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IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

No. 19-0484

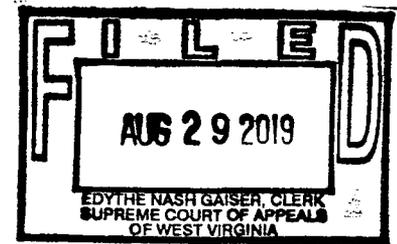
**ADAM HOLLEY,
ACTING COMMISSIONER, WEST VIRGINIA
DIVISION OF MOTOR VEHICLES,**

Petitioner,

v.

TIMOTHY R. MCCABE,

Respondent.



**BRIEF OF THE COMMISSIONER OF
THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES**

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ASSIGNMENTS OF ERROR

- I. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is an *ex post facto* law that cannot be applied retroactively to Respondent because the statute is a civil statute and the salesperson license process is a civil proceeding.
- II. The circuit court erred in finding that Respondent was denied due process because the denial of Respondent's license application was mandated by statute; the denial of his license was in direct relation to the statute's stated purpose - the protection of customers, dealers, banks, and the State from fraudulent activity; and Respondent was given notice of the denial of his license and the reasons therefore, and was given an opportunity to appear before the Commissioner's representatives and produce evidence on his behalf.
- III. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is overly broad as it is directly related to the stated purpose of W. Va. Code §§17A-6E-1 (2006), *et seq.* - the protection of customers, dealers, banks, and the state from fraudulent activity.
- IV. The circuit court erred in finding that §17A-6E-4(c)(5) (2006) is too narrow as it specifically prohibits all individuals who commit fraudulent acts from obtaining a salesperson license regardless of whether said acts were felonies, misdemeanors, or even criminal in nature.

STATEMENT OF THE CASE

The West Virginia Division of Motor Vehicles ("WVDMV") is the state agency responsible for, *inter alia*, issuing motor vehicle salesperson licenses under W. Va. Code §§17A-6E-1 (2006), *et seq.* Petitioner, the Commissioner of the WVDMV, is an officer of the State of West Virginia who is appointed by, and serves at the will and pleasure of, the Governor of West Virginia. W. Va. Code §17A-2-2 (1951). Until March 31, 2019, Pat S. Reed was the Commissioner of the WVDMV. As of the date of the filing of this appeal, WVDMV General Counsel Adam Holley is currently the Acting Commissioner. Mr. Holley appears in his official capacity as the executive officer of the WVDMV.

On October 10, 2005, Timothy McCabe (“Respondent”) signed a plea agreement dated October 5, 2005 agreeing to waive his right to indictment and plead guilty to a felony. (App.¹ at 69-73). The crime involved falsifying a loan application for a customer’s motor vehicle purchase while employed in a motor dealership in Wheeling, West Virginia. (App. at 69-73, 111-112, and 114-121). The above plea agreement was filed in the United States District Court for the Northern District of West Virginia on March 14, 2006. (App. at 74-79). On June 1, 2006, the District Court sentenced Respondent to two years’ probation. (App. at 80-84). W. Va. Code §§17A-6E-1, *et seq.* was enacted on March 11, 2006, went into effect on June 9, 2006, and required that commencing on January 1, 2008, all motor vehicle salespersons obtain a license under Chapter 17A, Article 6E.

Respondent did not work as a salesperson from the date of his conviction until April 2018. (App. at 114, 116, 118, and 123). On April 5, 2018, Respondent applied for a motor vehicle salesperson license and was granted a temporary license. (App. at 52). On April 30, 2018, Respondent’s application for licensure was denied under W. Va. Code §17A-6E-4(c)(5) (2006) due to Respondent’s prior felony conviction. (App. at 50). On May 3, 2018, Respondent appealed the denial of his licensure to the Commissioner, the denial of Respondent’s licensure was stayed, and Respondent retained a temporary salesperson license pending his appeal. (App. at 48-49, 126).

