administrative Hearing ("OAH") received Mr. Null's request for an

administrative hearing. (App. at P. 64.) Mr. Null did not dispute the allegation that he was driving a motor vehicle while under the influence of alcohol, controlled substances and/or drugs. *Id.* His only challenge was to the "results of the secondary chemical test of the blood, breath or urine." *Id.*

On March 4, 2016, the OAH conducted an administrative hearing. (App. at P. 201.) Mr. Null was the only witness at the hearing, and he testified. (App. at P. 203). Also, at the administrative hearing, it was unrebutted that after the termination of the companion criminal case, the State Police lab halted testing of the blood sample at the request of the prosecutor's office. (App. at PP. 207-208.) The documents submitted by the Investigating Officer to the DMV at the end of his investigation (App. at PP. 142-148) were admitted into the record as evidence pursuant to W. Va. Code § 29A-5-2(b) (1964) and indicated that the Investigating Officer requested that Mr. Null submit to a blood test. (App. at PP. 145, 207, 209.)

Although Mr. Null admitted to the Investigating Officer on the day of his arrest that he smoked marijuana (App. at PP. 143, 146) and although he filed a *Hearing Request Form* that challenged only the "results of the secondary chemical test of the blood, breath or urine" (App. at P. 64), at the administrative hearing, Mr. Null testified that he requested a blood test . . . "because it was going to prove my innocence." (App. at PP. 213, 215.)

On August 15, 2019, the OAH entered a *Final Order*. (App. at PP. 156-162.) The OAH found as fact that the Investigating Officer lawfully arrested Mr. Null for driving while under the influence ("DUI") of alcohol, controlled substances, drugs or a combination of the aforementioned (App. at P. 157, FOF 7) and "had reasonable grounds to believe that Mr. Null was driving or attempting to drive a motor vehicle while under the influence or impaired by alcohol, drugs, a controlled substance, or any combination of the aforementioned" because Mr. Null had bloodshot

eyes, was unsteady while walking and unsteady while standing, admitted that he had smoked a bowl of marijuana and there was a bowl with burnt residue in Mr. Null's vehicle. (App. at P. 157, FOF 2.) The OAH further found that the Investigating Officer observed impairment detection clues during Mr. Null's performance on the standardized field sobriety tests. (App. at P. 157, FOF 5.) Finally, the OAH also found that "[b]ecause the Investigating Officer suspected [Mr. Null] was under the influence of controlled substances and/or drug, he requested [Mr. Null] submit to a blood draw", and Mr. Null agreed. (App. at P. 158.)

Although the OAH found that there was evidence of driving, evidence of consumption, evidence of impairment and that the Investigating Officer requested the blood draw, it reversed the Commissioner's *Order of Revocation* for DUI because "it is the position of the Chief Hearing Examiner that an individual who voluntarily submits to a blood sample at the request of the Investigating Officer should be afforded the same due process protections as those who demand a blood test. Therefore, given this precedent, [Mr. Null] was denied the ability to present potentially, exculpatory evidence of his blood and was, therefore, denied due process rights under W. Va. Code § 17C-5-9 when the blood sample analysis was cancelled before the testing was completed." (App. at P. 159.) In making its conclusions, the OAH relied on this Court's decision in *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015) and *Reed v. Divita*, No. 14-11018, 2015 WL 5514209 (W. Va. Sept. 18, 2015) (memorandum decision). (App. at P. 159.)

On September 16, 2019, the DMV filed a *Petition for Judicial Review* (App. at PP. 31-55) with the Circuit Court of Kanawha County alleging that the clear evidence of DUI was determinative of the matter and that W. Va. Code § 17C-5-9 (2013) is inapplicable because Mr. Null did not demand a blood draw. On February 14, 2020, the circuit court entered its final order. (App. at PP.

2-9.) The circuit court concluded that

> it appears from the testimony of Mr. Null, the only witness to testify at the hearing below, that he, and not the Investigating Officer, requested the blood draw. This Court is hesitant to disregard the live testimony of an individual placed under oath in favor of a piece of paper. Therefore, [*Reed v. Hall,* 235 W. Va. 322, 773 S.E.2d 666 (2015)] is directly on point and the OAH decision must be affirmed because Mr. Null was denied the ability to present potentially exculpatory evidence of his blood and was, therefore, denied due process rights under W. Va. Code § 17C-5-9 when the blood sample analysis was cancelled before the testing was completed.

(App. at P. 7.)

SUMMARY OF ARGUMENT

The DMV proved by a preponderance of the evidence the statutory requirements to show that Mr. Null drove a motor vehicle in this state while under the influence of controlled substances or drugs. The OAH found as fact that Mr. Null was driving, that he consumed marijuana, that he exhibited impairment, and that he was lawfully arrested. The OAH ignored the substantial evidence of DUI even though Mr. Null did not request or demand a blood test as required by the plain language of W. Va. Code § 17C-5-9 (2013). In finding that Mr. Null had demanded a blood test, the circuit court substituted its judgment for that of the fact finder and improperly demonstrated a preference for testimonial evidence over documentary evidence. Because Mr. Null did not demand a blood test, this Court's opinions in *Hall, supra*, and *Divita, supra*, are inapplicable to this matter, and the circuit court was clearly wrong to find that Mr. Null's due process rights were violated.

