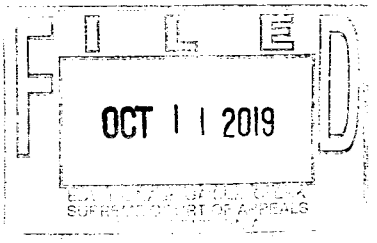
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Docket No. 19-0484**




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

RESPONDENT BELOW, PETITIONER,

v.

TIMOTHY R. MCCABE,

PETITIONER BELOW, RESPONDENT.

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# BRIEF OF TIMOTHY R. MCCABE
# RESPONDENT

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## INTRODUCTION

W.Va. Code § 17A-6E-4(c)(5) is supposed to further the Legislature's purpose of ensuring that only qualified individuals may be licensed as motor vehicle salespeople. The question presented by this appeal is this: Was the circuit court right in finding that W.Va. Code § 17A-6E-4(c)(5) was unconstitutional where it barred Respondent—a respected, qualified family man with years of experience in the automotive field and glowing character references—from ever obtaining a license simply because he pled guilty to a felony years before the statute ever took effect? As set forth in *Webb v. County Court*, 113 W.Va. 474, 476, 168 S.E. 760, 761 (1933):

> Society must be protected from law violators, and their punishment must be just—commensurate with the seriousness of the offense. But the state does not punish malefactors in vengeance. She does not entertain against them throughout the years a spirit of vindictiveness, nor is the state relentless or unforgiving. It is the anxious desire of the state that those of her citizens who have transgressed her laws, suffered convictions, and paid the penalty of the law, shall profit from their unfortunate experience and thereafter make of themselves good citizens by leading lives of uprightness and usefulness. Society is interested in such result, and not in placing forever the brand of iniquity upon the forehead of one who in the frailty of humanity has departed from the narrow path.

## RESPONSE TO ASSIGNMENTS OF ERROR

**Response to Assignment of Error I:** The Circuit Court properly held that W.Va. Code § 17A-6E-4(c)(5), while civil in nature, constitutes an *ex post facto* law as its effects when applied retroactively to Mr. McCabe are punitive.

**Response to Assignment of Error II:** The Circuit Court properly held that W.Va. Code § 17A-6E-4(c)(5) fails to satisfy due process requirements as the statute constitutes an irrebuttable presumption that thwarts the purpose of the statute.

**Response to Assignment of Error III**: The Circuit Court correctly found that W.Va. Code § 17A-6E-4(c)(5) is overly broad as it provides for no exceptions whatsoever to the prohibition against individuals convicted of felonies involving the motor vehicle or financial industry from obtaining licensure and thus is excessive in relation to the purpose of the statute.

**Response to Assignment of Error IV**: The Circuit Court properly found that W.Va. Code § 17A-6E-4(c)(5) is overly narrow as it prohibits a narrow category of individuals from obtaining their salesperson licensure.

## STATEMENT OF THE CASE

The West Virginia Division of Motor Vehicles (hereinafter the "DMV") is responsible for the issuance of all motor vehicle salesperson licenses. W.Va. Code § 17A-6E-1, *et seq.* (2006). In order to be issued such a license, and to continue with employment as a salesperson in the automobile industry in West Virginia, an application with the DMV must be completed by those who wish to obtain or retain their licensure. *Id.* The DMV, in turn, must issue a license to any applicant who satisfies the requirements set out by the legislation in their statutory provisions. W.Va. Code § 17A-6E-4.

Timothy McCabe is an Ohio County resident living in Wheeling, West Virginia, with his wife and their ten (10) children. App. at P. 131. Mr. McCabe has been involved in the automobile industry as a whole throughout the entire course of his adult career. *Id.* Mr. McCabe recently began working at Matt Jones Preowned Auto, LLC (hereinafter "Matt Jones Auto") in Wheeling, West Virginia. *Id.* Prior to that, Mr. McCabe had spent over a decade working in the automobile industry just across the Ohio River in Ohio about 5-10 minutes away. App. at P. 43. Accordingly, Mr. McCabe was required to apply for a salesperson license from the West Virginia DMV in order to continue with his employment. App. at P. 52.

Upon passing the required test, which was a prerequisite to obtaining the appropriate sales licensure, Mr. McCabe was granted a temporary salesperson license on April 5, 2018. *Id.* Thereafter, on April 30, 2018, Mr. McCabe received certified mail from the West Virginia DMV stating that the Commissioner for the West Virginia Division of Motor Vehicles was refusing his application for licensure pursuant to W.Va. Code § 17A-6E-4(c)(5) which provides:

> The division shall refuse to issue the license if the applicant . . .
>
> [h]as been convicted of a felony: *Provided,* That upon the applicant's appeal the commissioner may grant an exemption to this restriction if the felony did not involve financial matters or the motor vehicle industry.
>
> App. at P. 50.

Because Mr. McCabe had pled guilty to a felony many years prior that involved financial matters in the automobile industry, a felony conviction which Mr. McCabe had sufficiently explained with a letter attached to his application, Mr. McCabe was denied his salesperson licensure. *See id.* at 52.

