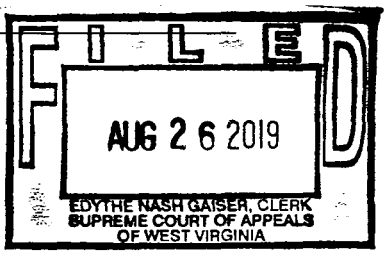
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0362



ADAM HOLLEY, ACTING COMMISSIONER, DIVISION OF MOTOR VEHICLES

Petitioner,

v.

On Appeal from the Circuit Court of Kanawha County (Case No. 19-P-47)

TERESA MAYNARD, DIRECTOR AND CHIEF HEARING OFFICER, OFFICE OF ADMINISTRATIVE HEARINGS

Respondent,

and

CLARENCE SIGLEY,

Party in Interest.

BRIEF OF RESPONDENT

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ASSIGNMENT OF ERROR

Petitioner's sole assignment of error argues that "the Office of Administrative Hearings lacked both jurisdiction and authority to hold a hearing" in this case. Pet. Br. 1. However, before the circuit court the Petitioner only sought prohibition on the ground that the Office of Administrative Hearings exceeded its legitimate powers by interpreting the statutes at issue. *See* WVSCA App. PP. 15 ("Defendant Maynard as Chief Hearing Examiner for the OAH overreached her statutory authority . . . ."), 19 ("It is clear that the OAH does not have express or implied authority via statute or rule to interpret W. Va. Code § 17C-5A-1a(c)(2010) . . . In that regard, a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court, although having jurisdiction, exceeds its legitimate powers."). It is generally accepted that where an argument is raised for the first time on appeal, the argument is waived. *In re A. B.*, No. 18-1147, 2009 WL 2452770, at *2 (W. Va., June 12, 2019) ("Because petitioner failed to raise this issue below, we decline to address the argument on appeal.") *See also id.* ("requiring a petitioner's brief to 'contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.'" (quoting W. Va. R. App. P 10(c)(7)).

Petitioner notes that defects with the subject matter jurisdiction of the court below cannot be waived, Pet. Br. 5 (citing *Lewis v. Municipality of Masontown*, 241 W. Va. 166, 820 S.E.2d 612, 618 (2018)), but there is no question that the circuit court had subject matter jurisdiction to rule on the instant petition. This Court has held that on appeal from a circuit court's disposition of a writ of prohibition, the Court will "decline to address" an "issue [that] was not raised below." *Young v. State*, 241 W. Va. 489, 826 S.E.2d 346, 351 n.9 (2019) (citing Syl. pt. 1, *State v. Berry*, 227 W. Va. 221, 222, 707 S.E.2d 831, 832 (2011). *Cf. Morris v. Calhoun*, 119 W. Va. 603, 195 S.E. 341, 345 (1938) (allowing a petitioner in this Court's original jurisdiction to raise jurisdictional claims not

presented to the tribunal against which prohibition is sought). Accordingly, Respondent addresses this assignment of error only insofar as is necessary to avoid prejudice in the event this assignment of error has not been waived.

STATEMENT OF THE CASE

I. The State Agencies And Officers.

The Office of Administrative Hearings ("OAH") and Division of Motor Vehicles ("DMV") are a separate operating agencies within the Department of Transportation. The Commissioner of the DMV ("Commissioner") has the power to issue orders suspending or revoking drivers' licenses for certain enumerated grounds. The OAH is vested with jurisdiction to hear and determine appeals from these orders, upon a timely written objection from the driver subject to the order. W. Va. Code § 17C-5C-3. Respondent Teresa Maynard is the OAH's Director and Chief Hearing Examiner. Her duties include supervising the work of the office staff, making hearing assignments, reviewing and approving decisions for legal accuracy, and to perform other duties necessary and proper to carry out the purposes of the OAH. W. Va. Code §17C-5C-2(b).

Prior to 2010, this hearing process was solely within the jurisdiction of the Commissioner of the DMV. W. Va. Code § 17C-5A-2 (2009). However, in 2010 the West Virginia Legislature created the OAH and transferred the power to adjudicate these appeals from the DMV to the OAH. W. Va. Code § 17C-5C-3, 5. *See also* 2010 W. Va. Acts ch. 136.

The OAH has promulgated legislative rules that govern the initiation and administration of appeals heard by the OAH. *See* W. Va. Code St. R. § 105-1-1 *et seq*. Appeals before the OAH are conducted by a hearing examiner, who issues "decision[s] contain[ing] findings of fact and conclusions of law," "based on the determination of the facts of the case and applicable law . . . affirming, reversing or modifying" the order of the Commissioner of the DMV. W. Va. Code § 17C-5A-2(a). In accordance with these appeal procedures, the Chief Hearing Examiner has the

authority to regulate the course of hearings and rule on motions, procedural matters, and evidence. W. Va. Code St. R. § 105-1-15.4.

Pursuant to the OAH appeal procedures,

> If the case has not been otherwise resolved, following the hearing upon consideration of the designated record and based on the determination of the facts of the case and applicable law, the OAH shall issue a final order that includes findings of fact and conclusions of law and affirms, reverses, or modifies the appealable order.

W. Va. Code St. R. § 105-1-17.2. In addition, the Chief Hearing Examiner has the authority to review and modify a hearing examiner's final decision. W. Va. Code St. R. § 105-1-17.3 If the Chief Hearing Examiner disagrees with some or all of the hearing examiner's findings of facts or conclusions of law, the final order must include separate findings of fact and conclusions of law by the Chief Hearing Examiner. W.Va. Code § 17C-5C-2(a).

II. Procedural And Factual History.

On or about April 19, 2017, the Commissioner issued an Order of Revocation under File No. 315895C revoking the driving privileges of Clarence Sigley, Party in Interest, for driving under the influence ("DUI") of controlled substances or drugs. WVSCA App. P. 25. The Commissioner issued the Order of Revocation based upon receipt of the DUI Information Sheet and criminal narrative from the Investigating Officer in accordance with West Virginia Code Section 17C-5A-1. WVSCA App. PP. 27-39.

On May 11, 2017, Mr. Sigley submitted a Written Objection and Request for Hearing concerning the Commissioner Order of Revocation in File No. 315895C. Supp. App. PP. 1-3. A hearing before the OAH was set for September 20, 2017. Supp. App. P. 4.