Assuming, *arguendo*, that this Court determines that Mr. Null demanded a blood draw or that *Hall* and *Divita* apply to an officer requested blood draw case, this Court should revisit those cases. The remedy applied by the OAH and the circuit court was not provided by the Legislature, and the rescission of the license revocation solely on the basis that Mr. Null did not receive a blood analysis

thwarts the purpose of the administrative license revocation proceeding when the substantial evidence proves that he committed the offense of DUI.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Argument pursuant to Rev. R. App. Pro. 20 (2010) is appropriate on the basis that this case involves a matter of fundamental public importance which is currently on appeal before this Court in the following matters: *Frazier v. Agin* (No. 20-0038), *Frazier v. Bowman* (No. 20-0034), *Frazier v. Raschella* (No. 20-0103), *Frazier v. Talbert* (No. 20-0134), *Frazier v. Workman* (No. 20-0035), *Frazier v. Bragg* (No. 19-0519), *Frazier v. Fazio* (No. 20-0102), *Frazier v. Fowler* (No. 20-0076), *Frazier v. Murphy* (No. 20-0092), and *Warner v. Frazier* (No. 20-0199).

ARGUMENT

A. Standard of Review

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)." Syllabus Point 1, *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66 (2018).

B. Mr. Null did not demand a blood test, and in so finding, the circuit court substituted its judgment for that of the fact finder and improperly demonstrated a preference for testimonial evidence over documentary evidence.

It is a critical fact in this case that the OAH found that Mr. Null did not demand a blood test but as the OAH found, he acquiesced to the Investigating Officer's request for a blood test: "[b]ecause the Investigating Officer suspected [Mr. Null] was under the influence of controlled substances and/or drugs, he requested [Mr. Null] submit to a blood draw" and "[a]lthough in the

present case, [Mr. Null] did not initiate the blood draw. . ." (App. at P. 158.) In order to reach its result-oriented decision, the circuit court, however, concluded that "it appears from the testimony of Mr. Null, the only witness to testify at the hearing below, that he, and not the Investigating Officer, requested the blood draw. This Court is hesitant to disregard the live testimony of an individual placed under oath in favor of a piece of paper." (App. at P. 7.)

It is well-established that "findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). *See also*, *Frazier v. Corley*, No. 18-1033, 2020 WL 1493971, at *3 (W. Va. Mar. 26, 2020) (memorandum decision); Syl. Pt. 1, *Frazier v. S.P.*, 838 S.E.2d 741 (W. Va. 2020); Syl. Pt. 1, *Reed v. Winesburg*, 241 W. Va. 325, 825 S.E.2d 85 (2019). The circuit court's reversal of the OAH's factual finding was based upon a preference for testimonial evidence over documentary evidence, which has been prohibited by this Court. *See, Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010) (concluding that "the lower court's view of the evidence revealed a preference for testimonial evidence over documentary evidence. Our law recognizes no such distinction in the context of drivers' license revocation proceedings.) *See also*, *Dale v. Dingess*, 232 W. Va. 13, 17, 750 S.E.2d 128, 132 (2013) (concluding that "the circuit court was incorrect when it elevated Ms. Dingess's hearing testimony over the testimony of Deputy Hess that was in agreement with his contemporaneous documentary evidence recorded on the DUI Information Sheet.")

The factual finding regarding who requested the blood draw is relevant because W. Va. Code § 17C-5-9 (2013) makes a demand for a test by an arrestee a predicate to the Investigating Officer's duty to facilitate the test. West Virginia Code § 17C-5-9 (2013) mandates that a suspected impaired

driver "shall have the right to demand" a test of his "blood or breath" and that analysis of the test "shall be made available" to the arrestee upon demand. The Legislature's use of the word "shall" in this context makes this directive to the appealing party mandatory. *See, e.g.*, Syl. pt. 1, *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."); Syl. pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969) ("The word 'shall' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation."). The requirements in statute and case law flow from a driver exercising his right ***to demand*** a blood test.

Here, the blood sample was the Investigating Officer's evidence. The absence of an analysis results in there being no blood test evidence in the record. It should not be determinative of the case. The drawing of the blood did not create an extra right for Mr. Null, as the OAH concluded in its final order. (App. at P. 156-162.) The OAH breezed by the fact that Mr. Null did not request the test and relied on this Court's decisions in *Reed v. Hall*, *supra*, and *Reed v. Divita*, *supra*, to erroneously conclude that "individuals who voluntarily submit to a blood sample at the request of the Investigating Officer should be afforded the same due process as those who demand a blood test. 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 West Virginia Code § 17C-5-9. *Reed v. Hill* [sic], 235 W. Va. 322, 773 S.E.2d 666 (2015)." (App. at P. 159.)

The circuit court similarly relied on *Hall* and *Divita* in erroneously determining that to conclude that "Mr. Null was denied the ability to present potentially exculpatory evidence of his blood and was, therefore, denied his due process rights under W. Va. Code § 17C-5-9 when the

blood sample analysis was cancelled before the testing was completed. " (App. at P. 7.)

