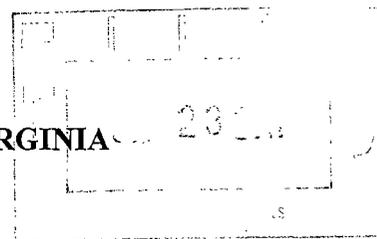


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0891



**JOE E. MILLER, Commissioner,
Division of Motor Vehicles,**

Respondent below, Petitioner,

v.

MARK THOMPSON,

Petitioner below, Respondent.

BRIEF OF PETITIONER

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I. TABLE OF CONTENTS

	<u>Page</u>
(I) ASSIGNMENTS OF ERROR	1
The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a DUI offense that is preceded by another DUI offense or administrative revocation is not a conviction	1
(II) STATEMENT OF THE CASE	1
(III) SUMMARY OF ARGUMENT	2
The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a DUI offense that is preceded by another DUI offense or administrative revocation is not a conviction.	2
(IV) STATEMENT REGARDING ORAL ARGUMENT AND DECISION	3
(V) ARGUMENT	3
The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a DUI offense preceded by another DUI offense or administrative license revocation is not a conviction	3
VI. CONCLUSION	9

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>Appalachian Power Co. v. State Tax Department</u> , 195 W. Va. 573, 466 S.E.2d 424 (1995) . . .	4
<u>Cisneros v. Alpine Ridge Grp.</u> , 508 U.S. 10, 113 S. Ct. 1898 (1993)	6
<u>Compare State ex rel. Baker v. Bolyard</u> , 221 W. Va. 713, 656 S.E.2d 464 (2007)	4
<u>Cowie v. Roberts</u> , 173 W. Va. 64, 312 S.E.2d 35 (1984)	4
<u>DeRosa v. Bell</u> , 24 F. Supp. 2d 252 (D. Conn. 1998)	4
<u>Harrison v. Commissioner</u> , 226 W. Va. 23, 697 S.E.2d 59 (2010)	8
<u>Kump v. McDonald</u> , 64 W. Va. 323, 61 S.E. 909 (1908)	3
<u>Lanahan v. Chi Psi Fraternity</u> , 175 P.3d 97 (Colo. 2008)	6
<u>Martin v. Randolph County Board of Ed.</u> , 195 W. Va. 297, 465 S.E.2d 399 (1995)	8
<u>Mission Critical Solutions v. United States</u> , 91 Fed. Cl. 386 (2010)	7
<u>Mitchell v. Wheeling</u> , 202 W. Va. 85, 502 S.E.2d 182 (1998)	5
<u>National Coalition to Save Our Mall v. Norton</u> , 161 F. Supp. 2d 14 (D.D.C. 2001)	8
<u>Parkins v. Londeree</u> , 146 W. Va. 1051, 124 S.E.2d 471 (1962)	5
<u>People v. Mitchell</u> , 15 N.Y.3d 93, 931 N.E.2d 84 (2010)	6
<u>Pleasant Hills Construction Co., Inc. v. Public Auditorium Authority</u> , 567 Pa. 38, 784 A.2d 1277 (2001)	6
<u>Purkey v. American Home Assur. Co.</u> , 173 S.W.3d 703 (Tenn. 2005)	8
<u>Shoshone Indian Tribe v. United States</u> , 364 F.3d 1339 (Fed. Cir.2004)	7
<u>Smith v. State Work. Comp. Commissioner</u> , 159 W. Va. 108, 219 S.E.2d 361 (1975)	5

<u>Souvannarath v. Hadden</u> , 95 Cal. App. 4th 1115, 116 Cal. Rptr. 2d 7 (2002)	7
<u>Springs v. Stone</u> , 362 F. Supp. 2d 686 (E.D. Va.2005)	6
<u>Stanley v. Department of Tax and Rev.</u> , 217 W. Va. 65, 614 S.E.2d 712 (2005)	5
<u>State ex rel. Affiliated Construction Trades Foundation v. Vieweg</u> , 205 W. Va. 687, 520 S.E.2d 854 (1999)	4
<u>State ex rel. Allstate Insurance Co. v. Union PSD</u> , 151 W. Va. 207, 151 S.E.2d 102 (1966) ...	4
<u>State ex rel. Burdette v. Zakaib</u> , 224 W. Va. 325, 685 S.E.2d 903 (2009)	4
<u>State ex rel. Kucera v. City of Wheeling</u> , 153 W. Va. 538, 170 S.E.2d 367 (1969)	4
<u>State ex rel. Miller v. Reed</u> , 203 W. Va. 673, 510 S.E.2d 507 (1998)	4
<u>State ex rel. Noce v. Blankenship</u> , 93 W. Va. 273, 116 S.E. 524 (1923)	3
<u>State ex rel. Potter v. Office of Disciplinary Counsel</u> , 226 W. Va. 1, 697 S.E.2d 37 (2010) ...	3
<u>State ex rel. Richey v. Hill</u> , 216 W. Va. 155, 603 S.E.2d 177 (2004)	4
<u>State v. Campbell</u> , 877 So. 2d 112 (La. 2004)	7
<u>State v. Elder</u> , 152 W. Va. 571, 165 S.E.2d 108 (1968)	5
<u>State v. Lynch</u> , 137 Vt. 607, 409 A.2d 1001 (1979)	7
<u>State v. Lyons</u> , 951 S.W.2d 584 (Mo. 1997)	7
<u>State v. Mid-South Pavers, Inc.</u> , 246 S.W.3d 711 (Tex. App. 2007)	7
<u>Staten v. Dean</u> , 195 W. Va. 57, 464 S.E.2d 576 (1995)	4
<u>Town of Beacon Falls v. Towers Golde, LLC, No. CV096001345S</u> , 2010 WL 2365849 (Conn. Super. Ct. May 6, 2010)	6
<u>Velez v. Commissioner of Correction</u> , 250 Conn. 536, 738 A.2d 604 (1999)	6

