

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOE E. MILLER, COMMISSIONER  
OF THE WEST VIRGINIA DIVISION  
OF MOTOR VEHICLES,

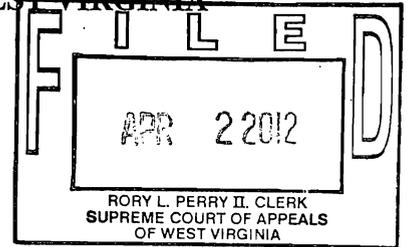
Petitioner,

v.

No. 11-1726

ELIZABETH A. DIVITA,

Respondent.



PETITIONER'S BRIEF

Respectfully submitted,

JOE E. MILLER, Commissioner  
West Virginia Division of Motor Vehicles,

By counsel,

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
ASSIGNMENTS OF ERROR .....	1
A.    THE CIRCUIT COURT ERRED IN DENYING PETITIONER’S <i>MOTION TO DISMISS</i> AND IN RETAINING JURISDICTION OF THE CASE .....	1
B.    THE CIRCUIT COURT ERRED IN ORDERING THE PETITIONER TO IMPOSE A REVOCATION PERIOD CONSISTENT WITH NON-AGGRAVATED DUI WHEN THE DIVISION’S RECORDS SHOW THAT SHE COMMITTED THE OFFENSE OF AGGRAVATED DUI .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	3
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	4
ARGUMENT .....	4
A.    THE CIRCUIT COURT ERRED IN DENYING PETITIONER’S <i>MOTION TO DISMISS</i> AND IN RETAINING JURISDICTION OF THE CASE .....	4
B.    THE CIRCUIT COURT ERRED IN ORDERING THE PETITIONER TO IMPOSE A REVOCATION PERIOD CONSISTENT WITH SIMPLE DUI WHEN THE DIVISION’S RECORDS SHOW THAT SHE COMMITTED THE OFFENSE OF AGGRAVATED DUI .....	7
CONCLUSION .....	14

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>CASES:</u></b>	
<u>Harrison v. Commissioner, Div. of Motor Vehicles</u> , 2010 WL 2243429, 8 (W.Va. 2010) . . . . .	11
<u>Martin v. West Virginia Division of Labor Contractor Licensing Board</u> , 199 W. Va. 613 (1997) . . . . .	9
<u>State ex rel. Department of Motor Vehicles v. Sanders</u> , 184 W. Va. 55, 399 S.E.2d 455 (1990) . . . . .	10
<u>State ex rel. Miller v. Reed</u> , 203 W. Va. 673, 510 S.E.2d 507 (1998) . . . . .	5
<u>State ex rel. Stump v. Johnson</u> , 217 W. Va. 733, 619 S.E.2d 246 (2005) . . . . .	5, 6
<u>State ex rel. West Virginia Board of Education v. Perry</u> , 189 W. Va. 662, 434 S.E.2d 22 (1993) . . . . .	5
<u>Staten v. Dean</u> , 195 W. Va. 57 (1995) . . . . .	9
<u>Thomas v. Board of Education, County of McDowell</u> , 167 W. Va. 911, 280 S.E.2d 816 (1981) . . . . .	5
<u>Williams v. West Virginia Division of Motor Vehicles</u> , 226 W. Va. 562, 703 S.E.2d 533 (2010) . . . . .	5
<b><u>STATUTES:</u></b>	
W. Va. Code §14-2-2 . . . . .	4, 5, 7
W. Va. Code §14-2-2(a)(1) . . . . .	6
W. Va. Code §17C-5-2(b) . . . . .	passim
W. Va. Code §17C-5-2(d) . . . . .	passim