The background regarding Mr. McCabe's criminal charge is important for this Court's consideration. Mr. McCabe began working in the automobile industry in 1998 as a finance manager. App. at P. 7. In 2000, Mr. McCabe became the general manager of Marhefka Autos. *Id.* Thereafter, Mr. McCabe stepped down as a general manager to become more involved in automobile sales. *Id.* At some point in 2005, the FBI began an investigation into the business practices of Marhefka Autos. Mr. McCabe, as an employee of Marhefka's, was fully cooperative and compliant with the FBI investigation; however, he was informed during the investigation that if any wrongdoing at Marhefka's was found, Mr. McCabe would also be criminally charged as a result of his prior title and work as a General Manager. *Id.* at P. 8. Because Mr. McCabe had a growing family at the time and did not want to put them through a formal and public investigation

into his life and business, Mr. McCabe decided to plead guilty to a felony charge of falsifying a loan application. *Id.* As set forth hereinabove, because of this felony charge, Mr. McCabe was denied his automobile salesperson licensure. App. at P. 50. Mr. McCabe exercised his appeal rights and a hearing was set before the West Virginia Division of Motor Vehicles on this matter. App. at P. 49; App. at P. 47.

As part of Mr. McCabe's appeal, he provided five (5) character/reference letters from members of his community with whom he had established relationships over the years vouching for his character, notwithstanding the felony charge from years past. App. at P. 40. These letters were written by (1) a former FBI agent, Thomas Burgoyne; (2) an Assistant U.S. Attorney for the Northern District of West Virginia, Stephen L. Vogrin; (3) the Associate Pastor at St. Michael Parish School in Wheeling, West Virginia, Rev. Fr. William K. Matheny, Jr.; (4) a respected attorney and mediator, Elba Gillenwater, Jr.; and (5) long-time high school football coach and Director of Alumni Relations, Mike Young. *Id.* All of the letters of support demonstrated that Mr. McCabe is a reputable member of the community who has overcome his past legal issue. App. at P. 40-46. Moreover, Mr. McCabe's employer, Matt Jones, further offered testimony at the August 21, 2018 hearing vouching for the credibility of Mr. McCabe. App. at P. 121-125.

Notwithstanding the fact that there were numerous letters in support of Mr. McCabe's trustworthiness and ability to work as a salesman in the automobile industry, and further, evidence that Mr. McCabe has never had any related legal issues since signing his plea agreement in 2005, even though he has spent a majority of his career, including up until the present day, working in the automobile industry, the Commissioner for the West Virginia Division of Motor Vehicles upheld the denial of Mr. McCabe's salesperson license due to the sole fact that Mr. McCabe pled guilty to a felony fourteen (14) years ago. App. at P. 26-28.

Notably, the Commissioner in the Final Order stated that even though there were numerous letters of support and no subsequent legal issues involving Mr. McCabe, West Virginia Code, specifically, §17A-6E-4(c)(5), "is very clear that an exemption cannot be given in this situation." App. at P. 27. Thus, Mr. McCabe was left with no recourse as a result of the denial but to seek judicial review by the Circuit Court of Ohio County, West Virginia. Accordingly, Mr. McCabe filed his Petition for Judicial Review with the Circuit Court on November 15, 2018. App. at P. 2-25. After both Mr. McCabe and the Commissioner thoroughly briefed the constitutional issues set forth with the Commissioner of the WV DMV's Final Order and denial of Mr. McCabe's salesperson license, and the overall constitutionality of W.Va. Code § 17A-6E-4(c)(5), the Circuit Court entered an Order **GRANTING** Mr. McCabe's Petition for Review and ultimately **vacated** the Commissioner's October 19, 2018 Order denying Mr. McCabe's salesperson licensure. App. at P. 129-150. Upon entry of the Order, the instant appeal by the now Commissioner for the West Virginia Department of Motor Vehicles, Adam Holley, ensued.

## SUMMARY OF ARGUMENT

W.Va. Code § 17A-6E-4(c)(5) (2006) violates a number of constitutional provisions as brought to light by Mr. McCabe's successful appeal to the Circuit Court of Ohio County, West Virginia, from the Commissioner for the West Virginia DMV's Final Order denying Mr. McCabe's automobile salesperson licensure. App. at P. 129-150. The Circuit Court reversed the denial of the Commissioner's Final Order refusing to grant Mr. McCabe his salesperson licensure on multiple constitutional grounds. These grounds being that (1) W.Va. Code § 17A-6E-4(c)(5) constitutes an *ex post facto* law when applied retroactively to Mr. McCabe's unique situation; (2) W.Va. Code § 17A-6E-4(c)(5) violates the West Virginia and United States Constitutions as it fails to satisfy due process requirements and constitutes an irrebuttable presumption; (3) W.Va. Code § 17A-6E-

4(c)(5) is overly broad; and (4) W.Va. Code § 17A-6E-4(c)(5) is overly narrow in violation of both the due process and equal protection provisions. *Id.* These grounds for reversal by the Circuit Court of Ohio County, West Virginia, were not erroneous, and thus the Ohio County Circuit Court's Order should be upheld by this Court.

