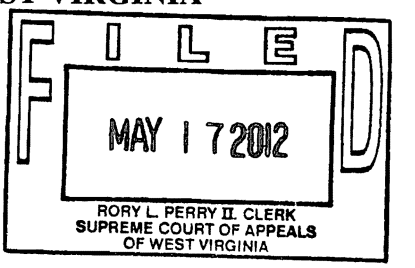
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
JOE E. MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR VEHICLES
Petitioner,

v. No. 11-1726

ELIZABETH A. DIVITA
Respondent.

RESPONDENT'S BRIEF

Respectfully Submitted,

ELIZABETH A. DIVITA,
By counsel,

Natalie J. Sal, Esq.
Sal Sellaro Culpepper Legal Group PLLC
430 Spruce Street, Suite 3
Morgantown, WV 26505
Phone: (304) 599-5291 Fax: (304) 599-5294

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RESPONDENTS REPLY BRIEF

Now comes the Respondent, Elizabeth A. Divita, by counsel, Natalie J. Sal, and submits this brief in the above-captioned case pursuant to the Court's *Amended Scheduling Order*. The Petitioner in this case seeks reversal of the "Order Following Hearing on Petitioner's Petitioner 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 wherein the Circuit Court ordered the Department of Motor Vehicles to permit the Respondent to serve a 15 day license revocation period, as opposed to a 45 day revocation period, after finding that W.Va Code 17C-5-2b applied to the Respondent's case.

POINTS AND AUTHORITIES RELIED UPON

Statutes and Regulations

W.Va Code § 14-2-2 ..... 8, 10

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W.Va Code § 17C-5A-3a 18, 19

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Caselaw

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Walls v. Miller, 162 W. Va. 563, 569, 251 S.E.2d 491, 496 (1978) 14

Williams v. W. Virginia Div. of Motor Vehicles,
226 W. Va. 562, 566, 703 S.E.2d 533, 537 (2010) 10, 12

STATEMENT OF THE CASE

Ms. Divita was traveling home on the night of December 5, 2009 when she was pulled over by an officer for speeding. Based upon field sobriety tests conducted during the traffic stop, Ms. Divita was taken into custody and transported to the Monongalia County Sheriff's Department, where she was administered a breathalyzer test. During the breathalyzer test, Ms. Divita's blood alcohol content was estimated at 0.153, which lead to an initial charge of aggravated driving under the influence of alcohol (hereinafter "DUI"), per West Virginia Code Section 17C-5-2(e).

Administrative proceedings were also initiated at this time, and Ms. Divita requested a hearing before the Department of Motor Vehicles. Ms. Divita's request was granted and a hearing was held on October 27, 2010; however, an Order was not issued by the Agency at that time.

On March 17, 2011, Ms. Divita's aggravated DUI charge was dismissed and re-filed as non-aggravated DUI. This change was based partly upon potential problems with the procedure followed when the breathalyzer test was given to the Respondent. Additionally, the breathalyzer's known margin of error could have placed Ms. Divita within the non-aggravated DUI range at the time of the test. Accordingly, the prosecution dismissed the charge and refilled it as a non-aggravated DUI.

Upon the filing of the new charge for non-aggravated DUI, Ms. Divita gave notice of her intent to participate in the DUI Deferral Program outlined in West Virginia Code Section 17C-5-2b and pled guilty to the charge against her, as required.

Section 17C-5-2b was enacted in 2010 and elects to treat defendants facing their first charge of driving under the influence with forgiveness, granting them the chance to have their violation dismissed and expunged if certain conditions are met. Specifically, the Defendant's admission to

the program waives his/her administrative rights before the Department of Motor Vehicles, and the Defendant must participate in the Test and Lock Program.

Several weeks after Ms. Divita took these steps to participate in the Deferral Program, the Commissioner of the Department issued an order from Ms. Divita's hearing in October, finding that Ms. Divita's "...license to operate a motor vehicle must be revoked for at least forty-five days accompanied by completion of the Motor Vehicle Test and Lock Program and the Safety and Treatment Program." Shortly afterwards, Ms. Divita also received a letter from the DMV stating that she was not eligible for the Deferral Program. The letter rejecting Ms. Divita's application to the program stated that the rejection was because she was charged with an aggravated DUI.