On August 21, 2018, a hearing was held before Sandra Castillo, Hearing Examiner. (App. at 108, 126). The independent Hearing Examiner was appointed by the Commissioner to make a proper disposition (App. at 126). At this hearing, Respondent admitted to being convicted of a felony in 2006 for falsifying a loan application while employed at a motor vehicle dealership in Wheeling, West Virginia. (App. at 111-112, 114-121). Respondent further testified that the loan application was for a customer at the dealership, that Petitioner knew information on the loan

¹ App. refers to the Appendix filed contemporaneously with *Petitioner’s Brief*.

application was not accurate, and that the customer eventually defaulted on the loan. (App. at 111-112, 114-121). Respondent also submitted character references and the testimony of Matthew Jones, Respondent's current employer, on his behalf. (App. 40-46, 121-124)

Because Respondent was convicted of a felony involving the motor vehicle industry, the Commissioner issued a "Final Order" on October 19, 2018 denying Respondent's appeal based upon W. Va. Code §17A-6E-4(c)(5) (2006). (App. at 26-28). On November 15, 2018, Respondent filed a Petition for Review with the Circuit Court of Ohio County. (App. at 1-30). On April 30, 2019, the Circuit Court entered an Order granting Respondent's Petition for Review and reversing the Commissioner's Order. (App. at 1, 129-150).

SUMMARY OF ARGUMENT

The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is an *ex post facto* law that cannot be applied retroactively. The statute is not an *ex post facto* law and can be applied retroactively because it is a civil statute, it is not penal in nature, and the salesperson license process is a civil proceeding. This Court has held that "[t]he due process concerns of the *Ex Post Facto* Clause have application only to retroactivity of 'punitive' laws or rules. That is, '[a] fundamental principle of *ex post facto* law is that it only applies to criminal proceedings, not civil.'" *Richmond v. Levin*, 219 W. Va. 512, 516, 637 S.E.2d 610, 614 (2006) (per curiam) citing *State v. Smith*, 198 W. Va. 702, 713, 482 S.E.2d 687, 698 (1996). The legislative intent is clear that W. Va. Code §17A-6E-4(c)(5) (2006) is a civil statute and is not penal in nature. The stated purpose of W. Va. Code §17A-6E-1(a) (2006) is "to protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles." Accordingly, W. Va. Code §17A-6E-4(c)(5) (2006) is a civil statute and can be applied retroactively.

The circuit court further erred in finding that Respondent was denied due process. The denial of Respondent's license application was mandated by statute – W. Va. Code §17A-6E-4(c)(5) (2006). Additionally, the denial of his license was directly related to the stated purpose of the statute - the protection of customers, dealers, banks, and the State from fraudulent activity in the motor vehicle industry. W. Va. Code §17A-6E-1(a) (2006). Furthermore, Respondent was given proper notice of the denial of his license application and the reasons therefore, had the opportunity to retain counsel, had the opportunity to appear before the Commissioner's representatives and produce evidence on his behalf, and had the opportunity to appear before an unbiased hearing tribunal that kept an adequate record of the proceedings. *See Jordan v. Roberts*, 161 W. Va. 750, 755-56, 246 S.E.2d 259, 262 (1978), *citing* Syl. Pt. 3, *North v. Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977). Furthermore, the circuit court erroneously found that Respondent pleaded guilty to falsifying a loan application without knowledge that his salesperson license application would be denied in the future. The subject statute was enacted *before* Respondent's plea agreement was filed with the District Court and *before* judgment was entered by the District Court. Finally, the circuit court's determination that Respondent has had no legal issues since 2005 and that there is no risk that he would engage in fraudulent activity in the future ignored that Respondent did not work as a salesperson in the automobile industry for over 12 years or at any time after his conviction in 2006. Accordingly, Respondent was not denied due process.

The circuit court also erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is overly broad. The circuit court determined that the subject statute provides no exceptions for those persons who committed felonies in the motor vehicle industry. But this analysis ignores that the denial of licensure for these persons is directly related to the stated purpose of W. Va. Code §§17A-6E-1 (2006), *et seq.* - the protection of customers, dealers, banks, and the State from fraudulent

activity. Furthermore, not all felonies are included. Instead, only felonies involving financial matters or involving the motor vehicle industry are included, with exceptions permitted for other felonies. If any exceptions were permitted for those convicted of felonies involving the motor vehicle industry, the entire purpose of the statute would be frustrated.