First, prior to the enactment of W.Va. Code § 17A-6E-1, *et seq.* in March of 2006 which statute went into effect on June 9, 2006, there was no requirement that automobile salespersons in the State of West Virginia be licensed. Moreover, there was no prohibition as to who could obtain this licensure. However, upon enactment of W.Va. Code § 17A-6E-3(a), it was declared as law that "no person may engage in business in this state as a motor vehicle salesperson on and after the first day of January, two thousand eight, without holding a license issued under the provisions of this article."

Mr. McCabe's plea agreement was signed over fourteen (14) years ago on October 10, 2005. App. at P. 69-73. At the time Mr. McCabe entered into the plea agreement, W.Va. Code § 17A-6E-4(c)(5) was not in effect. This application of the law in regard to those who had committed a crime prior to the enactment thereto of this statutory framework is not only in direct contravention to the prospective nature of the statute, but also violates constitutional principles. This Court has held, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." *Martinez v. Asplundh Tree Expert Co.*, 239 W.Va. 612, 803 S.E.2d 582, 586-587 (2017). This retroactive application, as correctly held by the Circuit Court, was in contravention to West Virginia caselaw and further, was erroneous when considering the language of other provisions within Article 6(E), specifically, W.Va. Code § 17A-6E-3(c) which provides, "[a]ny person employed by licensed dealers as a salesperson immediately preceding the effective date of this section is exempt from the requirements of the background investigation and the written test .

. . ." This Court has held, "[i]n ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, *Smith v. State Workers Compensation Comm.*, 159 W.Va. 108, 219 S.E. 2d 361 (W.Va. 1976).

In looking at this statutory scheme as a whole, the legislature set forth a prospective date upon which the provisions within the statute would take effect. Moreover, within the statute are provisions exempting those who were previously employed salespersons from undergoing a background test. Therefore, these two unambiguous terms of the statute clearly demonstrate a prospective application of the statute at hand.

Further supporting this fact is the Circuit Court's accurate determination that a retroactive application of the statutory framework would result in W.Va. Code § 17A-6E-4(c)(5) operating as an *ex post facto* law. Petitioner argues that because this statute is a civil statute, the same cannot constitute an *ex post facto* law – this is clearly in contradiction to West Virginia and Supreme Court precedent. The definition of an unconstitutional *ex post facto* law was set forth best in Syllabus Pt. 1 of *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980), in which the West Virginia Supreme Court of Appeals held, "[u]nder ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Moreover, *Haislop v. Edgell*, 593 S.E.2d 839, 845 (W.Va. 2003), provides:

> The question whether an Act is civil or punitive in nature is initially one of statutory construction. A court will reject the Legislature's manifest intent only when a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the Legislature's intention.

(*citing Hensler v. Cross*, 210 W.Va. 530, 558 S.E.2d 330 (2001)).

Here, the Circuit Court did not err in finding that "the statute operates to deny him the ability to earn a living in a profession he has pursued nearly his entire adult life. Had Mr. McCabe known at the time of his guilty plea that, in the future, he would be denied the ability to pursue his chosen profession, he may have made a different decision with regard to his guilty plea." App. at P. 134-135. Clearly, this statutory provision makes more burdensome the punishment to which Mr. McCabe served over a decade ago, thus resulting in an *ex post facto* law.

Second, the Circuit Court did not err in finding that Mr. McCabe was denied due process of law through the denial of his salesperson licensure by the Petitioner. Specifically, this Court has consistently held, a "license to practice a profession is a valuable right, one that will be protected by the law." *State ex rel. Hoover v. Smith,* 198 W.Va. 507, 511, 482 S.E.2d 124, 128 (1997). Thus, administrative agencies, in ensuring that due process requirements are satisfied, must "use the procedures which have traditionally been associated with the judicial process" prior to taking away a fundamental interest of a citizen of its state. *See generally* 2 Am.Jur.2d Administrative Law § 140 (1994). Here, while Mr. McCabe was given notice of the denial of his license as well as given the opportunity to appear for a hearing and produce evidence on his behalf, this procedure and opportunity was meaningless because W.Va. Code §17A-6E-4(c)(5) does not allow for exemptions to the prohibition of licensure for those who were convicted of felonies involving financial matters in the automobile industry. Mr. McCabe could have been given all the procedures available by the Petitioner; however, because these procedures are arbitrary and capricious as they have no impact on whether an exemption or a reversal of the denial of the license can be given, the procedures are essentially meaningless in contravention to due process principles.

Lastly, the Circuit Court did not err in holding that W.Va. Code § 17A-6E-4(c)(5) is unconstitutional as it is both overly broad and overly narrow, thus violating the due process and

equal protection clause. This Court has held "[a] statute may be constitutional as written yet be unconstitutionally applied in a given case." Syl. Pt. 2, *State ex rel. Miller v. Locke*, 162 W.Va. 946, 253 S.E.2d 540 (1979). "In order for a statute 'to withstand constitutional scrutiny under the substantive due process standard, it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary or discriminatory.'" *State ex rel. Harris v. Calendine*, 160 W.Va. 172, 179, 233 S.E.2d 318, 324 (1977).