Ms. Divita, within 30 days of her receipt of the Commissioner's Final Order, appealed both of these decisions to the Circuit Court of Monongalia County and requested a stay of the revocation of her license. The Circuit Court accepted the Appeal on June 14, 2011 and issued a stay of any revocation proceedings for 30 days or until a final hearing was held in the matter. The Circuit Court stated that this stay was based upon there being a "substantial probability that the Petitioner would prevail" and because Ms. Divita would "suffer irreparable harm if the Commissioner's Final Order [was] not stayed." Ms. Divita is a supervisor for an automobile rental agency and her employer requires her to have a valid, unimpeded driver's license.

At the final hearing in the Circuit Court of Monongalia County, held on August 4, 2011, the Circuit Court denied a motion to dismiss for lack of jurisdiction which was filed by the Petitioner and ruled that the Respondent should be permitted to participate in the Test and Lock Program, following a 15 day license revocation, consistent with W.Va Code 15C-5-2b:

"I'm going to rule that she was in a deferment program and [the] DMV did not have the right to impose a higher revocation and Interlock time period because she has already been accepted by the Magistrate into the deferment plan... therefore, the time period is that set forth in 17C-5-2b(a)(2)... and that would be 15 days of license suspension and participation in the Test and Lock Program as provided in section 3(a), article 5(a) of this chapter..."

The Circuit Court's order, in general, corrected the incorrect statement of law found in the Commissioner's Order.

Unknown to the Respondent, the Petition had violated the Circuit Court's prior Order before the August hearing and, on July 4, 2011, revoked the Respondent's driver's license. No notice of this revocation was ever given to the Respondent, nor was the Circuit Court made aware of the Department's actions in contravention of its Order at the time of the August, 2011 hearing. Following the August hearing, the Department remained in violation of the Court's Initial Order preventing the revocation and additionally violated the Court's second order by refusing to permit Ms. Divita to enter the Test and Lock Program or the Safety and Treatment Program.

These actions by the Department led to the Respondent filing a motion to enforce on February 8, 2012. The Respondent was informed at this hearing that a reinstatement of her license was not permitted by the Department's enabling statute while litigation was ongoing and that her license could not, accordingly, be reinstated until the appeal to the Supreme Court of Appeals of West Virginia was finally decided. The Respondent was also informed that the time during which her license was revoked, which was at that time approximately 300 days, would not be credited toward her revocation. Accordingly, whether the Respondent wins or loses this appeal, she will have likely served in excess of one year of revocation and still need to serve

either 15 or 45 days of additional revocation, followed by participation in the Test and Lock Program[1].

Following the August hearing, the Respondent and her employer learned of the indefinite administrative revocation of Ms. Divita's license and she has been placed on an administrative probation at work, preventing her from receiving any bonuses, pay raises, or promotions until the DUI on her record is dealt with.

SUMMARY OF ARGUMENT

Contrary to the argument of the Petitioner, the Respondent's action in the Circuit Court of Monongalia County was an Appeal of a contested case pursuant to W.Va Code 14-2-2. An Administrative Order was issued by the Commissioner of the Department of Motor Vehicles following a hearing held on October 27, 2010. That Order was to be effective on June 21, 2011, and specifically stated that the Respondent was to serve a 45 day license revocation period followed by completion of the Test and Lock Program, pursuant to W.Va Code 17C-5A-2(k)(1). This is an incorrect statement of the law because, at the time this Order was issued, the Respondent was already properly admitted into the Deferral Program by the Magistrate Court of Monongalia County pursuant to W.Va Code 17C-5-2b and was to serve a revocation period of 15 days, followed by participation in the Test and Lock Program for at least 165 days.

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[1] In essence, the Respondent, and any other individual who chooses to appeal an order of the Department, is placed in administrative procedural limbo without permission to drive throughout the entire appeal process. In theory, a stay could be issued on the revocation permitting the Respondent to drive until a final decision is made with regard to the appeal; however, the Department has already revoked the Respondent's license in direct violation of such an Order. The Department's actions certainly create a chilling effect on any respondent who wishes to appeal an adverse decision in this type of case, as the respondent will certainly be subject to a license revocation far in excess of what would have been imposed had the respondent simply accepted the erroneous decision.