Finally, the circuit court erred in finding that §17A-6E-4(c)(5) (2006) is overly narrow in that it specifically prohibits all individuals who commit a certain type of felony from obtaining a salesperson license, but allows others who have committed criminal acts to obtain licensure so long as such acts were not felonies. The circuit court wholly ignored the specific language of W. Va. Code §17A-6E-4(c)(4) (2006), which also prohibits licensure to an individual who commits a fraudulent act or omission or has repeatedly defaulted in financial obligations regarding the motor vehicle industry regardless of whether said acts were felonies, misdemeanors, or even criminal in nature.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure, the Commissioner requests oral argument on the bases that this case involves issues of first impression, involves issues of fundamental public importance, and involves constitutional questions regarding the validity of statutes.

ARGUMENT

I. Standard of Review

A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4 (1998). *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 71, 464 S.E.2d 589, 590 (1995) (per curiam).

The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision 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.

W. Va. Code § 29A-5-4(g) (1998).

This Court's review of a circuit court's order deciding an administrative appeal is made pursuant to W. Va. Code §29A-5-4(a)(1998). This Court reviews questions of law *de novo*; and findings of fact by the administrative office are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Reed v. Hall*, 235 W. Va. 322, 773 S.E.2d 666 (2015). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

II. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is an *ex post facto* law that cannot be applied retroactively because it is a civil statute and the salesperson license process is a civil proceeding.

The West Virginia Legislature intended for §17A-6E-4(c)(5) (2006) to apply retroactively. This Court has held that "a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582, 586-87 (2017) (internal citations omitted). This Court has held that "[w]here 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).

W. Va. Code §17A-6E-4(c)(5) (2006) requires that the Commissioner refuse to issue a license if the applicant “*has been convicted* of a felony.” The phrase *has been convicted* denotes an act occurring prior to the application for licensure. Furthermore, it is evident that the Legislature intended retroactive application because prospective application of the statute would directly frustrate the intended purpose of the statute. Specifically, an individual like Respondent who was convicted of a felony in the motor vehicle industry eight days prior to June 9, 2006, the effective date of the statute, can obtain a salesperson license, but an individual who is convicted of a felony one day after the effective date cannot obtain said license. This construction of the statute would result in an absurdity. This Court has consistently held that where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not result in an absurdity, will be made instead. *Matheny v. Scalpio*, 240 W. Va. 30, 39, 807 S.E.2d 278, 297 (2017); Syl. Pt. 3, *Sheena H. ex rel. Russell H. v. Amfire, LLC*, 235 W. Va. 132, 772 S.E.2d 317 (2015); *State v. Horn*, 232 W. Va. 32, 42, 750 S.E. 2d 248, 258 (2013); *Pristavec v. Westfield Insurance Company*, 184 W. Va. 331, 337, 400 S.E.2d 575, 581 (1990); Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938); Syl. Pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925). The statute aims to prevent all said persons from obtaining licensure regardless of when the felony conviction occurred, and the use of past tense language clearly indicates this intent. Any alternate construction of the statute would result in an absurdity and would clearly frustrate the purpose of the statute.

Irrespective, this Court has held that “[t]he due process concerns of the *Ex Post Facto* Clause have application only to retroactivity of ‘punitive’ laws or rules. That is, ‘[a] fundamental

principle of *ex post facto* law is that it only applies to criminal proceedings, not civil.'" *Richmond*, 219 W. Va. at 516, 637 S.E.2d at 614 citing *Smith*, 198 W. Va. at 713, 82 S.E.2d at 698 (1996); See also *Haislop v. Edgell*, 215 W. Va. 88, 94, 593 S.E.2d 839, 845 (2003) (observing that legislation which is civil "would not implicate the *ex post facto* clause," whereas legislation which is punitive "would violate the clause."); Syl. Pt. 2, *Ex Parte Quarrier and Fitzbaugh*, 4 W. Va. 210 (1870) ("*ex post facto* laws relate to penal and criminal proceedings, and not to civil proceedings which effect private rights retrospectively.")

This Court has held that

the question of whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction, and requires the application of a two-level inquiry adopted by the United States Supreme Court in *United States v. Ward*, 448 U.S. 242 (1980). First, courts must determine whether the legislature indicated, either expressly or impliedly, a preference for labelling the statute civil or criminal. Second, if the legislature indicates an intention to establish a civil remedy, courts must consider whether the legislature, irrespective of its intent to create a civil remedy, provided for sanctions so punitive as to transform the civil remedy into a criminal penalty.