W.Va. Code § 17A-6E-4(c)(5) unequivocally states:

> The division shall refuse to issue the license if the applicant . . . [h]as been convicted of a felony: Provided, That upon the applicant's appeal the commissioner may grant an exemption to this restriction if the felony did not involve financial matters or the motor vehicle industry.

The Circuit Court properly held that the statute is overly broad in that it provides no exceptions at all for those who have committed felonies involving financial matters in the motor vehicle industry. Because all individuals are required to be given due process prior to the government taking away a property interest such as their fundamental right to earn a living, it is clear that this statute fails to provide for such due process and violates the equal protection clause based on the categorization of these individuals.

Likewise, the Circuit Court properly held that the statute is overly narrow in that it specifically prohibits those who have committed a certain type of felony from obtaining the requisite licensing needed to work in the automobile field, as well as those who have committed crimes involving a fraudulent act or omission or someone who has repeatedly defaulted in financial obligations regarding the motor vehicle industry - yet allows other individuals who are guilty of criminal acts to acquire licensure so long as they do not fall within the categories set forth in

Sections (c)(4) and (c)(5) of this statutory provision. These prohibitions constitute irrebuttable presumptions which the United States Supreme Court of Appeals has found to be unconstitutional. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

Moreover, when it comes to whether a certain classification under legislative enactment which precludes individuals from acquiring certain licensure is constitutional under the due process and equal protection clauses of the Fourteenth Amendment, the United States Supreme Court of Appeals has held, "any qualification must have a rational connection with the applicant's fitness or capacity to perform the job." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

Here, because of the language of the subject statute, there was no opportunity for Mr. McCabe to argue that his fundamental right to employment should not be taken away; nor was there ever an opportunity for Mr. McCabe to argue that his due process rights were being violated at the time he signed his plea agreement in 2005 because W.Va. Code § 17A-6E-4(c)(5) was not a statute at the time. Notably however, even if there was an opportunity for argument that Mr. McCabe should be permitted to obtain his licensure, the very language of the statute precludes this argument from having any effect or impact due to the strict language of the statute, and in essence, is an irrebuttable presumption.

In sum, because the Circuit Court properly held that the Commissioner for the West Virginia Department of Motor Vehicles' Final Order of October 19, 2018 was required to be reversed and Mr. McCabe's salesperson license to be granted based on the unconstitutionality of W.Va. Code § 17A-6E-4(c)(5) when applied to Mr. McCabe's situation, this Court must affirm the Circuit Court's Order.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner has requested oral argument in this case pursuant to Rule 20 of the Revised Rules of Appellate Procedure as this case involves issues of first impression, issues of fundamental importance, and constitutional questions regarding the validity of W.Va. Code § 17A-6E-4(c)(5). Respondent, Mr. McCabe, agrees with Petitioner that this is a matter of first impression and, thus, requests oral argument before this Court as the same will be necessary for the resolution of this matter. Mr. McCabe further requests that subsequent to oral argument, the Court decide the case on the merits by issuing an opinion affirming the rulings made by the Circuit Court in its April 30, 2019 Order.

## ARGUMENT

### I. Standard of Review

Under W.Va. Code § 29A-5-4 (1998), a Circuit Court may reverse or vacate the order of an agency if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of Constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to Rule 6(e) of the West Virginia Rules of Procedure for Administrative Appeals, "[t]he judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the West Virginia Supreme Court of Appeals, in accordance with W.Va. Code § 29A-6-1." Pursuant

to W.Va. Code § 29A-6-1, "any party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal to the Supreme Court of Appeals of this state, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally."

Upon this Court's review of the Circuit Court's Order deciding an administrative appeal, the Court decides such questions of law *de novo*. Pursuant to *West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp.*, 196 W.Va. 326, 335, 472 S.E. 2d 211 (1996), this Court has held "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Moreover, pursuant to Syl. Pt. 1 in *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995), "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."

## II. The Petitioner's Assignments of Error are Without Merit.

### A. W.Va. Code § 17A-6E-4(c)(5) (2006) constitutes an *ex post facto* law when applied retroactively to Mr. McCabe or others convicted of felonies prior to its effective date of application.

The Petitioner here proceeds from a faulty premise claiming that (1) W.Va. Code § 17A-6E-4(c)(5) (2006) was intended to apply retroactively; (2) W.Va. Code § 17A-6E-4(c)(5) (2006) does not implicate the *ex post facto* clause because it is civil in nature; and (3) that the *Mendoza-Martinez* factors lean towards W.Va. Code § 17A-6E-4(c)(5) being civil in nature. These arguments are without merit, and, thus, the Circuit Court's Order concluding that the statute when applied retroactively to Mr. McCabe's unique situation constitutes an *ex post facto* law should be affirmed.

### 1. The Circuit Court did not err in finding that the statute itself does not call for a retroactive application of the same.