The Respondent appealed the Agency's determination that she was to receive a 45-day license revocation period, arguing that the Agency misapplied W.Va Code 17C-5-2b when determining her license revocation period. The Department of Motor Vehicles claims that the Respondent's appeal should have been filed as a mandamus since it sought extraordinary relief; however, the action merely sought to correct the agency's incorrect application of the law in Ms. Divita's case. While Ms. Divita's rejection to the Deferral Program by the DMV is relevant, that document is only tangential and shows the Department's incorrect understanding of the law.

Accordingly, since Ms. Divita was appealing a finding of law stated in the Commissioner's Final Order, the Circuit Court of Monongalia County correctly retained jurisdiction of Ms. Divita's appeal.

Additionally, the Circuit Court's determination that the Respondent was to receive a 15-day license revocation pursuant to W.Va Code 17C-5-2b was correct and should not be over-turned on appeal since Ms. Divita was correctly admitted to the Deferral Program by the Magistrate Court of Monongalia County. Lastly, even if the Respondent was incorrectly permitted into the Deferral Program by the Magistrate Court of Monongalia County, that error lies with the Magistrate Court and the Department of Motor Vehicles does not have the discretion to refuse to permit the Respondent into the Test and Lock Program for any reason. The Department's correct avenue would be one of a writ of prohibition against the Magistrate Court of Monongalia County.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent does not feel that oral argument pursuant to Rev. R.A.P. Rule 19 is appropriate in this case because the case does not involve the application of settled law and does not meet any of the other requirements of Rev. R.A.P. Rule 19.

ARGUMENT

A. THE CIRCUIT COURT OF MONONGALIA COUNTY HAD JURISDICTION TO HEAR THE CASE AT HAND BECAUSE IT WAS AN APPEAL OF A FINDING OF LAW MADE BY AN ADMINISTRATIVE AGENCY IN A CONTESTED CASE.

W.Va Code Section 14-2-2 requires that all actions naming a state officer as a party shall be brought in Kanawha County. Additionally, pursuant to W.Va Code § 53-1-2 and *Williams v. W. Virginia Div. of Motor Vehicles*, all writs of mandamus are to be brought in Kanawha County, West Virginia, except that "such an action cannot be used to circumvent the administrative appeals procedure." *Williams v. W. Virginia Div. of Motor Vehicles*, 226 W. Va. 562, 566, 703 S.E.2d 533, 537 (2010). Accordingly, excluded from the requirements of W.Va Code § 53-1-2 are appeals of contested cases, pursuant to W.Va Code § 29A-1-2. That code section defines a 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." W. Va. Code Ann. § 29A-1-2. Additionally, Section 17C-5A-2 permits a party to an administrate hearing to appeal the Agency's decision to the local Circuit Court.

When reviewing an appealed case under the APA, the Circuit Court can make a number of determinations:

> "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."

State ex rel. Miller v. Reed, 203 W. Va. 673, 676, 510 S.E.2d 507, 510 (1998); Syllabus Point 2, *Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Syl. Pt. 1, *Johnson v. State Dep't of Motor Vehicles*, 173 W.Va. 565, 318 S.E.2d 616 (1984).

There is no question that Ms. Divita received an Administrative Hearing in which her rights were to be determined. *See* App'x 8-14. Pursuant to the Order issued against Ms. Divita from that hearing, she was to serve a 45-day license revocation period followed by participation in the Test and Lock Program. *Id.* at 13. However, when the Department issued this order, it did so despite the fact that Ms. Divita had already been received into the Deferral program by the Magistrate Court of Monongalia County and had waived her right to receive an Order from the Department. *Id.* at 110. However, if Ms. Divita wished to enforce the 15 day revocation which she was due under W.Va Code § 17C-5-2b, she was required to appeal the Final Order of the Department which had improperly set her revocation at 45 days. Any attempt by the Respondent to challenge the length of her revocation period by way of a mandamus would have likely been deemed an attempt to circumvent the administrative appeal process. *See Cowie v. Roberts*, 173 W.Va. at 67, 312 S.E.2d at 38; *Daurelle v. Traders Federal Savings & Loan Association*, 143 W.Va. 674, 104 S.E.2d 320 (1958).

While the Department attempts to color the Respondent's Action as a writ of mandamus, the Department's reliance upon this Court's decision in *Williams v. W. Virginia Div. of Motor Vehicles* is flawed. In *Williams*, the Department "state[d] that the Appellee's request for relief was in the nature of an extraordinary writ in which the Appellee contended that revocation was beyond the scope of DMV authority based upon the statutory limitations." *Williams* at 565. Most importantly, however, in *Williams* the appeal filed in the Circuit Court did not arise from a contested case because "there was no administrative hearing before the Division by the Commissioner" *Id.* at 566.

