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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Docket No. 21-0990  
(Putnam County Circuit Court Civil Action No. 21-AA-2)

EVERETT J. FRAZIER, COMMISSIONER,  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Petitioner,

v.

STEVE BRISCOE,

Respondent.

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BRIEF OF THE DIVISION OF MOTOR VEHICLES

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Respectfully submitted,

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Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), by and through his undersigned counsel, and hereby submits the *Brief of the Division of Motor Vehicles* pursuant to this Court’s *Scheduling Order* dated December 9, 2021.

#### **ASSIGNMENTS OF ERROR**

1. The Circuit Court of Putnam County committed error of law by *sua sponte* reversing the administrative appeal below without holding an evidentiary hearing as required by W. Va. Code § 17B-3-6(d) (2009), § 17C-5C-1a (2020), and § 29A-5-1(a) (1964).
2. The Circuit Court of Putnam County committed error of law by determining that the Respondent’s license suspension for driving while revoked was moot.

#### **STATEMENT OF THE CASE**

On November 28, 2019, Steve Briscoe, the Respondent herein, was arrested in Putnam County, West Virginia. (App<sup>1</sup>. at PP. 51-53.) On December 11, 2019, the DMV sent the Respondent an *Order of Revocation* for driving a motor vehicle in this State while under the influence (“DUI”) of alcohol, controlled substances and/or drugs and an *Order of Revocation* for refusing the designated secondary chemical test (“refusal.”) (App. at P. 52.) The Respondent appealed the Commissioner’s orders to the Office of Administrative Hearings (“OAH”), a separate operating agency from the DMV pursuant to W. Va. Code § 17C-5C-1 (2010) *et seq.* (App. at P. 52.) The OAH affirmed the DMV’s *Orders of Revocation* for DUI and refusal. *Id.* The Respondent filed a *Petition for Administrative Appeal* in Civil Action No. 21-AA-1 with the Circuit Court of Putnam County and asked that court to stay [supersede] the orders of revocation for DUI and refusal pending his appeal. (App. at P. 53.) The Honorable Phillip M. Stowers was assigned to preside over said appeal. (App. at P. 51.)

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<sup>1</sup> App. refers to the Appendix filed contemporaneously with the instant brief.

On April 23, 2021, the DMV revoked the Respondent's driving privileges as indicated in the OAH's *Final Order*. (App. at P. 54.) On May 20, 2021, Judge Stowers conducted a hearing on the Respondent's request to supersede the Commissioner's orders of revocation for DUI and refusal which were already in effect at the time of the hearing in Civil Action No. 21-AA-1. (App. at P. 53.) At the supersedeas hearing, the Respondent testified under oath that he works as a delivery person for Husson's Pizza and that to maintain his employment, he had been driving his car since April 23, 2021 (the date that his license revocation went into effect.) *Id.*

From the bench, Judge Stowers granted the Respondent's request to stay [supersede] his license revocation and limited the supersedeas to 150 days as required by W. Va. Code § 17C-5A-2(s) (2015). (App. at P. 53.) After the hearing on May 20, 2021, Judge Stowers entered an order stating that the court "does hereby GRANT the [Respondent]'s Motion to Stay the Execution of the April 9, 2021, Order of Revocation herein, and does hereby ORDER and ADJUDGE that [the Respondent]'s revocation is hereby stayed from said date for a period of 150 days." *Id.*

On June 24, 2021, pursuant to W. Va. Code § 17B-3-6(a) (2009), the DMV entered an *Order [of] Suspension* in DMV File No. MR0623 because the DMV had received evidence (the transcript from the supersedeas hearing) that the Respondent had driven a motor vehicle while his license was revoked for DUI. (App. at P. 7.) On June 30, 2021, in Putnam County Civil Action No. 21-AA-2, the Respondent filed an administrative appeal of the mandatory revocation pursuant to W. Va. Code §§ 17B-3-6(d) (2009)<sup>2</sup>, 17C-5C-1a (2020)<sup>3</sup>, and § 29A-5-1(a) (1964)<sup>4</sup>. (App. at PP. 1, 3-10.)

