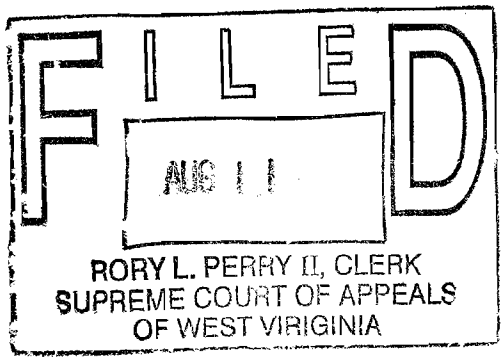
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34971

KENNETH E. REESE, JR.,

Appellee (Petitioner below),

v. No. 34971



JOSEPH CICCHIRILLO,
Commissioner, Department of Transportation,

Appellant (Respondent below).

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE THOMAS A. BEDELL, JUDGE

BRIEF OF APPELLEE, KENNETH E. REESE, JR.

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Appellant (Respondent below).

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE THOMAS A. BEDELL, JUDGE

BRIEF OF APPELLEE, KENNETH E. REESE, JR.

I. Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

The appellant, Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles, Department of Transportation (the commissioner was Joseph Cicchirillo when the administrative proceedings and judicial review took place), appeals the "Final Order Modifying License Revocation" entered on November 1, 2008, by the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, in an administrative appeal (judicial review) styled Kenneth E. Reese, Jr., Petitioner, v. Joseph Cicchirillo, Commissioner, Department of Transportation, Respondent, Petition No. 08-P-139.

Judge Bedell ordered the modification of the commissioner's order, which revoked the driver's license of the Appellee, Kenneth E. Reese, Jr., treated the revocation as a second offense and imposed an enhanced penalty. The validity of the revocation was not disputed, but the Circuit Court concluded that the Appellee's 2002 no contest plea was not a valid predicate offense to support an enhanced penalty. Therefore, Judge Bedell ordered that the commissioner limit the penalty to that for a first offense. He concluded that:

1. The petitioner's 2002 plea of nolo contendere did not trigger the automatic revocation of his license, because, prior to *Stump* and *Baker*[1], the D.M.V. interpreted existing law to allow the challenge of the administrative license revocation after a plea of nolo contendere, and only convictions that resulted in license suspension or revocation were deemed to be valid predicate offenses for the purpose of enhancement of penalties for subsequent offenses, per West Virginia Code §17C-5A-2(n).

2. As a result of the D.M.V.'s interpretation and application of the law prior to *Stump* and *Baker*, it did not follow the procedural steps set out in West Virginia Code §17C-5A-1a to revoke the petitioner's license and establish a "conviction" for purposes of enhancement of the penalty for subsequent offenses.

3. The Due Process clause of the West Virginia State Constitution applies to civil administrative license revocation proceedings, in recognition of the important property interest inherent in drivers licenses. *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978).

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[1] *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 733 (2005) and *State ex rel. Baker v. Bolyard*, 221 W.Va. 713, 656 S.E.2d 464 (2007)

4. The most basic requirement embodied in the concept of Due Process is that the government must follow the process or procedure set out by law.

5. Since the D.M.V. did not observe the procedure set out in West Virginia Code §17C-5A-1a to revoke the petitioner's license and establish a "conviction" after his 2002 nolo contendere plea, it violates Due Process for the D.M.V. to treat the petitioner's 2002 nolo plea as a "conviction" or "revocation" retroactively.

6. Although West Virginia Code §17C-5A-3a modified the law by adding prior "conviction[s]" as well as a prior "suspension[s]" or "revocation[s]," as a basis for enhanced penalties for subsequent offenses, West Virginia Code §17C-5A-3a does not define "conviction," nor does any other section of chapter 17C, article 5A define it, beyond the provisions of West Virginia Code §17C-5A-2, which only treat a "conviction" that results in a "suspension" or "revocation" as a valid predicate offense for enhancement of subsequent revocations. See, West Virginia Code §17C-5A-2(n).