In the instant case, however, Ms. Divita was granted an administrative hearing and her appeal to the Circuit Court of Monongalia County was a direct result of the Commissioner's Order which was issued from that hearing. As an example, see *State ex rel. Miller v. Reed*, 203 W. Va. 673, 682, 510 S.E.2d 507, 516 (1998):

> "Had Mr. Shedd or Ms. Burrough filed a written request within ten days after receiving the revocation order, they would have preserved their right to administrative hearings; and had the Division affirmed the revocation of Mr. Shedd's and Ms. Burrough's license, then they would have been entitled to judicial review of the decision under the APA. *See* W.Va.Code § 17C-5A-2(q)."

The case at hand is not analogous to *Williams* or *Reed* and is instead more analogous of the hypothetical situation envisioned by the Court in *Reed.* Accordingly, the Respondent correctly appealed the Department's Final Order to the Circuit Court of Monongalia County.

B. THE PETITIONER WAS REQUIRED TO SERVE A 15-DAY LICENSE REVOCATION FOLLOWED BY PARTICIPATION IN THE TEST AND LOCK PROGRAM

The length of Ms. Divita's license revocation depends on the applicability of W.Va Code § 17C-5-2b. That section states that its terms apply "notwithstanding any provisions of this code to the contrary" and goes on to state that "[p]articipation [in the Test and Lock Program] 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 Ann. § 17C-5-2b (West).

Whether or not Ms. Divita was charged with a non-aggravated DUI for purposes of Section § 17C-5-2b is a matter of statutory interpretation, and thus a question of law to be reviewed *de novo* by the Court. *McDaniel v. W. Virginia Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003). The Petitioner argues that the Court should find that the statute is clear on its face and should be applied as written; alternatively, if the statute is found to be vague and open to interpretation, the Petitioner argues that the meaning of the word "charged" in this statute should be interpreted in a manner consistent with how the word is typically used in criminal law: namely, that the charge occurs at the time that the criminal complaint is filed against the defendant.

1. <u>The Statute in Question Should be Applied as Written Since it is Clear and is not Vague.</u>

West Virginia Code § 17C-5-2b requires that the defendant has not been charged with a violation other than Section § 17C-5-2(d). Thus, individuals who were initially charged with an aggravated DUI but have pled to a lesser charge are excluded from the program. A Statute is only open to interpretation where it is "...susceptible of two or more constructions or of such

doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Fountain Place Cinema 8, LLC v. Morris*, 707 S.E.2d 859, 863 (W. Va. 2011). If a statute is not vague or ambiguous, it is to be applied as written. *Id.*, *Walls v. Miller*, 162 W. Va. 563, 569, 251 S.E.2d 491, 496 (1978). The West Virginia Supreme Court of Appeals has previously stated that generally the word "charged" is not ambiguous. Specifically, the Court stated in Burdette that:

> "W.Va.Code, 62-1-1 and -2 (1965), make it clear that a person is "charged" with a crime once a written complaint has been filed against him... When these sections are read together with W.Va.Code, 50-5-7 (1976), as required under W.Va.Code, 50-4-2 (1976),[4] the word "charged" has no ambiguity."

State ex rel. Burdette v. Scott, 163 W. Va. 705, 709, 259 S.E.2d 626, 629 (1979). Thus, an individual is "charged" at the time and in the manner specified in his/her Criminal Complaint.

The language of Section § 17C-5-2b is neither more vague nor more ambiguous than that at issue in *Burdette*. Since this is a criminal statute and addresses the criminal proceedings against the defendant, the interpretation of "charged" found in *Burdette* and described in the criminal code is unambiguous and equally applicable.

It is not contested that Ms. DiVita was initially charged with an aggravated DUI; however, as the procedural history shows, this charge was dismissed. Instead, a Criminal Complaint was filed on March 17, 2011 for non-aggravated DUI. To this Ms. Divita pled, placing her firmly within Section 17C-5-2(d) and Section 17C-5-2b. Thus, since Ms. Divita was charged with a violation of section 17C-5-2(d), she should be permitted to enroll in the deferral program described in 17C-5-2b.

2. The Statute in Question Should not be Interpreted According to the Analysis Found in Carroll since that Analysis Only Applies to the Civil DUI Proceedings Against a Defendant.