On August 24, 2017, the DMV requested a continuance of this hearing, citing a backlog in cases at the State Police Lab concerning medical blood tests. Supp. App. P. 16. The request was granted, Supp. App. P. 12, and the matter was rescheduled for January 19, 2018. Supp. App. P. 19.

Thereafter, on January 11, 2018, Mr. Sigley's legal counsel requested a continuance due to a scheduling conflict. Supp. App. P. 26. The DMV's legal counsel did not object to the continuance. Supp. App. P. 26. The matter was rescheduled for March 1, 2018. Supp. App. P. 28. On February 9, 2018, Mr. Sigley's legal counsel requested another continuance because blood test results were still not available. Supp. App. P. 31. Once again, the DMV's legal counsel did not object to the continuance. (*Id.*). The matter was reset for May 15, 2018. Supp. App. P. 37.

In Mr. Sigley's criminal DUI proceeding, on March 21, 2018, he entered into a Deferred Adjudication Agreement with the Harrison County Prosecutor's Office pursuant to West Virginia Code Section 61-11-22a. WVSCA App. PP. 39-40. Mr. Sigley agreed he would plead guilty to the offense of "DUI with Drugs 1st offense." *Id.* Pursuant to the Deferred Adjudication Agreement,

> 4. Upon entry of said plea, the parties shall recommend to the Magistrate Court of Harrison County, West Virginia, that both the acceptance of the guilty plea and the adjudication of this/these offense(s) be deferred for a period of one (1) year from the date of the execution of this agreement pursuant to West Virginia Code §61-11-22a, provided the Defendant abides by the following conditions and requirements of this agreement:

WVSCA App. P. 39. The Deferred Adjudication Agreement further states:

> 5. Should the Defendant successfully complete this Deferred Adjudication, the parties shall join in recommending to the Court that the Defendant be allowed to withdraw his/her guilty plea to the aforementioned charge(s) in Paragraph 3, and that said charges **X** be dismissed.

WVSCA App. P. 40.

There is no signature affixed by the Magistrate on the guilty plea document. WVSCA App. PP. 41-42. Thus, Mr. Sigley's guilty plea has never been accepted by the court. The adjudication of Mr. Sigley's criminal offense was deferred for one year. WVSCA App. P. 39. Mr. Sigley did not enter into the deferral process set forth in West Virginia Code Section 17C-5-2b, which would

have waived his right to an administrative hearing before the OAH concerning the revocation of his motor vehicle license. W. Va. Code § 17C-5-2b(b).

On May 8, 2018, the DMV's legal counsel requested another continuance of the administrative hearing in File 315895C because the blood test results were still not available. Supp. App. PP. 39-41. The matter was reset for July 31, 2018. Supp. App. 43. On July 23, 2018, DMV's legal counsel requested another continuance because the blood test results were not available. Supp. App. PP. 46-49. The matter was reset for October 16, 2018. Supp. App. P. 50.

Thereafter, October 2, 2018, the DMV's legal counsel requested another continuance of the administrative hearing, but the request was denied by the OAH hearing examiner. Supp. App. PP. 53-57. On October 9, 2018, the DMV moved to get the administrative hearing canceled, arguing that Mr. Sigley had plead guilty to DUI on March 21, 2018, which mandates a revocation of his motor vehicle license. Supp. App. P. 58.

Mr. Sigley's legal counsel argued that the OAH was not authorized to cancel Mr. Sigley's request for an administrative hearing. Supp. App. P. 61. Mr. Sigley had entered into a Deferred Adjudication Agreement under West Virginia Code Section 61-11-22a and Mr. Sigley's "plea was not accepted, was not signed by the magistrate, and was not entered against Mr. Sigley." Supp. App. P. 61. Mr. Sigley's legal counsel further argued that "no conviction has been entered against him as defined in WV Code §17C-5A-1a and, as such, OAH is not authorized to cancel his requested administrative hearing." Supp. App. P. 61.

The DMV's legal counsel replied by asserting that a defendant's election to participate in deferral under West Virginia Code Section 17C-5-2b(b) constitutes a waiver of his right to an administrative hearing concerning the revocation of his motor vehicle license. Supp. App. PP. 60-61. The DMV's legal counsel noted Mr. Sigley had entered into a "conditional guilty plea under

the deferred adjudication statute" and therefore, waived his right to an administrative hearing. Supp. App. PP. 60-61. However, the DMV's legal counsel did not address the fact that Mr. Sigley's participation in deferral was under West Virginia Code Section 61-11-22a, which does not contain the same hearing waiver language as Section 17C-5-2b(b). *See* Supp. App. PP. 60-61.

On October 9, 2018, Mr. Sigley's legal counsel requested a continuance due to a scheduling conflict. Supp. App. P. 74. The DMV's legal counsel objected, claiming that Mr. Sigley was no longer entitled to an administrative hearing concerning his motor vehicle license because he is participating in a deferral program, and thus waived his right to such hearing. Supp. App. P. 74. The OAH granted the continuance. *Id.* The OAH rescheduled the hearing in Order of Revocation File No. 315895C for November 28, 2018. Supp. App. 76.

On or about October 12, 2018, the DMV issued a second Order of Revocation, File No. 315895D, concerning Mr. Sigley's motor vehicle license. Supp. App. 73. This time the DMV revoked Mr. Sigley's driving privileges alleging he had been "convicted" of driving a motor vehicle while under the influence of controlled substances or drugs. *Id.*

On or about November 5, 2018, Mr. Sigley submitted a Written Objection and Request for Hearing concerning the DMV's Order of Revocation, File No. 315895D. *See* WVSCA App. PP. 48-51. On or about November 15, 2018, the OAH denied his request for hearing because of his "criminal conviction." WVSCA App. P. 52. Mr. Sigley was informed that he remained in "hearing status" in Order of Revocation File No. 315895C for the same incident. *Id.*

By submission dated November 15, 2018, Mr. Sigley's legal counsel informed the OAH that the DMV's conclusion his client had been "convicted" of DUI was incorrect. WVSCA App. P. 53. He reiterated that no plea had been "entered" in Mr. Sigley's case and Mr. Sigley had not been adjudicated by any court on the underlying DUI charge. *Id.*

By letter dated November 28, 2018, the DMV informed Mr. Sigley that it had received a "guilty plea" from Harrison County Magistrate Court for File No. 315895C, which resulted in an Order of Revocation in File No. 315895D. WVSCA App. P. 54. DMV withdrew and rescinded File No. 315895C because it was now moot. *Id.*