STATUTES:

W. Va. Code § 17C-5A-1(e) 5

W. Va. Code § 17C-5A-1a(e) 2

W. Va. Code § 17C-5A-3a 2, 3

W. Va. Code § 17C-5A-3a(d) 2, 3,5,7,8

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MARK THOMPSON,

Petitioner below, Respondent.

BRIEF OF PETITIONER

(I)

ASSIGNMENTS OF ERROR

The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a DUI offense that is preceded by another DUI offense or administrative revocation is not a conviction.

(II)

STATEMENT OF THE CASE

Mr. Thompson was arrested for DUI. J.A. at 48. The Commissioner revoked his license and Mr. Thompson sought an administrative hearing before the Office of Administrative Hearings. Ap'x at 61-62. Mr. Thompson had a previous DUI conviction and revocation. J.A. at 24. Pending the hearing, he pled nolo contendere to first offense DUI. J.A. at 1. The Commissioner automatically revoked the Respondent's license. J.A. at 84. The OAH cancelled the hearing due to the plea. J.A. at 84.

Mr. Thompson filed a Petition for Prohibition with the Circuit Court of Kanawha County. J.A. at 5-12. This Petition was not accompanied by a summons and was served by counsel upon the

Commissioner by regular mail. *See id.* The Commissioner responded by arguing that (1) the Rules of Civil Procedure apply to extraordinary remedy proceedings which requires issuance of a summons and proper service to bring the defendant within the jurisdiction of the court; (2) that Prohibition did not lie as this was not a quasi-judicial proceeding; and (3) W. Va. Code § 17C-5A-3a(d) required the revocation. J.A. at 15-20. The Commissioner waived personal jurisdiction so as to allow for a judgment and the Circuit Court of Kanawha County found that a nolo contendere plea did not count as a conviction and found that Mr. Thompson was entitled to a ruling on the merits of his driver's license revocation. J.A. at 3. This appeal timely followed.

(III)

SUMMARY OF ARGUMENT

The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a DUI offense that is preceded by another DUI offense or administrative revocation is not a conviction.

West Virginia Code § 17C-5A-1a(e), deals with automatic license revocations for convictions without the necessity or right to a hearing, "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. A plea of no contest does not constitute a conviction for purposes of this section except where the person holds a commercial drivers' license or operates a commercial vehicle." The Respondent, though, has been convicted of a prior DUI offense. J.A. at 54-55. Under W. Va. Code § 17C-5A-3a:

(d) Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under section two, article five of this chapter or the person's license is revoked under section two of this article or section seven, article five of this chapter 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. The minimum revocation period for a person required to participate in the program under this subsection is one year and the minimum period for the use of the ignition interlock device is two years, except that

the minimum revocation period for a person required to participate because of a violation of subsection (n), section two of this article or subsection (I), section two, article five of this chapter is two months and the minimum period of participation is one year.

Under W. Va. Code § 17C-5A-3a(d) a nolo contendere plea counts toward revocation and the Petitioner has erred in his reading of the Code.

(IV)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary; the facts and legal argument are adequately presented in the briefs and appeal record, and the decisional process will not be significantly aided by oral argument.

(V)

ARGUMENT

The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a DUI offense preceded by another DUI offense or administrative license revocation is not a conviction.