State ex rel. Palumbo v. Graley's Body Shop, Inc., 188 W. Va. 501, 507, 425 S.E.2d 177, 183 (1992).

This Court further held that

[a]s part of the second level of the inquiry, courts should be guided by the following factors identified by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963):

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]

Id.

The United States Supreme Court has held that “[a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.” *Mendoza-Martinez*, 372 U.S. at 168-69.

The legislative intent is clear that W. Va. Code §17A-6E-4(c)(5) (2006) is a civil statute, not a criminal statute. It is further clear that its purpose is not penal in nature nor does it operate to extend criminal punishment. Instead, the stated purpose of W. Va. Code §§17A-6E-1, *et seq.* (2006) is “to protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles.” W. Va. Code §17A-6E-1(a) (2006). And the statute is contained within an administrative chapter of the West Virginia Code (i.e. Chapter 17A) and does not in any way label the statute criminal either expressly or impliedly.

Because the Legislature clearly indicated that it intended the statute to be civil in nature, the seven *Mendoza-Martinez* factors must be considered. This analysis shows that denying an automobile salesperson license is not so punitive as to transform the civil remedy into a criminal penalty.

A. Whether the sanction involves an affirmative disability or restraint.

The statute does not impose a physical restraint, which is the “paradigmatic affirmative disability or restraint.” *Smith v. Doe*, 538 U.S. 84, 100 (2004). The denial of a motor vehicle salesperson license closely mirrors “occupational debarment,” the selective prohibition of certain individuals from participating in particular industries, especially where recidivism is a concern. *See id.* Although “sanctions of occupational debarment” are “harsh,” they are “nonpunitive.” *Id.*, citing *Hudson v. United States*, 522 U.S. 93, 104 (1997); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960).

The court below points to Respondent’s “[in]ability to earn a living in a profession he has pursued nearly his entire adult life.” (App. at 134). But this consequence is no more inherently severe than the *Hudson* and *De Veau* denials of employment in specific fields of industry. At best, this is simply one of many collateral consequences of committing a felony.

B. Whether the sanction has historically been regarded as a punishment.

Denial of a professional license has not historically been regarded as punishment. As the United States Supreme Court explained, “revocation of a privilege voluntarily granted” is “characteristically free of the punitive criminal element.” *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). The Court applied this reasoning to individuals who were “prohibited from further participating in the banking industry,” and found that such a bar on employment “[has not] historically been viewed as punishment.” *Hudson*, 522 U.S. at 104. This factor thus also weighs in favor of finding that the denial of a motor vehicle salesperson license is nonpunitive.

C. Whether the sanction is implicated only upon a finding of scienter.

The statute does not have any inherent scienter requirements built into it. The statute states that the WVDMV “shall refuse to issue the license if the applicant: . . . Has been convicted of a felony.” W. Va. Code § 17A-6E-4(c)(5) (2006). Thus, the plain language of the statute indicates that it applies “without regard to the violator’s state of mind.” *Hudson*, 522 U.S. at 104. Moreover, the Court in *Smith* held that where a “regulatory scheme applies only to past conduct, which was, and is, a crime,” the scienter factor is of little weight. *Smith*, 538 U.S. at 105. Accordingly, there is no scienter aspect to the statute and nothing to point toward the statute being criminal in nature.

D. Whether the sanction’s operation promotes the traditional aims of punishment.

The statute promotes deterrence—a traditional aim of punishment. But the deterrent effect of the statute is a mere side effect of the statute’s true purpose: to protect the public from fraud in

the motor vehicle industry. This is a wholly non-punitive objective. In *Hudson*, the Court held this factor neutral because occupational debarment, “while intended to deter future wrongdoing, also serve[d] to promote the stability of the banking industry.” 522 U.S. at 105. Like in *Hudson*, this factor does not weigh in favor of finding the statute punitive.

E. Whether the behavior affected by the sanction is already a crime.

Because the license limitation applies only to past conduct, the “obligations the statute imposes” are “not predicated upon some present or repeated violation.” *Smith*, 538 U.S. at 105. Rather, “past conduct, which was, and is, a crime. . . . is a necessary beginning point,” especially when recidivism is a concern—as it is here. *Id.* The statute does not criminalize the fact of a prior felony conviction. Thus, the fifth *Mendoza–Martinez* factor does not evidence that the statute is punitive.

