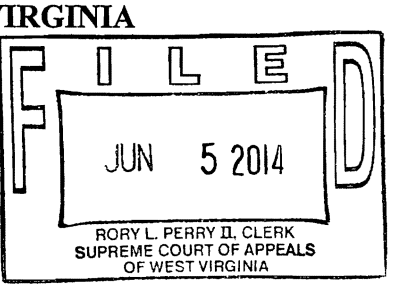
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0043



JOHN FULLER,

Petitioner,

v.

STEVEN O. DALE, Acting Commissioner
of the West Virginia Division of Motor Vehicles,

Respondent.

RESPONSE BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

STEVEN O. DALE, ACTING
COMMISSIONER, DIVISION
OF MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich, WVSB # 8097
Assistant Attorney General
DMV - Office of the Attorney General
P.O. Box 17200
Charleston, WV 25317-0010
(304) 926-3874

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I. ASSIGNMENTS OF ERROR

A. The circuit court did not abuse its discretion in concluding that a lawful stop and a valid arrest are not synonymous.

B. The circuit court did not err in concluding the officer had reasonable suspicion to effect a stop of Mr. Fuller's vehicle.

II. STATEMENT OF THE CASE

On July 6, 2010, Corporal J. A. Bailes of the South Charleston Police Department (formerly of the Dunbar Police Department) responded to a radio transmission from Corporal D. A. Hammonds formerly of the Dunbar Police Department (and now with the Putnam County Sheriff's Department.) (A. Tr.[1] at PP. 15 and 25.) Cpl. Hammond's radio transmission to Cpl. Bailes was that an individual driving a Honda tried to evade him. *Id.* Cpl. Bailes observed the vehicle exit one parking lot, turn left and then enter the parking lot of the Pour House Bar on West Washington Street in Dunbar, Kanawha County, West Virginia. (A. Tr. at P. 16.) Cpl. Bailes approached Mr. Fuller's stopped vehicle, remained on scene for the arrival of Cpl. Hammond, and was present during the DUI investigation. (A. Tr. at PP. 17-18.) Cpl. Bailes observed that Mr. Fuller was unsteady on his feet and had slurred speech. (A. Tr. at P. 20.)

Also on July 6, 2010, while on routine patrol, Cpl. Hammond was traveling on West Washington Street and followed behind a Honda Accord for one-half mile. (A. Tr. at P. 46.) Cpl. Hammond approached close to the rear of the vehicle (two to three car lengths), and the vehicle decelerated and entered the parking lot of a closed business establishment, the Cold Spot. (A. Tr.

[1]A. Tr. refers to the administrative transcript, which is part of the Appendix, filed by Mr. Fuller with this Court on March 19, 2014.

at P. 27 and App[2]. at P. 15.) Cpl. Hammond passed the Honda and continued traveling down the 2900 block of Dunbar Avenue until he could make a U-turn to double back. (A. Tr. at P. 27.) Cpl. Hammond passed Cpl. Bailes and another officer in his police cruiser and radioed that a Honda had just "shot" into the parking lot. (A. Tr. at PP. 27- 28.)

Cpl. Hammond initiated contact with the vehicle and identified the driver as Mr. Fuller. (A. Tr. at P. 28 and App. at P. 15.) While speaking with Mr. Fuller, Cpl. Hammond detected the odor of an alcoholic beverage on Mr. Fuller's breath (A. Tr. at P. 28 and App. at P. 16); observed that Mr. Fuller had bloodshot and glassy eyes (A. Tr. at P. 29 and App. at P. 16); and noted that Mr. Fuller was unsteady on his feet, staggered while walking to the roadside and staggered while standing. (A. Tr. at P. 29 and App. at P. 16.) Mr. Fuller's speech was slurred, and he was slow to answer Cpl. Hammond's questions. (App. at P. 16.)

Cpl. Hammond explained and administered three standard field sobriety tests to Mr. Fuller. (A. Tr. at P. 28 and App. at PP. 16-17.) Mr. Fuller failed the horizontal gaze nystagmus test because he demonstrated lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees. (A. Tr. at P. 37 and App. at P. 16.) Mr. Fuller failed the walk-and-turn test because he could not keep his balance during the instruction stage, stopped while walking, stepped off the line, made an improper turn, missed heel-to-toe, raised his arms to balance, and took the incorrect number of steps. (A. Tr. at P. 38 and App. at P. 16.) Mr. Fuller also failed the one-legged stand test because he swayed while balancing, used his arms to balance, and put his foot down. (A. Tr. at P. 39 and App. at P. 17.) Mr. Fuller also failed a preliminary breath test with the result of .226%. (App. at P. 17.) Mr. Fuller admitted to drinking

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[2]App. refers to the Appendix filed by Mr. Fuller in this matter on March 19, 2014.

a bottle of tequila prior to driving. (App. at P. 19.)

Pursuant to W. Va. Code § 17C-5A-2(f) (2010), Cpl. Hammond had reasonable grounds to believe that Mr. Fuller had been driving a motor vehicle in this state while under the influence of alcohol. Cpl. Hammond then transported Mr. Fuller to the Dunbar Police Department for the purpose of administering a secondary chemical test of Mr. Fuller's breath. (A. Tr. at PP. 41-42 and App. at P. 14.) The results of the secondary chemical test revealed a blood alcohol content of .227% which is almost three times the legal limit of .08%. (A. Tr. at P. 43 and App. at P. 14.)