The circuit court granted the driver extraordinary relief in this case sounding in Prohibition. This is in error. Prohibition extends only to prevent usurpation of power by a judicial or quasi-judicial tribunal and does not extend to ministerial or executive acts. “Prohibition lies only to inferior courts, boards, officers, or tribunals having and exercising judicial or quasi judicial powers; it does not lie to mere ministerial or executive officers alone who do not or are not exercising judicial or quasi judicial powers.” Syl. Pt. 2, *State ex rel. Noce v. Blankenship*, 93 W. Va. 273, 116 S.E. 524 (1923). Where a party defendant “is not a judicial or quasi judicial tribunal or body . . . no writ of prohibition lies against it.” *Kump v. McDonald*, 64 W. Va. 323, 61 S.E. 909, 910 (1908). *See also State ex rel. Potter v. Office of Disciplinary Counsel*, 226 W. Va. 1, 2 n.1, 697 S.E.2d 37, 38 n.1

(2010) (per curiam). The act of revoking a license is not quasi-judicial, but ministerial; it becomes quasi-judicial only after initiation of adversarial proceedings. *DeRosa v. Bell*, 24 F. Supp.2d 252, 256 (D. Conn. 1998). Compare *State ex rel. Baker v. Bolyard*, 221 W. Va. 713, 718, 656 S.E.2d 464, 469 (2007) and *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998) with *Cowie v. Roberts*, 173 W. Va. 64, 67, 312 S.E.2d 35, 38 (1984). If Mr. Thompson is entitled to pursue relief, it must be through mandamus which compels an agency to perform a non-discretionary duty, Syl. Pt. 1, *State ex rel. Allstate Ins. Co. v. Union PSD*, 151 W. Va. 207, 151 S.E.2d 102 (1966), which is actually the relief the circuit court ordered. J.A. at 3 (“[T]his Court hereby ORDERS Respondent to hold an administrative hearing on Petitioner’s license.”). However, even if pled as a prohibition, this Court may construe the pleading as one for mandamus. *State ex rel. Affiliated Constr. Trades Foundation v. Vieweg*, 205 W. Va. 687, 692, 520 S.E.2d 854, 859 (1999) (per curiam).

“A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). A failure to meet any one of the three elements is fatal to the request for relief. *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 331, 685 S.E.2d 903, 909 (2009); *State ex rel. Richey v. Hill*, 216 W. Va. 155, 160, 603 S.E.2d 177, 182 (2004). “The standard of appellate review of a circuit court’s order granting relief through the extraordinary writ of mandamus is de novo.” Syl. Pt. 1, *Staten v. Dean*, 195 W. Va. 57, 464 S.E.2d 576 (1995). Further, “[i]nterpreting a statute . . . presents a purely legal question subject to *de novo* review.” Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

In interpreting any statute, the Court's obligation is to determine legislative intent. Syl. Pt. 1, *Smith v. State Work. Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). Legislative intent cannot be gleaned in isolation. "In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety." Syl. Pt. 1, *Parkins v. Londeree*, 146 W. Va. 1051, 124 S.E.2d 471 (1962). Thus, "[t]he general rule for interpreting differing statutory sections is that courts should attempt to harmonize them, if possible." *Stanley v. Dep't of Tax and Rev.*, 217 W. Va. 65, 71, 614 S.E.2d 712, 718 (2005). "[N]o part of a statute is to be treated as meaningless and we must give significance and effect to every section, clause, word or part of a statute as well as to the statute as a whole." *Mitchell v. Wheeling*, 202 W. Va. 85, 88, 502 S.E.2d 182, 185 (1998).

West Virginia Code § 17C-5A-1(e), deals with automatic license revocations for convictions,

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. A plea of no contest does not constitute a conviction for purposes of this section except where the person holds a commercial drivers' license or operates a commercial vehicle.

The driver, though, is a second offender. J.A. at 54-55. Under W. Va. § 17C-5A-3a(d):

(d) Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under section two, article five of this chapter or the person's license is revoked under section two of this article or section seven, article five of this chapter 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. The minimum revocation period for a person

required to participate in the program under this subsection is one year and the minimum period for the use of the ignition interlock device is two years, except that the minimum revocation period for a person required to participate because of a violation of subsection (n), section two of this article or subsection (I), section two, article five of this chapter is two months and the minimum period of participation is one year.

“[T]his appeal turns on the meaning of a single statutory phrase,” *Pleasant Hills Constr. Co., Inc. v. Public Auditorium Auth.*, 567 Pa. 38, 44, 784 A.2d 1277, 1281 (2001), *i.e.*, “[n]otwithstanding any provision of the code to the contrary[.]” Yet the circuit court completely ignored the phrase “[n]otwithstanding any provision of the code to the contrary[.]”

“[T]he term ‘notwithstanding’ means excluding, in opposition to, or in spite of other statutes.” *Lanahan v. Chi Psi Fraternity*, 175 P.3d 97, 102 (Colo. 2008). “[T]he use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 1903 (1993). ““[A] clearer statement is difficult to imagine.”” *Id.*, 113 S. Ct. at 1903 (citations omitted). The phrase is unequivocal, *Velez v. Commissioner of Correction*, 250 Conn. 536, 544, 738 A.2d 604, 609 (1999) and “sufficiently precise to constitute a specific legislative override of another statute.” *Town of Beacon Falls v. Towers Golde, LLC*, No. CV096001345S, 2010 WL 2365849, at & 2 (Conn. Super. Ct. May 6, 2010).