Because the OAH found that Mr. Null did not demand or request a blood draw on the date of his arrest, W. Va. Code § 17C-5-9 (2013) is not applicable to this case. This Court has held that "[w]hen a driver asserts that his or her right to a blood test requested pursuant to W. Va. Code § 17C-5-9 (1983) has been violated, the burden of proof is on the driver to show he or she ***made the request*** in compliance with the conditions set forth in the statute for making that request." Syl. Pt. 3, *Dale v. Painter*, 234 W. Va. 343, 765 S.E.2d 232 (2014) (emphasis added). Furthermore, "a request for a blood test made pursuant to W. Va. Code § 17C-5-9 (1983) must be made ***to the investigating officer*** or officers." Syl. Pt. 8, *Dale v. Painter*, 234 W. Va. 343, 765 S.E.2d 232 (2014). [Emphasis added.] The OAH found that Mr. Null did not request or demand a blood test. Therefore, *Hall* and *Divita* are distinguishable in that the drivers in those cases demanded or requested to submit to a blood draw on the date of the arrest.

Further, Mr. Null did not demand analysis of the blood. There was no analysis. "The analysis disclosed by such chemical test shall be made available to such arrested person forthwith upon demand." W. Va. Code § 17C-5-9 (2013). " 'The requirement that a driver arrested for DUI must be given a blood test on request does not include a requirement that the arresting officer obtain and furnish the results of that requested blood test.' Syl. Pt. 3, *In re Burks,* 206 W. Va. 429, 525 S.E.2d 310 (1999). *Hall*, 235 W. Va. at 324, 773 S.E.2d at 668, syl. pt. 6." *Frazier v. Hussing,* No. 19-0056, 2020 WL 533965, at *3 (W. Va. Feb. 3, 2020) (memorandum decision). There is no basis for recision of the revocation due to the lack of evidence of an officer requested blood test result.

Nothing in W. Va. Code § 17C-5A-1 (2008) provides for anything except mandatory revocation when a person is deemed to have committed the offense of DUI. The DMV mandatorily revokes when,

"upon examination of the written statement of the officer and the tests results described in subsection (b) of this section, the commissioner determines that a person committed an offense described in section two, article five of this chapter. . ." W. Va. Code § 17C-5A-1(c) (2008). Despite Mr. Null's right to demand and receive a blood test pursuant to W. Va. Code §17C-5-9 (2013), which the OAH determined did not occur here, there is no reward to a driver whose test is not analyzed. The circuit court erred in extending this Court's judicially created remedy for a purported violation of W. Va. Code § 17C-5-9 (2013).

Hall, supra and *Divita, supra,* although inapplicable here, are further distinguishable because the OAH found as fact that Mr. Null admitted to smoking a bowl of marijuana and being under the influence of marijuana. (App. at PP . 143, 146, 157 at FOF 6.) The drivers in both *Hall* and *Divita* directly refuted to the officer that they were under the influence. Given Mr. Null's clear admission to the Investigating Officer that he had smoked marijuana prior to driving, there was no "exculpatory evidence" to present and no denial of his due process rights as determined by both the OAH and the circuit court.

Accordingly, the OAH and the circuit court incorrectly applied *Hall*, *Divita*, and W. Va. Code §17C-5-9 (2013) as being applicable in this matter because Mr. Null did not request or demand a blood draw and test from the Investigating Officer on the date of the arrest. Further, the circuit court improperly substituted its judgment for that of the fact finder and demonstrated a preference for testimonial evidence over documentary evidence.

C. This court's judicially created remedy for violations of W. Va. Code § 17C-5-9 (2013) in *Reed v. Hall* and *Reed v. Divita* should be reversed because it thwarts the purpose of the administrative sanctions for DUI and lets impaired drivers avoid license revocations by excluding all relevant evidence of DUI.

Assuming, *arguendo*, that *Hall* and *Divita* apply to an officer requested blood draw case, the remedy applied by the circuit court for the violation of a criminal statute was not provided by the

Legislature, and the rescission of the license revocation solely on the basis that Mr. Null did not receive a blood analysis thwarts the purpose of the administrative license revocation proceeding when the undisputed evidence proves that he committed the offense of DUI.

1. *Hall* and *Divita* should be overruled because they conflate the more stringent remedies appropriate for criminal actions with those more appropriate for administrative proceedings and undermine important efforts to protect the public from unsafe drivers.

West Virginia Code § 17C-5-9 (2013) mandates that a suspected impaired driver "**shall** have the right to demand" (emphasis added) a test of his "blood or breath" and that analysis of the test "**shall** be made available" (emphasis added) to the arrestee upon demand. The Legislature's use of the word "shall" in this context makes this directive to the appealing party mandatory. *See, e.g.*, Syl. pt. 1, *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982) ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."); Syl. pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969) ("The word 'shall' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation."). Although the criminal statute utilizes the mandatory language, the Legislature did not provide a remedy in the administrative hearing statutes, W. Va. Code § 17C-5A-1 *et seq.*, if a blood test was not provided upon demand or if a sample was not analyzed.