On July 25, 2010, the West Virginia Division of Motor Vehicles ("DMV") sent Mr. Fuller an *Order of Revocation* for DUI. (App. at P. 20.) On July 28, 2010, the DMV received Mr. Fuller's request for an administrative hearing. (App. at PP. 21-22.) On June 16, 2011, the Office of Administrative Hearings ("OAH") held the administrative hearing in this matter. (A. Tr. at P. 1.) On February 2, 2012, the OAH issued its *Final Order Finding of Fact and Conclusions of Law.* (App. at PP. 105-111.) The OAH reversed the DMV's *Order of Revocation* for DUI. (App. at P. 111.) On March 7, 2012, the DMV filed a *Petition for Appeal* with the Circuit Court of Kanawha County. (App. at PP. 93-118.) On July 5, 2012, the DMV filed its *Brief of the Division of Motor Vehicles* with the circuit court. (App. at PP. 140-152.) On July 16, 2012, Mr. Fuller filed a *Respondent's Memorandum of Law* and *Proposed Order* with the circuit court. (App. at PP. 153-171.) On August 21, 2012, the DMV filed its *Reply Brief of the Division of Motor Vehicles* with the circuit court. (App. at PP. 172-185.) On December 19, 2013, the circuit court entered its *Final Order Reversing Final Decision of Office of Administrative Hearings.* (App. at PP. 2-10.)

III. SUMMARY OF ARGUMENT

It is unrebutted that Mr. Fuller was driving a motor vehicle in this state on July 6, 2010. It

is also unrebutted that at the time that Mr. Fuller was driving, he was under the influence of alcohol with a blood alcohol content of .227% which is almost three times the legal limit of .08%. Those unrebutted facts were admitted into evidence at the administrative hearing below and clearly answer the principal question at hearing pursuant to W. Va. Code § 17C-5A-2(e) (2010). Incredibly, the OAH ignored its statutory duty to answer the principal question and instead focused its attention on criminal procedural matters. The Circuit Court of Kanawha County recognized the OAH's clear error and determined that the nature of the stop of a vehicle is not relevant to the civil, administrative process and that a lawful arrest is not predicated on the stop. The circuit court also concentrated on the administrative process of upholding a license revocation when the driver was clearly drunk and clearly driving.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure (2010), the Commissioner requests oral argument in this case because the issue of a lawful arrest has been argued in multiple cases still pending before this Court, and this matter involves issues of fundamental public importance.

V. ARGUMENT

A. Standard of Review

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam).

> Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the

> administrative findings, inferences, conclusions, decisions, or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. SER, State of W. Va. Human Rts. Comm'n,* 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong, and conclusions of law are reviewed *de novo*. *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam).

B. The circuit court did not abuse its discretion in concluding that a lawful stop and a valid arrest are not synonymous.

In his *Petition for Appeal and Writ of Error* filed with this Court, Mr. Fuller relies upon this Court's unreported Memorandum Decision in *Dale v. Arthur*, No. 13-0374, 2014 WL 1272550 (W. Va. March 28, 2014)(memorandum decision) stating that this Court has affirmatively announced that a "lawful arrest" within the meaning of W. Va. Code § 17C-5A-2(f) (2010) requires "a finding that the underlying traffic stop was legal." Mr. Fuller further argues that because "the relevant version of W. Va. Code § 17C-5A-2(f) herein requires a finding that the driver be 'lawfully arrested,' proof that the initial traffic stop was legal is required in order to sustain a license revocation." Mr. Fuller's reliance on *Arthur* is misplaced, and he completely fails to address the principal question at hearing. The OAH also ignored what the Legislature deemed as the principle issue at the administrative hearing as found in W. Va. Code § 17C-5A-2(e) (2010) while at the same time creating a non-existent remedy in W. Va. Code § 17C-5A-2(f) (2010). This is clear error. The circuit court, however, corrected that error.

Pursuant to W. Va. Code § 17C-5A-1(c) (2008), once the Commissioner reviews the DUIIS

and determines that a person has committed a DUI offense, then the Commissioner **"shall** make and enter an order revoking or suspending the person's license..." Quite simply, the administrative revocation process statutorily mandates that the Commissioner examine the evidence of drunk driving and revoke the driver's license. The only evidence available to the Commissioner in executing his legislatively-mandated duty is the information contained in the DUIIS, the intoximeter ticket, and the Implied Consent document which the investigating officer has submitted pursuant to his legislatively mandated duty in W. Va. Code § 17C-5A-1(b) (2008). The Commissioner's mandate is to revoke a driver's license if the information provided by the officer shows that the person was DUI. There is no legislative mandate for the Commissioner to consider the nature of the stop of the vehicle (if there even was one) or even the lawfulness of an arrest (if there even was one.) In fact, the most heinous of DUI offenses are most likely to be prosecuted through the criminal information or indictment process rather than via an arrest. Obviously, the Legislature did not intend for drivers who committed felony DUI offenses to get an "free pass" on an administrative revocation because there was no arrest.

Even when matters proceed to administrative hearing, there is no legislative mandate for the OAH to consider the nature of the stop. Instead, the Legislature mandates that the OAH answer the principal question at the hearing: whether the person drove a motor vehicle in this State while under the influence of alcohol. W. Va. Code § 17C-5A-2(e) (2010). The Legislature placed nothing in the relevant statutes regarding the nature of the stop when determining whether a person was DUI: it was only this Court in its decisions in *Clower v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009); *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994); and *Dale v. Arthur*, *supra*, which inserted any meaning about the nature of the stop into the administrative process. Further,

the Legislature certainly never intended to create two classes of DUIs: one where there was a stop of a vehicle which a later reviewing tribunal determines to be invalid thus letting the drunk driver escape his administrative penalty and one where the stop was not at issue or was not challenged by the driver at the administrative hearing. Because this Court has previously determined in *Stuart, Clower,* and *Arthur* that the validity of the stop must be considered when determining the lawfulness of the arrest for DUI[3], the OAH failed to answer the principal question at hearing and permitted a drunk driver with a BAC of .227% to evade administrative penalty.