W. Va. Code §17C-5-2(e) .....	9
W. Va. Code §17C-5-2b(a) .....	8
W. Va. Code §17C-5-2b(a)(1) .....	passim
W. Va. Code §17C-5-2b(a)(2) .....	4
W. Va. Code §17C-5-2b(b) .....	4
W. Va. Code §17C-5-2b(g) .....	8, 10
W. Va. Code § 17C-5A-3a(c)(1) .....	4, 9
W. Va. Code § 17C-5A-3a(c)(3) .....	passim
W. Va. Code § 29A-1-1 .....	5
W. Va. Code §29A-1-2(b) .....	5
W. Va. Code § 29A-5-4(a) .....	5
W. Va. Code §53-1-2 .....	passim

**MISCELLANEOUS:**

Rev. R.A.P Rule 19 .....	4
W. Va. R. Civ. P. Rule 12(b)(1), (2) and (3) .....	4, 7

**BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**JOE E. MILLER, COMMISSIONER  
OF THE WEST VIRGINIA DIVISION  
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**Petitioner,**

**v.**

**No. 11-1726**

**ELIZABETH A. DIVITA,**

**Respondent.**

**PETITIONER'S BRIEF**

Now comes Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Senior Assistant Attorney General, and submits this brief in the above-captioned case pursuant to the Court's *Amended Scheduling Order*. Petitioner seeks reversal of the *Order Following Hearing on Petitioner's Petition for Judicial Review and Respondent's Motion to Dismiss and ex Parte Stay*, (hereinafter, "Order") entered by the circuit court of Monongalia County on November 17, 2011. App'x. At 28.

**ASSIGNMENTS OF ERROR**

- A. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S *MOTION TO DISMISS* AND IN RETAINING JURISDICTION OF THE CASE.**
- B. THE CIRCUIT COURT ERRED IN ORDERING THE PETITIONER TO IMPOSE A REVOCATION PERIOD CONSISTENT WITH NON-AGGRAVATED DUI WHEN THE DIVISION'S RECORDS SHOW THAT SHE COMMITTED THE OFFENSE OF AGGRAVATED DUI.**

## STATEMENT OF THE CASE

Petitioner was arrested for “aggravated” driving under the influence of alcohol (hereinafter, “DUI”) on December 5, 2009. Her blood alcohol content was .153. App’x at 6. On December 30, 2009, the Division issued an initial Order of Revocation to the Petitioner revoking her license for aggravated DUI.

Petitioner timely, *i.e.*, within 30 days of her receipt of the Order of Revocation, requested an administrative hearing before the Division of Motor Vehicles. An administrative hearing was held on October 27, 2010.

On March 17, 2011, the charges against the Petitioner were re-filed in the Magistrate Court of Monongalia County, creating Case No. 11-M-1088. The Criminal Complaint filed on that day reflects that on December 5, 2009, Petitioner was arrested for DUI, and “She also blew a .153 on the Intoximeter.” App’x. At 63-64. Also on March 17, 2011, Petitioner entered a Plea Agreement in Case No. 09-M-3379, which stated, “Defendant will enter the deferral program on the accompanying DUI First Offense charge (11M-1088). App’x. at 65. Nothing in the aforementioned documents reflects a guilty plea to DUI.

On March 30, 2011, the Division issued an *Eligibility Assessment for DUI Deferral*, noting that the Division “cannot allow participation in the Alcohol Test and Lock Program under the terms of W. Va. Code § 17C-5-2b [because Petitioner was] charged with violation other than §17C-5-2(d)”. App’x. At 32.

The Final Order of the Commissioner was entered effective June 21, 2011, finding that the revocation for aggravated DUI must be upheld. App’x. At 8-14. The Final Order was not appealed.

In her *Petition for Judicial Review* (App'x. At 33-49), Petitioner asked the circuit court to compel the Division to shorten the Respondent's revocation period to that for simple DUI—15 days of revocation, followed by at least 45 days of Interlock. The underlying matter, brought by Respondent in the circuit court of Monongalia County, was styled as an appeal, but was in fact a case in which extraordinary relief was sought.

This matter must be reversed on the basis that the Petitioner's *Motion to Dismiss* should have been granted. Secondly, the matter must be reversed because the Respondent is not eligible to have her conviction deferred. Respondent must complete the requirements of reinstatement of her license in accordance with a revocation for aggravated DUI: 45 days of revocation, satisfactory completion of the Interlock Program (minimum nine months or 270 days), and payment of reinstatement fees.