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<sup>2</sup> "Upon suspending the driver's license of any person as hereinbefore in this section authorized, the division shall immediately notify the licensee in writing, sent by certified mail, return receipt requested, to the address given by the licensee in applying for license, and upon his or her request shall afford him or her an opportunity for a hearing as early as practical within [*sic*] not to exceed twenty days after receipt of such request in the county wherein the licensee resides unless the division and the licensee agree that such hearing may be held in some other county. Upon such hearing the commissioner

Judge Joseph K. Reeder was assigned to hear the appeal of the mandatory revocation. (App. at PP. 1, 3.) On June 30, 2021, the Respondent filed a *Motion for Stay of Execution*. (App. at PP. 11-14.) On July 9, 2021, Judge Reeder sua sponte transferred the mandatory revocation appeal in Civil Action No. 21-AA-2 to the docket of Judge Stowers for no stated reason. (App. at PP. 1, 14-19.) Also on July 9, 2021, Judge Stowers entered an *Order Granting Stay* stating, “Pursuant to this Court’s order entered on this same date in 21-AA-1, all proceedings in the above-captioned case are **STAYED.**” (App. at PP. 20-22.)

On July 16, 2021, the DMV filed an *Objection to Order Granting Stay* (App. at PP. 23-30) and an *Objection to Transfer Order*. (App. at PP. 31-39.) On July 21, 2021, the circuit court filed a response to the DMV’s *Objection to Transfer Order* which noted the DMV’s two objections and opined that in a multi-judge circuit, reassignment of cases is discretionary. (App. at PP. 40-42.)

On December 2, 2021, without conducting an evidentiary hearing as required by W. Va. Code § 17B-3-6(d) (2009), § 17C-5C-1a (2020), and § 29A-5-1(a) (1964), the Circuit Court of Putnam County entered an *Order of Dismissal* in Civil Action No. 21-AA-2. (App. at PP. 1, 43-61.) The circuit court improperly characterized its order as a “dismissal” order which would have dismissed the Respondent’s *Petition for Administrative Appeal* and deprived the Respondent of his

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or his or her duly authorized agency may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require reexamination of the licensee. . .”

<sup>3</sup> Beginning on July 1, 2020, “jurisdiction over appeals described in § 17C-5C-3 of this code, except for those described in § 17C-5C-3(3) [DUI matters] of this code, shall be transferred to the circuit court for the circuit in which the event giving rise to the contested decision of the Commissioner of the Division of Motor Vehicles occurred.”

<sup>4</sup> In any contested case all parties shall be afforded an opportunity for hearing after at least ten days’ written notice. . .”

right to an administrative hearing. Also, instead of outright dismissing the matter, the circuit court made findings that the administrative appeal was mooted by its reversal of the DUI appeal in Civil Action No. 21-AA-1 and that there was “insufficient evidence for the revocation” (App. at P. 45) in Civil Action No. 21-AA-2. The DMV appealed the matter to this Court on December 8, 2021.

### **SUMMARY OF ARGUMENT**

In violation of the clear, unambiguous language in W. Va. Code § 17B-3-6(d) (2009), § 17C-5C-1a (2020), and § 29A-5-1(a) (1964), the Circuit Court of Putnam County failed to hold an evidentiary hearing so that both parties could put on evidence regarding whether the Respondent drove a motor vehicle in this state while his driver’s license was revoked for DUI and refusal. It was improper for the circuit court to dismiss the matter as moot based upon its reversal of the DUI matter in Civil Action No. 21-AA-1. In this matter, the circuit court was sitting as an administrative agency, and the issue of whether the DMV was authorized to enter the license suspension for driving revoked was a matter to be determined after an evidentiary hearing. This matter should be reversed so that the circuit court can conduct the hearing required by statute.

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

Pursuant to Rule 20 of the Rules of Appellate Procedure (2010), the DMV requests oral argument on the bases that this case involves issues of first impression and fundamental public importance.

### **ARGUMENT**

#### **A. Standard of Review**

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. W. Va. Dep’t of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. 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 orders 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.

Syl. Pt. 2, *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021).

“ ‘On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.’ Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).” Syl. Pt. 1, *Frazier v. Talbert*, *supra*.