Next, the required findings of the OAH as outlined in W. Va. Code § 17C-5A-2(f) (2010) need not be answered, *in toto*, in the affirmative. West Virginia Code § 17C-5A-2(f) (2010) requires the OAH to make the following findings:

> (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight;
> (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided,* That this element shall be waived in cases where no arrest occurred due to driver incapacitation;
> (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs; and
> (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

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[3] This Court's decision to consider the nature of the stop (if there was one) when determining the lawfulness of the arrest (if there was one) contradicts this Court's holding in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012) that the validity of the stop is only relevant to the criminal proceeding.

The OAH misinterpreted W. Va. Code § 17C-5A-2(f) (2010) and attempted to create a remedy if ***any*** of those required findings are in the negative. This is nonsensical, inasmuch as it is possible that one or more of the findings may be inapplicable to the case. The Legislature did not include such a remedy, and the OAH's overreaching interpretation is contrary to that which is in the Code. The circuit court clearly did not err in upholding Mr. Fuller's revocation because there was unrebutted evidence of him driving a motor vehicle in this State and unrebutted evidence that he was under the influence of alcohol at the time, namely, his BAC of .227%.

The first finding that the OAH must make is whether the investigating officer had reasonable grounds to believe that the driver was DUI. The officer's reasonable grounds are based upon his or her investigation, i.e., whether the driver exhibited the indicia of intoxication and failed the field sobriety tests. This finding directly relates to W. Va. Code § 17C-5-4(b) (2010) which gives the officer direction regarding the administration of the preliminary breath test:

> A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has *reasonable cause to believe a person* has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

[Emphasis added.]

If the OAH finds that the officer did not gather evidence of the indicia of intoxication or conduct any field sobriety test but instead simply administered the preliminary breath test, then the OAH should make the required finding in the negative and weigh the results of the preliminary breath test accordingly. A negative finding on one factor does not negate any of the other evidence of DUI.

The second required finding for the OAH, and the most critical one in this case, is whether

the person was lawfully placed under arrest for DUI for the purpose of administering a secondary test. W. Va. Code § 17C-5A-2(f) (2010). This finding also contains a caveat that "this element shall be waived in cases where no arrest occurred due to driver incapacitation." Therefore, it is possible that the OAH would not need to address the issue of the driver's arrest if, for instance, the driver was in an accident and taken to the hospital and, therefore, could not be placed under arrest by the officer. This is the very fact scenario which occurred in *Lowe v. Cicchirillo,* 223 W. Va. 175, 672 S.E.2d 311 (2008).

This second finding regarding the arrest contains no required finding about the nature of the stop of the vehicle (if there even was a stop by the officer) and relates directly to the lawful arrest language in W. Va. Code § 17C-5-4(c) (2010) regarding the admissibility of the secondary chemical test. Secondary breath test results cannot be considered if the test was administered when the driver was not lawfully arrested, meaning that the officer had not gathered enough evidence to have a reasonable suspicion to believe that the driver had been driving while under the influence of alcohol, drugs or controlled substances. Any definition of lawful arrest contained in W. Va. Code § 17C-5A-2 (2010) that disregards its limited use in W. Va. Code § 17C-5-4(c) (2010) is overreaching.

> The phrase "[a] secondary test of blood, breath or urine shall be incidental to a lawful arrest" means that the results of a chemical test are not admissible unless it was done in connection with, or "incidental" to, a lawful arrest. This is the construction we placed on this statutory language in *State v. Byers,* 159 W. Va. 596, 224 S.E.2d 726 (1976), where we found a blood test to be inadmissible because it was not taken incident to a lawful arrest.

Albrecht v. State, 173 W. Va. 268, 272, 412 S.E.2d 859, 863 (1984). Therefore, a negative finding as to the second factor simply means that the results of the SCT cannot be considered.

The third required finding for the OAH to make pursuant to W. Va. Code § 17C-5A-2(f)

(2010) is whether the driver committed an offense involving DUI of alcohol, controlled substances or drugs. The OAH can find in the affirmative if "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..." Syl. pt. 2, *Albrecht, supra. See also*, syl. pt. 2, *Carte v. Cline,* 200 W. Va. 162, 488 S.E.2d 437 (1997); syl. pt. 4, *Lowe, supra.* Therefore, it is possible to have a negative finding as to the first and second factors but still have a positive third finding if the requirements of the *Albrecht* test are met.

Here, the evidence shows that Mr. Fuller had the odor of an alcoholic beverage on his breath (A. Tr. at P. 28 and App. at P. 16); had bloodshot and glassy eyes (A. Tr. at P. 29 and App. at P. 16); was unsteady on his feet, staggered while walking to the roadside and staggered while standing (A. Tr. at P. 29 and App. at P. 16); had slurred speech and was slow to answer questions (App. at P. 16); failed the horizontal gaze nystagmus test because he demonstrated lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees (A. Tr. at P. 37 and App. at P. 16); failed the walk-and-turn test because he could not keep his balance during the instruction stage, stopped while walking, stepped off the line, made an improper turn, missed heel-to-toe, raised his arms to balance, and took the incorrect number of steps (A. Tr. at P. 38 and App. at P. 16); failed the one-legged stand test because he swayed while balancing, used his arms to balance, and put his foot down (A. Tr. at P. 39 and App. at P. 17); and failed a preliminary breath test with the result of .226%. (App. at P. 17.) Mr. Fuller admitted to drinking a bottle of tequila prior to driving. (App. at P. 19.) Therefore, even without considering any evidence of a secondary chemical test, the DMV presented more than sufficient evidence to show by a preponderance of the evidence that Mr. Fuller drove a motor vehicle in this state while

under the influence of alcohol. The third factor was met, and this alone is sufficient to support the revocation.