7. The term "conviction" is broadly and generally defined as the "act or process of judicially finding someone guilty of a crime; the state of having been proved guilty." *Black's Law Dictionary*, as cited in n. 8 of the majority opinion of *Baker,* [see n. 1, above].

8. In the courts of this state, criminal defendants may enter and persist in asserting one (1) of three (3) pleas: "guilty," "not guilty" or "nolo contendere."

9. It is self-evident that a plea of "nolo contendere" is not a plea of "guilty," and by no twist of logic or rhetoric can a defendant who entered a plea of nolo contendere be said to have been found "guilty."

10. By extension of the definition of "conviction" used by the West Virginia Supreme Court of Appeals, a defendant who pleads nolo contendere was not necessarily "convicted" prior to the *Stump* and *Baker* decisions.

11. The *Stump* and *Baker* opinions do not address the retroactivity of the doctrine they adopted, and, although they did not explicitly overrule prior case law, it would be inequitable to apply the new principle of law adopted in those opinions retroactively to individuals who entered pleas of nolo contendere in criminal cases in reliance upon the prevailing interpretation of that time, later to learn that he is subject to enhanced penalties for subsequent offenses based on a change in the law. *See*, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 347, 256 S.E.2d 879, 887 (1979) (discussed and applied recently in *Caperton v. A.T. Massey Coal Company, Inc.*, ___ S.E.2d. ___, 2008 WL 918444 (W.Va.)).

12. The petitioner's 2002 plea of nolo contendere is not a valid predicate offense for the purpose of enhancing the revocation for his 2008 offense because the D.M.V. failed to follow the procedure prescribed by law to establish a "conviction" or "revocation" with respect to his 2002 plea, and it is inequitable to apply the new principle of law adopted in *Stump* and *Baker* retroactively.

Based on the Circuit Court's findings and conclusions, it was ordered that Commissioner of the Department of Transportation modify the revocation of the appellee's license to reflect the period of time applicable to a first offense, along with the corresponding requirements for participation in the alcohol test and lock program and the safety and treatment programs and the payment of all applicable fines, fees and costs.

II. Statement of the Facts of the Case

On May 31, 2008, the appellee was arrested and charged with D.U.I. in Harrison County. He subsequently entered a plea of "Nolo Contendere" in the Magistrate Court. He was represented by counsel, and he was advised regarding the effect of entering a no contest plea. He fully intended to waive his right to contest guilt in magistrate court or before the DMV - on the 2008 charge. He understood that the latest iteration on this topic from the West Virginia Supreme Court, "clarify[ing]" the effect of no contest pleas in D.U.I. cases, *State ex rel. Baker v. Bolyard*, 221 W.Va. 713, 718, 656 S.E.2d 464, 468 (2007), stands for the proposition that a no contest plea triggers the mandatory, auto-revocation procedure of §17C-5A-1a and functions as a waiver of any further procedure to challenge guilt, either in the magistrate court or in the civil administrative license revocation proceeding.

He was previously charged with a 1st D.U.I., in 2002. He also entered a no contest plea in magistrate court shortly after his arrest, in that case. However, under the interpretation of the law prevailing at that time, he requested and was granted an administrative hearing, after which the charge was dismissed. The Magistrate Court forwarded the Criminal Case History and other documents, constituting the entire transcript of the case to the DMV. Nevertheless, the DMV took no further action.

After entering his 2008 no contest plea, the appellee expected his license to be revoked, but only for the period of time and under the terms applicable to a first offense, per West Virginia Code §17C-5A-2 and §17C-5A-3a. By Order of Revocation, dated August 8, 2008, the DMV notified him that his license would be revoked for one (1) year followed by completion of the alcohol test and lock program and the Safety and

treatment program, which is the penalty for a second offense. The Appellee petitioned the circuit court, which modified the DMV's order, as described above. The DMV then filed this appeal.

III. Question Presented

WHETHER THE CIRCUIT COURT ERRED BY RULING THAT THE APPELLEE'S 2002 NO CONTEST PLEA TO 1ST DUI IN MAGISTRATE COURT AND DISMISSAL OF THE ADMINISTRATIVE LICENSE REVOCATION PROCEEDING WAS NOT A VALID PREDICATE TO ENHANCE THE ADMINISTRATIVE PENALTY FOR APPELLEE'S LICENSE REVOCATION ON THE 2008 D.U.I.

