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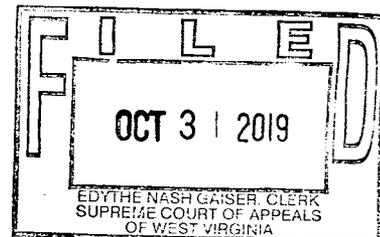
**ADAM HOLLEY,  
ACTING COMMISSONER, WEST VIRGINIA  
DIVISION OF MOTOR VEHICLES,**

**Petitioner,**

v.

**TIMOTHY R. MCCABE,**

**Respondent.**



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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

ARGUMENT

I. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is an *ex post facto* law because it is a non-punitive civil statute.....1

II. The circuit court erred in finding that Respondent was denied due process because Respondent was provided with both substantive and procedural due process.....6

III. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is overly broad because it is appropriately tailored.....13

IV. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is overly narrow because it is appropriately tailored.....15

CONCLUSION.....16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Commonwealth v. Muniz</i> , 164 A.3d 1189 (Pa. 2017) .....	4
<i>Conn. Dep't of Public Safety v. Doe</i> , 538 U.S. 1 (2003).....	10
<i>Cooper v. Gwinn</i> , 171 W. Va. 245, 298 S.E.2d 781 (1981) .....	12
<i>Dent v. State of West Virginia</i> , 129 U.S. 114 (1889) .....	7, 8
<i>De Veau v. Braisted</i> , 363 U.S. 144.....	2
<i>Graves v. Minnesota</i> , 272 U.S. 425 (1926).....	7
<i>Haig v. Agee</i> , 453 U.S. 280 (1981).....	13, 14
<i>Haislop v. Edgell</i> , 215 W. Va. 88, 593 S.E.2d 839 (2003).....	1, 2, 9, 10
<i>Hawker v. People of New York</i> , 170 U.S. 189 (1898).....	6, 7, 8, 9
<i>Helvering v. Mitchell</i> , 303 U.S. 391 (1938).....	2
<i>Hensler v. Cross</i> , 210 W. Va. 530, 558 S.E.2d 330 (2001).....	2, 14
<i>Hudson v. United States</i> , 522 U.S. 93 (1997).....	2, 3, 4
<i>Jordan v. Roberts</i> , 161 W. Va. 750, 246 S.E.2d 259 (1978).....	10
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963).....	1
<i>Lehman v. Pennsylvania State Policy</i> , 576 Pa. 365, 376 (2003).....	3, 4
<i>North v. Board of Regents</i> , 160 W. Va. 248, 233 S.E.2d 411 (1977).....	10
<i>O'Grady v. Vill. Of Libertyville</i> , 304 F.3d 719 (7 <sup>th</sup> Cir. 2002).....	5
<i>Pancho's LLC v. Hughes</i> , 2019 WL 4257286 (W.Va. September 9, 2019) (memorandum decision).....	7, 11
<i>Regents of Univ. of Mich. v. Ewing</i> , 474 U.S. 214 (1985).....	7

TABLE OF AUTHORITIES – CONT.

<u>Cases</u>	<u>Page</u>
<i>Smith v. Doe</i> , 538 U.S. 184 (2004).....	2, 3, 4, 5, 14
<i>State ex rel. Ellis v. Kelly</i> , 145 W. Va. 70, 112 S.E.2d 641 (1960).....	7
<i>State v. Morrison</i> , 98 W. Va. 289, 127 S.E. 75, 79 (1925).....	7, 8
<i>State ex rel. Palumbo v. Graley’s Body Shop, Inc.</i> , 188 W. Va. 501, 425 S.E.2d 177 (1992).....	1
<i>Thorne v. Roush</i> , 164 W. Va. 165, 261 S.E.2d 72 (1979).....	7
<i>Vest v. Cobb</i> , 138 W. Va. 660, 76 S.E.2d 885 (1953).....	7, 8
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	7
 <b><u>Statutory Provisions</u></b>	
W. Va. Code §§17A-6E-1 (2006), <i>et seq</i> .....	9, 10, 11, 13
W. Va. Code §17A-6E-1(a) (2006).....	14
W. Va. Code §17A-6E-4(c)(4) (2006).....	14, 15, 16
W. Va. Code §17A-6E-4(c)(5) (2006).....	1, 3, 12, 13, 14, 15, 16
W. Va. Code §§15-12-1, <i>et seq</i> .....	14
 <b><u>Rules</u></b>	
Fed. R. Crim. P. 11.....	11
Revise Rules of Appellate Procedure Rule 10 (g).....	1