## **B. Jurisdiction of this Court**

From June 11, 2010<sup>5</sup> through June 30, 2020<sup>6</sup>, the OAH had jurisdiction over appeals as outlined in W. Va. Code § 17C-5C-3 (2010): namely, (1) suspensions for failure to meet visual acuity or visual field minimum standards [W. Va. Code § 17B-2B-8]; (2) failure to appear in court

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<sup>5</sup> See, *Miller v. Smith*, 229 W. Va. 478, 482, 729 S.E.2d 800, 804 (2012) (holding that the DMV would retain jurisdiction over license revocation and suspension matters occurring prior to the effective date of W. Va. Code § 17C-5C-5 (2010), June 11, 2010, and that the OAH obtained jurisdiction over those matters occurring on or after June 11, 2010).

<sup>6</sup> “The Office of Administrative Hearings shall retain jurisdiction over appeals described in § 17C-5C-3(3) of this code arising from offenses occurring on or before June 30, 2020. The Office of Administrative Hearings has no jurisdiction over appeals described in said subdivision arising from offenses occurring on or after July 1, 2020.” W. Va. Code § 17C-5C-1a (2020).

[W. Va. Code § 17B-3-3c], mandatory suspensions under W. Va. Code § 17B-3-6<sup>7</sup>, and fraudulent use of a driver's license [W. Va. Code § 17B-3-12]; (3) DUI [W. Va. Code § 17C-5A-2] and implied consent violations [W. Va. Code § 17C-5-7]; (4) failure to renew licenses and failure to pay civil penalties for violations of W. Va Code §§ 17B and 17C; and (5) "Other matters which may be conferred on the office by statute or legislatively approved rules."

In 2020, the Legislature amended W. Va. Code § 17C-5C-1 *et seq.* to provide for the termination of the OAH. Pursuant to W. Va. Code § 17C-5C-1a(a) (2020), the OAH retained jurisdiction over appeals described in W. Va. Code § 17C-5C-3(3) (2010) [the DUI and implied consent matters] if the offense dates for the DUI/implied consent violations occurred on or before June 30, 2020. However, "[b]eginning on July 1, 2020, jurisdiction over appeals described in § 17C-5C-3 of this code, except for those described in § 17C-5C-3(3) [the DUI and implied consent

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<sup>7</sup> "The DMV is authorized to suspend the driver's license of any person without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee: (1) Has committed an offense for which mandatory revocation of a driver's license is required upon conviction; (2) Has by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in the death or personal injury of another or property damage; (3) Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways; (4) Is an habitually reckless or negligent driver of a motor vehicle; (5) Is incompetent to drive a motor vehicle; (6) Has committed an offense in another state which if committed in this state would be a ground for suspension or revocation; (7) Has failed to pay or has defaulted on a plan for the payment of all costs, fines, forfeitures or penalties imposed by a magistrate court or municipal court within ninety days, as required by section two-a, article three, chapter fifty of this code or section two-a, article ten, chapter eight of this code; (8) Has failed to appear or otherwise respond before a magistrate court or municipal court when charged with a motor vehicle violation as defined in section three-a of this article; (9) Is under the age of eighteen and has withdrawn either voluntarily or involuntarily due to misconduct from a secondary school or has failed to maintain satisfactory academic progress, as provided in section eleven, article eight, chapter eighteen of this code; or (10) Has failed to pay overdue child support or comply with subpoenas or warrants relating to paternity or child support proceedings, if a circuit court has ordered the suspension of the license as provided in article five-a, chapter forty-eight-a of this code and the Child Support Enforcement Division has forwarded to the division a copy of the court order suspending the license, or has forwarded its certification that the licensee has failed to comply with a new or modified order that stayed the suspension and provided for the payment of current support and any arrearage due."

matters] of this code, shall be transferred to the circuit court for the circuit in which the event giving rise to the contested decision of the Commissioner of the Division of Motor Vehicles occurred.” W. Va. Code § 17C-5C-1a(b) (2020).