The fourth and last finding which the OAH must make pursuant to W. Va. Code § 17C-5A-2(f) (2010) is whether the "tests, if any, were administered in accordance with the provisions of this article and article five of this chapter." If there is no SCT, this factor is inapplicable. Further, if the SCT was not administered in accordance with the provisions of Articles 17C-5 and 17C-5A, then there is no prima facie presumption of the driver being under the influence of alcohol according to W. Va. Code § 17C-5-8 (2004). Again, the OAH need not make positive findings for all four subsections of W. Va. Code § 17C-5A-2(f) (2010) in order to uphold the DMV's order of revocation. This Court's previous holding in *Albrecht* supports that conclusion. Here, Mr. Fuller failed the SCT with a result of . 227%. (A. Tr. at P. 43 and App. at P. 14.) This finding alone supports the revocation of Mr. Fuller's license.

The OAH's and Mr. Fuller's implicit supposition that all of the required findings of W. Va. Code § 17C-5A-2(f) (2010) need to be made in the affirmative is not found in the statute and is not supported by Chapters 17C-5 and 17C-5A of the Code. If the OAH found that the officer did not have reasonable grounds to believe that the driver was DUI before administering the preliminary breath test, only then should a negative finding be made and appropriate consideration given the results. If the OAH found that the driver was not lawfully placed under arrest, only then should a negative finding be made and appropriate consideration given the results. There is absolutely no remedy anywhere in Chapters 17C-5 or 17C-5A of the Code which requires that the other evidence of DUI (e.g., odor of alcoholic beverage, slurred speech, glassy eyes, failure of the field sobriety test, etc.) be excluded. For a court to determine otherwise is contrary to law and tantamount to legislating

from the bench. Here, there was sufficient evidence that Mr. Fuller committed the offense of DUI, yet it was wrongly ignored by the OAH. The circuit court, however, correctly considered the evidence of DUI and answered the principal question pursuant to W. Va. Code § 17C-5A-2(e) (2010).

Moreover, W. Va. Code § 17C-5A-2(f) (2010) should be read *in pari materia* with the remainder of Chapter 17C of the Code. This Court has previously held that "[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." Syl. pt. 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). *See also*, *Clower v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 535, 539, 678 S.E.2d 41, 45 (2009).

A review of Chapter 17C of the W. Va. Code reveals that the entire Chapter pertains to "Traffic Regulations and Laws of the Road." In its review of administrative license revocation proceedings, this Court regularly analyzes both Article 5, "Serious Traffic Offenses," and Article 5A, "Administrative Procedures for Suspension and Revocation of Licenses for Driving Under the Influence of Alcohol, Controlled Substances or Drugs." For instance, W. Va. Code § 17C-5-8 (2004) addresses "Interpretation and Use of Chemical Test," and this Court has found that "W. Va. Code § 17C–5–8(a) (2004) (Repl.Vol.2009) allows the admission of evidence of a chemical analysis performed on a specimen that was collected within two hours of either the acts alleged or the time of the arrest." Syl. Pt. 5, *Sims v. Miller,* 227 W. Va. 395, 709 S.E.2d 750 (2011). *See also,* Syl. Pt. 4, *Dale v. Veltri*, 230 W. Va. 598, 741 S.E.2d 823 (2013).

Further, in Syl. Pt. 1 of *Moczek v. Bechtold,* 178 W. Va. 553, 363 S.E.2d 238 (1987), this Court found that W. Va. Code § 17C-5-9 (1983) does not require blood tests of drivers arrested for

DUI of alcohol and law enforcement officers are under no duty to inform DUI suspects of their right to blood tests in addition to the designated chemical test for intoxication; however, W. Va. Code § 17C-5-9 (1983) accords a driver arrested for DUI of alcohol a right to demand and receive a blood test within two hours of his arrest. *Sims*, *Veltri* and *Moczek* were all appeals of administrative license revocations (Article 5A) wherein this Court interpreted Article 5 as part of its review.

This review makes clear, therefore, that the various Articles of Chapter 17C of the West Virginia Code "relate to the same persons or things" and "have a common purpose" capable of being "regarded *in pari materia* to assure recognition and implementation of the legislative intent." Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). *See also*, *Clower*, *supra* at 540, 678 S.E.2d 46. As a result, Article 17C-5 must be read *in pari materia* with Article 17C-5A.

In addition, this Court must read W. Va. Code § 17C-5A-2(f) (2010) *in pari materia* with Chapter 17E of the Code. The DMV also enforces Chapter 17E, the Uniform Commercial Driver's License Act, and is required to consider Chapter 17C in its enforcement of Chapter 17E. Specifically, W. Va. Code § 17E-1-15 (2005) contains the implied consent requirements for commercial motor vehicle drivers and outlines the procedures for disqualification for driving with a blood alcohol concentration of four hundredths of one percent or more, by weight.