If it is determined that the word "charged" found in Section 17C-5-2b is vague, then there are two possible interpretations of the word. One interpretation is that described in *Burdette*, which holds that "a person is 'charged' with a crime once a written complaint has been filed against him and a judicial officer, having found that the complaint contains sufficient facts to establish probable cause that a crime has been committed by the defendant, issues a warrant." *Burdette* at 709. The second interpretation is the one found in *Carroll,* where the Court held that "a person is 'charged' with an offense, for the purposes of West Virginia Code § 17C-5A-1 when he or she is lawfully arrested by a law-enforcement officer having probable cause to suspect the person was driving a motor vehicle under the influence of alcohol." *Carroll v. Stump, 217 W. Va. 748, 619 S.E.2d 261 (2005).* Section 17C-5A-1 is the statute which enables the Department of Motor Vehicles to initiate license revocation proceedings against an individual suspected of driving under the influence. *See* W.Va. Code § 17C-5A-1.

While both of these interpretations of the word "charged" are valid, only one is applicable to the case currently at hand. The *Carroll* analysis is intended solely for the administrative proceedings against an individual and the Court in that case recognized that "Administrative actions and criminal sanctions are independent lines of inquiry which must not be confused or integrated." *Id.* at 756. While Section 17C-5-2b discusses administrative actions, the actions are merely incidental to the statute's primary concern: the deferral of criminal sanctions and the eventual dismissal and expungement of the underlying charge. The statute is concerned solely with criminal sanctions and any use of the word "charged" should thus not be interpreted as in *Carroll*, but in the manner described in *Burdette*.

Accordingly, for purposes of Section 17C-5-2b, Ms. DiVita was "charged" when her Criminal Complaint was filed in March of 2011. Thus, she should have been permitted to participate in the Deferral Program.

3. The Court Should not Interpret "Charged" to be Analogous to "Arrested" because the Statute Specifically Uses Both Terms

It is a known rule of statutory construction "...that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." *Evans v. Evans*, 219 W. Va. 736, 740, 639 S.E.2d 828, 832 (2006), *citing State ex rel. Johnson v. Robinson,* 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979). Additionally, the Court has stated that "We are required to operate under the presumption that the Legislature attaches specific meaning to every word and clause set forth in a statute." *State v. Saunders*, 219 W. Va. 570, 576, 638 S.E.2d 173, 179 (2006). Thus, when the Legislature uses two distinct words within the same statute, it can be inferred that the Legislature intends them to have different meanings. *See id.*

In the present case, the Legislature stated that an individual attempting to use Section 17C-5-2b must be "charged" with a violation of 17C-5-2(d). The Commissioner contends that this definition is synonymous with the act of being arrested, which initiates administrative proceedings. However, the Legislature specifically uses the term "arrested" within the same statute when stating that the defendant must "...notif[y] the court within thirty days of his or her arrest of his or her intention to participate in a deferral." W.Va. Code § 17C-5-2b.

In *Saunders* the Court stated that "To accept [the] contention that the terms "willfully" and "knowingly" were intended by the Legislature to operate in synonymous fashion is simply untenable." *Saunders*, 219 W. Va. 570, 576-77, 638 S.E.2d 173, 179-80 (2006). Similarly, in the instant case, it should be presumed that since the Legislature chose to use two distinct words

within the same section, that the Legislature did not intend for the two words to be construed in the same manner. Thus, the word "charged" as used in Section 17C-5-2b should not be made analogous to being "arrested" and should be given the only other logical interpretation: namely, that being "charged" occurs through a Criminal Complaint.

Once the term "charged" has been correctly interpreted, there is no reason why Ms. DiVita should be rejected from the Deferral Program and the Commissioner's rejection of her application to that program should be vacated.

C. REGARDLESS OF THE PETITIONER'S CHARGE, THE COMMISSIONER DOES NOT HAVE THE DISCRETION TO DENY HER APPLICATION TO THE DEFERRAL PROGRAM BECAUSE THAT PROGRAM IS SEPARATE AND DISTINCT FROM THE TEST AND LOCK PROGRAM ADMINISTERED BY THE COMMISSIONER

In the case at hand, the Department of Motor Vehicles appears to contend that they have the authority to determine if an individual is permitted into the deferral program created in Section 17C-5-2b.