The Circuit Court of Putnam County had jurisdiction to hear the Respondent’s mandatory license suspension appeal (i.e., his contested case<sup>8</sup>) pursuant to W. Va. Code § 17C-5C-1a(b) (2020)<sup>9</sup>. Appeals of contested cases of DMV orders are governed by W. Va. Code § 17B-3-6(a)(1) (2009) and W. Va. Code § 29A-5-4(b) (2021) *et seq.*

West Virginia Code § 29A-5-4(b) (2021) outlines judicial review of contested cases:

Proceedings for review of any final order or decision issued on or before June 30, 2022, shall be instituted by filing a petition, at the election of the petitioner, in either the Circuit Court of Kanawha County, West Virginia, or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within 30 days after the date upon which such party received notice of the final order or decision of the agency.

Had the Circuit Court of Putnam County entered its administrative decision on or after July 1, 2022, then the Intermediate Court of Appeals would have jurisdiction over this matter. *See*, W. Va. Code 29A-5-4(b) (2021) (“Notwithstanding any provision of this code to the contrary, proceedings for judicial review of any final order or decision issued after June 30, 2022, must be

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<sup>8</sup> “Contested Case. A proceeding before a state 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, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and shall not include state agency rule making or applications for extraordinary remedies.” W. Va. R. Pro. Admin. App. 1(c) (2008).

<sup>9</sup> An argument can also be made that the DMV should have heard the contested case below. While the OAH termination statute, W. Va. Code § 17C-5C-1a(b) (2020), discusses circuit courts hearing *appeals* of mandatory suspensions, W. Va. Code § 17B-3-6(d) (2009) and W. Va. Code § 29A-5-1(a) (1964) discuss notice, hearings, and the right to appeal administrative decisions made by the agency below. In this case, the DMV would have been that agency to hear the contested matter as it had done prior to the creation of the OAH in 2010. In either case, due process required that there be an administrative hearing below, and there was not.

instituted by filing an appeal to the Intermediate Court of Appeals as provided in § 51-11-1 *et seq.* of this code.”) However, because the Circuit Court of Putnam County entered its order on December 2, 2021, this case falls into a procedural “limbo”, but it appears that the Administrative Procedures Act would require the appeal of the Putnam County order to be filed in Kanawha County.<sup>10</sup> Notwithstanding, it is unprecedented for one circuit court to hear the appeal of another circuit court, and because the sole issue in this matter is a legal one, the DMV posits that this Court is the ultimate authority to determine the issue. “This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*. Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).” Syl Pt. 1, *Gallant v. Cty. Comm’n of Jefferson Cty.*, 212 W. Va. 612, 575 S.E.2d 222 (2002).

**C. The circuit court committed error of law by reversing the administrative appeal below without holding an evidentiary hearing as required by statute.**

As outlined above, beginning on July 1, 2020, jurisdiction over administrative appeals of mandatory license suspensions for driving while revoked for DUI/refusal was transferred to the circuit court for the circuit in which the event giving rise to the contested decision of the DMV. *See*, W. Va. Code § 17C-5C-1a(b) (2020). Because the Respondent resides, works, and testified in Putnam County about driving while his license was revoked, it is unrebutted that the Circuit Court of Putnam County had jurisdiction to hear his administrative appeal.

Pursuant to W. Va. Code § 29A-5-1(a), “[i]n any contested case all parties shall be afforded an opportunity for hearing after at least ten days’ written notice. The notice shall contain the date,

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<sup>10</sup> Out of an abundance of caution, the DMV also appealed the Putnam County *Order of Dismissal* to the Circuit Court of Kanawha County at the same time that it appealed the order to this Court.

time and place of the hearing and a short and plain statement of the matters asserted.” On June 24, 2021, the DMV sent the Respondent an order of suspension which informed him that his privilege to operate any motor vehicle in the State of West Virginia was being suspended because he committed an offense for which mandatory revocation of his license is required. The DMV also informed him that he may appeal the order of suspension by requesting a hearing with the circuit court of the county in which the event giving rise to the contested decision of the DMV occurred within 10 days of receipt of the order.

West Virginia Code § 29A-5-1(a) also provides that

[a]n opportunity shall be afforded **all parties** to present evidence and argument with respect to the matters and issues involved. The required notice must be given as specified in section two, article seven of this chapter. All of the testimony and evidence at any such hearing shall be reported by stenographic notes and characters or by mechanical means. All rulings on the admissibility of testimony and evidence shall also be reported. The agency shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default. Each agency shall adopt appropriate rules of procedure for hearing in contested cases. (Emphasis added.)