IV. ARGUMENT, POINTS AND AUTHORITIES RELIED UPON AND RELIEF SOUGHT

A. Statutory Framework

Chapter 17A, article 5A of the West Virginia Code sets out the procedures applicable to the civil administrative license revocation process. It also specifies penalties, graduated in three stages of severity for first, second or third and subsequent "conviction," "suspension" or revocation." The "enhanced" penalties (as they are often called) for second and third or subsequent offenses are based on a valid current "conviction," "suspension" or "revocation" plus proof of a prior "conviction," "suspension" or "revocation" (referred to herein as the "predicate" offense).

West Virginia Code §17C-5A-1a states:

> If a person is convicted for an offense defined in section two, article five of this chapter . . . because the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or the combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, . . . and if the person does not act to appeal the

conviction within the time periods described in subsection (b) of this section, the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section (underlining emphasis added).

In subsection (e) to West Virginia Code §17C-5A-1a it defines "conviction" by stating:

> For the purposes of this section, a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury (underlining emphasis added).

Regarding a second offense D.U.I., West Virginia Code §17C-5A-2(j) states:

> [I]f the commissioner has previously suspended or revoked the persons license under the provisions of this section or section one [§17C-5A-1] of this article within the ten years immediately preceding the date of arrest, the revocation shall be ten years.

West Virginia Code §17C-5A-2(n) defines "previous suspensions or revocations" as follows:

> For purposes of this section, where reference is made to previous suspensions or revocations under this section, the following types of criminal convictions or administrative suspensions or revocations shall also be regarded as suspensions or revocations under this article or section one [17C-5A-1] of this article:
>
> (1) Any administrative revocation under the provisions of the prior enactment of this section for conduct which occurred within the ten years immediately preceding the date of the arrest;
> (2) Any suspension or revocation on the basis of a conviction under a municipal ordinance of another state or a statute of the United States or of any other state of an offense which has the same elements as an offense described in section two [17C-5A-2], article 5 of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest; or
> (3) Any revocation under the provisions of section seven [17C-5A-7], article 5 of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest.

West Virginia Code §17C-5A-2(n) includes "criminal convictions" as valid predicates for mandatory revocation, but the enumerated examples make it clear that "convictions" are applicable only when they result in a suspension or revocation, *see* §17C-5A-2(n)(2). Logically, this could only refer to "guilty" pleas which trigger the mandatory, auto-revocation provisions of §17C-5A-1a. Before 2005, in the case of a no contest plea, when there were further proceedings before the DMV, even when it did result in suspension or revocation, it wasn't "on the basis of a conviction," it was on the basis of the evidence presented in the administrative proceeding.

In this case, it is indisputable that the commissioner has not previously suspended or revoked the appellee's license within the ten years immediately preceding the date of arrest. Thus, under §17C-5A-2, there is no valid predicate for enhancing the penalty imposed with regard to the administrative license revocation for his 2008 revocation.

Moreover, as a matter of Due Process, it is clear that the Magistrate Court Clerk sent a transcript of the judgment (see attached copy) to the DMV after the appellee's 2002 plea of no contest, as required by §17C-5A-1. It is equally clear that the Commissioner, in accordance with West Virginia Code §17C-5A-1a(c), examined the entire transcript of appellee's court file, and then determined, in accordance with its own policy and interpretation of the law prevailing at that time, the appellee was not "convicted," for the purpose of triggering the mandatory, auto-revocation procedure. The commissioner, therefore, did not make and enter an order revoking appellee's license. On the contrary the commissioner entered an order dismissing the administrative proceeding (see attached December 3, 2002 "Final Order") and took no further action with respect to the appellee's license.