F. Whether there is a rational alternative purpose.

The statute’s rational alternative purpose is to “protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to . . . fraudulent activity.” W. Va. Code §17A-6E-1(a)(2008). Like the sex registration statute in *Smith*, this is a “legitimate nonpunitive purpose.” *Smith*, 538 U.S. at 87. As such, the law is not a mere pretext for a criminal purpose, but is civil in nature.

G. Whether the sanction appears excessive in relation to the alternative purpose.

The circuit court’s rationale erroneously implies this factor weights in favor of finding the statute punitive. In *Smith*, the Court rejected the argument that not requiring “individual determination of . . . dangerousness” renders a law punitive. *Smith*, 538 U.S. at 104. This is because “[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.”

Id. at 103. The Seventh Circuit similarly held that “denial of [a masseuse] license based on an arrest that occurred prior to the passage of the Ordinance” was not excessive in relation to the stated non-punitive goals. *See O’Grady v. Vill. of Libertyville*, 304 F.3d 719, 724 (7th Cir. 2002).

That is precisely what the Legislature did here. The ability of the Commissioner to grant a salesperson license to individuals who have committed virtually *any* felony—except those relating to fraud or the motor vehicle industry—further indicates that the law is not excessive.

The constitutional prohibition against *ex post facto* laws applies only to *criminal* penalties, not collateral consequences. Under *Mendoza–Martinez*, the majority of factors weigh in favor of finding the statute is civil: On balance five of the seven factors indicate that the statute is civil; and no factor indicates that the statute should be considered criminal. This Court therefore should hold that the denial of Respondent’s motor vehicle salesperson license application did not violate the *Ex Post Facto* Clause.

III. The circuit court erred in finding that Respondent was denied due process because the denial of Respondent’s license application was mandated by statute; the denial of his license application was in direct relation to the stated purpose of the statute - the protection of customers, dealers, banks, and the State from fraudulent activity; and Respondent was given notice of the denial of his license application and the reasons therefore, and was given an opportunity to appear before the Commissioner’s representatives and produce evidence on his behalf.

This Court has held that “in regulating a given occupation, as in all legislative matters based upon the police power, regulations will only be valid if they bear some reasonable relationship to the public health, safety, morals or general welfare.” *Thorne v. Roush*, 164 W. Va. 165, 168, 261 S.E.2d 72, 74 (1979). The purpose of West Virginia Code §17A-6E-1, *et seq.* (2006) is “to protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles.” W. Va. Code §17A-6E-1(a) (2006). The Commissioner’s denial of Respondent’s license application was

mandated by statute and is in *direct* relation to the stated purpose of the statute. Specifically, a person who knowingly falsifies a loan application and is convicted of a felony is the exact person and activity from which this statute seeks to protect the public, and the denial of said licensure furthers the general welfare of the citizens of West Virginia.

This Court has held that “[t]he right to engage in a lawful business, though such business is subject to reasonable regulations under the police power, is protected by constitutional provisions relating to due process of law.” Syl. Pt. 1, *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960). This Court has articulated that due process requires

a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings.

Jordan, 161 W. Va. at 755-56, 246 S.E.2d 259, 262 (1978), *citing* Syl. Pt. 3, *North*, 160 W. Va. 248, 233 S.E.2d 411.

Respondent was provided with all of the above in this matter and, thus, was given due process of law. *First*, Respondent was clearly notified of the basis for the denial of his application (i.e. his prior felony conviction) and was clearly aware of the same. *Second*, Respondent had an ample opportunity to prepare a rebuttal to the reasons for the denial; the hearing was scheduled and held 3 months after his notice of appeal. *Third*, Respondent was given the option of having counsel represent him at this hearing. *Fourth*, the Commissioner’s representatives were present at the hearing and Respondent had an opportunity to confront them. *Fifth*, Respondent presented evidence on his own behalf regarding whether his felony involved the motor vehicle industry or financial matters. *Sixth*, an independent Hearing Examiner conducted the hearing. *Finally*, the proceedings were properly recorded. That Respondent did not achieve the result he wished does not evidence a lack of due process nor does it make the statute unconstitutional.