A notwithstanding clause “preempt[s] any other potentially conflicting statute, wherever found in the State’s laws.” *People v. Mitchell* 15 N.Y.3d 93, 97, 931 N.E.2d 84, 86 (2010). *See also Springs v. Stone*, 362 F. Supp.2d 686, 698 (E.D .Va.2005) (“It matters not whether the conflicting provisions are in the same statute or a different one; a ‘notwithstanding’ clause as broad as the one

used here by Congress provides a blanket exception”). “The phrase ‘(n)otwithstanding any other provision of law’ clearly indicates the legislative intent that [W. Va. § 17C-5A-3a(d)] take precedence over any other enactment dealing with the same subject matter.” *State v. Lynch*, 137 Vt. 607, 611, 409 A.2d 1001, 1004 (1979). “This phrase has a special legal connotation; it is considered an express legislative intent that the specific statute in which it is contained controls in the circumstances covered by that statute, despite the existence of some other law which might otherwise apply to require a different or contrary outcome.” *Souvannarath v. Hadden*, 95 Cal. App.4th 1115, 1126, 116 Cal. Rptr.2d 7, 14 (2002). ““The introductory phrase ‘[n]otwithstanding any other provision of law’ connotes a legislative intent to displace any other provision of law that is contrary’ to the terms of the law introduced by the phrase.” *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386, 402 (2010) (quoting *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1346 (Fed. Cir.2004)).

The “[n]otwithstanding any provision of the code to the contrary,” makes W. Va. § 17C-5A-3a(d) exclusive and self-contained, *see State v. Campbell*, 877 So.2d 112, 118 (La. 2004) (“[T]he plain language of that statute instructs the sentencing court in no uncertain terms that it must not stray from the sentencing provisions contained in that statute, even in the event those terms conflict with other provisions of law.”); *State v. Lyons*, 951 S.W.2d 584, 595 (Mo. 1997) (emphasis deleted) (“The language in the statute is clear. In the trial of a chapter 565 offense, the prior inconsistent statement of ‘any witness testifying in the trial . . . shall be received as substantive evidence’ “[n]otwithstanding any other provisions of law to the contrary.’ Demetrius testified at trial. Therefore, any prior inconsistent statements are admissible solely on this basis.”), *mandate recalled for other reasons*, 303 S.W.3d 523 (Mo. 2010); *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711,

721 (Tex. App. 2007) (“The phrase ‘[n]otwithstanding any law to the contrary’ makes clear the legislature’s intent that section 201.112(c) supersede other Texas law regarding an agency’s ability to change findings of fact or conclusions of law, including section 2001.058 of the APA.”); *Wilshire Ins. Co. v. Home Ins. Co.*, 179 Ariz. 602, 604, 880 P.2d 1148, 1150 (1994) (“The use of the words. . . “[n]otwithstanding any statute,” is further evidence of the legislative intent to enact a self-contained article[.]”), it simply supercedes or trumps any other statute to the contrary. *National Coalition to Save Our Mall v. Norton*, 161 F. Supp.2d 14, 21 (D.D.C. 2001). When prefacing a code section with a notwithstanding clause, “the Legislature clearly intended for this provision to trump all others.” *Purkey v. American Home Assur. Co.*, 173 S.W.3d 703, 708 (Tenn. 2005).

If the Legislature presumably means what it says in statutes, *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995)), then the notwithstanding “clause means what it says[.]” *Watkins v. County of Alameda*, 177 Cal. App.4th 320, 344, 98 Cal. Rptr.3d 847, 866 (2009)—for purposes of W. Va. § 17C-5A-3a(d), W. Va. § 17C-5A-1a(e) does not exist. And if W. Va. § 17C-5A-1a(e) does not exist, a nolo contendere plea is a conviction under the provisions of W. Va. § 17C-5A-3a(d), see Syl. Pt. 4, *Harrison v. Commissioner*, 226 W. Va. 23, 26, 697 S.E.2d 59, 62 (2010). The Commissioner acted properly in revoking the license upon conviction and the circuit court should be reversed.

VI.

CONCLUSION

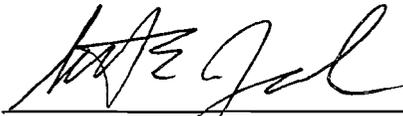
For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for Joe E. Miller, Commissioner, certify that on the 23rd day of September, 2011, I served the foregoing "Brief of Petitioner" upon counsel for the Respondent by depositing true and correct copies thereof in the United States Mails, First Class Postage Prepaid addressed as follows:

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