### **SUMMARY OF ARGUMENT**

The denial of the Petitioner's *Motion to Dismiss* constitutes error. Because the relief sought by the Respondent in her *Petition for Judicial Review* was not based on the Petitioner's adjudication of the merits of the case (the Final Order of the Petitioner was never appealed), this action is necessarily one in which extraordinary relief is sought.

The Order is also in error because it compels the Petitioner to give Respondent terms of revocation consistent with those whose convictions are deferred. However, the Respondent is ineligible for reinstatement in accordance with the deferral statute: the date of her arrest precedes the date of the enabling statute for deferral; she did not request entry into deferral within 30 days of her arrest (W. Va. Code §17C-5-2b(a)(1)); she requested a hearing from the Respondent, and the administrative process culminated in the issuance of a Final Order, which was not appealed (all of

which is foregone by the deferral statute (W. Va. Code §17C-5-2b(b)); she did not plead guilty to simple DUI (W. Va. Code §17C-5-2b(a)(2)); the revocation period for “aggravated” DUI is 45 days of revocation, nine months of Interlock, and completion of the Safety and Treatment Program (W. Va. Code § 17C-5A-3a(c)(3)), whereas the deferral statute provides only for a period of 15 days’ revocation and 165 days of Interlock, consistent with first-offense, non-aggravated DUI. W. Va. Code §17C-5A-3a(c)(1).

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Argument pursuant to Rev. R.A.P Rule 19 is appropriate on the bases that this case involves assignments of error in the application of settled law; that the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and that this case involves a result against the weight of the evidence.

### **ARGUMENT**

#### **A. THE CIRCUIT COURT ERRED IN DENYING PETITIONER’S *MOTION TO DISMISS* AND IN RETAINING JURISDICTION OF THE CASE.**

In the circuit court, Petitioner moved to dismiss for lack of jurisdiction and improper venue pursuant to W. Va. Code §§14-2-2 and 53-1-2 and Rule 12(b)(1)-(3) of the West Virginia Rules of Civil Procedure, on the grounds that the circuit court of Monongalia County lacked jurisdiction over the subject matter and the person, and that venue was inappropriate. That motion was denied in the *Order*. Petitioner also argued that the relief sought by Respondent was in contravention of the statute.

In the *Order*, the circuit court found that with regard to the *Motion to Dismiss* brought by the Petitioner herein, “the Court must consider the evidence in the light most favorable to the

Petitioner,” (App’x. At 28) and found that the *Petition for Judicial Review* was properly before the court.

The standard applied by the circuit court was incorrect, as was its decision. There is no requirement that the issues of jurisdiction and venue must be construed in the light most favorable to the Respondent. Even if it were, statute and caselaw are clear that this matter was not an appeal of a contested case, but was one in which extraordinary relief was sought; therefore, dismissal was absolutely required. W.Va. Code §§ 14-2-2, 53-1-2, 29A-1-2(b)(defines “contested case” as “a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing....”); *State ex rel. Miller v. Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1998); *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 246 (2005); *Williams v. West Virginia Div. of Motor Vehicles*, 226 W.Va. 562, 703 S.E.2d 533 (2010); *State ex rel. West Virginia Board of Education v. Perry*, 189 W.Va. 662, 434 S.E.2d 22 (1993); *Thomas v. Board of Education, County of McDowell*, 167 W.Va. 911, 280 S.E.2d 816 (1981). Appellate review of a final order of an administrative agency is limited to a “contested case.” W.Va.Code § 29A-5-4(a). This Court has held:

Accordingly, we hold that when an individual brings a mandamus action seeking to compel the West Virginia Division of Motor Vehicles to perform a statutory duty which relates to the Division's maintenance of records, and such action is not an administrative appeal pursuant to the West Virginia Administrative Procedures Act, West Virginia Code §§ 29A-1-1 to 29A-7-4 (1998), West Virginia Code §§ 14-2-2(a)(1) and 53-1-2 require that such action shall be brought in the Circuit Court of Kanawha County, but such an action cannot be used to circumvent the administrative appeals procedure.