Now comes Petitioner, Adam Holley, Acting Commissioner of the West Virginia Division of Motor vehicles (“the Commissioner”), and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits his reply to the *Brief of Timothy R. McCabe, Respondent*. The Commissioner stands on his initial brief for all points not further addressed herein.

### ARGUMENT

**I. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is an *ex post facto* law because it is a non-punitive civil statute.**

In his brief, Timothy R. McCabe (“Respondent”) concedes that W. Va. Code §17A-6E-4(c)(5) (2006) is a civil statute. Specifically, Respondent does not assert that the subject statute is criminal, nor could he. Rather, Respondent argues that the civil statute has a “punitive effect” when applied to him. (Resp. Br. at 15). Thus, the seven *Mendoza-Martinez* factors<sup>1</sup> must be considered to determine whether the subject statute’s sanctions are so punitive in nature so “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). In addressing these factors and in asserting that said factors show that the subject statute is punitive in nature and effect, Respondent ignores relevant case law applying the *Mendoza-Martinez* factors and fails to cite a single relevant case in support of his argument. Moreover, the circuit court failed to address any of the *Mendoza-Martinez* factors in its determination that the subject statute was an *ex post facto* law. And as indicated by Respondent in his brief, this Court has held that “[a] court will reject the legislature’s manifest intent only when a party challenging the Act provides the *clearest proof* that the statutory scheme is so punitive in either purpose or effect so as to negate the Legislature’s intention.” Syl.

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<sup>1</sup> See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

Pt. 3, *Haislop v. Edgell*, 215 W.Va. 88, 593 S.E.2d 839 (2003)(emphasis added), citing *Hensler v. Cross*, 210 W. Va. 530, 558 S.E.2d 330, 335 (2001) (internal citations omitted).

A. The sanction does not involve an affirmative disability or restraint.

It is telling that Respondent does not cite a single case in support of his assertion that “[t]he inability to work in a profession is clearly an affirmative disability and/or restraint.” (Resp. Br. at 20). Respondent completely ignores the United States Supreme Court’s decisions in *Smith v. Doe*, 538 U.S. 84 (2004), *Hudson v. United States*, 522 U.S. 93 (1997), and *De Veau v. Braisted*, 363 U.S. 144 (1960). As explained in the Commissioner’s initial brief, the denial of a motor vehicle salesperson license closely mirrors “occupational debarment,” which is the selective prohibition of certain individuals from participating in particular industries, especially where recidivism is a concern. (Pet. Br. at 9). In those cases, the Court held that occupational debarment is regulatory and, thus, civil in nature. *Smith*, 538 U.S. at 100. Although “sanctions of occupational debarment” are “harsh,” they are “nonpunitive.” *Id.*, citing *Hudson*, 522 U.S. at 104; *De Veau*, 363 U.S. at 160. Thus, contrary to Respondent’s argument, the sanction here does not involve an affirmative disability or restraint.