In *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015), although Mr. Hall's blood sample was taken, a "chemical test thereof," as required by W. Va. Code § 17C–5–9 (2013), was never performed. 235 W. Va. 322, 331, 773 S.E.2d 666, 675. The sample was retained under the control of the police department and was placed in an evidence locker. The investigating officer's intent was

to have the blood sample tested by the West Virginia State Police Laboratory; however, during that period of time, the West Virginia State Police Laboratory was not accepting blood, so the officer did not submit it to the lab. *Id.* In *Hall*, this Court affirmed "the conclusion of the hearing examiner and circuit court that Mr. Hall was denied the statutory and due process rights, under West Virginia Code § 17C–5–9, to have his blood tested independently." *Id.* at 333, 773 S.E.2d 666, 677.

Four months later in *Reed v. Divita*, No. 14-11018, 2015 WL 5514209 (W. Va. Sept. 18, 2015) (memorandum decision), this Court emphasized that it had previously recognized the remedy when a DUI suspect requests a blood test and is denied and reiterated that W. Va. Code § 17C–5–9 (2013) accords an individual arrested for DUI a right to demand and receive a blood test within two hours of his arrest. *Id.* "This statutory right is hardly a new development." *Id.* at *4. The *Divita* Court, citing *State v. York*, 175 W. Va. 740, 338 S.E.2d 219 (1985), reminded the DMV 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.*

York involved the application of a criminal statute, W. Va. Code § 17C-5-9 (1983), to a criminal appeal, and the current statutory dilemma is essentially a question of how the Legislature intended the administrative license revocation provisions in W. Va. Code § 17C-5A-1 *et seq.* to interrelate with the serious criminal traffic offense provisions in W. Va. Code § 17C-5-1 *et seq.* As this Court explained in syllabus point 3 of *Smith v. State Workmen's Comp. Comm'r,* 159 W. Va. 108, 219 S.E.2d 361 (1975), "[s]tatutes which relate to the same subject matter should be read and

applied together so that the Legislature's intention can be gathered from the whole of the enactments."

This Court also recognized that:

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. Syllabus Point 5, *State v. Snyder,* 64 W. Va. 659, 63 S.E. 385 (1908).

Syl. Pt. 1, *State ex rel. Simpkins v. Harvey,* 172 W. Va. 312, 305 S.E.2d 268 (1983), *superseded by statute on other grounds as stated in State ex rel. Hagg v. Spillers,* 181 W. Va. 387, 382 S.E.2d 581 (1989).

And "[t]his Court has previously recognized that administrative license revocation proceedings and criminal DUI 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). This Court ". . . clearly recognized that the two 'tracks' of criminal and civil drivers' license-related proceedings that arise out of an incident where a person is accused of DUI are separate . . .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. Div. of Motor Vehicles*, 216 W. Va. 731, 613 S.E.2d 98, 101 (2005). This Court has observed that "[a]lthough the Commissioner is to give consideration to the results of related criminal proceedings, the criminal proceedings are not dispositive of the administrative license revocation proceedings and are not a jurisdictional prerequisite to the administrative proceedings." *Carroll v. Stump,* 217 W. Va. 748, 619 S.E.2d 261

(2005). *Compare with*, Syl. Pt. 4, *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012) (overruling syllabus point 3 of *Choma v. W. Va. Div. of Motor Vehicles,* 210 W. Va. 256, 557 S.E.2d 310 (2001) and holding "When a criminal action for driving while under the influence in violation of West Virginia Code § 17C–5–2 (2008) results in a dismissal or acquittal, such dismissal or acquittal has no preclusive effect on a subsequent proceeding to revoke the driver's license under West Virginia Code § 17C–5A–1 *et seq.* Moreover, in the license revocation proceeding, evidence of the dismissal or acquittal is not admissible to establish the truth of any fact.").

Likewise, this Court's remedy for a due process violation of a criminal statute, W. Va. Code § 17C-5-9 (2013), should not be dispositive of the administrative license revocation proceeding when there is unrebutted evidence that a driver committed the offense of DUI. "[T]he penalties for DUI are imposed under the criminal, *not* administrative, DUI statutes. *Shell v. Bechtold,* 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (per curiam) (recognizing distinction between the judicial imposition of criminal penalties and the administrative revocation or suspension of a driver's license)." *Harrison v. Comm'r, Div. of Motor Vehicles*, 226 W. Va. 23, 32–33, 697 S.E.2d 59, 68–69 (2010).

The purpose of the administrative sanction of license revocation "is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways." *Shell v. Bechtold,* 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (per curiam). This objective of removing substance-affected drivers from our roads in the interest of promoting safety and saving lives is consistent "with the general intent of our traffic laws to protect the innocent public." *Id.* "Administrative actions and criminal sanctions are independent lines of inquiry which must not be confused or integrated." *Wagoner v. Sidropolis,* 184 W. Va. 40, 43, 399 S.E.2d 183, 186 (1990) (per

curiam).