Before the circuit court below, the Respondent was the petitioner, “the party who takes the appeal”, and the DMV was the respondent, “the party against whom the appeal is taken.” W. Va. R. Pro. Admin. App. 1(c) (2008). Under W. Va. Code § 29A-5-1(a), both parties were entitled to present evidence and argument at an administrative hearing before the Circuit Court of Putnam County; however, the Circuit Court of Putnam County failed to schedule and to conduct an administrative hearing as required by statute.

The Legislature has determined to afford hearings for the appeal of the mandatory suspension of a driver's license in a number of circumstances. For example, a conviction for driving under the influence of alcohol, controlled substances or drugs

results in the automatic suspension of a person's driver's license. *See*, W. Va. Code § 17C-5A-1a (2004), *Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005). Likewise, offenses such as habitual reckless or negligent driving, multiple convictions for driving offenses and failure to pay child support also may result in the mandatory suspension of a person's driver's license without a preliminary hearing. W. Va. Code §§ 17B-3-6 (a)(1997). A post-suspension hearing is *required* upon timely request of the person whose license has been suspended. W. Va. Code § 17B-3-6(d).

FN 1, *David v. Comm'r of W. Va. Div. of Motor Vehicles*, 219 W. Va. 493, 637 S.E.2d 591 (2006) (emphasis added).

Because the Circuit Court of Putnam County failed to conduct an evidentiary administrative hearing as required by W. Va. Code § 29A-5-1 (1964) and W. Va. Code § 17B-3-6 (2009), the circuit court also erred in making its finding that there was “insufficient evidence for revocation [*sic*].” (App. at P. 45.) The DMV was entitled by statute to present evidence to affirm its order of suspension for the Respondent driving a motor vehicle in this State while his license was revoked for DUI/refusal. The Circuit Court’s reversal for lack of evidence without ever taking evidence is a violation of the DMV’s procedural due process rights. Both parties are entitled to be heard at an administrative hearing.

**D. The circuit court committed error of law by determining that the Respondent’s license suspension for driving while revoked was moot.**

In its *Order of Dismissal*, the Circuit Court of Putnam County determined that the Respondent’s administrative appeal of his mandatory license suspension for driving while his license was revoked for DUI/refusal was mooted by its previous *Order Denying Motion to Amend and Staying Suspension* in the DUI appeal. (App. at PP. 51-61.) The Circuit Court determined that it had “plenary power under the West Virginia Code and the United States and West Virginia Constitutions to afford comprehensive remedy to Fourth Amendment violations. . . Therefore, the second revocation [*sic*] is not valid because the Court stayed the initial revocation.” (App. at P. 45.)

**1. The instant matter is not moot because the decision of the Circuit Court of Putnam County to relate back the supersedeas order in Civil Action 21-AA-1 to the date that the OAH entered its *Final Order* was improper.**

The DMV suspended the Respondent's driver's license under W. Va. Code § 17B-3-6(a)(1) (2009): "[t]he division is hereby authorized to suspend the driver's license of any person without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee . . . [h]as committed an offense for which mandatory revocation of a driver's license is required upon conviction[.]" Further, "[p]ursuant to W. Va. Code § 17B-3-6(a)(1) (1997), the West Virginia Division of Motor Vehicles is authorized to suspend the driver's license of any person without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee committed an offense for which mandatory revocation of a driver's license is required upon conviction, *regardless of whether the licensee is convicted of the offense.*" Syl. Pt. 2, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005) (emphasis added). "[P]ursuant to W. Va. Code § 17B-4-3(c), driving while revoked for DUI is an offense for which mandatory revocation of a driver's license is required upon conviction." *In re Petition of McKinney*, 218 W. Va. 561, 625 S.E.2d 323.

