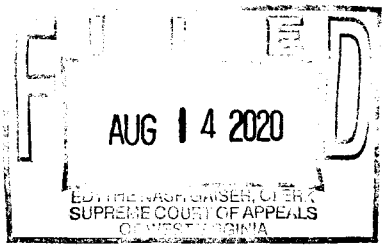
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 20–0134



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

Petitioner,

v.

NATHAN TALBERT,

Respondent.

REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES

EVERETT J. FRAZIER, Commissioner,
Division of Motor Vehicles,

By Counsel,

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Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by and through his undersigned counsel, and pursuant to Rev. R. App. Pro. 10(g) submits the *Reply Brief of the Division of Motor Vehicles*.

ARGUMENT

1. The instant matter is not moot.

In his response, Mr. Talbert correctly points out that W. Va. Code § 17C-5-2 was amended in 2020 by the Legislature but improperly argues that 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." (Resp. Br. at P. 10.) "[O]nce the issue of mootness has been raised, "[t]he 'heavy burden of persua[ding]' the court that the [case has been rendered moot] lies with the party asserting mootness." *Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *U. S. v. Concentrated Phosphate,* 393 U.S. 199, 203 (1968)). *See also*, *SER Bluestone Coal Corp. v. Mazzone,* 226 W. Va. 148, 156, 697 S.E.2d 740, 748 (2010); *SER. Wooten v. Coal Mine Safety Bd. of Appeals*, 226 W. Va. 508, 515, 703 S.E.2d 280, 287 (2010). Mr. Talbert conflates mootness of a particular case with retroactive application of an amended statute to future cases, and has, therefore, failed in his burden to prove that the instant matter is moot.

The amendments to W. Va. Code § 17C-5-2 (2020) were not in effect at the time Mr. Talbert was arrested for DUI June 20, 2015 (App. at PP. 176, 250), or at the time he asked for an administrative hearing on July 13, 2015. (App. at PP. 96-98.) West Virginia Code § 17C-5-2(u) (2020) specifically provides that "[t]he amendments made to this section during the 2020 regular session of the Legislature shall become effective on July 1, 2020."

This Court has determined that a "'statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from

the language of the statute. Syllabus Point 3, *Shanholtz v. Monogahela [Monongahela] Power Co.*, [165 W. Va. 305], 270 S.E.2d 178 (1980). Syllabus Point 2, *State ex rel. Manchin v. Lively,* 170 W. Va. 655 [672], 295 S.E.2d 912 (1982).' Syl. pt. 4, *Arnold v. Turek,* 185 W. Va. 400, 407 S.E.2d 706 (1991)." Syl. Pt. 1, *Myers v. Morgantown Health Care Corp.*, 189 W. Va. 647, 434 S.E.2d 7 (1993). "'The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.' Pt. 4, syllabus, *Taylor v. State Compensation Commissioner,* 140 W. Va. 572 [86 S.E.2d 114 (1955)]. Syl. Pt. 1, *Loveless v. State Workmen's Comp. Comm'r,* 155 W. Va. 264, 184 S.E.2d 127 (1971)." Syl. Pt. 6, *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012).

West Virginia Code § 17C-5-2(u) (2020) makes clear that the changes in the statute have no retroactive application; therefore, the pre-2020 statutory and case law regarding the administrative license revocation process remain applicable to Mr. Talbert's case. Because the instant matter is not moot, this Court is not required to complete the test in *Gallery v. W. Va. Secondary Sch. Activities Comm'n*, 205 W. Va. 364, 517 S.E.2d (1999) (per curiam) (explaining factors considered when deciding whether to address technically issues).

However, it is important for this Court to be aware that there ***are*** sufficient collateral consequences which will result from determination of the questions presented by the Petitioner on appeal. Although the nature of the administrative license revocation process changed in 2020 for DUI arrests occurring on or after July 1, 2020, the Office of Administrative Hearings ("OAH")

maintains jurisdiction over DUI arrests from June 11, 2010,[1] through June 30, 2020. There are approximately 375 administrative appeals pending before the OAH and 187 administrative appeals pending in the circuit courts of this State and before this Court. For those 562 pending appeals, the "old" law is applicable, and the more stringent remedies appropriate for criminal actions should remain separate from the remedies more appropriate for administrative proceedings because the purpose of the administrative sanction of license revocation to remove persons who drive under the influence of alcohol and other intoxicants from our highways[2] remains in force for arrests occurring before July 1, 2020.