B. The sanction has not historically been regarded as a punishment.

Respondent completely disregards the United States Supreme Court’s holding in *Helvering v. Mitchell*, 303 U.S. 391 (1938) that “revocation of a privilege voluntarily granted” is “characteristically free of the punitive criminal element.” *Id.* at 399. Respondent also attempts to distinguish the United States Supreme Court’s decision in *Hudson* in which the court specifically held that a bar on employment in the banking industry “[has not] historically been viewed as punishment.” *Hudson*, 522 U.S. at 104. Respondent ignores the clear holding in *Hudson* and unpersuasively attempts to distinguish the case by asserting that the bankers were barred before

they were indicted for a crime, but that Respondent was barred after he committed the crime while being unaware that his guilty plea would lead to the denial of his salesperson license. (Resp. Br. at 20). But *Hudson* unequivocally held that occupational debarment is a purely civil penalty and is not punitive for the purposes of the Double Jeopardy Clause of the Sixth Amendment. Respondent does not cite any law supporting his implicit argument that the analysis for a penalty is different under the *Ex Post Facto* Clause and the Double Jeopardy Clause. This is because the Court's decision in *Smith*, which cites *Hudson's* analysis in the context of an *Ex Post Facto* Clause challenge, shows that the analysis of what constitutes a punitive penalty is the same for both the *Ex Post Facto* Clause and the Double Jeopardy Clause. The occupational debarment analysis in *Hudson* is therefore applicable in this occupational debarment case. As such, the sanction has not historically been viewed as punishment.

C. The sanction is not implicated upon a finding of scienter.

Respondent concedes that W. Va. Code § 17A-6E-4(c)(5) (2006) “does not involve a finding of scienter.” (Resp. Br. at 20). Accordingly, this factor weighs in favor of the subject statute being civil and not punitive. Regardless, Respondent unpersuasively asserts that the past crime committed involved a finding of scienter and, thus, the statute has a punitive effect. Respondent overlooks 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. The sanction's operation does not promote the traditional aims of punishment.

Respondent ignores the United States Supreme Court's decision in *Hudson*, which is relevant precedent. Rather, he cites the Pennsylvania Supreme Court's decision in *Lehman v. Pennsylvania State Policy*, 576 Pa. 365, 376, 839 A.2d 265, 272 (2003) in support of his position

that “[a] statute with a deterrent effect may indicate it is punitive instead of civil in nature.” (Resp. Br. at 21). But Respondent fails to disclose that the Pennsylvania Supreme Court views the Pennsylvania *ex post facto* clause differently than the United States and West Virginia Supreme Courts view their respective *ex post facto* clauses. Specifically, the Pennsylvania Supreme Court has made clear that “there is some divergence between the [Pennsylvania] and federal *ex post facto* clauses.” *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017). Because “there is some tension between the *Hudson* language [that no *Mendoza–Martinez* factor is controlling] and our own suggestion . . . which postdated *Hudson* by over five years, that the last *Mendoza–Martinez* factor alone might render Megan's Law unconstitutional provided an adequate showing.” *Id.* at 1222 (internal citations omitted). Finally, the court held that “Pennsylvania's *ex post facto* clause provides even greater protections than its federal counterpart.” *Id.* at 1223. So *Lehman* is not instructive when evaluating this *Mendoza–Martinez* factor under the United States and West Virginia constitutions' *ex post facto* clauses.

Additionally, Respondent fails to address and wholly ignores the relevant precedent in *Hudson* where the United States Supreme Court determined that this factor was 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 subject statute punitive because while the subject statute promotes deterrence, it also serves to promote the stability of the motor vehicle industry.

E. The behavior affected by the sanction is not already a crime.

Respondent fails to cite any case law supporting his position regarding this factor and wholly discounts the relevant precedent in *Smith*. As previously indicated in the Commissioner's initial brief, 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. (Pet. Br. at 11). 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 subject statute is punitive.

F. There is a rational alternative purpose.

Respondent concedes that there is an alternative purpose. (Resp. Br. at 21). The bar from salesperson licensure of those who commit felonies involving the motor vehicle industry is directly related to the purpose of the statute - protecting customers, dealers, banks, and the State from fraudulent activity. Accordingly, this factor weighs in favor of the subject statute being civil and not punitive.