As an initial matter, it is clear that the Circuit Court properly held that the statutory framework of W.Va. Code § 17A-6E-1, *et seq.* indicates that W.Va. Code § 17A-6E-4(c)(5) was not intended to apply retroactively to Mr. McCabe.

This Court has held time and time again that the language of a statutory framework is the first place to look in determining statutory intent. While the Petitioner argues that this statute was intended to apply retroactively, this application would be in direct contradiction to the language of the statute which specifically sets forth a ***prospective date*** upon which the licensing scheme and restrictions were to be enforced. As set forth in Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968), "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Here, the licensing requirement was clearly set forth to have a prospective application. Moreover, the Petitioner agrees that controlling caselaw in this State provides, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." W.Va. Code § 2-2-10(bb); *Martinez v. Asplundh Tree Expert Co.*, 239 W.Va. 612, 803 S.E.2d 582, 586-587 (2017). "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." *Id.* (*citing* Syl. Pt. 4, *Taylor v. State Compensation Comm'r*, 140 W.Va. 572, 86 S.E.2d 114 (1955); Syl. Pt. 2, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014)).

Clearly, the Legislature did not intend to give W.Va. Code § 17A-6E-4(c)(5) retroactive application or the licensing requirement and prohibitions as to who could acquire licensure would have gone into effect without a prospective date. Nonetheless, the Commissioner has overlooked this

clear prospective application date and instead, relied upon the fact that because the wording of the statute uses the term, "*has been convicted,*" the phrase "denotes an act occurring prior to the application for licensure." The words "has been convicted" do not relate to the time prior to the effective date of the statute. The word "has" relates to a time prior to the seeking of a license. Additionally, this argument ignores the very fact that even after W.Va. Code § 17A-6E-1, *et seq.* became effective in June of 2006, automobile salespersons were still not required to obtain licensure for another year and a half; and ultimately, could continue with their occupation as an automobile salesperson even if they "had been convicted" of a felony involving financial matters or the automobile industry. Further supporting this fact is the language of W.Va. Code § 17A-6E-3(c) which provides:

> Any person employed by licensed dealers as a salesperson immediately preceding the effective date of this section is exempt from the requirements of the background investigation and the written test and payment of the fee for the background investigation provided in section four of this article.

Thus, Respondent's argument that, "[t]he statute aims to prevent all said persons from obtaining licensure regardless of when the felony conviction occurred . . ." is clearly unconvincing. Pet. Br. at 7. Accordingly, regardless of the *ex post facto* nature of this statute, it is clear from its face that the statute was not intended to apply retroactively. Thus, the Circuit Court did not err as a matter of law in this regard.

**2. Civil statutes that are punitive in nature when applied retroactively constitute *ex post facto* laws.**

Even if W.Va. Code § 17A-6E-4(c)(5) applies retroactively, it is an illegal, *ex post facto* law due to its punitive effect when applied to those who were convicted of crimes prior to its effective date. Specifically, W.Va. Code § 17A-6E-3(a) provides, "no person may engage in business in this state as a motor vehicle salesperson on and after **January 1, 2008** without holding a license

issued under the provisions of this article." (emphasis added). W.Va. Code § 17A-6E-4(c)(5) then limits who will be allowed to obtain such a license by stating:

> "The division **shall refuse** to issue the license if the applicant . . .[h]as been convicted of a felony: Provided, That upon the applicant's appeal the commissioner may grant an exemption to this restriction if the felony did not involve financial matters or the motor vehicle industry." (emphasis added)

While the statute does not appear unconstitutional on its face, when the statute is applied to the unique situation at hand, these statutory provisions increase the punishment for a crime for which Mr. McCabe has since paid for. Thus, the Circuit Court did not err in finding that this civil statute becomes punitive when applied to the situation at hand.

As the Petitioner makes clear, Mr. McCabe signed a plea agreement in October of 2005 agreeing to waive his right to indictment and plead guilty to a felony, which crime involved financial matters in the automobile insurance industry. App. at P. 69-73. At this time W.Va. Code § 17A-6E-4(c)(5) was **not enacted or in effect**. At the time of the signing of Mr. McCabe's plea agreement, a term of his agreement was not his prohibition from employment in the motor vehicle sales industry. At the time of the signing of Mr. McCabe's plea agreement, W.Va. Code § 17A-6E-4(c)(5) was not a law. Accordingly, Mr. McCabe was unable to consider what impact signing said plea agreement would have upon his future employment as a motor vehicle salesperson at the time he agreed to the terms of the same.

Notably, the statutory provisions under W.Va. Code § 17A-6E-1, *et seq.* were not implemented until five months after Mr. McCabe's plea agreement was signed; and further, did not go into effect until June 9, 2006. Moreover, even though this statutory framework became effective on June 9, 2006 – the mandatory licensing program was not required to take effect until January 1, 2008. Thus, there were no restrictions as to who could acquire licensure between 2006 and December

31, 2007. In sum, prior to 2006, there was no restriction whatsoever as to who could acquire salesperson licensure in the State of West Virginia.