"Criminal proceedings are not necessary predicates to the maintenance of administrative proceedings for the purpose of driver's license revocations under the provisions of W. Va. Code § 17C–5A–1 for driving a motor vehicle while under the influence of alcohol. Neither are they restraints on such proceedings." *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 742, 619 S.E.2d 246, 255 (2005). Further, this Court has "observe[d] that the Legislature's inclusion of a separately-designated criminal offense for driving while license revoked for DUI is indicative of the societal importance attached to removing such motorists from our roadways. *See* W. Va. Code § 17B–4–3(b)." *State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 96–97, 502 S.E.2d 190, 193–94 (1998).

In this case, "[t]he principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs. . ." W. Va. Code § 17C-5A-2(e) (2015). "The obvious and most critical inquiry in a license revocation proceeding is whether the person charged with DUI was actually legally intoxicated." *Carte v. Cline*, 194 W. Va. 233, 238, 460 S.E.2d 48, 53 (1995).

In *Reed v. Hall*, *supra* and *Reed v. Divita*, *supra*, both civil administrative license revocation appeals, this Court created an exclusionary rule for violations of the criminal statute, W. Va. Code § 17C-5-9 (2013). This flies in the face of this Court's decisions in *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). There, this Court created a general rule that the "judicially-created exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension proceeding." Syl. Pt. 3, *Toler, supra*; Syl. Pt. 7, *Smith, supra.*

This general rule was then examined by the Court in *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (per curiam). In *Ciccone*, this Court did not reverse the general rule but instead found that a change in the statute requiring a finding of lawful arrest was a statutorily-created exclusionary rule which required the exclusion of all evidence of DUI if the OAH determined that a driver was not lawfully arrested. In *Ciccone*, this Court explained that its decision in *Clower v. W. Va. Dep't of Motor Vehicles,* 223 W. Va. 535, 544, 678 S.E.2d 41, 50 (2009), applied the 2004 version of W. Va. Code § 17C–5A–2(f) which required a specific finding of "whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol ... or was lawfully taken into custody for the purpose of administering a secondary test." The 2008 version of the statute did not contain this language. *Miller v. Chenoweth,* 229 W. Va. 114, 117 n. 5, 727 S.E.2d 658, 661 n. 5 (2012) (per curiam). "However, the Legislature amended the statute in 2010, and restored the language requiring a finding that the person was either lawfully arrested or lawfully taken into custody." *Dale v. Ciccone*, 233 W. Va. 652, 659, 760 S.E.2d 466, 473 (2014) (per curiam).

Inasmuch as *Ciccone* modified *Toler, supra,* and *Smith, supra*, relative to a finding of lawful arrest, it did not overturn the prohibition against applying the judicially-created exclusionary rule to administrative license revocation proceedings. Only the statute pertaining to lawful arrest changed.

"The 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 Petition of McKinney,* 218 W. Va. 557, 625 S.E.2d 319 (2005). "This purpose behind the administrative sanctions for driving under the influence set forth in West Virginia Code §§ 17C–5A–1 to –4 (2009) would be thwarted if the exclusionary rule was applied in an administrative

license revocation or suspension proceeding at a substantial cost to society." *Miller v. Toler*, 229 W. Va. 302, 306, 729 S.E.2d 137, 141 (2012). In *Toler*, this Court considered how other courts have acknowledged this substantial cost of excluding evidence of DUI in an administrative license revocation proceeding.

For instance, in *Powell v. Secretary of State,* 614 A.2d 1303 (1992), the Supreme Judicial Court of Maine stated that: "[b]ecause the evidence has already been excluded from the criminal proceeding, there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner. The costs to society resulting from excluding the evidence, on the other hand, would be substantial. . . *Because of the great danger posed by persons operating motor vehicles while intoxicated, it is very much in the public interest that such persons be removed from our highways.* 614 A.2d at 1306–07 (emphasis added)." 229 W. Va. 302, 307, 729 S.E.2d 137, 142. In *State ex rel. Schwartz v. Kennedy,* 120 N.M. 619, 904 P.2d 1044 (1995), the New Mexico Supreme Court held that [a] license revocation hearing "is entirely separate and distinct from the proceeding to determine the guilt or innocence of the person as to the crime of DWI." 120 N.M. 619, 626, 904 P.2d 1044, 1051. The New Mexico Court further determined that the "exclusionary rule excludes evidence of the illegal stop from the criminal DWI proceeding, thereby preventing the loss of the driver's liberty interest and deterring future police misconduct." *Glynn v. State, Taxation & Revenue Dep't, Motor Vehicle Div.*, 2011-NMCA-031, 149 N.M. 518, 252 P.3d 742, 750 (2011) *overruled by Schuster v. State Dep't of Taxation & Revenue, Motor Vehicle Div.*, 2012-NMSC-025, 283 P.3d 288 (2012).

After considering other courts' rationales for not applying the criminal exclusionary rule to administrative proceedings, this Court opined that the other courts "have found that applying the

exclusionary rule in an administrative license revocation or suspension proceeding offers little deterrence for police misconduct." *Miller v. Toler*, 229 W. Va. 302, 307, 729 S.E.2d 137, 142 (2012). Further, this Court agreed that "if the exclusionary rule is extended to civil license revocation or suspension proceedings there would be minimal likelihood of deterring police misconduct because the real punishment to law enforcement for misconduct is derived by excluding unlawfully seized evidence in the criminal proceeding. When this minimal deterrent benefit is compared to the societal cost of applying the exclusionary rule in a civil, administrative driver's license revocation or suspension proceeding that was designed to protect innocent persons, the cost to society outweighs any benefit of extending the exclusionary rule to the civil proceeding." 229 W. Va. 302, 306–08, 729 S.E.2d 137, 141–43.