Furthermore, this Court has indicated that the West Virginia Legislature, which is comprised of the Senate and the House of Delegates, is “given detailed instructions in article 6 of the State Constitution respecting the procedures by which laws may be enacted.” *Cooper v. Gwinn*, 171 W. Va. 245, 249, 298 S.E.2d 781, 785 (1981). This Court further indicated that “these constitutional provisions respecting mandatory legislative procedures can therefore properly be deemed a form of procedural due process. The culmination of these procedures results in law, law being a public policy statement of the people acting through their legislature in the republican form of government.” *Id.* The West Virginia Legislature was bound by and followed the procedures articulated in Article 6 of the West Virginia Constitution when it enacted W. Va. Code §17A-6E-4(c)(5) (2006). Accordingly, procedural due process was given to Respondent and all citizens when the subject statute was enacted.

The Circuit Court cited *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973) when determining that Respondent was not provided due process, but that case is not analogous to the case at bar. The municipal code in *Freitag* required that the lack of “infirmity of mind” be a prerequisite to the issuance of a public chauffer’s license. *Id.* at 1379. Thus, the government official had to determine whether Mr. Freitag lacked “infirmity of mind,” which was a vague and undefined term. The Medical Division of the Chicago Police Department determined that Mr. Freitag might be a “bad risk” based upon his brief stay at a mental-health facility years prior to his application and, thus, the government official denied his license solely on this basis. *Id.* at 1380. So, the court held that the government official’s basis for determining that Mr. Freitag was unfit was insufficient. *Id.* at 1381-1382. Furthermore, the Court held that the government official failed to notify Mr. Freitag of the basis for the denial until *after* the denial and until *after* Mr. Freitag requested an explanation.

Id. at 1382. Moreover, Mr. Freitag did not receive the name of the police department doctor and did not have the opportunity to question the doctor. *Id.*

Here, the Commissioner clearly informed Respondent of the basis for the denial of his salesperson license and gave Respondent the opportunity to present evidence and confront the Commissioner's representatives. Moreover, the Commissioner made a well-reasoned decision while applying a specific statutory provision. And unlike *Freitag*, there is no question that Respondent committed the disqualifying act – Respondent candidly admitted that he committed a felony directly involving the motor vehicle industry (i.e. falsifying a loan application) and he knew the information contained in the loan application was false.

The circuit court also determined that Respondent was denied due process by having a property right taken away without being informed that pleading guilty would take away such right at the time of his plea agreement. Neither the circuit court nor Respondent cited case law in support of this holding – because none exists. The circuit court's determination ignores several key factors.

First, regardless of what laws may have been passed in the future, Respondent clearly admitted he committed the felonious act and accepted responsibility for the same. This is not a situation where Respondent maintained his innocence yet accepted a plea bargain to expedite the matter and mitigate expenses. *Second*, Respondent did not work as a salesperson at any time and did not apply for a salesperson license until approximately 12 years after the date of his conviction. At the time of his application, Respondent knew, or should have known, of the requirements to become a licensed salesperson. *Third*, Respondent's plea agreement was filed with the District Court 3 days *after* West Virginia §§17A-6E-1, *et seq.* (2006) was enacted and the final order sentencing Respondent was entered approximately 3 months *after* West Virginia §§17A-6E-1, *et*

seq. (2006) was enacted. Accordingly, Respondent, who claims to have extensive work experience in the motor vehicle industry, should have been aware of the new law.

The circuit court speculated that there is no risk that Respondent will engage in fraudulent activity in the future. The speculative nature of the circuit court's decision is shown by several key factors. *First*, Respondent has never worked in the automobile industry as a salesperson for over a decade since his conviction – from January 1, 2008, the first date a license was required, to August 5, 2018, when Respondent applied for a license. *Second*, at the August 21, 2018 administrative hearing, Respondent offered no evidence that he ever worked as salesperson. And there is no definitive proof that he would not engage in similar conduct when employed in the motor vehicle industry again as a salesperson. *Finally*, Respondent's prior act is the very act this statute aims to prevent. The circuit court thus erred in holding that Respondent was denied due process of law.

IV. The circuit court erred in finding that §17A-6E-4(c)(5) (2006) is overly broad as it is directly related to the stated purpose of W. Va. Code §§17A-6E-1 (2006), et seq. - the protection of customers, dealers, banks, and the State from fraudulent activity.