Nonetheless, the Commissioner for the West Virginia Division of Motor Vehicles in denying Mr. McCabe's salesperson application in 2018, attempted to apply these restrictions to prohibit Mr. McCabe from gaining licensure due to a crime he pled guilty to before the statutory scheme became effective, and further, years prior to the time the licensure restriction was implicated. App. at P. 26-28. Accordingly, the Circuit Court correctly held that this denial of Mr. McCabe's licensure, and ultimately, the prohibition of his employment through the application of this statute to his situation constitutes an *ex post facto* law.

This Court has held, "[u]nder ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or **operates to the detriment of the accused**, cannot be applied to him." Syl. Pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980) (emphasis added). Thus, *ex post facto* laws are barred under Article III, Section 4 of the West Virginia Constitution and Article I, Section 10 of the United States Constitution.

The Circuit Court accurately found that, "[i]t is inarguable in this matter that W.Va. Code § 17A-6E-4(c)(5) is an *ex post facto* law that operates to the detriment of Mr. McCabe. Specifically, the statute operates to deny him the ability to earn a living in a profession he has pursued nearly his entire adult life. Had Mr. McCabe known at the time of his guilty plea that, in the future, he would be denied the ability to pursue his chosen profession, he may have made a different decision with regard to his guilty plea. The statute constituted an unlawful *ex post facto* law when applied to Mr. McCabe's situation, and cannot be found to be constitutional in this regard." App. at P. 134-135.

This determination by the Circuit Court was made appropriately when considering the fact that Mr. McCabe's plea agreement was signed over a decade ago on October 10, 2005, and only now, years after the plea agreement was signed and Mr. McCabe completed his probation, was the Commissioner of the Division of Motor Vehicles attempting to punish Mr. McCabe for these same acts; and further, attempting to apply a law that did not exist to an individual who committed a crime prior to its effective date. Mr. McCabe said it well during his hearing, "[n]o, I've been removed from any sanctions related to this offense for well over ten years sir." App. at P. 118.

Notwithstanding the fact that Mr. McCabe was now being punished a decade later by the Commissioner through the denial of his licensure, the Commissioner argues that regardless of this significant detriment that would befall Mr. McCabe if the statute were to be applied retroactively, that because the statute is civil in nature, it cannot constitute an *ex post facto* law. This theory is misguided, however, as a civil statute can be found to constitute an *ex post facto* law. As set forth in Syl. Pt. 3, *Haislop v. Edgell*, 593 S.E.2d 839, 845 (W.Va. 2003),

> The question whether an Act is civil or punitive in nature is **initially one of statutory construction**. A court will reject the Legislature's manifest intent only when a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the Legislature's intention.

(emphasis added) (*citing Hensler v. Cross*, 210 W.Va. 530, 558 S.E.2d 330, 335 (2001)).

Moreover, in determining whether the statute is punitive in nature, the West Virginia Supreme Court of Appeals has held, "[t]he proper inquiry is . . . whether [the law] makes more burdensome the punishment for the crime." *Hensler v. Cross,* 210 W.Va. 530, 535, 558 S.E.2d 330 (2001) (*citing State v. Ward*, 123 Wash.2d 488, 497, 869 P.2d 1062, 1067 (1994)). Other factors the Court may consider in determining whether a statute is punitive in nature is whether the statute aggravates a crime or makes it greater than when it was committed. *See id.* Accordingly, the

appropriate inquiry can be summarized as "whether a statute, which applies to persons who have served their sentence for a criminal conviction but which was enacted after said persons were convicted and sentenced, could nevertheless be applied to regulate their post-release conduct." *See Rohrbaugh v. State,* 216 W.Va. 298, 303, 607 S.E.2d 404, 409 (2004). Insofar as this type of statute is civil in nature, the Supreme Court of Appeals has further held, that a proper inquiry to make is "whether the legislature, irrespective of its intent to create a civil remedy, provided for sanctions so punitive as to transform the civil remedy into a criminal penalty." *State ex rel. Palumbo v. Graley's Body Shop, Inc.*, 188 W.Va. 501, 507, 425 S.E.2d 177, 183 (1992). Here, the Circuit Court properly held that "[c]ase law clearly prohibits Respondent from applying this statute to deny Mr. McCabe his salesperson license as this retroactive application 'diminishes his substantive rights' as to his fundamental interest to continue with his chosen employment." App. at P. 136.

The Commissioner argues that the subject statute does not extend criminal punishment, as the purpose of the statute is to "protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles." *See* Pet. Br. at 5. Although the Commissioner is correct in that that is, in fact, the stated purpose of the statute, the Commissioner fails to acknowledge that regardless of the legislative purpose, West Virginia caselaw looks at the "effect" of the legislation. If the effect of an enactment is punitive when applied, the statute may not be solely civil or regulatory in nature. *See generally Hensler v. Cross*, 210 W.Va. 530, 558 S.E.2d 330 (2001).