While this Court in dicta in *Clower*, *supra*, *Arthur, supra*, and *Dale v. Odum*, No. 12-1403 (2014 WL 641990, W. Va., Feb. 11, 2014) (per curium) has opined that a lawful arrest is based on the nature of the stop of the vehicle, that proposition is only found in the statutes governing commercial drivers. The Legislature addressed the stop of a vehicle in W. Va. Code § 17E-1-15(b) (2005):

> A test or tests may be administered at the direction of a law-enforcement officer, who after lawfully stopping or detaining the commercial motor vehicle driver, has reasonable cause to believe that driver was driving a commercial motor vehicle while having alcohol in his or her system.

If the Legislature had wanted to provide similar protection to non-commercial drivers, it would have included language about a lawful stop in W. Va. Code § 17C-5A-2(f) (2010) when it amended that statute in 2010. It did not. The Legislature did, however, tie in the implied consent requirements to the commercial driver statutes, referencing W. Va. Code § 17C-5-4 (2010) in W. Va. Code § 17E-1-15(a) (2005):

> A person who drives a commercial motor vehicle within this State is deemed to have given consent, subject to provisions of section four [§ 17C-5-4], article five, chapter seventeen-c of this code, to take a test or tests of that person's blood, breath or urine for the purpose of determining that person's alcohol concentration, or the presence of other drugs.

The commercial driver is under heightened scrutiny because he or she may be subject to license disqualification with a blood alcohol content of only .04% – which is below the .05% limit required to show *prima facie* evidence of intoxication pursuant to W. Va. Code § 17C-5-8(a)(2) (2004) for an operator's license. Therefore, the Legislature has provided commercial drivers with an extra level of protection by including the lawful stop or detention language in W. Va. Code § 17E-1-15(b) (2005). Again, this language could have been included in Article 5A, but it was not.

Clearly, the Legislature is capable of determining when a lawful stop or a lawful arrest is required. The Legislature placed the "stop" language in Chapter 17E: it did not do so in Chapter 17C. If lawful stop and detention [W. Va. Code § 17E-1-15(b) (2005)] meant the same as lawful arrest [W. Va. Code § 17C-5A-2(f) (2010)], then the Legislature would not have needed to put the lawful stop and detention language in W. Va. Code § 17E-1-15(b) (2005).

> "The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended." Syl. pt. 2, *Hall v. Baylous,* 109 W. Va. 1, 153 S.E. 293 (1930).

Butler v. Rutledge, 174 W. Va. 752, 753, 329 S.E.2d 118, 120 (1985). In *Clower*, *Arthur,* and *Odum*, this Court did not analyze the language in W. Va. Code § 17E-1-15(b) (2005), and this Court must read all of Chapter 17 *in pari materia.*

Requiring an affirmative finding a of valid stop as a predicate to lawful arrest, and lawful arrest as determinative of the license revocation, overreaches the intent of the statute.

> The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or did refuse to submit to the designated secondary chemical test, or did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight.

W. Va. Code § 17C-5A-2(e)(2010).

The record is replete with an abundance of evidence regarding the only issue that was before the OAH: whether Mr. Fuller drove a motor vehicle in the State of West Virginia while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having a blood alcohol concentration of fifteen hundredths of one percent (0.15%) or more, by weight. The OAH erred in ignoring this evidence, and the circuit court was correct in considering all of the evidence of drunk driving.

Mr. Fuller suggests that the OAH was not applying the criminal exclusionary rule in contravention of this Court's holdings 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) but was, instead, requiring that one of

the findings in W. Va. Code § 17C-5A-2(f) (2010) was made. As argued above, not all four findings must be made in the affirmative, and save for excluding the results of the SCT, there is no statutory remedy if the OAH deems the arrest unlawful; therefore, the OAH took it upon itself to create the remedy of excluding the other evidence of DUI. That, by definition, is the application of the criminal exclusionary rule.

The DMV further submits that the proper application of the judicially created criminal exclusionary rule requires more than a summary dismissal of any evidence obtained after the stop of the vehicle. If the OAH is to apply the exclusionary rule, there must be a motion to suppress the evidence; a hearing on the motion; and a separate order from the OAH explaining why each piece of evidence is being excluded. Even if some of the evidence of intoxication would be suppressed at the motion hearing, the prosecuting party would still have the opportunity to present other evidence of intoxication (e.g., testimony from witnesses such as a bartender or other occupants of the driver's vehicle, a bar tab, video tape from a bar or convenience store, etc.) None of these required procedures were followed here, nor should the administrative process include such criminal trial procedures. Such complex trial requirements would frustrate the "purpose of this State's administrative driver's license revocation procedures [which] 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).

Since the criminal exclusionary rule cannot be, and was not, properly applied to the instant matter, then the following unrebutted evidence of Mr. Fuller's intoxication, which was admitted into evidence but ignored by the OAH, must be considered: the odor of an alcoholic beverage on his breath; his bloodshot and glassy eyes; his unsteadiness on his feet, staggering while walking to the

roadside and staggering while standing; his slurred speech and slowness in answering questions; his failure of three field sobriety tests; his failure of the preliminary breath test with the result of .226% which constitutes aggravated DUI pursuant to W. Va. Code § 17C-5-2(e) (2010); and his admission to drinking a bottle of tequila prior to driving. All of that evidence answers the principal question in W. Va. Code § 17C-5A-2(e) (2010), which is whether the person drove a motor vehicle while under the influence of alcohol, drugs or controlled substances.