As this Court refused to apply the judicially-created exclusionary rule as a remedy for Fourth Amendment violations, it should not exclude all evidence of DUI for violations of W. Va. Code § 17C-5-9 (2013) in administrative proceedings. This thwarts the purpose of the administrative sanctions for DUI and lets impaired drivers avoid license revocations by excluding all relevant evidence of DUI. As discussed in *Toler, supra,* when a law enforcement officer, who is not employed by or under the control of the DMV, fails to ensure analysis of a blood sample, the evidence of DUI can be excluded or the matter dismissed completely *in the companion criminal proceeding.* Therefore, there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner in the civil, administrative license revocation proceeding. The costs to society resulting from excluding the relevant evidence of DUI, on the other hand, are substantial. The purpose of administrative license suspensions is to protect the public – not to redress police conduct.

Here, for example, the officer's failure to ensure analysis of the blood sample should be remedied in the companion criminal matter and not again in the administrative case. The Investigating Officer is not an employee of the DMV, and at the administrative hearing, he or she is a fact witness, not a party. Instead, the lack of blood analysis must simply be weighed along with the other evidence in the administrative case. This remedy is even more salient in this administrative matter because someone other than the DMV halted the blood analysis at the conclusion of the companion criminal case.

The deterrence rationale for applying the exclusionary rule in criminal proceedings further breaks down because in this administrative license revocation proceeding, the DMV has no further obligation to investigate or provide evidence. "The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests." *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988). The DMV is under no obligation to present more evidence than it has. "Part of it stems from our unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, see *Lisenba v. California,* 314 U.S. 219, 236 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Arizona v. Youngblood*, 488 U.S. at 58.

In *Reed v. Conniff*, 236 W. Va. 300, 779 S.E.2d 568 (2015), this Court "recognized that dismissal of the proceedings would run counter to the principle that license revocation proceedings should be, where possible and equitable, resolved on their merits and conducted in a manner 'devoid of those sporting characteristics. . .of a game of forfeits [.]' [*David v. Comm'r of W. Va. Div. of*

Motor Vehicles, 219 W. Va. 493, 498, 637 S.E.2d 591, 596 (2006)] (quoting *Rosier v. Garron, Inc.*, 156 W. Va. 861, 875, 199 S.E.2d 50, 58 (1973))." 236 W. Va. 300, 309, 779 S.E.2d 568, 577.

"Stare decisis is the policy of the court to stand by precedent." *Banker v. Banker*, 196 W. Va. 535, 546 n. 13, 474 S.E.2d 465, 476 n. 13 (1996). That is, "[a]s a general rule, the principle 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 important 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 n. 14, 456 S.E.2d 167, 194 n. 14 (1995)).

Finally, "[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. Park at Evansdale, LLC*, 241 W. Va. 194, 820 S.E.2d 901 (2018).

This Court's decision that the exclusionary rule does not apply to civil, administrative license revocation proceedings predates this Court's decisions in *Hall* and *Divita. Stare decisis* does not bar this Court from revisiting *Hall* and *Divita* so that it may apply its rationale in *Toler* to limit the remedy for police misconduct to the criminal arena while still considering the relevant evidence of DUI in the administrative arena. Uniformity and certainty in the law require it.

2. The proper standard for violations of the statute should be the multi-factored test when assessing destruction of evidence.

Although a license revocation proceeding is clearly not a criminal trial for DUI, the failure to provide a suspected impaired driver with the opportunity to obtain an independent blood or breath test is most closely associated with a failure of the State to preserve evidence in a criminal matter. In the criminal case of *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), during a murder investigation, the police destroyed a bloody couch that was in evidence. The defendant was convicted, and argued on appeal that his due process rights were violated when the trial court permitted the State to introduce evidence from the couch which he was never afforded an opportunity to examine and which was destroyed prior to trial.

There, this Court noted that "[a]s a matter of state constitutional law, we find that fundamental fairness requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the **entire record**." *State v. Osakalumi*, 194 W. Va. 758, 766, 461 S.E.2d 504, 512 (1995) (emphasis added). There this Court determined that,

> [w]hen the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either *West Virginia Rule of Criminal Procedure* or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. **In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.**

Syl. Pt. 2, *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995) (emphasis added).