Left remaining for the OAH to address was Mr. Sigley's Written Objection and Request for Hearing concerning the Order of Revocation in File No. 315895D. In this regard, Teresa Maynard, the Chief Hearing Examiner, entered an *Order Rescinding Denial and Granting Administrative Hearing* in File No. 315895D. In her Order, the Chief Hearing Examiner stated:

> On October 12, 2018, the [DMV] subsequently issued a duplicate Order of Revocation under file number 315895D, revoking the [Mr. Sigley]'s driving privileges for the offense of driving a motor vehicle in this State while under the influence of controlled substances and/or drugs on April 5, 2017. This Order of Revocation was issued based upon [Mr. Sigley]'s "conviction" of the alleged DUI offense occurring on April 5, 2017. In accordance with the Order of Revocation issued by the [DMV] on October 12, 2018, under file number 315895D, which advised [Mr. Sigley] that he could contest the DUI by filing a Written Objection form with the Office of Administrative Hearings within thirty days after receiving the Order of Revocation, [Mr. Sigley], through Counsel, timely filed a request for an administrative hearing before the Office of Administrative Hearing to contest the revocation of his driving privileges for such alleged DUI offense.

WVSCA App. P. 55. The Chief Hearing Examiner stated:

> Although any person whose license to operate a motor vehicle in this State has been revoked or suspended by Order of the Commissioner of the West Virginia Division of Motor Vehicles is afforded the opportunity to request an administrative hearing, there are limited circumstances under which the Office of Administrative Hearings must deny such request. The entry of a guilty plea or the conviction of the parallel criminal offense will result in mandatory revocation of the person's driving privileges.

Id. The Chief Hearing Examiner stated:

> [Mr. Sigley]'s counsel asserts that [Mr. Sigley] "has not been found guilty nor has a guilty plea been entered" regarding the parallel criminal DUI offense, which was alleged to have occurred on April 5, 2017.

WVSCA App. P. 55.

The Chief Hearing Examiner stated:

> However, [Mr. Sigley]'s request for an administrative hearing regarding the Order of Revocation issued by the [DMV] under file number 315895D was denied in part because he had previously been granted an administrative hearing to contest the revocation of his driving privileges for the alleged DUI offense occurring on April 5, 2017, as set forth in the Order of Revocation issued by the [DMV] under file number 315895C

WVSCA App. P. 56.

The Chief Hearing Examiner then concluded:

> Further, although [Mr. Sigley]'s Counsel acknowledged that [Mr. Sigley] 'executed a guilty plea form as part of a diversionary plea, that plea has not been accepted, entered, or adjudicated by the presiding court', such agreement does not constitute participation in the 'Deferral Program' established under West Virginia Code § 17C-5-2b, and therefore, [Mr. Sigley] has not waived his wright to an administrative hearing to contest the revocation of his driving privileges for an alleged DUI offense occurring on April 5, 2017.

Id. (footnote omitted).

The Chief Hearing Examiner concluded that Mr. Sigley's participation in "deferral" under West Virginia Code Section 61-11-22a, does not constitute a waiver of his right to an administrative hearing concerning the revocation of his motor vehicle license. Mr. Sigley's legal counsel argued before the OAH that the deferral documents show that no plea was accepted, entered, or adjudicated by the Magistrate Court, and thus, no conviction had been entered against Mr. Sigley. Supp. App. PP 53, 60-61. The DMV did not cite to any authority or precedent to support its argument that Mr. Sigley's deferral was tantamount to a conviction.

Moreover, the Chief Hearing Examiner acknowledged in a footnote that DUI cases may only be deferred pursuant to the "Deferral Program" established under West Virginia Code Section 17C-5-2b. WVSCA App. P. 56 n.1. Thus, any deferred adjudication agreement Mr. Sigley may have entered into under West Virginia Code Section 61-11-22a to resolve his criminal DUI case

would be irrelevant in the eyes of the OAH in determining whether to grant Mr. Sigley a hearing concerning the revocation of his driving privileges.

The DMV subsequently filed a petition in Kanawha County Circuit Court to prohibit the OAH from having an administrative hearing concerning the revocation of Mr. Sigley's driving privileges. Before OAH and Mr. Sigley could enter a notice of appearance and respond, the circuit court dismissed the matter as prematurely filed. The circuit court ruled the writ of prohibition was "premature as it pre-empted the OAH's jurisdiction to hear appeals in administrative proceedings delegated to the OAH by West Virginia Code Section 17C-5C-3 *et seq.*" WVSCA App. P. 2. The circuit court noted that Mr. Sigley's "liberty interest" was at stake. *Id.* The circuit court noted that once the OAH had issued a decision on Mr. Sigley's appeal, the DMV could appeal the matter to circuit court if it lost. *Id.*

SUMMARY OF ARGUMENT

Petitioner is asking this Court to prohibit the Office of Administrative Hearings ("OAH") from doing that which it was created to do: holding hearings and adjudicating appeals from Petitioner's license revocation orders. Petitioner charges both that the OAH lacks jurisdiction over the case before it, and that by setting a hearing in accordance with the OAH's interpretation of its legislative mandate it was "exceeding its legitimate power." Pet. Br. 7, 9. Each of these arguments fail, and the court below was right to deny Petitioner a writ of prohibition.

Petitioner's interpretation of the OAH's jurisdictional statutes is inconsistent with the text of those statutes, but even that narrow reading grants the OAH jurisdiction to hold a hearing in this case. The OAH has a broad jurisdictional mandate over all appeals arising under West Virginia Code Chapter 17C. *See* W. Va. Code § 17C-5C-3(d). It is true that where the DMV has revoked a driver's license following a criminal conviction for DUI, the driver may only prevail in that appeal to the OAH upon showing that he or she is "not the person named in the judgment of

conviction." W. Va. Code § 17C-5C-1a(c). While this statutory limitation adjusts the evidentiary standards and burdens of proof for the hearing before the OAH, it does not change the fact that the underlying order arises under Chapter 17C, and thereby within the OAH's subject matter jurisdiction. And irrespective of the merits of Petitioner's asserted jurisdictional limitation, the case at issue here still falls within that limitation. The driver seeking an appeal in this case argues that he has not been convicted of DUI. A person cannot be "named in a judgment of conviction" if the judgment of conviction does not exist, so the driver's claim speaks directly to the one question that Petitioner acknowledges the OAH may consider. Petitioner's other jurisdictional claim—advanced before the OAH but seemingly abandoned here—is repudiated by this Court's recent opinion in *Young v. State of West Virginia*, 241 W. Va. 489, 826 S.E.2d 346 (2019).