The circuit court determined that the subject statute is overly broad as it provides no exceptions for those who have committed felonies in the motor vehicle industry or in financial matters. But these are the exact persons the statute aims to protect the public against. This Court's "prior decisions have repeatedly counseled that statutes are presumed to be constitutional." *In re Tax Assessment of Woodlands*, 223 W. Va. 14, 22, 672 S.E.2d 150, 158 (2008). And "every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality. . . ." Syl., *Johnson v. Bd. of Stewards of Charles Town Races*, 225 W. Va. 340, 693 S.E.2d 93 (2010) (per curiam), citing Syl. Pt. 1, *State ex rel. Appalachian Power Company v. Gainer*. 194 W. Va. 740, 143 S.E. 2d 351

(1965). The party challenging a statute bears the burden of proving a statute is unconstitutional “beyond a reasonable doubt.” *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017).

The prohibition of persons who have committed felonies in the motor vehicle industry is not overly broad in that it is directly related to the specific purpose of W. Va. Code §17A-6E-1, *et seq.* (2006) - the protection of customers, dealers, banks, and the State. Furthermore, not all felonies are included. Instead, only felonies involving financial matters or the motor vehicle industry are included, with exceptions permitted for other felonies.

The circuit court’s reliance on *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn 1977) is misplaced as it is easily distinguishable. In *Smith*, private investigator/security guard applicants were automatically disqualified if they committed *any* felony while persons who committed misdemeanors and persons with histories of alcohol or drug abuse could be licensed. The court in *Smith* held that the statute was overbroad in that certain felonies (i.e. bigamy and income tax evasion) had no relevance to a person’s ability to perform as a private detective or security guard. *Id.* at 1080. The court further held that the statute was overbroad in that it made an “irrational distinction between those convicted of felonies and those convicted of misdemeanors.” *Id.*

Unlike the statute in *Smith*, W. Va. Code §17A-6E-4(c)(5) (2006) only disqualifies those convicted of certain felonies from obtaining licensure - those who committed felonies in the motor vehicle industry or involving financial matters. But the statute also prohibits *non-felons* who have committed fraud or repeatedly defaulted on financial obligations in the motor vehicle industry from obtaining licensure. These persons are those the statute specifically aims to prevent from becoming motor vehicle salespersons. And the prohibitions are directly related to the purpose of the statute – “to protect retail motor vehicle customers, motor vehicle dealers, banks and the state

from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles.” W. Va. Code §17A-6E-1(a) (2006). Thus, the circuit court erred by holding that the statute is overbroad.

V. The circuit court erred in finding that §17A-6E-4(c)(5) (2006) is too narrow as it specifically prohibits all individuals who commit fraudulent acts from obtaining a salesperson license regardless of whether said acts were felonies, misdemeanors, or even criminal in nature.

The circuit court held that the statute is overly narrow as it specifically prohibits those who have committed a certain type of felony from obtaining licensure, but allows others who have committed criminal acts to obtain licensure so long as such acts were not felonies. This holding is based on a misreading of the statute: While W. Va. Code §17A-6E-4(c)(5) (2006) prohibits licensing felons convicted of crimes involving financial matters or in the motor vehicle industry, W. Va. Code §17A-6E-4(c)(4) (2006) also prohibits licensing individuals who commit a fraudulent acts or omission or who repeatedly default on financial obligations regarding the motor vehicle industry. This prohibition applies regardless of whether said acts were felonies, misdemeanors, or even crimes. Thus, the statute prohibits felons in the motor vehicle industry *and* non-felons who commit fraudulent acts or repeatedly default on financial obligations from obtaining licenses. These non-felons are also persons who are prohibited from obtaining licensure in order to satisfy the purpose of the statute. Accordingly, the subject statute is not overly narrow.

CONCLUSION

For the reasons set forth above, this Court should reverse the circuit court's order and remand for entry of an order affirming the Commissioner's denial of Respondent's license application.

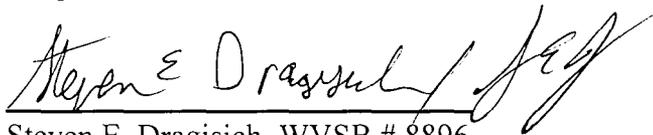
Respectfully submitted,

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