All documents in the DMV file (including the DUI Information Sheet and the intoximeter ticket) were required to be admitted into evidence, subject to rebuttal. West Virginia Code § 29A-5-2(b) (1998) specifically states:

> All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

See also, Crouch v. W. Va. Div. of Motor Vehicles, 219 W. Va. 70, 631 S.E.2d 628 (2006) (holding "Without a doubt, the Legislature enacted W. Va. Code § 29A–5–2(b) with the intent that it would operate to place into evidence in an administrative hearing [a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself..." W. Va. Code § 29A–5–2(b) (1998).

Indeed, admission of the type of materials identified in the statute is mandatory. *Lowe v. Cicchirillo,* 223 W. Va. 175, 672 S.E.2d 311 (2008) (holding that admission of hospital record showing motorist's blood alcohol content on night of accident was .33% that was part of DMV's records was mandatory); and *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010) (reiterating the holding in *Crouch, supra,* that the 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.) *See also*, *Dale v. Odum*, No. 12-1403 (W. Va., Feb. 11, 2014) (per curiam). This Court in *Crouch, supra*, also indicated that "the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy." *Crouch* at 76, 634, FN. 12. In this matter, the DUI Information Sheet and Intoximeter ticket were admitted into evidence, and Mr. Fuller did not testify; therefore, the evidence regarding the stop of the vehicle, the indicia of intoxication, and the results of the SCT remain wholly unrebutted.

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer,* 156 W. Va. 766, 197 S.E.2d 111 (1973). *See also,* syl. pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003). Accordingly, there is no legislatively or judicially created rule to exclude evidence or to dismiss a matter completely based on the stop of the vehicle. Courts cannot read more into the statute than what the Legislature wrote.

"At common law admissibility of evidence was not affected by the illegality of the means by which it was obtained." *State v. Stone,* 165 W. Va. 266, 269, 268 S.E.2d 50, 53 (1980), *overruled on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991). *See also Wardlaw v.*

Pickett, 303 U.S.App.D.C. 130, 135 1 F.3d 1297, 1302 (1993) (observing that the exclusionary rule did not exist at common law), *United States v. Rodriguez*, 596 F.2d 169, 173 n.9 (6th Cir. 1979) (same).

Being in derogation of the common law, W. Va. Code § 17C-5A-2(f) (2010) must be strictly construed, *see* Syl., *Kellar v. James,* 63 W. Va. 139, 59 S.E. 939 (1907), as must any statute that suppresses or restricts the admission of relevant and probative evidence and impedes the search for the truth. *See, e.g., State ex rel. U.S. Fidelity and Guar. Co. v. Canady,* 194 W. Va. 431, 438, 460 S.E.2d 677, 684 (1995) ("As the attorney-client privilege and the work product exception may result in the exclusion of evidence which is otherwise relevant and material and are antagonistic to the notion of the fullest disclosure of the facts, courts are obligated to strictly limit the privilege and exception to the purpose for which they exist."); *State ex rel. Allen v. Bedell,* 193 W. Va. 32, 41, 454 S.E.2d 77, 86 (1994) (citations omitted) ("'It is well recognized that a privilege may be created by statute. A statute granting a privilege is to be strictly construed so as "to avoid a construction that would suppress otherwise competent evidence."'"); *Pierce County v. Guillen*, 537 U.S. 129, 144-45, 123 S. Ct. 720, 730 (2003) ("We have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.")

Here, the West Virginia Code, when read *in pari materia*, outlines the remedy for a violation of W. Va. Code § 17C-5A-2(f) (2010). If the OAH finds that the officer did not have reasonable grounds to believe that the driver was driving while under the influence of alcohol, then a negative finding should be made and appropriate consideration given the results. If the OAH finds that the arrest was not lawful, then a negative finding should be made and appropriate consideration given the results of the SCT. If the OAH finds that the officer did not properly administer the SCT, then

a negative finding should be made and appropriate consideration given the results. West Virginia Code § 17C-5A-2(f) (2010) requires the OAH to make specific findings, but nowhere in the Code is there a requirement that all of those findings have to be made in the affirmative. Rather, the factors are considered on the way to answering the principal question: whether the person drove a motor vehicle while under the influence. The circuit court correctly answer the principal question below.

This Court recently held that

> Our decision in this matter is controlled by the statute that requires a specific finding by the hearing examiner 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 chemical test." W. Va. Code § 17C-5A-2(f) (2010).

Dale v. Arthur, No. 13-0374, 2014 WL 1272550 (W. Va. March 28, 2014)(memorandum decision). However, in *Arthur*, this Court made its determination based upon a negative finding of one of four factors in W. Va. Code § 17C-5A-2(f) (2010) while completing ignoring the principal question in W. Va. Code § 17C-5A-2(e) (2010), the statutory ***issues*** in W. Va. Code § 17C-5A-2(g-p) (2010), and the recision/modification provisions in W. Va. Code § 17C-5A-2(s) (2010).

The relevant issue in Mr. Fuller's case is found in W. Va. Code § 17C-5A-2(k)(1) (2010), which states in pertinent part:

> If in addition to finding by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substance or drugs, the Office of Administrative Hearings also finds by a preponderance of the evidence that the person did drive a motor vehicle while having an alcohol concentration in the person's blood of fifteen hundredths of one percent or more, by weight, the commissioner ***shall revoke*** the person's license for a period of forty-five days with an additional two hundred and seventy days of participation in the Motor Vehicle Alcohol Test and Lock Program in accordance with the provisions of section three-a, article five-a, chapter seventeen-c of this code... [Emphasis added.]