Petitioner's second claim, that the OAH exceeds its powers by interpreting its own enabling statutes, is similarly flawed. The OAH is authorized by statute and regulation to pass upon questions of law in determining the appeals before it. Moreover, it would be impossible for the OAH to function, much less to adjudicate cases before it, if it could not interpret its own statutes. Dismissing this appeal as Petitioner requested, no less than granting a hearing on it, would have involved interpreting the OAH's enabling statutes. Contrary to Petitioner's assertion that granting a hearing here represents an "oft repeated error," the facts of this case are uncommon enough to present an issue of first impression. And, rather than provoking a flurry of appeals, as Petitioner speculates will occur if a hearing is granted, addressing these questions through a hearing will *discourage* future appeals by providing guidance to both the DMV and to other prospective appellants.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This cases raises questions of first impression and public importance, making oral argument appropriate under West Virginia Rule of Appellate Procedure 20.

STANDARD OF REVIEW

This case is an appeal from the circuit court's denial of a writ of prohibition. "The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*." Syl. pt. 1, *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 557 S.E.2d 890 (2001) (citations omitted). "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. pt. 2, *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 687 S.E.2d 403 (2009) (quoting Syl. pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965)).

ARGUMENT

A writ of prohibition may only issue "to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers." Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). Petitioner only advanced the latter basis at the circuit court stage, WVSCA App. PP. 15, 19, but Petitioner's sole assignment of error advances both grounds, Pet. Br. 1 (asserting that "the Office of Administrative Hearings lacked both jurisdiction and authority to hold a hearing" in this case). Petitioner's claims fail to meet the standards for issuance of a writ on either basis, and the circuit court was right to deny the petition.

I. The OAH Has Jurisdiction To Hold A Hearing In This Case.

Petitioner did not raise the issue of the OAH's jurisdiction to hear an appeal from the DMV's order before the circuit court. WVSCA App. PP 15, 19. Regardless of whether this argument has therefore been waived, *supra* pp. 1-2, it is incorrect. The OAH was created to "hear appeals of certain orders and decisions by the DMV." *Reed v. Thompson*, 235 W. Va. 211, 214, 772 S.E.2d 617, 620 (2015). It is expressly given "jurisdiction to hear and determine *all*" appeals within certain categories, including "[a]ppeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license . . . for violating the provisions of any licensing law contained in chapters seventeen-B [W. Va. Code §§ 17B-1-1, *et seq.*] and seventeen-c [W. Va. Code §§ 17C-1-1, *et seq.*] that are administered by the Commissioner of the Division of Motor Vehicles." W. Va. Code § 17C-5C-3(4) (emphasis added). Accordingly, the revocation order here—issued by the DMV pursuant to Section 17C-5A-1a—falls within this broad purview.

Petitioner is incorrect that the OAH's jurisdiction is limited by the substance or merits of the underlying objection raised by the appealing driver. And even if Petitioner were correct, the claim brought by Mr. Sigley would still fall within that jurisdiction. Moreover, the only limitation that the Code does place on OAH's jurisdiction—waiver—does not apply.

A. The substance of a driver's objection to an order of the Commissioner does not confine the OAH's jurisdiction to hear that objection.

Petitioner concedes that "[t]he OAH enabling statutes give the tribunal jurisdiction to hold hearings and determine appeals from orders of the DMV issued pursuant to W. Va. Code § 17C-5A-1a." Pet. Br. 8. However, Petitioner asserts that because "[i]dentity was not an issue" raised in Mr. Sigley's written objection, "the OAH was required to cancel the administrative hearing requested." Pet. Br. 13. Petitioner does not identify any statute that limits the jurisdiction of OAH

to appeals that raise the issue of identity. Rather, Petitioner relies on the fact that Mr. Sigley could only prevail in his appeal if he could demonstrate that he "is not the person named in the transcript of the judgment of conviction" relied upon by the DMV in issuing its revocation order. W. Va. Code § 17C-5A-1a(c). *See also* Pet. Br. 8 ("In the present case, the only ground for such a hearing would be for the driver to contest that he was not the person named in the guilty plea." (citing W. Va. Code § 17C-5A-1a)).

Petitioner's reading conflates the jurisdictional predicates for the OAH's to *hear* an appeal with the evidentiary bases on which the OAH could *sustain* that appeal. This distinction was clarified in the context of drivers' license revocations by *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998). Although that case arose prior to the creation of the OAH, it squarely addresses the difference between a jurisdictional threshold and an evidentiary requirement. Prior to the creation of the OAH, the DMV had jurisdiction over appeals of its own revocation orders issued under Section 17C-5A-1a. *Id.* at 202 W. Va. 608, 505 S.E.2d 671 (citing W. Va. Code § 17A-2-9 (1951) (Repl. Vol. 1996)). *Coll* involved a revocation order that could be sustained on the basis of a blood test showing the driver in question was intoxicated when the offense occurred. *Id.* at 202 W. Va. 610, 505 S.E.2d at 673. The Court held that the results of the test were an "evidentiary requirement," without which "the Commissioner lacked the evidentiary foundation upon which to base her revocation of Coll's license." *Id.*

In contrast to "procedural and evidentiary requirements for revocation," which must be weighed when reviewing a revocation under Section 17A-5C-1a, the Court emphasized that "jurisdiction [relates to] the *nature* of the claim" and determines whether the matter can be reviewed at all. *Id.* at 202 W. Va. at 608-09, 505 S.E.2d at 671-72 (emphasis added). The Court "explained that '[j]urisdiction relates to the power of a court, board or commission *to hear and*

determine a controversy presented to it, and not to the right of recovery as between the parties thereto.'" *Id.* at 202 W. Va. at 608, 505 S.E.2d at 671 (quoting Syl. pt. 1, *Fraga v. State Compensation Comm'r*, 125 W.Va. 107, 23 S.E.2d 641 (1942)) (emphasis and alterations in original). "In other words, jurisdiction refers to the *type* or *nature* of cases over which a court, board or, in this case, administrative agency has the power to preside." *Id.* (emphasis in original). The absence of a blood test in that case was a "defect" in the "evidentiary foundation" of the revocation order, but that deficiency did not remove the order from the DMV's jurisdiction. *Id.* at 202 W. Va. 610, 505 S.E.2d at 673.