*State ex rel. Miller v. Reed*, 203 W.Va. 684, 510 S.E.2d 518.

In *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 740-41, 619 S.E.2d 246, 253-54 (2005),

this Court held:

Accordingly, since the "record," to which Bishop's mandamus/prohibition circuit court action "relates," his driver's license, is in Kanawha County, and because the Commissioner was effectively a "defendant" below in Bishop's mandamus/prohibition circuit court action, we find that the Circuit Court of Nicholas County lacked the jurisdiction to proceed with Bishop's mandamus/prohibition circuit court actions and that the proper jurisdiction and venue for the action was the Circuit Court of Kanawha County. W. Va. Code § 53-1-2 (1933); W. Va. Code § 14-2-2(a)(1) (1976).

The denial of the *Motion to Dismiss* constitutes error. Because the relief sought by the Respondent in her *Petition for Judicial Review* was not based on the Petitioner's adjudication of the merits of the case (the merits were resolved in the Final Order, which was never appealed), this action must be deemed one in which extraordinary relief is sought. In this matter, it was not the Final Order (App'x. At 8-14) of which Respondent sought review; it was the refusal of the Petitioner to place Respondent in the Motor Vehicle Test and Lock Program<sup>1</sup> pursuant to the provisions of W. Va. Code § 17C-5-2b.

As will be discussed in more detail below, the Petitioner determined that the Respondent cannot participate in the Motor Vehicle Test and Lock Program in accordance with the deferral statute because she committed the offense of "aggravated" DUI. The Respondent attempted unsuccessfully to have the charge of aggravated DUI reduced to non-aggravated DUI; and even if she had successfully done so, the Petitioner would still be obligated to revoke her for a period

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<sup>1</sup>Throughout this Brief, the terms "Motor Vehicle Test and Lock Program," "Test and Lock Program" and "Interlock" are used synonymously.

consistent with aggravated DUI, because its revocation was based on records reflecting that she committed the offense of aggravated DUI, and because she is ineligible to complete her reinstatement requirements in accordance with W. Va. Code § 17C-5-2b. The actions of the magistrate are not conclusive of the necessary actions of the Petitioner in this regard.

The *Motion to Dismiss* should have been granted pursuant to W. Va. R. Civ. P. Rule 12(b)(1), (2) and (3); and W. Va. Code §§ 14-2-2 and 53-1-2. The circuit court had no authority to hear a petition for an extraordinary writ to compel the Petitioner revoke the Respondent's license for simple DUI. This issue is determinative of the present appeal.

**B. THE CIRCUIT COURT ERRED IN ORDERING THE PETITIONER TO IMPOSE A REVOCATION PERIOD CONSISTENT WITH SIMPLE DUI WHEN THE DIVISION'S RECORDS SHOW THAT SHE COMMITTED THE OFFENSE OF AGGRAVATED DUI.**

On June 10, 2010, the deferral statute, W. Va. Code § 17C-5-2b, became effective. (Respondent was arrested some six months earlier). That section created a deferral of entry of the conviction for first-offense DUI offenders, and provides, in part:

*Except as provided in subsections [sic] (g) of this section, whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to driving under the influence alcohol, any controlled substance or any other drug:*

(1) *notifies the court within thirty days of his or her arrest of his or her intention to participate in a deferral pursuant to this section; and*

(2) *pleads guilty to or is found guilty of driving under the influence of alcohol under subsection (d), section two of this article [W. Va. Code §17C-5-2(d)—simple DUI], the court, without entering a judgment of guilt and with the consent of the accused, shall defer further proceedings and, notwithstanding any provisions of this code*

to the contrary, place him or her on probation, which conditions shall include, that he or she successfully completes the Motor Vehicle Alcohol Test and Lock Program as provided in section three-a, article five-a of this chapter. Participation therein shall be for a period of at least *one hundred and sixty five days after he or she has served the fifteen days of license suspension imposed pursuant to section two, article five-a* of this chapter.