G. The sanction is not excessive in relation to the alternative purpose.

Respondent essentially asserts that because the Commissioner is not required to consider Respondent’s lack of criminal record since his felony conviction, the statute is excessive. Respondent again fails to cite any case law in support of his position. He altogether overlooks relevant precedent in which the United States Supreme 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. *O’Grady v. Vill. of Libertyville*, 304 F.3d 719, 724 (7th Cir. 2002). Finally, the United States Supreme Court also held that a statute

prohibiting medical licensure to a felon who was convicted prior to the enactment of the statute, even without consideration of potential reformation, was not excessive in relation to the purpose of the statute. See *Hawker v. New York*, 170 U.S. 189, 197 (1898).

Even independent of this precedent, the subject statute is not excessive in relation to the alternative purpose. It does not prohibit Respondent from obtaining employment as a salesperson outside of the motor vehicle industry. Rather, the subject statute is tailored to the alternative purpose of protecting customers, dealers, banks, and the State from fraudulent activity in the motor vehicle industry because it only prohibits Respondent from obtaining employment as a salesperson in that industry.

\* \* \*

The constitutional prohibition against *ex post facto* laws applies only to *criminal* penalties, not collateral consequences. Even after Respondent's attempts to assert otherwise, it is still clear that five of the seven *Mendoza-Martinez* factors weigh in favor of finding the statute is civil and that no factor indicates that the statute should be considered criminal. Accordingly, this Court should hold that the denial of Respondent's motor vehicle salesperson license application did not violate the *Ex Post Facto* Clause and, thus, the circuit court's order should be reversed.

**II. The circuit court erred in finding that Respondent was denied due process because Respondent was provided with both substantive and procedural due process.**

In his brief, Respondent intermingles and confuses substantive due process rights with procedural due process rights. Specifically, Respondent asserts that he was denied substantive due process (i.e. the right to pursue a lawful occupation) because of the procedures used at the hearing (i.e. not having certain evidence considered), which implicates procedural due process.

But substantive due process and procedural due process are two separate concepts. “[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Pancho’s LLC v. Hughes*, 2019 WL 4257286, \*2 n. 2 (W. Va. Sept. 9, 2019) (memorandum decision), citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). “[S]ubstantive due process rights are created only by the Constitution,’ unlike procedural due process rights, for which the interest is derived from state law.” *Id.*, citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985).

#### A. Substantive Due Process

“In order for a statute to withstand constitutional scrutiny under the substantive due process standard, it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary or discriminatory.” *Thorne v. Roush*, 164 W.Va. 165, 168, 261 S.E.2d 72, 74 (1979). W. Va. Code § 17A-6E-4(c)(5) (2006) does not violate substantive due process. While the pursuit of lawful occupation is a right protected by due process<sup>2</sup>, the United States and West Virginia Supreme Courts have consistently held that a state may regulate a profession or occupation with qualifications so long as such regulations are not arbitrary or unreasonable. See *Dent v. West Virginia*, 129 U.S. 114 (1889); *Graves v. Minnesota*, 272 U.S. 425, 427 (1926); *Hawker*, 170 U.S. 189; *Vest v. Cobb*, 138 W. Va. 660, 674, 76 S.E.2d 885, 893 (1953); *State v. Morrison*, 98 W. Va. 289, 127 S.E. 75, 79 (1925).

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<sup>2</sup> 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).