The distinction clarified in *Coll* underlies this case. Pursuant to Section 17C-5A-1a(c), the Commissioner may suspend and revoke licenses based upon a "transcript of conviction." W. Va. Code § 17A-5C-1a(c). A driver whose license is revoked under Section 17A-5C-1a(c) may overturn this revocation if they can establish that they are not named in such a transcript. *Id.* Imposing a "presumption . . . that the person named in the transcript of the judgment of conviction is the person named in the commissioner's order" does not alter the underlying nature of the appeal. *Id.* Rather, this provision merely serves to "shift the burden of proof" from the Commissioner to the appellant. *See* W. Va. Code § 17C-5C-4(d) ("Except as otherwise provided by this code or legislative rules, the Commissioner of Motor Vehicles has the burden of proof."). Whether or not an appellant can clear this "procedural and evidentiary requirement[]" shifts the balance "between the parties" *Coll*, 202 W. Va. at 609, 505 S.E.2d at 672, not the OAH's "power . . . to hear and determine the controversy presented to it." *Id.* at 202 W. Va. at 608, 505 S.E.2d at 671. That controversy is still, by definition, an appeal from an "order[] of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license . . . for violating

the provisions of any licensing law contained in chapter[] . . . seventeen-c." W. Va. Code § 17C-5C-3(4).

The only necessary elements for the OAH to have jurisdiction are an order from the Commissioner revoking a license and a timely written objection to that order. Notwisthanding the arguments advanced by an appellant in his or her objections, all such appeals fall within the jurisdiction of the OAH.[1] Accordingly, Petitioner was not entitled to the writ sought below.

B. Even if the OAH's jurisdiction is limited to cases raising questions of "identity," it had jurisdiction to hear Mr. Sigley's appeal.

Even if this Court were to accept Petitioner's narrow conception of the OAH's jurisdiction, this case would fall within that jurisdiction. Petitioner argues that the OAH may only hold a hearing under Section 17C-5C-1a(c) if the appellant is going to argue that "he or she is not the person named in the judgment of conviction." W. Va. Code § 17C-5C-1a(c). *See also* Pet. Br. 9 (arguing the OAH lacked jurisdiction to hold a hearing in this matter "unless [the appellant] contests identity"). It is axiomatic that a person cannot be "named in the judgment of conviction" where there is *no* judgment of conviction. And this is precisely the claim Mr. Sigley brought before the OAH. Mr. Sigley disagreed with Petitioner's assertion he had been "convicted" of DUI. Supp. App. PP. 53, 60-61. Mr. Sigley asserted that no plea had been "entered" in his case and he had not been adjudicated by any court on the underlying DUI charge. *Id.* And if a plea agreement has not been "entered," then by the terms of West Virginia Code Section 17C-5A-1a(e) there has been no "conviction."

[1] The OAH may implicilty have the implied power to deny hearings where written objections are timely but facially insufficient to support reversing the order. Meritless appeals, such as those where it is undisputed that a conviction has been entered, would therefore be within OAH's jurisdiction but could be subject to immediate dismissal. Whether this implied power exists is not at issue in this appeal.

As Mr. Sigley could not be named in a judgment that does not exist, questions relating to the existence of a conviction fall within Petitioner's overly limited framing of the OAH's jurisdiction.

C. This case does not fall within the "deferred ajudication" exception to the OAH's jurisdiction.

The OAH's jurisdiction to conduct a hearing is subject to limitation: A person who participates in the deferred adjudication program for DUI offenses established by Section 17C-5-2b "waive[s] his or her right to an administrative hearing." W. Va. Code § 17C-5-2b(b). In her *Order Rescinding Denial and Granting Administrative Hearing*, the OAH concluded that Mr. Sigley entered into a Deferred Adjudication Agreement with the Harrison County Prosecutor's Office pursuant to W. Va. Code § 61-11-22a. As this is separate from the process set forth in Section 17C-5-2b, the OAH correctly concluded that Mr. Sigley's participation in "deferral" under Section 61-11-22a, does not constitute a waiver of his right to an administrative hearing concerning the revocation of his motor vehicle license. This decision was recently bolstered by the Supreme Court in *Young v. State of West Virginia*:

> A person charged with the crime of driving under the influence (DUI), pursuant to Chapter 17C, Article 5 of the West Virginia Code, may only seek deferred adjudication as permitted by W. Va. Code 17C-5-2b (2016). **The deferred adjudication allowed under W. Va. Code § 61-11-22a (2016) is not available to a person charged with a DUI offense**. [Emphasis added.]

Syl. Pt. 4, *Young v. State of West Virginia*, 241 W. Va. 489, 826 S.E.2d 346 (2019)

The DMV acknowledges that the only legal process for deferring adjudication for a DUI offense is that set forth in Section 17C-5-2b. Pet. Br. 7. Thus, the DMV cannot rely upon Mr. Sigley's purported "deferral" under Section 61-11-22a to deny him a hearing.

II. The OAH Did Not Exceed Its Powers By Interpreting Its Enabling Statutes To Determine The Scope Of The Hearing.

Assuming the OAH has jurisdiction to hold a hearing in this case—and it does—then it does not exceed its powers by setting the scope of that hearing in accordance with its own interpretation of its enabling statutes. The "general guidelines" for claims seeking writs of prohibition arising from a "usurpation or abuse of legitimate powers" are well-established:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.
>
> *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 484–85, 557 S.E.2d 890, 891–92 (2001) (quoting Syl. pt. 4, *State ex rel. Hoover v. Berger,* 199 W.Va. 12, 483 S.E.2d 12 (1996)).

Of these "general guidelines," "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.* As to the fifth factor, Respondent concedes that this case is a matter of first impression for this Court. However, Petitioner cannot satisfy any other factor, and is therefore not entitled to the writ sought below.

A. The OAH's interpretation of the scope of the hearing is not "clearly erroneous as a matter of law."

Petitioner argues that the OAH's order granting a hearing contains two errors of law: the order should not "interpret W. Va. Code § 17C-5A-1a(c)," and the order should "cancel[] the hearing because Mr. Sigley did not allege that he is not the person who pled guilty." Pet. Br. 9-10. Although these questions of law are considered under the *de novo* standard, *State ex rel.*

Gessler v. Mazzone, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002), Petitioner must demonstrate that the underlying statutes "clearly and without dispute entitle [him] to relief." *State ex rel. Blue Eagle Land, LLC v. W. Va. Oil & Gas Conservation Comm'n*, 222 W. Va. 342, 345, 664 S.E.2d 683, 686 (2008).