W. Va. Code § 17C-5-2b(a)(emphasis added). W. Va. Code § 17C-5-2b(g) provides as follows:

No person shall be eligible for dismissal and discharge under this section: (1) *in any prosecution in which any violation of any other provision of this article has been charged*; (2) if the person holds a commercial driver's license or operates commercial motor vehicle(s), or (3) the person has previously had his or her driver's license revoked under section two-a of this article or under any statute of the United States or of any state relating to driving under the influence alcohol, any controlled substance or any other drug.

(emphasis added). W. Va. Code § 17C-5-2(d) defines simple DUI thus:

Any person who:

(1) Drives a vehicle in this state while he or she:

(A) Is under the influence of alcohol;

(B) Is under the influence of any controlled substance;

(C) Is under the influence of any other drug;

(D) Is under the combined influence of alcohol and any controlled substance or any other drug; or

(E) Has an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, *but less than fifteen hundredths of one percent, by weight*;

(2) Is guilty of a misdemeanor and, upon conviction thereof, except as provided in section two-b of this article, shall be confined in jail for up to six months and shall be fined not less than one hundred dollars nor more than five hundred dollars. A person sentenced pursuant to this subdivision shall receive credit for any period of

actual confinement he or she served upon arrest for the subject offense.

(emphasis added). Aggravated DUI is defined as:

Any person who drives a vehicle in this state while he or she has an alcohol concentration in his or her blood of fifteen hundredths of one percent or more, by weight, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than two days nor more than six months, which jail term is to include actual confinement of not less than twenty-four hours, and shall be fined not less than two hundred dollars nor more than one thousand dollars....

W. Va. Code § 17C-5-2(e).

It is clear from the deferral statute that only those individuals charged with first-offense simple DUI are eligible for the deferral program. In addition to the deferral statute's explicit reference to W. Va. Code §17C-5-2(d), the contemplated period of 15 days' revocation and 165 days of Test-and-Lock is consistent with first-offense, simple DUI. W. Va. Code §17C-5A-3a(c)(1).

The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus or prohibition is *de novo*. Syl. Pt. 1., *Staten v. Dean*, 195 W.Va. 57 (1995); Syl. Pt. 1., *Martin v. West Virginia Division of Labor Contractor Licensing Board*, 199 W.Va. 613 (1997). Inasmuch as the relief granted in the *Order* was extraordinary in nature, that is the appropriate standard of review on the issue of Respondent's revocation period.

Although Respondent was charged with aggravated DUI in the magistrate court, she subsequently attempted to circumvent the attendant revocation period by asking the magistrate to order deferral of her conviction. The basis for her petition to the circuit court was to compel the Petitioner to reduce her revocation period.

On March 17, 2011, a *Criminal Complaint* was filed in magistrate court, the factual recitation of which reflected that she had been arrested for aggravated DUI. A *Plea Agreement*, entered the same day, noted that the Respondent would enter the deferral program, and conspicuously absent from the *Plea Agreement* was a guilty plea to DUI. The magistrate court transmitted a *Request for DUI Deferral Program* (West Virginia Supreme Court Form MCRDUIR), also dated March 17, 2011, to the Division, reflecting that the Petitioner had been charged with “First Offense DUI”. The documents generated by the magistrate court are internally inconsistent; and none reflects a guilty plea to DUI.

More importantly, the events in the magistrate court do not change the Division’s obligation to impose a revocation period consistent with its records.

The principles and procedures governing the administrative and criminal contexts are separate and distinct. The validity of the administrative sanction of license revocation is not dependent upon the criminal outcome. Consequently, the appellee's plea of guilty to the lesser offense of public intoxication did not undermine the validity of the administrative revocation.