As set forth hereinabove, the effect of the legislation is clearly punitive as it further punishes Mr. McCabe for a crime he pled guilty to over a decade ago, works to his detriment, and increases his punishment, and in effect, adds additional terms to his plea agreement - terms that were not agreed to

or even contemplated in 2005. Thus, the Circuit Court did not err in finding that W.Va. Code § 17A-6E-4(c)(5), when specifically applied to Mr. McCabe, constitutes an *ex post facto* law.

### 3. The *Kennedy v. Mendoza-Martinez* factors support that W. Va. Code § 17A-6E-4(c)(5) (2006) is punitive in nature and effect and thus further supports the Circuit Court's decision.

Notwithstanding the fact that W.Va. Code § 17A-6E-4(c)(5) (2006) clearly works to the detriment of Mr. McCabe and has a punitive effect on the same, Petitioner insists that an analysis of the statutory framework under the *Kennedy v. Mendoza-Martinez* factors is relevant. 372 U.S. 144 (1963). These factors are:

(1) whether the sanction involves an affirmative disability or restraint;

(2) whether it has historically been regarded as punishment;

(3) whether it comes into play only on a finding of scienter;

(4) whether its operation will promote the traditional aims of punishment – retribution and deterrence;

(5) whether the behavior to which it applies is already a crime;

(6) whether an alternative purpose to which it may rationally be connected is assignable for it; and

(7) whether it appears excessive in relation to the alternative purpose assigned.

Even applying these factors, the result is the same – i.e., the application of W.Va. Code § 17A-6E-4(c)(5) to Mr. McCabe's license application is an *ex post facto* violation.

#### a. Whether the sanction involves an affirmative disability and restraint

Here, the statutory framework at issue clearly results in an affirmative disability and restraint if applied to Mr. McCabe – that is his prohibition from working in his chosen profession. While Petitioner states that because this prohibition is not a physical restraint nor is it "punitive," this element has not been met. This is a complete disregard of the implications that would occur if this Court

reversed the Circuit Court's finding, that is, the inability of Mr. McCabe to work in his chosen profession. The inability to work in a profession is clearly an affirmative disability and/or a restraint.

**b. Whether the sanction of prohibiting employment in a chosen profession has historically been regarded as a punishment**

It has long been recognized that one of the liberty interests protected by due process is a person's interest in the pursuit of a lawful occupation. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Petitioner argues that *Hudson v. U.S.*, 522 U.S. 93, 118 S. Ct. 488, 139 L.Ed.2d 450 (1997) is persuasive and that a bar on employment "has not historically been viewed as punishment." *Hudson*, however, presented a different set of facts. In *Hudson* the individuals who were prohibited from further participating in the banking industry were prohibited **prior** to being indicted with the crime which initially led to their occupational debarment. Here, the Circuit Court properly held that Mr. McCabe's situation – where the statute was not in effect at the time Mr. McCabe signed his plea agreement, and was unaware that his guilty plea to the crime would lead to his inability to obtain a salesperson licensure – led to the statute being a sanction that operated to Mr. McCabe's detriment. Thus, in this situation, the sanction constitutes a punishment as it adds an additional term to Mr. McCabe's plea agreement that was signed in October of 2005. Although the sanction at hand may not historically be viewed as a punishment, in this unique situation it is, in fact, a punishment.

**c. Whether the statute comes into play on a finding of scienter**

While W.Va. Code § 17A-6E-4(c)(5) (2006) does not involve a finding of scienter, the crime which must be committed for it to come into effect, does in fact, involve scienter; clearly, without the commission of the crime, the prohibition within the subject statute would not apply. Thus, this factor weighs in favor of a finding that the statute has a punitive effect.

**d. Whether the statute's operation will promote the traditional aims of punishment –retribution and deterrence**

Here, W.Va. Code § 17A-6E-4(c)(5) promotes the traditional aim of punishment, that being deterrence. Here, the deterrent and retributive effect of W.Va. Code § 17A-6E-4(c)(5) is an individual's inability to work as an automobile salesperson if convicted of a felony involving financial matters or the automobile industry. While Petitioner agrees that "[t]he statute promotes deterrence," Petitioner nonetheless argues that the deterrent effect is simply a "side effect of the statute's true purpose" and thus, does not necessarily mean that it is punitive. Pet. Br. at 10. However, as set forth in *Lehman v. Pennsylvania State Policy*, 576 Pa. 365, 376 (2003), "[a] statute with a deterrent effect may indicate it is punitive instead of civil in nature."

**e. Whether the behavior to which the statute applies is already a crime**

W.Va. Code § 17A-6E-4(c)(5) specifically prohibits those who have been convicted of a felony involving financial matters in the automobile industry from obtaining licensure. The fact that Mr. McCabe had been convicted of a crime is the sole basis for Petitioner's refusal to give him a license. Thus, the behavior to which this statute applies is clearly already a crime, thus satisfying this factor.

**f. Whether there is a rational alternative purpose to the statute**

While there is an alternative purpose to W.Va. Code § 17A-6E-4(c)(5), the alternative purpose, when applied in this unique situation, results in a punitive effect and impact upon Mr. McCabe. It is clear that Mr. McCabe, an upstanding member of the community with no legal issues since 2005, who has indeed worked in the automobile and financial industry since the time he pled guilty to a felony with no issues, is not a risk to the public as more fully detailed below with respect to the next factor.