1. The OAH Has The Power To Interpret Its Enabling Statutes.

Administrative agencies like the OAH "are creatures of statute," and therefore possess those powers "conferred upon them by law expressly or by implication." Syl. pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973). The statute empowering the OAH to conduct hearings expressly requires it to make a "determination of the facts of the case *and applicable law*." W. Va. Code § 17C-5A-2(a) (emphasis added). The applicable law in this case is Section 17C-5A-1a(c), meaning the OAH is expressly authorized to make "determinations" and "conclusions of law" relating to that statute. *Id.* Similarly, the OAH may exercise powers granted by its legislatively authorized "administrative rules." *Reed*, 235 W. Va. at 216, 772 S.E.2d at 622. Pursuant to West Virginia Code of State Rules Section 105-1-15.4, the OAH had the authority to issue the *Order Rescinding Denial and Granting Administrative Hearing* in File No. 315895D, in that it has the authority to regulate the course of hearings and rule on motions.

Even if this language did not expressly authorize the OAH to interpret applicable statutes, such power is implicit in the necessary course of the OAH's duties. Agencies may exercise "'such powers as are reasonably and necessarily implied in the exercise of their duties in accomplishing the purposes of the act.'" *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 727, 591 S.E.2d 277, 285 (2003) (quoting *State Human Rights Comm'n v. Pauley*, 158 W.Va. 495, 498, 212 S.E.2d 77, 78 (1975)). *See also Colvin v. State Workmen's Comp. Com'r*, 154 W. Va. 280, 289–90, 175 S.E.2d 186, 192–93 (1970) ("In the construction of a grant of powers, it is a general principle of law that where the end is required the appropriate means are given and that every grant of power

carries with it the use of necessary and lawful means for its effective execution." (quoting 1 Am.Jur.2d, Administrative Law, Section 44, page 846)). For example, "[i]t is well-recognized . . . that administrative agencies have a broader authority to remand matters for further proceedings before a hearing examiner, even if such authority is not specifically listed in the agency's statutory powers," because "[t]his implied power to remand is necessary for the agency to render a full and complete decision on the matters which it is statutorily empowered to decide." *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 121, 492 S.E.2d 167, 180 (1997) (citing 2 Am.Jur.2d. Administrative Law § 375 (1994)).

An agency tasked with applying a statute must necessarily have the power to interpret that statute. Although this Court has never expressly ruled on this proposition, it has been widely accepted by other States' courts of last resort. *See, e.g., City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 261 P.3d 1071, 1076 (Nev. 2011) ("An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." (quotation omitted)); *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 820 P.2d 1206, 1211 (Idaho 1991) ("To carry out their responsibility, administrative agencies are generally 'clothed with power to construe [the law] as a necessary precedent to administrative action.'" (quotation omitted, alteration in original); *Dean v. State*, 826 P.2d 1372, 1376 (Kan. 1992) ("Interpretation of a statute is a necessary and inherent function of an agency in its administration or application of that statute."). *See also* 2 Am. Jur. 2d Administrative Law § 67 (2019) ("Administrative agencies are generally clothed with the power to construe the law as a necessary precedent to administrative action.").

Indeed, Petitioner's actions below indicate why it is an unavoidable necessity for the OAH to interpret the statutes it applies. Petitioner, by counsel, asserted before the OAH that Mr. Sigley

had pled guilty to DUI, and therefore "OAH should cancel the pending administrative hearing . . . because it is moot," pursuant to West Virginia Code Section 17C-5-2b(b). Supp. App. PP. 60-61. In order for the OAH to grant the relief sought by Petitioner and dismiss the matter, it would need to agree with his interpretation of Section 17C-5-2b. By asking the OAH to reach a *favorable* interpretation of law while simultaneously insisting it has no power to reach an *unfavorable* interpretation, Petitioner has demonstrated why the power to interpret law necessarily inures in the functions of the OAH. "When an agency acts or refuses to act in a case, it necessarily determines whether the subject matter and its activity are or are not within the purview of the statute creating the agency." *Cty. of Knox ex rel. Masterson v. Highlands, L.L.C.*, 723 N.E.2d 256, 262 (Ill. 1999).

Petitioner's reading of the OAH's other powers as an exclusive list, Pet. Br. 12-13, is similarly unavailing. It is true that this Court will read a list of powers as exclusive of other *freestanding* powers. *See McDaniel*, 214 W. Va. at 728, 591 S.E.2d at 286 ("Given the vast array of powers with which the Division specifically has been vested, it is quite apparent that the Legislature did not intend the Division's authority to be so broad as to additionally include the power to award damages."). But a list of specific powers does not create the presumption that powers related and *subordinate* to those powers are excluded. Nor is Petitioner helped by the rule that "powers should not be extended by implication beyond what may be necessary for their just and reasonable execution." Pet. Br. 13 (quoting *Reed*, 235 W. Va. at 215, 772 S.E.2d at 621). As Petitioner's quoted case points out, this rule only requires that an agency's powers will not be extended by implication "to place [a] greater restraint on the liberties of a citizen than was clearly and unmistakably indicated by the language [the legislature] used." *Reed*, 235 W. Va. at 215, 772 S.E.2d at 621. An implied power to interpret the relevant statutes would enable the OAH to grant citizens a full and fair adjudication of their appeals. Indeed, to adopt Petitioner's narrow

construction would be to *deprive* a citizen of a hearing, whereas recognizing the implied power of the OAH to interpret its statutes would lead to a *lesser* restriction on that citizen's liberty.

2. The OAH's interpretation of the scope of the hearing was not "clearly erroneous as a matter of law."

The OAH's interpretation of Section 17C-5C-1a was correct. Petitioner claimed that Mr. Sigley was convicted of DUI based on the "guilty plea" that the DMV received from Harrison County Magistrate Court. *See* WVSCA App. P. 54; Supp. App. PP. 72-73. The DMV subsequently claimed that Mr. Sigley's "guilty plea" was "entered by the magistrate court." WVSCA App. P. 57. Mr. Sigley disagreed with Petitioner's assertion that he had been "convicted" of DUI. *Id.* at P. 53. *See also* Supp. App. P. 61. Mr. Sigley aruged that no plea had been "entered" in his case and he had not been adjudicated by any court on the underlying DUI charge. *See* WVSCA App. P. 53; Supp. App. P. 60. Petitioner asserts that Mr. Sigley's guilty plea "was entered by the magistrate court." WVSCA App. P. 57; *See* Petitioner's Brief at 8.