*State ex rel. Dept. of Motor Vehicles v. Sanders*, 184 W.Va. 55, 59, 399 S.E.2d 455, 459 (1990).

On March 30, 2011, the Petitioner issued an *Eligibility Assessment for DUI Deferral*, noting that the Division “cannot allow participation in the Alcohol Test and Lock Program under the terms of W. Va. Code § 17C-5-2b [because Respondent was] charged with violation other than §17C-5-2(d)”. See, W. Va. Code §17C-5-2b(g).

The magistrate’s acceptance of a plea the terms of which were “Defendant will enter the deferral program on the accompanying DUI First Offense charge (11-M-1088)” does not impose a duty on the Petitioner to give Respondent a reduced period of revocation. According to the

Petitioner's records, Respondent committed the offense of aggravated DUI. The terms of the *Order* require the Petitioner to perform an act which is contrary to law: *i.e.*, to allow the Respondent to serve a reduced revocation period, consistent with the terms of deferral set forth in W. Va. Code §17C-5-2b.

The *Order* is also in error because of the many ways in which the Respondent is ineligible for the reinstatement in accordance with the deferral statute: the date of her arrest precedes the date of the enabling statute for deferral; she did not request deferral within 30 days of her arrest (W. Va. Code §17C-5-2b(a)(1)); she requested a hearing from the Respondent, and the administrative process culminated in the issuance of a Final Order, which was not appealed (all of which is foregone by the deferral statute (W. Va. Code §17C-5-2b(b))); she did not plead guilty to DUI (W. Va. Code §17C-5-2b(a)(2)); the revocation period for "aggravated" DUI is 45 days of revocation, nine months of Interlock, and completion of the Safety and Treatment Program (W. Va. Code § 17C-5A-3a(c)(3)), whereas the deferral statute provides only for a period of 15 days' revocation and 165 days of Interlock, consistent with first-offense, simple DUI. W. Va. Code §17C-5A-3a(c)(1).

The Petitioner must revoke Respondent's privilege to drive for aggravated DUI, pursuant to its Final Order. The actions of the magistrate court are not determinative of the revocation period. "A conviction occurs within the confines of the criminal jurisdiction of the courts, and we have clearly stated that administrative license revocation proceedings for DUI are proceedings separate and distinct from criminal proceedings." *Harrison v. Commissioner, Div. of Motor Vehicles*, 2010 WL 2243429, 8 (W.Va. 2010).

The deferral statute does not bind the Petitioner to the decision of the magistrate to allow a conditional probation period: the Petitioner's role is to administer the Interlock program and other

requirements for reinstatement in accordance with its records. In fact, the magistrate is obligated to submit one of this Court's forms to the Petitioner to determine eligibility of an individual for reinstatement pursuant to the deferral statute. App'x. At 110. As the Division found (App'x. At 32), she was not eligible.

There is no "deferral program," as the court consistently refers to it in the *Order*. The deferral statute provides for a magistrate to accept a guilty plea to DUI, to place the driver on probation conditioned upon her successful completion of the Interlock Program and to ultimately expunge the conviction. The statute does *not* change the Division's normal requirements for revocation.

The deferral statute does not change the Petitioner's obligations for revocation. The Petitioner's role under W. Va. Code §17C-5-2b is to administer the Interlock Program, as it would for any revokee. The magistrate court cannot dictate to the Petitioner the terms of the revocation process. The statute provides that the magistrate court "shall defer further proceedings and...place him or her on probation, which conditions shall include, that he or she successfully completes the Motor Vehicle Test and Lock Program...". W. Va. Code §17C-5A-3a(a)(2). If the person "fail[s] to successfully complete the program," the Magistrate Court may issue process to bring the defendant before the court. W. Va. Code §17C-5A-3a(c)(1).