Specifically, “there is no arbitrary deprivation of [the right to pursue lawful occupation] where its exercise is not permitted because of the failure to comply with conditions imposed by the state for the protection of society.” *Morrison*, 98 W. Va. at 301, 127 S.E. at 79, *citing Dent*, 129 U.S. at 121. Moreover, “[i]t is only when [the regulations] have no relation to such calling or profession . . . that they can operate to deprive one of his right to pursue lawful vocation.” *Id.*, *citing Dent*, 129 U.S. at 122. And the right to pursue a lawful occupation “is not absolute or unqualified. That right is subject to the exercise of the police power of the State in the protection of public health.” *Vest*, 138 W. Va. at 673-74, 76 S.E. at 893. Such regulations do not violate substantive due process if they are “reasonably necessary and appropriate for the purpose for which the statutes were enacted.” *Id.*

The United States Supreme Court’s decision in *Hawker* is instructive. There, an individual who was convicted of a felony prior to enactment of a statute prohibiting felons from practicing medicine argued that the statute violated his constitutional rights. *Hawker*, 170 U.S. at 189-91. The Supreme Court indicated that “a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people” including by requiring “good character.” *Id.* at 191-92. A state does not have “arbitrary power in the matter, [and] can[not] make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test.” *Id.* at 195.

Even if another civil remedy would accomplish the purpose of the statute, it is “not the province of the courts to say” that another remedy would be more appropriate; instead, this is a “question for the legislature to determine.” *Hawker*, 170 U.S. at 195. “When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good

moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience.” *Id.* at 196. “The state is not seeking to further punish a criminal, but only to protect its citizens from” those with “bad character.” *Id.*

While Respondent asserts that the subject statute contains an “irrebuttable presumption” in that it takes away his fundamental right to work in his chosen profession without consideration of his current character, the United States Supreme Court has addressed this exact issue as well.

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist.

*Hawker*, 170 U.S. at 197; *See Also Haislop v. Edgell*, 215 W.Va. at 97, 593 S.E.2d at 848 (“While one may argue that the Legislature could improve upon this statute, unless we find it to be violative of the constitution, we must accept it as is.”) Thus, although the statute does not permit consideration of Respondent’s recent good behavior, the West Virginia Legislature’s decision to exclude certain felons from obtaining salesperson licenses is a reasonable and proper exercise of the State’s regulatory power. The bar on individuals who have committed felonies, who have committed fraud, or who have repeatedly defaulted on financial obligations in the motor vehicle industry from obtaining salesperson licensure is directly related to the specific purpose of W. Va. Code §17A-6E-1 (2006), *et seq.* (i.e. the protection of customers, dealers, banks, and the State) and, thus, is in no way arbitrary. Accordingly, there is no violation of substantive due process.

#### B. Procedural Due Process

Procedural due process was also provided to Respondent. This Court has articulated that procedural 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 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). As the Commissioner has previously explained, Respondent was provided with all of the protections listed above at the administrative hearing in this matter and, thus, was given procedural due process of law. (Pet. Br. at 13).

Furthermore, Respondent and the circuit court fail to heed this Court's decision in *Haislop*. There, sexual offenders asserted that the lifetime registration required under the West Virginia Sex Offender Act was unconstitutional because: (1) they are subject to publication without making a determination if each offender poses a current risk to the public; and (2) there is no mechanism to demonstrate that he or she has been rehabilitated and is no longer a danger to the public. *Haislop*, 215 W. Va. at 96, 593 S.E.2d at 847. These assertions fundamentally mirror Respondent's assertions in this matter. This Court rejected the offenders arguments, held that the statute was constitutional, and determined that "the law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.*, *citing Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 5 (2003). Respondent had procedural due process rights during his criminal case and waived many of those by pleading guilty. This Court further held that the Legislature passed the Sex Offender Act as part of "a rational public policy that seeks to provide citizens with information about convicted sexual offenders." *Id.* at 848. Likewise, the West Virginia Legislature enacted W. Va. Code §17A-6E-1 (2006), *et seq.* consistent with the relational public policy of protecting customers, dealers, banks, and the State from fraudulent activity in the motor vehicle industry.

Respondent was also provided with due process protections throughout the administrative process. He had the option of being represented by counsel. At the hearing, Respondent was permitted to present evidence. The fact that the Commissioner did not consider certain evidence does not mean that he was denied procedural due process. As noted above, procedural due process in administrative hearings is defined by the West Virginia Code. *See Pancho's*, 2019 WL 4257286 at \*2 n.2 (citation omitted). The Code does not permit consideration of certain evidence and that mandate was followed here.