The Chief Hearing Examiner needed to make a determination whether there had been a deferred adjudication in order to grant or deny Mr. Sigley's request for an administrative hearing. Further, she needed to determine whether the burden of proof at that hearing had shifted to Mr. Sigley. And it appears from the paperwork submitted before the OAH that the county magistrate had not accepted Mr. Sigley's guilty plea. WVSCA App. at PP. 41-42. The magistrate never signed the guilty plea. *Id.* at P. 42. Mr. Sigley's diversionary plea had not been accepted, entered, or adjudicated by the presiding court. Supp. App. P. 56.

West Virginia Code Section 17C-5A-1a(c) states, in part, the following:

> If, upon examination of the **transcript of the judgment of conviction, or imposition of a term of conditional probation** pursuant to section two-b, article five of this chapter, the commissioner determines that the person was convicted for an offense described in section two, article five of this chapter or had a period of conditional probation imposed pursuant to section two-b, article five of this chapter, or for an offense described in a municipal ordinance which has the same elements as a an offense described in said section because

> the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or the combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle. [Emphasis added]

Further, W. Va. Code Section 17C-5A-1a(e) states:

> For the purposes of this section, a person is convicted **when the person enters a plea of guilty or found guilty by a court or jury**. A plea of no contest does not constitute a conviction for purposes of this section except where the person holds a commercial drivers' license or operates a commercial vehicle. [Emphasis added]

The Chief Hearing Examiner made the following findings and conclusions in support of granting an administrative hearing.

> Further, although the Petitioner's Counsel acknowledged that the Petitioner 'executed a guilty plea form as part of a diversionary plea, that plea has not been accepted, entered, or adjudicated by the presiding court', such agreement does not constitute participation in the 'Deferral Program' established under West Virginia Code § 17C-5-2b, and therefore, the Petitioner has not waived his wright to an administrative hearing to contest the revocation of his driving privileges for an alleged DUI offense occurring on April 5, 2017.

WVSCA App. P. 56 (footnote omitted).

Although a Deferred Adjudication Agreement/Plea Agreement had been executed by Mr. Sigley, WVSCA App. PP. 39-40, there was no evidence presented that the plea had been accepted, entered, or adjudicated by the presiding court. The language of Deferred Adjudication Agreement/Plea Agreement states there needs to be an "entry of said plea." The magistrate did not sign Mr. Sigley's guilty plea. *See* WVSCA App. p. 42. A signature would have signaled that the magistrate had "accepted" or "entered" Mr. Sigley's plea. Indeed, until a plea is accepted, it remains subject to revocation. W. Va. R. Crim. P. 11(e)(4).

If a plea agreement has not been "entered," then by the terms of West Virginia Code Section 17C-5A-1a(e) there has been no "conviction." Where there is no "transcript of the judgment of conviction," the burden of proof does not shift to the appealing driver to prove they are *not* the

person therein named—indeed, the driver cannot be the person named in the "judgment of conviction" if there has been no judgment of conviction.

There is no clear statutory command compelling the OAH to defer to the DMV's interpretation of the law,[2] nor any statutory language that clearly contradicts the OAH's interpretation. Accordingly, Petitioner cannot satisfy the most important prong of the *Hoover* test.

B. Petitioner has not demonstrated any other basis supporting the issuance of the writ.

Petitioner's failure to satisfy the third element of *Hoover* is telling, as this factor is "given substantial weight." Syl pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12. Indeed, this is the only element substantively addressed in Petitioner's brief. The remaining four factors are discussed in less than two pages, Pet. Br. 14-15, and often in conclusory terms. *See, e.g., id.* ("Further, the OAH's granting a hearing manifests persistent disregard for procedural and substantive law. The OAH's granting of a hearing when Mr. Sigley entered a guilty plea and DMV revoked upon conviction raises new and important problems or issues of first impression."). Respondent concedes that the fifth factor is satisfied here, as this case does present a novel question of first impression. Beyond that, however, none of the *Hoover* factors come out in Petitioner's favor.

1. This case does not present an "oft repeated error" or "persistent disregard" for the law.

Respondent concedes that this case presents an issue of first impression, and thus satisfies the fifth prong of *Hoover*. Syl. pt. 4, 199 W. Va. 12, 483 S.E.2d 12. However, it is axiomatic that an issue of first impression is not presenting an "oft repeated error." Such "oft repeated error" is "seldom seen," arising only in cases of "blatant disregard" for "explicit instructions" from both

[2] DMV has not argued below that its countervailing interpretation of "conviction" is entitled to any deference, and has therefore waived any such argument. *In re A. B.*, No. 18-1147, 2009 WL 2452770, at *2 (W. Va, June 12, 2019) ("Because petitioner failed to raise this issue below, we decline to address the argument on appeal.") See also *id.* ("requiring a petitioner's brief to 'contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.'" (quoting W. Va. R. App. P 10(c)(7)).

"the Legislature[] *and this Court*[]." *State ex rel. Miles v. W. Va. Bd. of Registered Prof'l Nurses*, 236 W. Va. 100, 106, 777 S.E.2d 669, 675 (2015) (emphasis added). It is unclear how such "explicit instructions" from this Court could exist, given that Petitioner acknowledges that this is an issue of first impression. Pet. Br. 15. Indeed, Petitioner has failed to demonstrate that similar facts have *ever* occurred before, much less that the OAH has ever issued a similar ruling when faced with similar facts. Petitioner's unadorned recitation of the *Hoover* factors does not address this inquiry, nor does it grapple with the inconsistency inherent in claiming an oft-repeated issue of first impression. Pet. Br. 14-15.

Rather than show that this issue is "oft-repeated" or "persistent," Petitioner makes—albiet incomplete and unsupported—assertions that this issue is at least capable of repetition. In that regard, Petitioner refers to the "8,000-9,000" orders issued by the DMV each year. Pet. Br. 15. This is an exaggerated picture of the OAH's caseload, as fewer than 10% of the DMV's orders provoke written objections. In fiscal year 2018, the OAH received only 818 written objections, 704 of which were set for a hearing.[3] In the most recent fiscal year, the office received only 773 objections. Even within this much narrower universe, Petitioner does not indicate how many of these appeals are brought under the circumstances relevant here: where, due to the use of certain deferred adjudication procedures at the county level, no plea or conviction has been entered *and* the driver has not participated in deferred adjudication pursuant to Section 17C-5-2b. Insofar as there are other such cases, they will only become less frequent following this Court's recent holding in *Young v. State*, that a person charged with DUI "may only seek deferred adjudication as permitted by W. Va. Code § 17C-5-2b." 241 W. Va. 489, 826 S.E.2d 346, 350 (2019).