The circuit court revised history in its *Order* to compel the Division to act as though the Respondent's conviction was properly deferred by the magistrate. It adopted as fact that the Respondent "was charged with simple driving under the influence of alcohol" (App'x. at 29) when in fact the magistrate court's documents show that the offense was aggravated DUI; the court noted that Respondent indicated her intent to participate in the program on the day she was charged

(referring to the March 17, 2011 *Criminal Complaint*); the circuit court noted that “she waived her right to contest the DMV’s suspension of her license as part of her participation in the deferral program” (App’x. At 30) (but a hearing had already been held, and a Final Order was issued on May 9, 2011, effective June 21, 2011).

However, the more egregious error is that the court tied the Petitioner’s “authority” in this matter to the decision of the magistrate to place Respondent on probation with the condition that she complete the Interlock program. The Respondent is not eligible to reinstate her license on the terms set forth in W. Va. Code § 17C-5-2b. To require the Petitioner to do so is error and an abuse of discretion. Petitioner is obligated to revoke a person in accordance with its records, not according to the actions of the magistrate court. In this case both the DUI Information Sheet and the Final Order reflect that the Respondent committed the offense of aggravated DUI.

The *Petition for Judicial Review* by which this matter was instituted before the circuit court averred that Petitioner “was charged with a non-aggravated DUI under W. Va. Code 17C-5-2” and Petitioner “pled guilty to the charge immediately upon being charged.” App’x. At 35. *See also*, App’x. At 41. However, at the August 4, 2011 hearing before the circuit court, counsel for the Respondent advised the court that, “there’s a plea agreement reflecting a not guilty plea—there’s a guilty plea to speeding, but not a guilty plea to DUI. There were some machinations in the magistrate court, obviously, where although the criminal complaint notes this is a .153, that charge was dismissed and it was re-filed as a plain DUI, ordinary DUI which is within the province of the magistrate court.” App’x. At 18. However, the *Criminal Complaint* reflects that the Respondent was arrested on December 5, 2009, for aggravated DUI: “She also blew a .153 on the Intoximeter.” App’x. At 106. The *Plea Agreement* reflects that with regard to the DUI charges, “Defendant will

enter the deferral program on the accompanying DUI charge (11-M-1088).” App’x. At 65. Those documents do not reflect that Respondent in fact pled guilty to DUI.

The Division’s records, including the Final Order, require the Division to place Respondent in the Test and Lock Program pursuant to the provisions of W. Va. Code § 17C-5A-3a(b)(1), consistent with the offense of aggravated DUI. The Respondent cannot participate in the Test and Lock Program in accordance with the deferral statute, which provides only for a revocation period consistent with simple DUI. This determination is made by the Division on the records of the Division, not on the disposition of the criminal case. Even if Respondent had made a valid plea to simple DUI in magistrate court, the Division would still be obligated to revoke her consistent with its records.

The *Order* requires that the Division “admit [Respondent] into the Deferral Program established under W. Va. Code § 17C-5-2b and shall accordingly allow the [Respondent’s] participation in the Motor Vehicles Test and Lock Program as contemplated by W. Va. Code § 17C-5-2b,” and specifically sets forth that the revocation period shall be that set forth in W. Va. Code § 17C-5-2b, specifically, 15 days of suspension followed by at least 165 days of participation in the Interlock program. App’x. At 30. Because the *Order* requires the Division to act in contravention of statute, it must be reversed.

### CONCLUSION

WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests the *Order Following Hearing on Petitioner’s*

*Petition for Judicial Review and Respondent's Motion to Dismiss and ex Parte Stay* entered by the circuit court of Monongalia County on November 17, 2011 be reversed by this Court.

**Respectfully submitted,**

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

**By counsel,**

**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**



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**No. 11-1726**

**ELIZABETH A. DIVITA,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Janet E. James, Senior Assistant Attorney General, and counsel for the respondents, do hereby certify that the foregoing *Petitioner's Brief* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 2nd day of April, 2012, addressed as follows:

Natalie J. Sal, Esquire  
430 Spruce Street, Suite 3  
Morgantown, WV 26505

  
\_\_\_\_\_  
JANET E. JAMES