Throughout his brief, Respondent repeatedly asserts that he pleaded guilty before knowing that such a law would be enacted and affect his right to engage in his chosen occupation. This argument clearly ignores several key facts. Based upon the entire record in this matter, Respondent has offered no proof that he worked in the motor vehicle industry as a salesperson at any time after his conviction until he applied for his salesperson license in August 2018. Specifically, at the administrative hearing before the Commissioner, Respondent testified that subsequent to his conviction, he worked as a “buyer” in Ohio, that he worked in the mortgage industry, and that he worked as an assistant processor in the housing industry. (App. at 114).

Respondent’s continued protestations about pleading guilty prior to the statute’s enactment date are unpersuasive for another reason. While Respondent entered into a plea agreement prior to West Virginia §§17A-6E-1 (2006), *et seq.* being enacted, Respondent’s plea agreement was filed with the District Court 3 days *after* the subject statute was enacted<sup>3</sup>, and the final order finding Respondent guilty and sentencing Respondent was entered approximately 3 months *after* West Virginia §§17A-6E-1 (2006), *et seq.* was enacted. Accordingly, Respondent, who claims to have

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<sup>3</sup> On March 14, 2006, the District Court entered an order regarding the plea bargain and indicated in said order that the court was deferring the adjudication of Respondent’s guilt until the time of sentencing. (App. at 74-79). See Fed. R. Crim. P. 11.

extensive work experience in the motor vehicle industry, should have been aware of the new law, and Respondent had ample opportunity to withdraw his guilty plea as the statute was enacted *before* his plea agreement was filed and *before* the court's final order in the criminal case.

Furthermore, as the Commissioner previously asserted in his initial brief, Respondent was provided with procedural due process legislatively. (Pet. Br. at 14). This Court has indicated that the West Virginia Legislature 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). Respondent does not even attempt to explain how this legislative process failed to satisfy procedural due process requirements. And for good reason; he cannot do so. Accordingly, procedural due process was given to Respondent and all citizens when the subject statute was enacted.

\* \* \*

The Legislature made a policy decision to restrict the right to pursue an occupation as a motor vehicle salesperson by prohibiting certain felons from obtaining licenses. This was a rational exercise of the State's police powers. During his criminal case, Respondent was provided with ample due process - both before and during the hearing. The administrative process fully complied with the due process clauses of both the federal and state constitutions. Respondent was

also provided legislative procedural due process; as were all West Virginians. Accordingly, the circuit court erred in holding that Respondent was denied due process of law.

**III. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is overly broad because it is appropriately tailored.**

Respondent argues 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. (Resp. Br. at 30). But these are the exact persons the statute aims to prevent from harming the public.

As the Commissioner has previously stated in his initial brief, 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 (2006), *et seq.* - the protection of customers, dealers, banks, and the State from fraudulent activity. (Pet. Br. at 17). Furthermore, not all felonies are included in the statute. Instead, only felonies involving financial matters or the motor vehicle industry are included, with exceptions permitted for other felonies.

Respondent essentially concedes that the subject statute is not overbroad in a general sense, but asserts that it is overbroad when applied to his specific situation. (Resp. Br. at 30). To support his overbreadth argument, Respondent relies on the same due process arguments previously addressed – that he had no opportunity “to argue that his fundamental right to employment should not be taken away” and that he had no opportunity to “argue that his due process rights were being violated at the time he pled guilty in 2005 because W. Va. Code §17A-6E-4(c)(5) had not been enacted.” (Resp. Br. at 33). Because Respondent was provided with substantive and procedural due process as indicated above, Respondent’s arguments fail, and the circuit court’s determination that the subject statute was overbroad is in error.