2. *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) should be overruled.

a. West Virginia Code § 17C-5-9 (2013) is a criminal statute, the remedy for a violation of which should not be in the civil, administrative license revocation proceeding.

In his response brief, Mr. Talbert argues that this Court has recognized that the only appropriate remedy for a due process violation of W. Va. Code § 17C-5-9 (2013) is reversal of an administrative license revocation. (Resp. Br. at P. 6.) As the circuit court did below, Mr. Talbert relies on the criminal case of *State v. York,* 175 W. Va. 740, 338 S.E.2d 219 (1985). Specifically, Mr. Talbert alleges that although an administrative license revocation proceeding is distinct from a criminal proceeding for driving while under the influence ("DUI"), W. Va. Code § 17C-5-9 (2013) applies equally to administrative proceedings and does not limit its application for criminal proceedings. (Resp. Br. at P. 6.) Mr. Talbert further alleges that *stare decisis* should apply and this

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[1] *See*, W. Va. Code § 17C-5C-1, *et seq*. (2010) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012).

[2] *See*, *Shell v. Bechtold,* 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (per curiam).

Court should continue to adhere to its earlier holdings in *Hall* and *Divita* because "[p]olice 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." (Resp. Br. at P. 6. (emphasis added).)

Mr. Talbert's argument ignores the lack of a legislatively created remedy in the W. Va. Code for a violation of W. Va. § 17C-5-9 (2013); the fact that there is no provision in the administrative license revocation chapter of the Code, W. Va. Code § 17C-5A-1 *et seq.*, for consideration of a violation of the criminal statute; and the fact that a suspected drunk driver may receive a remedy for a violation of W. Va. § 17C-5-9 (2013) in the companion criminal matter.

This Court's decisions in *Hall*, *supra*, and *Divita*, *supra*, should be overruled because they created a remedy in the civil arena where the Legislature had not provided one. This Court has determined that "[d]ue process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments. Syl. pt. 2, *State ex rel. Ellis v. Kelly,* 145 W. Va. 70, 112 S.E.2d 641 (1960). Syl. Pt. 1, *McJunkin Corp. v. West Virginia Human Rights Commission,* 179 W. Va. 417, 369 S.E.2d 720 (1988)." *Reed v. Divita*, No. 14-11018, 2015 WL 5514209, at *3 (W. Va. Sept. 18, 2015) (memorandum decision). But "[j]udges are not free, in defining 'due process,'" to impose . . . 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *U. S. v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Rochin v. Cal.*, 342 U.S. 165, 170 (1952)). Such limitations on the judicial power in due process issues includes considering any relevant precedents and then assessing the several interests at stake. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

As early as 1978, this Court observed that "[t]here is a clear statutory demarcation between the administrative issue on a suspension and the criminal issues on a charge of driving while under the influence." *Jordan v. Roberts,* 161 W. Va. 750, 757, 246 S.E.2d 259, 263 (1978). And since then, this Court has "consistently held, license revocation is an administrative sanction rather than a criminal penalty." *State ex rel. DMV v. Sanders,* 184 W. Va. 55, 58, 399 S.E.2d 455, 458 (1990) (per curiam). Indeed, this Court held in Syllabus Point 2 of *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005), "[a]dministrative license revocation proceedings for driving a motor vehicle under the influence . . . are proceedings separate and distinct from criminal proceedings arising from driving a motor vehicle under the influence. . . ." *Hall, supra,* and *Divita, supra*, fail to recognize the distinction between the criminal DUI statutes, W. Va. Code § 17C-5-1 *et seq.*, and the civil, administrative license revocation statutes, W. Va. Code § 17C-5A-1 *et seq.*

Furthermore, this Court has determined that "[i]n the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted. *Woodrum v. Johnson,* 210 W. Va. 762, 766 n. 8, 559 S.E.2d 908, 912 n. 8 (2001) (internal quotations and citations omitted)." *SER. W. Va. Dep't of Transp., Div. of Highways v. Reed*, 228 W. Va. 716, 724 S.E.2d 320, 324 (2012). Further,

> As Justice Cleckley noted in *State v. Guthrie,* 194 W. Va. 657, 461 S.E.2d 163 (1995): "[A] precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled than an opinion which demonstrates that the court was aware of conflicting decisions and gave at least some persuasive discussion as to why the old law must be changed." *Guthrie,* 194 W. Va. at 679 n. 28, 461 S.E.2d at 185 n. 28.

SER. W. Va. Dep't of Transp., Div. of Highways v. Reed, 228 W. Va. 716, 724 S.E.2d 320, 324 (2012).