West Virginia Code § 17C-5A-2(s) (2010) states in pertinent part, "If the Office of Admin-

istrative Hearings finds to the contrary with respect to the above **issues**[,] the commissioner shall rescind his or her earlier order of revocation or shall reduce the order of revocation to the appropriate period of revocation under this section or section seven, article five of this chapter." [Emphasis added.] In an *in pari materia* reading, the language in W. Va. Code § 17C-5A-2(s) (2010) requires the OAH to rescind or modify the revocation if any of the issues in W. Va. Code § 17C-5A-2(g-p) (2010) are found in the negative; however, the direction given the OAH in subsection (s) is not tied to the direction given the OAH in subsection (f) as the **issues** and **findings** are separate and distinct.

For instance, if the OAH finds that the driver indeed was not under the influence of alcohol or drugs, then the revocation should be rescinded. However, if the OAH finds that the SCT was not administered properly and, therefore, cannot be considered, the result would not be to rescind the revocation for DUI but to modify the revocation to reflect a revocation for simple and not aggravated DUI. Similarly, if the OAH were to find that a driver charged with DUI causing bodily injury was not the cause of the injury, the result would be to modify the revocation to a simple DUI - not to rescind the DUI completely. As argued above, this Court has already spoken on this issue in *Albrecht*, *supra*, by holding that a SCT is not required to uphold a charge of DUI. In sum, one negative finding in W. Va. Code § 17C-5A-2(f) (2010) by the OAH does not vitiate the OAH's duty to answer the principal question in W. Va. Code § 17C-5A-2(e) (2010); to address the issues in W. Va. Code § 17C-5A-2(g-p) (2010); and to consider possible modification instead of recision as outlined in W. Va. Code § 17C-5A-2(s) (2010). The circuit court correctly analyzed the applicable statutes and evidence then answered the principal question at hearing.

C. The circuit court did not err in concluding the officer had reasonable suspicion to effect a stop of Mr. Fuller's vehicle.

The OAH committed clear error regarding the validity of the stop, and the circuit court corrected that error by concluding that, "The OAH's conclusion that the investigating officer lacked evidence of reasonable suspicion to believe that the driver was DUI before effecting a stop is in error." (App. at P. 4.) Here, Cpl. Bailes validly stopped Mr. Fuller's vehicle after he was informed by a fellow law enforcement officer, Cpl. Hammonds, that "a gold Honda had tried to avoid him – or evade him at the Cold Spot." (A. Tr. at P. 15.) Since Cpl. Bailes stopped Mr. Fuller's vehicle, it is Cpl. Bailes' reasonable suspicion which is relevant - not Cpl. Hammonds'. Cpl. Bailes was acting upon a radio call from another officer who stated that a vehicle had tried to evade him. Even if his investigation later proved that the facts as he believed them to be were wrong, the investigatory stop was not invalidated.

State v. Stuart, 192 W. Va. 428, 452 S.E.2d 886 (1994) is clearly distinguishable from the instant matter. *Stuart* was a criminal DUI case in which this Court determined that for a police officer to make an investigatory stop of a vehicle, the officer must have an articulable reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. In *Stuart*, this Court did not discuss anything more than the validity of the stop of Stuart's vehicle. This Court did not review the evidence of Stuart's DUI nor did it analyze the lawfulness of the arrest. However, this Court has determined that the validity of the stop is only relevant to the criminal proceeding. *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800, 806 (2012).

Further, because the *Stuart* case was criminal in nature, it would have been appropriate for this Court to discuss and apply the criminal exclusionary rule in that matter if the Court had not

found the stop to be lawful. However, this Court has already determined in both *Miller v. Toler,* 229 W. Va. 302, 729 S.E.2d 137 (2012) and *Smith, supra,* that the exclusionary rule is not applicable to an administrative license revocation. Accordingly, *Stuart* is neither instructive nor applicable to the case at bar, and the OAH erred in so relying. Even *Stuart* applicable here, as will be explained below, the stop in this case meets the *Stuart* standard.

Likewise, *Clower v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), is also distinguishable here. In *Clower*, a police officer was approximately two city blocks behind Clower's vehicle; saw Mr. Clower make a right turn without signaling; and arrested Clower for it even though no other traffic was affected by the turn. 223 W. Va. at 537, 678 S.E.2d at 43. The officer relied solely on W. Va. Code § 17C-8-9 (1951). This court held that § 17C-8-9 (1951) had to be read in conjunction with W. Va. Code § 17C-8-8(a) (1999) which only criminalized making an unsignaled turn if other traffic was affected. *Clower*, Syl. Pt. 3. In *Clower,* the officer did not stop the driver to investigate or because he mistakenly believed he was affected by the turn, but because the officer believed the conduct he observed was a crime, but no statute, ordinance, rule, or other official declaration of criminality existed. *Compare, State v. Hubble,* 146 N.M. 70, 78, 206 P.3d 579, 587 (2009) ("Deputy Francisco made no mistake about the applicable rules of law relating to the mandatory use of turn signal. Instead, he had to determine whether certain *facts* – the relative positions of the vehicles and their direction of travel – constituted a scenario where he may have been affected by Defendant's movement. Thus, any mistakes regarding these factual judgments would be classified as mistakes of fact and not mistakes of law.")

Clower was a simple recognition that a mistake of law can not give rise to a reasonable suspicion – that if the conduct an officer sees (or reasonably thinks he sees) is not criminalized by

a statute or ordinance or some other official declaration, then the conduct cannot give rise to reasonable suspicion. *See State v. Wright*, 791 N.W.2d 791, 797 n.2 (S.D. 2010) ("A majority of courts have held that an officer's mistake of law, no matter how reasonable, cannot provide objectively reasonable grounds for a stop.")