The United States Supreme Court’s decision in *Haig v. Agee*, 453 U.S. 280 (1981) shows another reason why Respondent’s argument must fail. There, an individual whose passport was

revoked sued arguing that the regulation that permitted revocation of his passport was overbroad. The Court held that he lacked standing to bring this claim because the conduct for which his passport was revoked fell within the core of the conduct prescribed by the regulation. *Id.* at 309 n.61. The same is true here. Respondent's felony is at the core of the subject statute - committing financial crimes connected to the motor vehicle industry. In light of the arguments in Petitioner's brief that the statute is not facially overbroad, but is instead overbroad as applied to him, that argument must fail because of *Haig*.

Respondent and the circuit court also ignore that the past crimes and acts that prohibit licensure under W. Va. Code §§17A-6E-4(c)(4) and (c)(5) (2006) are very limited. Specifically, W. Va. §17A-6E-4(c)(4) (2006) prohibits individuals who commit fraudulent acts or omissions or who repeatedly default on financial obligations *in the motor vehicle industry* from obtaining licensure. W. Va. §17C-6E-4(c)(5) (2006) prohibits individuals who commit felonies *in the motor vehicle industry* from obtaining licensure. These crimes and acts are *directly linked* to the motor vehicle industry. And the prohibition of such persons from obtaining licensure is *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).

Finally, this Court has rejected analogous constitutional challenges to the West Virginia Sex Offender Registration Act, W. Va. Code §§15-12-1, *et seq.*, which required a broad variety of sex offenders to register as sex offenders for life. *See, e.g., Hensler*, 210 W.Va. 530, 558 S.E.2d 330. The United States Supreme Court also rejected an analogous constitutional challenge to the Alaska Sex Offender Registration Act. *Smith*, 538 U.S. 184. Accordingly, the statute is not overbroad.

**IV. The circuit court erred in finding that W. Va. Code §17A-6E-4(c)(5) (2006) is overly narrow because it is appropriately tailored.**

Respondent incorrectly asserts that the subject statute is overly narrow. While Respondent asserts that W. Va. Code §17A-6E-4(c)(4) (2006) and §17A-6E-4(c)(5) (2006) relate to similar conduct (Resp. Br. at 34), this assertion is based on the same misreading of the statute that plagues the circuit court's order. The circuit court blatantly ignored the language of the statute and incorrectly determined that the statute

specifically prohibits those who have committed a certain type of felony from obtaining the requisite licensing . . . yet allows other individuals who are guilty of criminal acts to acquire licensure so long as they have not committed a felony. For example, an individual who was convicted of a misdemeanor involving untruthfulness, fraud, or forgery, or some other type of misconduct relating to their work in the automobile industry will be allowed to obtain licensing simply because their crime was not designated as a felony . . . .

(App. at 145). This is simply inaccurate and the circuit court's analysis is based upon a misreading of the statute. The statute is broad enough to cover the conduct the West Virginia Legislature wanted to eliminate from the motor vehicle industry. 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 act or omission or who repeatedly default on financial obligations in 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.

Furthermore, in his assertion that the subject statute is overly narrow, Respondent implicitly concedes that if there is no violation of due process, then the subject statute is not overly

narrow. Specifically, Respondent asserts that W. Va. Code §§17A-6E-4(c)(4) and (c)(5) (2006) are “overly narrow as their classifications preclude due process to said individuals . . . in their attempt to retain their fundamental right to earn a living.” (Resp. Br. at 34). Again, Respondent was provided with both substantive and procedural due process as indicated above. Accordingly, the subject statute is not overly narrow.

**CONCLUSION**

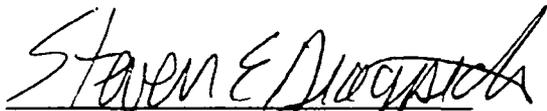
For the reasons set forth above, this Court should reverse the circuit court’s order and remand for entry of an order affirming the Commissioner’s denial of Respondent’s license application.

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