As explained in the *Brief of the Decision of Motor Vehicles*, this Court's decisions in *Hall, supra*, and *Divita, supra*, omit analysis of the differences between the criminal DUI statutes and the administrative DUI statutes; discussion of the duty of the OAH to weigh all of the evidence of DUI when making its required findings pursuant to W. Va. Code § 17C-5A-2(f)(2) (2015); and consideration that an officer's failure to provide a suspected drunk driver with a blood test can be remedied in the companion criminal matter and not again in the administrative DUI case. The lack of analysis by this Court on these issues warrants this Court revisiting its decisions in *Hall* and *Divita.*

b. Mr. Talbert did not rebut his .159% blood alcohol concentration, which is *prima facie* evidence of the offense of aggravated DUI.

In his response brief, Mr. Talbert asserts that "[i]t 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." (Resp. Br. at P. 7.) However, the lack of a finding by the tribunal is not the same as a lack of evidence supporting a conclusion that the secondary chemical test reflected that Mr. Talbert drove a vehicle while having a blood alcohol concentration in excess of .150%.

The Investigating Officer testified that he had been trained and certified to use the Intoximeter EC-IR II instrument for conducting secondary chemical tests of the breath. (App. at P. 249.) The Investigating Officer also testified that he read and provided Mr. Talbert with a copy of the West Virginia Implied Consent Statement, which Mr. Talbert signed, and that he observed Mr. Talbert for 20 minutes to ensure there was no oral intake. (App. at PP. 258-259.) The officer further testified that he completed all of the steps on the Breath Operational Checklist, that Mr. Talbert

provided a breath sample, and that the result of the test "was a 0.15." (App. at PP. 259-260.)

On cross-examination, Mr. Talbert's counsel asked the Investigating Officer about whether Mr. Talbert had requested a blood test (App. at PP. 261-265, 275-276); whether Mr. Talbert was able to complete the post-arrest interview (App. at PP. 265-267); whether the Investigating Officer was able to discern if Mr. Talbert walked with a limp (App. at PP. 267-268); about the Investigating Officer's reasonable suspicion to stop Mr. Talbert's vehicle (App. at PP. 268-269); about when the Investigating Officer completed the DUI Information Sheet (App. at PP. 269-270); about the officer's observations regarding his personal contact with Mr. Talbert (App. at PP. 270-271); and about the officer's administration of the standardized field sobriety tests (App. at PP. 271-275). On recross-examination, Mr. Talbert's counsel again asked the Investigating Officer about the administration of standardized field sobriety tests (App. at PP. 280-281) and again about Mr. Talbert's request for a blood test (App. at PP. 281-284.) Mr. Talbert's counsel failed to ask the Investigating Officer a single question about the administration of the secondary chemical test of the breath or the test results.

During direct examination, Mr. Talbert denied operating a vehicle while under the influence of alcohol (App. at P. 285) and testified about having a lazy eye (App. at PP. 285-286), having a leg abnormality (App. at PP. 286-289), the events of the evening prior to and including to the stop of his vehicle (App. at PP. 289-292), the administration of the standardized field sobriety tests and preliminary breath test (App. at PP. 292-295), and his post-arrest interview answers. (App. at P. 296.) On cross-examination, Mr. Talbert testified about wanting a blood test. (App. at PP. 296-297, 302), the events of the evening prior to and including the stop of his vehicle (App. at PP. 298-301, 302), and the administration of the Horizontal Gaze Nystagmus Test (App. at PP. 301-302.) Mr. Talbert

did not rebut that his blood alcohol concentration ("BAC") was .159% on either direct or cross-examination. (App. at PP. 285-302.) In fact, his counsel failed to ask him about the administration of the secondary chemical test or about that test's results, and Mr. Talbert never independently denied his BAC result. Therefore, Mr. Talbert's .159% BAC remains wholly unrebutted.

In his brief, Mr. Talbert attacks the Investigating Officer's credibility because he could not remember the Respondent asking for a blood test; however, the officer' credibility about a subjective memory is irrelevant to the unrebutted, objective secondary chemical test result. Not only did the Investigating Officer present unrebutted testimony about the administration and results of the secondary chemical test, but the DUI Information Sheet completed by the Investigating Officer substantiates his testimony regarding the administration and results of the secondary chemical test. (App. at PP. 179. 181.) "[T]he fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy." *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 76, 631 S.E.2d 628, 634 (2006). *See also*, *Groves v. Cicchirillo*, 225 W. Va. 474, 479, 694 S.E.2d 639, 644 (2010) (per curiam) (holding, "[i]n the present case, no effort was made to rebut the accuracy of *any* of the records, including the DUI Information Sheet, Implied Consent Statement or Intoximeter printout which were authenticated by the deputy and admitted into the record at the DMV hearing.")