Further, in 2002, the commissioner did not forward an order to appellee containing the reasons for the revocation and the revocation periods as provided in West Virginia Code §17C-5A-1a(c), and the commissioner did not advise the appellee of procedures for requesting a hearing in accordance with the provisions of that section. That section further provides that "no revocation or suspension shall become effective until ten days after receipt of a copy of this order." Therefore, no "conviction," "revocation" or "suspension" was established, because none of the required procedures were performed by the commissioner, in accordance with the law, policy, tradition and universal understanding of that era.

B. The Effect and Relevance of *Stump*, C.S.R. §91-5-14.1 and *Baker*

In 2005, the case of *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 733 (2005) "came flying out of left field," as Justice Starcher so aptly put it, dissenting in *State ex rel. Baker v. Bolyard*, 221 W.Va. 713, 656 S.E.2d 464 (2007). Prior to that, a no contest plea did not trigger the mandatory, auto-revocation provisions of West Virginia Code §17C-5A-1a. The right to challenge the civil administrative license revocation proceeding could be preserved by pleading nolo contendere. In *Stump*, Justice Benjamin, writing for the majority, held that "[i]n giving effect to the plain language contained within W. Va. Code § 17C-5A-1a(e), a person pleading guilty or found guilty by a court or jury of driving under the influence of alcohol, controlled substances, or drugs, shall be considered "convicted," and the Commissioner has a mandatory duty to revoke the person's license to operate a motor vehicle in the State of West Virginia as provided by W. Va. Code § 17C-5A-1a(a). The Court held that the defendant's no contest plea was sufficient to establish a "conviction," based on the

§17C-5A-1a(e), although section (e) clearly requires a "guilty" plea - not a no contest plea - or a finding of guilt by a court (bench trial) or jury (jury trial). Without explicitly saying so, the decision seemed to be based on the faulty logic that a no contest plea necessarily results in the defendant being "found" guilty by the judge. Ergo, a no contest plea has the same effect as a "guilty" plea. The term "conviction" is used loosely in many settings, and the tortured development of the doctrine in this case is no exception, in spite of the concrete definition cited in footnote 8 of *Baker* and relied upon by the Circuit Court as part of the logic by which it reached its decision.

After *Stump,* in May of 2006, an attempt was made to set the record straight by the promulgation of W.Va. C.S.R. §91-5-14.1, which stated:

> For the purposes of this rule, a plea of nolo contendere stands as neither an admission of guilt nor a conviction for administrative revocation proceedings.

Bloodied but unbowed, Justice Benjamin, authored the majority opinion (again) in *State ex rel. Baker,* "clarif[ying]" (*Id.* at 468) the holding of *Stump,* as the final and unassailable (even against the attempted overriding act of another branch of government) interpretation of the impact of no contest pleas in D.U.I. cases.

Stump is what it is, and *Baker* is what it is, but neither of them explicitly deal with the effect of a pre-*Stump* no contest plea as a predicate for a post-*Baker* license revocation. Nevertheless, after the appellee's 2008 plea, the DMV, assumed that the appellee's 2002 no contest plea resulted in a "conviction." Without notice to the appellee, without holding a hearing, and without following the statutorily required "process", the DMV arbitrarily treated the 2002 no contest plea in magistrate court as a

valid predicate offense and enhanced the appellee's revocation for the 2008 offense.

C. Further legislative revision:

Coincidentally, in 2005, long after the Appellee's 2002 no contest plea, the legislature tweaked article 5A for the umpteenth time by establishing mandatory participation in the Alcohol Test and Lock Program. West Virginia Code §17C-5A-3a was revised to include the following language:

> Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under . . . [§17C-5-2] or the person's license is revoked under . . . [§17C-5A-2] . . . and the person was previously either ***convicted*** or his or her license was revoked under any provision cited in this subsection within the past ten years. (emphasis added)

The term "convicted" was not defined within §17C-5A-3a, but it is easy to deduce that the legislature did not mean to change the treatment of no contest pleas based on this language, since the amendment to W.Va. C.S.R.§91-5-14.1 became effective later (in May 2006), explaining that a no contest plea did not stand as an admission of guilt or a "conviction" for administrative revocation proceedings.