It is important to note that there are two different overlapping programs involved in this particular case: the Deferral Program created in Section 17C-5-2b, and the Test and Lock Program found in Section 17C-5A-3a. While the Commissioner can create rules designed to determine who may be accepted into the Test and Lock Program, the Deferral Program is concerned with criminal penalties and is separate and distinct from the Test and Lock Program; participation in the Test and Lock Program is simply a probationary requirement of the Deferral Program. See W.Va. Code § 17C-5-2b. The power of an Administrative agency is restricted to that power granted by statute and "...they must find within the statute warrant for the exercise of any authority which they claim." *McDaniel* at 727. Thus, the commissioner cannot determine

who may be admitted into the Deferral Program, which is not delegated to his agency, but only who may be admitted into the Test and Lock Program. Even within that program, a defendant cannot be refused admittance for violation of 17C-5-2(e): "Any person whose license is revoked for the first time pursuant to this article or the provisions of article five of this chapter is eligible to participate in the program." W.Va. Code § 17C-5A-3a. Additionally, violation of 17C-5-2(e) is specifically accounted for in the statutory scheme. W.Va. Code § 17C-5A-3a(c)(3).

Thus, once Ms. DiVita was admitted to the Deferral Program by the Magistrate Court, the Commissioner was only permitted to determine her acceptance to the Test and Lock Program and to administer her involvement in that program. Accordingly, the Commissioner had no authority to accept or reject Ms. DiVita from participation in the Deferral Program.

CONCLUSION

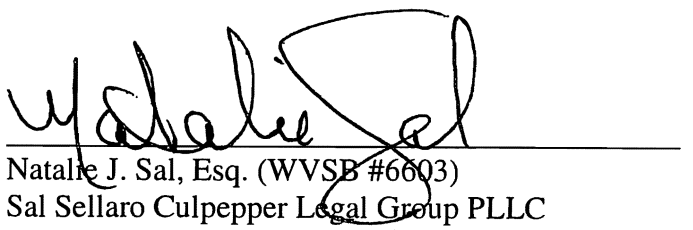
If the Court finds that section 17C-5-2b is clear on its face, Ms. DiVita should be permitted to participate in the program. Alternatively, if the Court finds that the statute is vague and open to interpretation, the Court should find that an individual is "charged" when a Criminal Complaint is issued. Any other interpretation would either impermissibly intertwine the administrative and criminal penalties for driving under the influence or give no meaning to the Legislature's choice of language. Additionally, it is argued that the Commissioner has no power over the Deferral Program created in Section 17C-5-2b and cannot determine who may or may not be accepted into that program. For these reasons, Ms. DiVita should be permitted to participate in the Deferral Program found in 17C-5-2b.

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent requests that this court uphold the Order entered by the Circuit Court of Monongalia County and allow the Respondent to serve a 15-day license revocation. Additionally, the Respondent asks this Court to determine that the Department of Motor Vehicles does not have the statutory authority to control admission into the DUI Deferral Program created under West Virginia Code 17C-5-2b but only into the Test and Lock Program.

Dated: May 16, 2012

Respectfully submitted,
Elizabeth A. Divita
Petitioner,
By Counsel.



Natalie J. Sal, Esq. (WVSB #6603)
Sal Sellaro Culpepper Legal Group PLLC
430 Spruce Street, Suite 3
Morgantown, WV 26505
Phone: (304) 599-5291 Fax: (304) 599-5294

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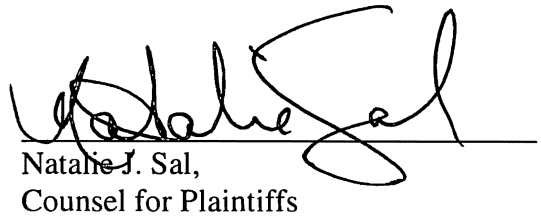
WEST VIRGINIA DIVISION OF MOTOR VEHICLES
Petitioner,
v. **No. 11-1726**

ELIZABETH A. DIVITA
Respondent.

CERTIFICATE OF SERVICE

I, Natalie J. Sal, hereby certify that on May 16, 2012, I served a true and correct copy of the foregoing **Respondent's Brief** upon the following via the U.S. Postal Service:

Janet E. James
DMV – Office of the Attorney General
PO Box 17200
Charleston, WV 25317



Natalie J. Sal,
Counsel for Plaintiffs