When the Circuit Court of Putnam County entered its *Order of Dismissal* in the mandatory revocation appeal (Civil Action No. 21-AA-2) (App. at PP. 43-49), the court attached its *Final Order* in the DUI appeal (Civil Action 21-AA-1) to it. (App. at PP. 51-61.) Therein, the circuit court explained that when it entered its supersedeas of the license revocation, it did so by "relating back to the date of the original suspension [*sic*] on April 9, 2021."<sup>11</sup> (App. at P. 54.) The circuit court did

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<sup>11</sup> In actuality, the OAH entered its *Final Order* on April 9, 2021, and the license revocation for DUI did not go into effect for 10 business days, which was on April 23, 2021.

not have authority to issue its order retrospectively. By doing so, the circuit court effectively created a legal impossibility for the Respondent to have driven while his license was validly revoked.<sup>12</sup>

West Virginia Code § 17C-5A-2(s) (2015) provides in pertinent part, “[n]either the commissioner nor the Office of Administrative Hearings may stay enforcement of the order. The court may grant a stay or supersedeas of the order only upon motion and hearing, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits and the appellant **will** suffer irreparable harm if the order is not stayed: Provided, That in no event shall the stay or supersedeas of the order exceed one hundred fifty days.” [Emphasis added.]

This Court has made clear that “[b]efore any stay may be granted in an appeal from a decision of the Commissioner of the Department of Motor Vehicles revoking a driver's license, the circuit court must conduct a hearing where evidence is adduced and, ‘upon the evidence presented,’ must make a finding that there is a substantial probability that the appellant will prevail upon the merits and that he will suffer irreparable harm if a stay is not granted. Syllabus Point 2, *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993).” Syllabus Point 2, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013). There is no provision in the statute to grant *ex parte* stays. See *State ex rel. Frazier v. Thompson*, 243 W. Va. 46, 842 S.E.2d 250 (2020) (holding that *ex parte* stay of revocation failed to comply with statutory requirements of hearing and findings by court upon evidence presented).

Moreover, there is no authority in W. Va. Code § 17C-5A-2(s) (2015) for any circuit court to grant a stay retroactive to the date that the revocation became effective. “The primary rule of

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<sup>12</sup> This issue is currently on appeal to this Court in Docket No. 21-0991 and is more fully developed in that matter.

statutory construction is to ascertain and give effect to the intention of the Legislature.” Syllabus Point 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). However, “[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W. Va. 535, 546–47, 474 S.E.2d 465, 476–77 (1996) (citing *Bullman v. D & R Lumber Company*, 195 W. Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994)). See also, *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994) (“Courts are not free to read into the language what is not there, but rather should apply the statute as written.”). Moreover, “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” Syllabus Point 1, *Consumer Advocate Div. v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

The clear language in the stay/supersedeas statute and the case law discuss the future tense - not the past tense: “. . . **will** suffer irreparable harm if a stay is not granted.” The Legislature’s clear and unambiguous language requires a circuit court to consider whether a drunk driver **will be** harmed if a stay is not granted from that point forward not whether the driver was harmed by a valid revocation already in effect at the time of the stay/supersedeas hearing. The Legislature contemplated that a license revocation could go into effect prior to a circuit court holding a hearing on a driver’s request to stay/supersede the license revocation.

West Virginia Code § 17C-5A-2(s)(2015) specifically permits granting a stay *or a supersedes*: “[n]either the commissioner nor the Office of Administrative Hearings may stay enforcement of the order. The court may grant a stay or **supersedes** of the order only upon motion

and hearing, and a finding by the court upon the evidence presented, that there is a substantial probability that the appellant shall prevail upon the merits and the appellant will suffer irreparable harm if the order is not stayed: Provided, That in no event shall the stay or **supersedeas** of the order exceed one hundred fifty days.” [Emphasis added.]

“What is a supersedeas? It is a writ issued to a ministerial officer, commanding him to supersede or desist from proceeding under another writ previously or subsequently issued to him. (*Abbott's Law Dict.*, word Supersedeas; *Burrill's Law Dict.*, same word.)” *Tyler v. Superior Court of Sonoma Cnty.*, 72 Cal. 290, 291, 13 P. 856 (1887). Pursuant to *Hovey v. McDonald*, 109 U.S. 150, 159, 3 S. Ct. 136, 141-42 (1883),

A supersedeas, properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, an execution has been lawfully issued, a writ of supersedeas, directed to the officer holding it, will be necessary; but if the writ of execution has been, not only lawfully issued, but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded.