On the other hand, if the officer sees (or reasonably believes he sees) conduct which would create a reasonable suspicion of a crime, even if an investigation proves that the facts as he believed them are wrong, an investigatory stop is not invalidated. As long as the officer correctly understands the law, he may incorrectly judge the facts and still be acting constitutionally in initiating a stop.[4] A "contrary result would contravene the very purpose of the investigatory . . . stop which is to 'allow the officer to confirm or deny (his) suspicions by reasonable questioning, rather than forcing in each instance the 'all or nothing' choice between arrest and inaction[,]'" *United States v. Jimenez*, 602 F.2d 139, 143 (7th Cir. 1979) (quoting *United States v. Hickman*, 523 F.2d 323, 327 (9th Cir. 1975)), the very conundrum that *Terry* resolved. 392 U.S. 1, 17, 88 S. Ct. 1868, 1878 (1968). Even if mistaken in their belief as to what the facts actually were, "that the officers were factually mistaken did not render the stop illegal." *United States v. Williams*, 85 Fed. Appx. 341, 347 (4th Cir. 2004) (citation omitted). "[A]n objectively reasonable suspicion, even if found to be based on an imperfect perception of a given state of affairs, may justify a *Terry* stop[,]" *United States v. Coplin*, 463 F.3d 96, 102 (1st Cir. 2006), with "[g]reat deference . . . given to the judgment of trained law enforcement officers 'on the scene.'" *United States v. Chanthasouxat*, 342 F.3d 1271, 1276 (11th Cir. 2003). *Accord State v. Wimberly*, 988 So.2d 116, 119 (Fla. Dist. Ct. App.2008); *United States v. Fowler*,

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[4]In fact, practically all courts agree that mistakes of fact justify stops, the distinction being that the minority of courts go further and hold that mistakes of law also justify stops. *See State v. Wright*, 791 N.W.2d 791, 797 n.2 (S.D. 2010).

402 F. Supp.2d 1338, 1340 (D. Utah 2005). All that is required is "an objectively reasonable appraisal of the facts – not a meticulously accurate appraisal." *Coplin,* 463 F.3d 96 at 101. *See also United States v. Cashman,* 216 F.3d 582, 587 (7th Cir. 2000) ("Careful measurement after the fact might reveal that the crack stopped just shy of the threshold for 'excessive' cracking or damage; but the Fourth Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one.") See also, *State v. Ramos,* 755 So.2d 836 (Fla. 5th DCA 2000) ("All that is required for a valid vehicle stop is a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute.")

Even if the information upon which Cpl. Bailes acted was incorrect, he still personally witnessed behavior which rose to the level of reasonable suspicion to stop Mr. Fuller's vehicle. Cpl. Bailes testified that "We caught up with the vehicle as it was exiting the lot at a high rate of speed and took off left out of the lot towards the Pour House. . .He turned in the lot and went to the back of the lot and stopped, and we caught up with him and stopped him." (A. Tr. at PP. 16-17.) Certainly, a vehicle exiting the parking lot of one closed establishment at a high rate of speed at three o'clock in the morning then pulling into another closed establishment and pulling into the back of the lot rises to the level of reasonable suspicion to investigate further.

In footnote 3 of his *Petition for Appeal and Writ of Error*, Mr. Fuller acknowledges that Cpl. Bailes witnessed Mr. Fuller "exiting the parking lot at a high rate of speed. . ." Mr. Fuller then attempts to disparage Cpl. Bailes' testimony by arguing that "Ofc. Bailes never articulated how fast Petitioner was traveling, whether he was speeding, whether traffic was impacted, whether Petitioner's driving was illegal or, most importantly, whether that, instead of the order by Ofc. Hammonds, was the reason for the traffic stop." Mr. Fuller was represented by counsel at the

administrative hearing and had the opportunity to cross-examine Cpl. Bailes further about his testimony. He did not. (A. Tr. at PP. 21-23.) Further, Mr. Fuller was present at administrative hearing which he, himself, requested, yet he provided no rebuttal testimony whatsoever. (A. Tr. at P. 64.) In fact, other than raising speculative alternative reasons for why an intoxicated driver could have been pulling into one closed bar parking lot after another, Mr. Fuller has never offered an affirmative reason why he pulled into the Cold Spot parking lot only to exit out of the other side at a high rate of speed then pull into the Pour House parking lot and drive to the back of the same. Accordingly, Cpl. Bailes' testimony about responding to a fellow officer's call for assistance with an evading driver and his testimony about witnessing Mr. Fuller "exiting the parking lot at a high rate of speed" remains wholly unrebutted evidence which supports the stop of Mr. Fuller's vehicle.

VI. CONCLUSION

For the above-reasons, the *Final Order* of the circuit court should be upheld.

Respectfully submitted,

STEVEN O. DALE, ACTING COMMISSIONER, DIVISION OF MOTOR VEHICLES,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

Elaine L. Skorich, WVSB # 8097
Assistant Attorney General
DMV - Office of the Attorney General
P.O. Box 17200
Charleston, WV 25317-0010
elaine.l.skorich@wv.gov
(304) 926-3874

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0043

JOHN FULLER,

Petitioner,

v.

STEVEN O. DALE, Acting Commissioner
of the West Virginia Division of Motor Vehicles,

Respondent.

VII. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **REPLY BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 5th day of June, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit:*

David Pence, Esquire
Carter Zerbe & Associates, PLLC
P. O. Box 3667
Charleston, WV 25336

Elaine L. Skorich