A rebuttable presumption, in the law of evidence, is a presumption which may be rebutted by ***evidence***. *Black's Law Dictionary,* 6th Ed. (1994) (emphasis added). It is "an inference which obtains until overthrown by ***proof***. *Barrow v. Territory*, 13 Ariz. 302, 114 P. 975, 976; Words and Phrases, Second Series, Vol. 2, p. 855." *Beck v. Kansas City Pub. Serv. Co.*, 48 S.W.2d 213, 215

(Mo. App. 1932) (emphasis added). "We have stated that the presumption announced in *McNulty* [*v. Cusack*, 104 So. 2d 785 (Fla. Dist. Ct. App. 1958)], and subsequently followed, is rebuttable. It is constructed by the law to give particular effect to a certain group of facts in the absence of further ***evidence***. The presumption provides a prima facie case which shifts to the defendant the burden to go forward with the ***evidence*** to contradict or rebut the fact presumed." *Gulle v. Boggs*, 174 So. 2d 26, 28–29 (Fla. 1965) (emphasis added).

"Rebuttal evidence is more than evidence that simply contradicts the opposing and corroborates the proffering party, but it is also '***evidence of denial of some affirmative fact which the answering party has endeavored to prove***.' [internal citation omitted]." *Michael on Behalf of Estate of Michael v. Sabado*, 192 W. Va. 585, 597, 453 S.E.2d 419, 431 (1994) (emphasis added). "In *United States v. Green,* 648 F.2d 587, 595 (9th Cir.1981), the court opined that '[a]n opening statement, however, having no evidentiary value, cannot operate to place an issue in controversy.'" *State v. Richards*, 190 W. Va. 299, 303, 438 S.E.2d 331, 335 (1993).

Mr. Talbert did not testify about his .159% BAC; therefore, he did not rebut the accuracy of the DUI Information Sheet or any of the DMV's evidence about the secondary chemical test result. Mr. Talbert's .159% BAC is *prima facie* evidence that he was under the influence of alcohol pursuant to W. Va. Code § 17C-5-8(b)(3) (2013). Mr. Talbert is correct that the OAH's order made no finding regarding the Respondent's blood alcohol level. (App. at PP. 191-195.)However, the OAH was required to make the findings in W. Va. Code § 17C-5A-2(f)(4) (2015). Specifically, the OAH was mandated to make a finding about whether the secondary chemical test was administered in accordance with the provisions of W. Va. Code §§ 17C-5 and 17C-5A, and if so, to consider the *prima facie* evidence of aggravated DUI. The OAH failed to even mention Mr. Talbert's .159%

BAC.

It was clear error for the OAH to ignore the *prima facie* unrebutted evidence altogether. Instead it abandoned its duty to make the required findings in W. Va. Code § 17C-5A-2(f) (2015) and applied this Court's remedy for a due process violation of a criminal statute, W. Va. Code § 17C-5-9 (2013), which should not be dispositive of the administrative license revocation proceeding when there is unrebutted evidence that a driver committed the offense of aggravated DUI.

c. Mr. Talbert failed to address the DMV's argument that the proper standard for violations of W. Va. Code § 17C-5-9 (2015) should be the multi-factored test when assessing destruction of evidence.

Revised Rule of Appellate Procedure 10(d) (2010) provides that "[i]f the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." In his response brief, Mr. Talbert did not address the DMV's argument that the proper standard for violations of the statute should be the multi-factored test when assessing destruction of evidence pursuant to *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995).

CONCLUSION

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*, 229 W. Va. 302, 729 S.E.2d 137 (2012) – 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.

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 aggravated DUI is the only answer to the principal question at the administrative hearing pursuant to W. Va. Code § 17C-5A-2(e) (2015).

For the reasons outlined above as well as in the *Brief of the Division of Motor Vehicles*, the DMV respectfully requests that this Court reverse the circuit court order.

Respectfully submitted,

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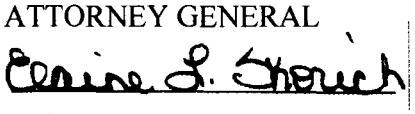

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CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that the foregoing *Reply Brief of the Division of Motor Vehicles* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 14th day of August, 2020, addressed as follows:

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