Per this Court's discussion in *State v. Lanham*, 219 W. Va. 710, 639 S.E.2d 802 (2006), the couch in *Osakalumi* was a critical piece of evidence given the testimony by the State medical examiner. *State v. Lanham*, 219 W. Va. 710, 714–15, 639 S.E.2d 802, 806–07 (2006). The doctor's testimony focused on the trajectory of the bullet through the couch and was paramount to the prosecution's contention that the death was a result of a homicide and not a suicide. *Id.* The doctor's testimony was the *only* evidence of murder presented at trial. *Id.* The problem, however, was that prior to disposing of the couch, the police failed to measure either the proportions of the couch, the location of the bullet hole on the couch, or the trajectory of the bullet. The police likewise failed to properly photograph either the couch or the bullet hole. *Id.* Then, two years after the disposal of the couch, the medical examiner, who had never actually seen the couch, testified at trial about the trajectory of the bullet based upon a detective's drawing of the couch. *Id.* In addition, the detective had put together the drawing of the couch from his memory after the couch had already been destroyed. *Id.* Given those facts, this Court found that the State breached its duty to preserve evidence because the defendant was foreclosed from fully and fairly examining the medical examiner's testimony. *Id.*

Unlike *Osakalumi*, there should be no exclusion of the other relevant evidence of DUI here. The OAH found as fact that Mr. Null was traveling 10 miles over the posted speed limit, had bloodshot eyes, was unsteady while walking and standing, admitted that he had smoked a bowl of marijuana, had a bowl with burnt residue in his vehicle, and showed impairment on three standardized field sobriety tests. (App. at PP. 156-157.) The DMV presented documentary evidence, and Mr. Null testified. The State's case in *Osakalumi* relied solely on the medical examiner's

testimony about a couch that had been destroyed. Here, the DMV's case did not rely on blood test results which were later destroyed but consisted of sufficient evidence of DUI.

The U.S. Supreme Court has considered a state's failure to preserve breath sample evidence in the context of DUI cases. In *California v. Trombetta,* 467 U.S. 479 (1984), two defendants, accused of drunken driving in unrelated incidents, submitted to breath-analysis tests, each registering a blood alcohol concentration high enough to presume intoxication under California law. Each defendant sought to suppress their respective test results on the ground that the police failed to preserve their breath samples, even though it was standard police procedure not to preserve such samples. Both defendants maintained that had their respective breath samples been preserved, their breath-analysis test results could have been impeached.

The U. S. Supreme Court rejected the defendants' arguments in *Trombetta* because, among other reasons, the police discarded the samples "in good faith and in accord with normal practice." *Trombetta,* 467 U.S. at 488 (*quoting Killian v. United States,* 368 U.S. 231 (1961)). The *Trombetta* court further determined that the chances were slim that the preserved breath samples would have exculpated the defendants in that case and, even if the samples would have revealed inaccuracies in the breath-analysis test, the defendants had "alternative means of demonstrating their innocence." *Trombetta,* 467 U.S. at 489-90. A state's constitutional duty to preserve evidence can only be applied to "evidence that might be expected to play a significant role in the suspect's case." *Id.* at 488 (footnote omitted). Under *Trombetta,* the standard of constitutionality is met where evidence possesses "an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489.

Here, Mr. Null admitted to smoking marijuana prior to driving. A blood test result would only have confirmed what he had told the officer; therefore, there was no exculpatory value attributable to the blood test result. Accordingly, an appropriate remedy for a violation of W. Va. Code § 17C-5-9 (2013) should fall short of automatic rescission of the *Order of Revocation* and should depend, at least in part, on what other evidence was produced to prove the offense as well as whether the evidence that was not preserved was utilized by the court in rendering its decision.

3. Revocation is appropriate when the proper standard is applied to the specific facts of this case.

Assuming, *arguendo*, that Mr. Null's failure to receive analysis of his blood sample was a breach of the Investigating Officer's duty, the three part test for determining the consequence for such a breach is relevant to this matter. First, the Court must consider the degree of negligence or bad faith involved. Here, it was unrebutted that after the termination of the companion criminal case, the State Police lab halted testing of the blood sample at the request of the prosecutor's office. (App. at PP. 207-208.) There is no evidence that prosecutor's request to halt analysis of the blood was attributable to the Investigating Officer. *Id.* Therefore, it is apparent that there was no bad faith or negligence on the officer's part or on the part of the DMV, the agency with the burden of proof at the administrative hearing.

Next, when determining the consequence for a violation of W. Va. Code § 17C-5-9 (2013), this Court must consider the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available. Here, "the principal question at the [administrative] hearing shall be whether the person. . .did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs. . ." W. Va. Code § 17C-5A-2(e) (2015). The

evidence presented by the DMV answers the principal question and was determined by the OAH to be reliable and probative even though it was ultimately ignored.

Moreover, analysis of the blood sample would not be exculpatory evidence, i.e., "evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt" because the absence of evidence in this case was not proof of petitioner's innocence. Syl. Pt. 4, in part, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). Clearly, the overwhelming evidence of DUI in the record outweighs the importance of the missing blood test result because an analysis would only confirm Mr. Null's admission of having smoked marijuana prior to driving. It would not have negated the indicia of impairment which the OAH found that he exhibited nor his admission that he was under the influence of marijuana during the post-arrest interview.