In spite of this legislative history, the DMV has now adopted an expansive interpretation of the inclusion of the term "convicted" in §17C-5A-3a to mean that the *Stump/Baker* doctrine should be applied retroactively to the Appellee's 2002 no contest plea. Their position ignores the fact that pre-*Stump* no contest pleas were made in reliance upon existing law that contradicted the later *Stump/Baker* interpretation and the fact that the DMV did not follow the "process" required to establish a "conviction" or "revocation" at the time of the appellee's 2002 no contest plea.

Once again, the DMV is utilizing the broadest and loosest possible definition of the term "convicted," in spite of the one cited in footnote 8 of *State ex rel. Baker v. Bolyard*, 656 S.E.2d at 468. Regardless of what the broader definition of the term may be, the DMV seeks to define the term in complete isolation from its use within the context and framework of the statutory scheme being construed. This is simply not fair. Changing the rules more than five (5) years after the appellee was called upon to elect how to handle the 2002 charge violates the most basic notion of fundamental fairness inherent in the ordered process of liberty which is enshrined in our state and federal constitutions under the concept of *Due Process. See,* U.S. Const., amend. V and IV; W.Va. Const. art. III, sec. 10.

D. Due Process/Fundamental Fairness

There is nothing in *Stump*, *Baker*, or §17C-5A-3a that requires the retroactive application of the *Stump/Baker* analysis to pre-*Stump* cases, nor, indeed, is it possible to do so, since, as has been pointed out, the DMV did not complete the procedural steps it was - and still is -required to follow to establish a conviction, suspension or revocation.

The commissioner's failure to follow the "process" required by §17C-5A-1a(c) undermines the legal fiction that a five (5) year old, pre-*Stump*, pre-*Baker,* no contest plea retroactively and spontaneously establishes a conviction, suspension or revocation, which now constitutes a valid predicate for enhanced penalties under §17C-5A-2 or §17C-5A-3a.

Although the *Ex Post Facto* principle of constitutional law has been held inapplicable to civil administrative license revocation process, *Jones v. Sidiropolis*, 183

W.Va. 37, 393 S.E.2d 675 (1990), the broader construct of *Due Process* has been held to be applicable, *see, Petry v. Stump*, 219 W.Va. 197, 632 S.E.2d 353 (2006), *citing Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978), in recognition of the important property interest inherent in drivers licenses. *See also* Syl. pt. 1, *Abshire v. Cline*, 193 W.Va. 180, 455 S.E.2d 549 (1995) ("A driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution.").

At the very least, Due Process must mean that the government has to follow its own statutorily required procedure. If the appellee had neglected to follow the procedure of timely requesting an administrative hearing after his 2002 no contest plea, he could not turn the clock back now to present a defense. The government should be forbidden to turn back the clock and change the outcome of the contest to suit its present purposes.

The commissioner attempts to bolster his argument by citing dicta from the case of *University of West Virginia v. Fox*, 197 W.Va. 91, 474 S.E.2d 91 (1996), which "foreshadowed" (and thus, by logical extension, *forewarned*) the appellees of the effect of their no contest pleas, according to the appellant's reasoning. In that decision, the majority held, and Justice Albright explained with great clarity, that a no contest plea is not even admissible in an administrative hearing to prove that the subject committed the particular acts which constitute the elements of the charged offense. This evidentiary provision is based on generations of jurisprudence establishing the legitimacy and utility of the no contest plea. A no contest plea allows the efficient disposition of typically minor offenses by allowing a defendant to simply not contest the charge. The potential

penalties are the same, but, in return for the concession, the accused may plead nolo contendere with the expectation that the plea may not be used against him in any subsequent proceeding as evidence that he actually did commit the charged conduct. Justice Albright stuck his neck out by saying that there "**might**," (bold emphasis added) [I repeat] "**might**" (bold emphasis added again) be an exception in the case of laws that provide enhanced penalty for second and subsequent offenses, when the predicate offense is established by a prior "conviction." *Id.*, at p. 96. Even in Justice Albright's guarded hypothetical application of a no contest plea, the predicate offense is supported by a "judgement of conviction." In this case, there was no "judgement of conviction." The words convict, convicted or conviction were never used in any documentation of the history of the appellee's 2002 nolo plea, either in the magistrate court or the DMV record.