[3] Teresa D. Maynard, *The Office of Administrative Hearings Fiscal Year 2018 Annual Report* at 4, *available at* http://wvlegislature.gov/legisdocs/reports/agency/OAH_FY_2018_14290.pdf.

Presumptively this guidance will discourage county courts from permitting such arrangements in the future, making this issue less likely to reoccur

Even treating the inquiry here as "capable of repetition" rather than "oft repeated," and even then assuming that this issue is capable of repetition, Petitioner's arguments still miss the mark. Petitioner argues that if a hearing is held here, then "other drivers [will] request hearings after pleading guilty to the companion criminal matter." Pet. Br. 15. This argument fails for two reasons. *First*, this argument assumes its own premise, as the entire issue to be addressed in this hearing is *whether* an un-entered plea is equivalent to a conviction for purposes of Section 17C-5A-1a(e). If it is not, then by definition this case does not involve a hearing "after pleading guilty." *Second*, resolving this issue at a hearing will in fact prevent Petitioner's hypothesized increase in appeals. Petitioner remains free to argue before the OAH—as he suggests in his brief, Pet. Br. 7—that an unlawful deferred adjudication agreement should be treated as a "transcript of the judgment of conviction" for purposes of license revocation.[4] Regardless of which answer ultimately prevails, the certainty that answer will provide will expedite future hearings, if not render them completely unnecessary. If Petitioner's interpretation is rejected, then presumably the DMV will cease issuing revocation orders in cases where the final guilty plea has not been entered by the court, and no further appeals will follow. If Petitioner prevails, then future hearings will only be sought on the basis of disputed identity and will be much more straightforward than Mr. Sigley's appeal.

[4] Counsel for Petitioner initially argued before the OAH that the deferred adjudication arrangement here should be treated as though it were a deferred adjudication proceeding under Section 17C-5-2b, under which the driver waives his or her right to a hearing before the OAH. Supp. App. 60-61. Petitioner appears to abandon this argument, and rightfully so as *Young* specifically holds that in DUI cases no other deferred adjudication process may be substituted for that contained in Section 17C-5-2b. 826 S.E.2d at 350.

2. Petitioner's claims can be addressed on direct appeal.

The OAH, like any administrative tribunal, is subject to the appeals process contained in the West Virginia Administrative Procedures Act. W. Va. Code §§ 17C-5C-4 ("A hearing before the office shall be heard de novo and conducted pursuant to the provisions of the contested case procedure set forth in article 5, chapter twenty-nine-a of this code."); 29A-5-4(a) ("Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof."). The availability of appellate review, if and when Petitioner's revocation order is reversed by the OAH, supports the circuit court's determination that this matter was "premature." WVSCA App. P. 2. Writs of prohibition are "premature" where they would prohibit a tribunal "from doing that which it has yet to rule upon." *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 45, 658 S.E.2d 728, 736 (2008) (citing *State ex rel. Allstate Ins. Co. v. Gaughan,* 220 W.Va. 113, 122, 640 S.E.2d 176, 185 (2006) (declining to address issues that were not ruled upon by trial court); *State ex rel. Mobil Corp. v. Gaughan,* 211 W.Va. 106, 114, 563 S.E.2d 419, 427 (2002) (same)). And Petitioner's ultimate legal argument—that Mr. Sigley's deferred adjudication agreement is a sufficient basis to support Petitioner's revocation order—can be addressed through this appeal process if it does not ultimately prevail before the OAH. Such questions of statutory interpretation "amount to little more than ordinary legal errors, which [courts] typically review by way of appeal, and not in the context of prohibition proceedings." *State ex rel. Davidson v. Hoke*, 207 W. Va. 332, 337, 532 S.E.2d 50, 55 (2000). *See also* Syl. pt. 3, in part, *State ex rel. Hoover v. Berger,* 199 W.Va. 12, 483 S.E.2d 12 ("Prohibition . . . may not be used as a substitute for [a petition for appeal] or certiorari." (internal quotations and citation omitted)); *State ex rel. Maynard v. Bronson,* 167 W.Va. at 41, 277 S.E.2d at 722 ("[P]rohibition cannot be substituted for a writ of error or appeal unless a writ of error or appeal would be an inadequate remedy." (citations omitted)); *State ex rel. Casey v. Wood,* 156 W.Va. 329, 334-35,

193 S.E.2d 143, 146 (1972) (same); *Fisher v. Bouchelle,* 134 W.Va. 333, 335, 61 S.E.2d 305, 306 (1950) (same).

Petitioner does not elaborate on the assertion that the DMV "will be damaged or prejudiced in a way that is not correctable on appeal" by proceeding with a hearing before the OAH. In relation to this case raising an issue of first impression, however, Petitioner offers that "immediate relief is necessary" to avoid prolonging an "illegal stay." Notwithstanding the conclusory statement that a stay mandated by Section 17C-5A-2(a) is "illegal," Petitioner does not reconcile this newfound urgency with the five continuances sought from the OAH. *See* Supp. App. P. 39-57. Each such request prolonged the stay of revocation in this case. Indeed, the OAH denied Petitioner's fifth request for a continuance, after Petitioner was unable to obtain Mr. Sigley's blood test results over the course of a year-and-a-half delay. Supp. App. 55.

* * *

Petitioner has raised a new issue, but not a complex one. The legislature charged the OAH with hearing appeals from Petitioner's orders. Petitioner argues that this jurisdictional grant ends where a driver challenges the facts underlying the Petitioner's order, and that the OAH lacks the power to interpret its own enabling statutes in determining whether Petitioner's characterization of these facts is legally correct. Placing such limits on the jurisdiction and powers granted by the legislature would transform the OAH from an appellate tribunal into a listless functionary. Writs of prohibition lie to constrain tribunals, not cripple them. Therefore, the writ sought below was appropriately denied.

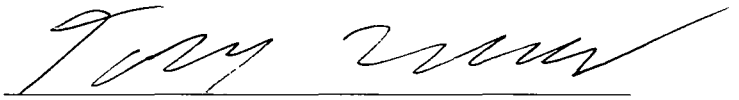
CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the circuit court.

STATE OF WEST VIRGINIA,
Respondent

by counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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