Finally, when determining the consequence for a failure to obtain a breath or blood test as requested per W. Va. Code § 17C-5-9 (2013), this Court must consider the sufficiency of the other evidence produced at the trial to sustain the conviction. In its *Final Order*, the OAH found that Mr. Null was DUI. (App. at PP. 211-215.) Paragraph 6 of the "Findings of Fact" provides: "There is evidence of the use of alcohol, drugs, controlled substances or any combination of the aforementioned based on the following: "[Mr. Null] was traveling ten (10) miles over the posted speed limit. He had bloodshot eye, he was unsteady while walking and while standing, and he failed the three standardized field sobriety test. [Mr. Null] also admitted that he smoked a bowl of marijuana." (App. at P. 157.) Clearly, there was more than sufficient evidence of DUI to outweigh the importance of the missing blood test result.

A chemical test is not required to prove that a motorist was driving under the influence of alcohol, controlled substances, or drugs for the purpose of making an administrative revocation of

the driver's license. *Dale v. Oakland*, 234 W. Va. 106, 763 S.E.2d 434 (2014) (per curiam); Syl. Pt. 1, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998); Syl. Pt. 2, *Dean v. W. Va. Dept. Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam); and Syl. Pt. 2, *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995) (per curiam).

It is well-established that "[w]here there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 1, *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995) (per curiam); Syl. Pt. 1, *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam); Syl. Pt. 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997); *Coll v. Cline*, 202 W. Va. 599, 605, 505 S.E.2d 662, 668 (1998); Syl. Pt. 4, *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004) (per curiam); Syl. Pt. 4, *Lilly v. Stump*, 217 W. Va. 313, 617 S.E.2d 860 (2005) (per curiam); *Carpenter v. Cicchirillo*, 222 W. Va. 66, 68, 662 S.E.2d 508, 510 (2008) (per curiam); Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (per curiam); Syl. Pt. 3, *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam); FN. 11, *Ullom v. Miller*, 227 W. Va. 1, 14, 705 S.E.2d 111, 124 (2010); *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012); Syl. Pt. 4, *Dale v. McCormick*, 231 W. Va. 628, 749 S.E.2d 227 (2013) (per curiam); Syl. Pt. 6, *Dale v. Dingess*, 232 W. Va. 13, 750 S.E.2d 128 (2013) (per curiam); Syl. Pt. 8, *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (per curiam). *See also*, *Dale v. Oakland*, 234 W. Va. 106, 763

S.E.2d 434 (2014) (per curiam) (applying the *Albrecht* test to an administrative license revocation for DUI with a controlled substance.)

The standard of review for the OAH is a preponderance of the evidence. "Also worth noting is the underlying preponderance of the evidence standard pertaining to administrative revocation proceedings." *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012). *See also*, *Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984); *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam).

Here, the OAH found as fact that Mr. Null was operating a motor vehicle in West Virginia on the day of his arrest for DUI, that he admitted to smoking marijuna prior to driving, and that he exhibited clues of impairment. There is more than sufficient evidence of DUI to uphold the license revocation pursuant to *Albrecht* and *Oakland.* Accordingly, an appropriate remedy for a violation of W. Va. Code § 17C-5-9 (2013) should fall short of automatic rescission of the *Order of Revocation* and should depend, at least in part, on what other evidence was produced to prove the offense as well as whether the evidence that was not preserved was utilized by the court in rendering its decision.

CONCLUSION

Mr. Null did not exercise his right to request or demand a blood test pursuant to W. Va. Code § 17C-5-9 (1983); therefore, the remedy created by this Court in *Reed v. Hall* and *Reed v. Divita* is inapplicable to the facts of this case. The OAH and the circuit court erred in rescinding the DUI revocation and in excluding the sufficient evidence of DUI.

If this Court finds that the judicially created remedy for violations of the statute applies to officer requested blood tests, then this Court's decisions in *Reed v. Hall* and *Reed v. Divita* should

be overruled because those decisions conflate the more stringent remedies appropriate for criminal actions with those more appropriate for administrative proceedings and undermine the DMV's statutory mandate to protect the public from impaired drivers. The ordinary rationale for the exclusionary rule in criminal contexts as explained by this Court in *Miller v. Toler* – the deterrence of police misconduct – does not apply here because any police deterrence for failing to obtain a blood test upon demand is not as strong when the evidence of DUI in the administrative arena is so compelling. The cost of excluding all evidence of DUI at the administrative hearing is extremely high in terms of public safety when the purpose of administrative license suspensions is to protect the public – not to redress police conduct.

For these reasons, *stare decisis* does not compel keeping *Hall* and *Divita* on the books, and this Court should adhere to its rationale in *Toler* and require application of the multi-factored test when assessing destruction of evidence instead of permitting the complete exclusion of all relevant evidence of DUI if there are no blood test results. When the proper standard is applied to the facts of this case, revocation for DUI is the only answer to the principle question at the administrative hearing. The circuit court's *Final Order* must be reversed.

Respectfully submitted,

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By Counsel,

PATRICK MORRISEY
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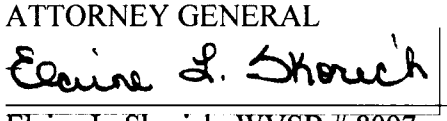

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0225
(Circuit Court Civil Action No. 19-AA-106)

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

Petitioner,

v.

DOUGLAS H. NULL,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 15th day of June, 2020, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, to wit:

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Elaine L. Skorich
Elaine L. Skorich