Further, the respondent relies upon the United States Supreme Court decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) (cited in *AT&T v. Hulteen*, 129 S.Ct. 1962 (2009)) for the proposition that the judicial construction of a statute is an authoritative statement of what the statute meant before, as well as after, the decision of the case giving rise to the construction. This does not strengthen the Appellant's case, insofar as he relies upon the application of West Virginia Code §17C-5A-3a, which includes "convictions" as a basis for enhanced penalties, since that language was only adopted in 2005, and nothing within the statute makes it retroactive and no court opinion has explicitly stated that the 2005 provision has retroactive effect. That is not the "plain language" that Justice Benjamin spoke of. He based his analysis on his reading of §17C-5A-1a(a) and (e).

The Appellant further attempts to bolster this argument by the disingenuous concession that the DMV misinterpreted and misapplied the statute for many years before *Stump* and *Baker* ("an agency has no power to ignore statutory language" etc., *Appellant's Brief*, p. 13). The concession is made in an attempt to undercut any weight or strength that the Appellee's due process and fundamental fairness arguments gain by pointing to his reasonable reliance on the policy, tradition and interpretation of the DMV, which jumped on the bandwagon and began "correctly" interpreting the statutory scheme after *Stump* and *Baker*.

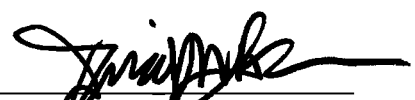
This appellee concedes that Justice Benjamin, without fulling explaining his rationale in *Stump*, held that a no contest plea was a "conviction," and he clarified the court's holding in *Baker*. This appellee does not agree that the "plain language" of §17C-5A-1a compels the interpretation adopted in *Stump*. In fact, this appellee believes the "plain language" compels the opposite interpretation and the opposite result and that a straightforward reversal would be warranted, although that is not likely to happen. Nevertheless, this appellee concedes that after *Stump* and *Baker* it is undisputed that a no contest plea is considered a "conviction" and the license will be revoked. But the new doctrine is a two-edged sword, and Justice Benjamin went on to explain that the ultimate effect of this interpretation was that the "conviction" . . . "triggered" the DMV's mandatory duty to revoke the license of the defendant who was "found guilty by a court" based on a no contest plea. In this case, the DMV failed to fulfill its duty and follow the procedure "triggered" by the purported "conviction." It failed to follow the process and procedure required by law to suspend or revoke the appellee's driving privileges or to notify him of any adverse effect due to the no contest plea. So, even if we assume that

Stump and Baker merely declared the proper interpretation of the law and that interpretation was effective from the inception of the law, the effect of the law has always been to impose a duty upon the DMV, which was not fulfilled in this case, as well as to impose an enhanced penalty on convicted, revoked or suspended drunk drivers if the DMV fulfilled that duty.

V. Conclusion

Consequently, the Appellee asks the Court to uphold the Circuit Court's decision requiring the commissioner to modify his order of revocation to specify the appropriate time and terms applicable to a first offense, pursuant to West Virginia Code §17C-5A-2 or §17C-5A-3a(c) (for a person whose underlying conviction is a first D.U.I. (§17C-5-2(d)), as in this case, the minimum period of revocation is fifteen (15) days and the minimum period of the use of the ignition interlock device is one hundred and twenty-five (125) days, subject to the provisions regarding the safety and treatment program).

Dated this 10th day of August, 2009.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KENNETH E. REESE, JR.,

Appellee (Petitioner below),

v. No. 34971

JOSEPH CICCHIRILLO,
Commissioner, Department of Transportation,

Appellant (Respondent below).

CERTIFICATE OF SERVICE

I, David W. Frame, certify that the foregoing "BRIEF OF APPELLEE, KENNETH E. REESE, JR." was served on the Appellant, by mailing it to the Commissioner in care of his attorney, as addressed below, on the 10th day of August, 2009 via the U.S. Postal Service.

Janet James, Assistant Attorney General
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