It was not only possible but very likely that a license revocation would become effective during the thirty-day appeal process governed by W. Va. Code § 29A-5-4(b) (1998) and W. Va. Code § 17C-5A-2(s) (2015). By the inclusion of the word “supersedeas” in W. Va. Code § 17C-5A-2(s) (2015), the West Virginia Legislature clearly anticipated that license revocations may go into effect prior to a stay hearing being conducted and that the order of revocation could be “superseded” by the circuit court. Accordingly, the Legislature did not provide authority for a circuit court to suspend all applicable statutes, rules and case law in order to protect a driver who has driven while

his license was revoked but before a court could take evidence and supersede the already effective revocation order.

Circuit courts only have authority to supersede the already active revocation from the date of the hearing. The circuit court's order permitting the Respondent to avoid a mandatory license suspension for driving while revoked by "relating back to the date of the original suspension" has no basis in the statutory or case law.

**2. Even if this Court determines that the DMV's *Order of Suspension* for the Respondent's driving while revoked is moot, this Court's inquiry and that of the Circuit Court of Putnam County do not end there.**

A moot case generally cannot properly be considered on its merits. "Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908). *Accord* Syl. pt. 1, *Tynes v. Shore*, 117 W. Va. 355, 185 S.E. 845 (1936) ("Courts will not ordinarily decide a moot question."). Nevertheless, a court may determine that an otherwise moot case may be considered due to the nature of the issues raised or the manner in which such issues are presented. See Syl. pt. 1, *Israel v. Secondary Schs. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) ("Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.").

*State ex rel. Wooten v. Coal Mine Safety Bd. of Appeals*, 226 W. Va. 508, 514–15, 703 S.E.2d 280, 286–87 (2010).

Alternatively, although changes may occur during the course of litigation that typically would render a case moot, the particular circumstances attending such changes may preserve the merits of the case so as to save it from mootness and to permit its consideration by the presiding tribunal. See *Hart v. National Coll. Athletic Ass'n*, 209 W. Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam) ("[T]he simple fact of apparent mootness, in and of itself, does not automatically preclude our

consideration of [a] matter.”). Thus, a case may survive mootness upon a change of circumstances. “When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot.” *Firefighters Local [Union No. 1784 v. Stotts]*, 467 U.S. [561], at 585, 104 S.Ct. [2576], at 2591, 81 L.Ed.2d 483 (O'Connor, J., concurring) (footnote and citations omitted). A case also may survive mootness despite a change in party status. “As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot [.]” *Firefighters Local*, 467 U.S. at 571, 104 S.Ct. at 2584(citation omitted). Finally, “[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.” Syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984).

*State ex rel. Wooten v. Coal Mine Safety Bd. of Appeals*, 226 W. Va. 515, 703 S.E.2d 287.

As the agency vested with the statutory mandate to enforce the administrative driving laws of this state, the DMV has a concrete interest in the outcome of the administrative appeal which the Respondent filed in the Circuit Court of Putnam County. Moreover, the issue of whether the Circuit Court of Putnam County had plenary power to backdate a supersedeas order or had limited authority pursuant to W. Va. Code § 17C-5A-2(s) (2015) either to stay (an order of revocation which had not yet gone into effect) or to supersede (a revocation order already in effect) is on appeal in Docket No. 21-0991. This issue is a matter which is capable of repetition yet will evade review if not addressed by this Court.

## CONCLUSION

The Circuit Court of Putnam County failed to conduct an evidentiary hearing as required by W. Va. Code § 17B-3-6(d) (2009), § 17C-5C-1a (2020), § 29A-5-1(a) (1964), and *David v. Comm'r of W. Va. Div. of Motor Vehicles, supra*. Accordingly, the *Order of Dismissal* was made upon unlawful procedures. The *Order of Dismissal* must be reversed, and the matter remanded for an evidentiary hearing pursuant to Code and case law.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Docket No. 21-0990  
(Putnam County Circuit Court Civil Action No. 21-AA-2)

EVERETT J. FRAZIER, COMMISSIONER,  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Petitioner,

v.

STEVE BRISCOE,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General and counsel for Everett J. Frazier, certify that on the 8<sup>th</sup> day of March 2022, I served the foregoing *Brief of the Division of Motor Vehicles* upon the following by depositing true and correct copies via U.S. Mail, first-class postage prepaid to:

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