### g. Whether the statute appears excessive in relation to the alternative purpose assigned

W.Va. Code § 17A-6E-4(c)(5) is excessive in relation to the alternative purpose assigned. Specifically, the purpose of W.Va. Code § 17A-6E-1 is "to protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles." While this purpose can be categorized as non-punitive, here, the complete ban on those who have been charged with felonies involving the automobile industry, with absolutely no exception for the same, is excessive as it provides for no allowances for those who have had no related legal issues since that time and who have fully served their criminal sentence. Here, Mr. McCabe has had no legal issues and has proved himself to be an upstanding member of the Wheeling community; however, this statute prohibits him from working in his chosen field of employment notwithstanding the fact that he has testified, "I have received licensure in other states . . . in making a living . . . and providing for my family. I've spent time as a buyer um, in Ohio and was licensed through Quality Motors Cars through Butch Miller, then I worked for various places serving as a buyer . . . I did spend some time in the mortgage industry, as well." App. at P. 113-114. Clearly, if there is any situation in which an exemption should be given, this is it. Because this statute provides for no exception whatsoever in this scenario, it is clearly excessive.

### h. The *ex post facto* nature of the statute is not the only unconstitutional aspect of W.Va. Code § 17A-6E-4(c)(5)

Notwithstanding these factors and the *ex post facto* nature of the statute, it is clear that the statute was not meant to apply retroactively to those who had committed felonies involving financial matters or the automobile industry prior to January 1, 2008. Moreover, even if this Court were to find that the Circuit Court erred in finding that the subject statute is punitive in nature, it is clear that the subject statute still violates additional constitutional provisions as outlined below. Specifically, the

United States Supreme Court of Appeals has found that even if a statute is not punitive in nature, "[t]he Due Process and Equal Protection Clauses . . . protect individuals from sanctions which are downright irrational." *Hudson v. U.S.*, 522 U.S. 93, 103, 139 L.Ed.2d 450, 495 (1997) *citing Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

**B. The Circuit Court did not err as a matter of law in finding that a strict application of W.Va. Code § 17A-6E-4(c)(5) (2006) led to a denial of Mr. McCabe's due process rights under both the United States and West Virginia Constitutions.**

Petitioner attempts to persuade this Court that because (1) the denial of Mr. McCabe's license application was mandated by statute; (2) the denial was allegedly in direct relation to the stated purpose of the subject statute; and (3) Mr. McCabe was given an opportunity to produce evidence on his behalf after receiving the denial of his salesperson licensure, there could be no finding by the Circuit Court that Mr. McCabe's due process rights had been violated. These arguments are unconvincing.

Under Article III, Section 10 of the West Virginia Constitution, "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." In this regard, the West Virginia Supreme Court of Appeals has recognized that "[d]ue process of law, within the meaning of the State and Federal constitutional provisions, extends **to actions of administrative officers** and tribunals, as well as to the judicial branches of the governments." Syl. Pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960); Syl. Pt. 1, *McJunkin Corp. v. Human Rights Com'n*, 179 W.Va. 417, 369 S.E.2d 720 (1988); *See also Syl. Pt. 5, State ex rel. Bowen v. Flowers*, 155 W.Va. 389, 184 S.E.2d 611 (1971).

Likewise, the Fourteenth Amendment to the United States Constitution provides, "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process." In this regard, the United States Supreme Court of Appeals has outlined the

following principles which must be considered when determining what procedural protections must constitutionally be afforded to individuals:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

In addition to the Supreme Court's guidelines as set forth hereinabove, the West Virginia Supreme Court of Appeals has also held, "[t]he Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. Pt. 1, *Waite v. Civil Serv. Comm'n.*, 161 W.Va. 154, 241 S.E.2d 164 (1977) .

Among the property interests that can be impacted by state action is one's interest in their employment. Specifically, the West Virginia Supreme Court has stated, "[i]t has long been recognized that **one of the liberty interests protected by due process is a person's interest in the pursuit of a lawful occupation**." *Major v. DeFrench*, 169 W. Va. 241, 254, 286 S.E.2d 688, 696 (W.Va. 1982). "In regulating a given occupation, as in all legislative matters based on the police power, regulations will be valid only if they bear some reasonable relationship to the public health, safety, morals or general welfare." *Thorne v. Rush*, 164 W.Va. 165, 168, 261 S.E.2d 72 (1979). As set forth by the West Virginia Supreme Court of Appeals in *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 512, 482 S.E.2d 124, 128(1997), the "license to practice a profession is a valuable right, one that will be protected by the law."

Accordingly, even if a regulation bears a reasonable relationship to the public health, safety, morals or general welfare, the same cannot stand if the regulation deprives an individual of due process. "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 368 U.S. 420, 442 (1960). Moreover, it has been noted that "[t]he due process that must be accorded in an administrative proceeding depends upon the nature of the administrative agency's actions." *See generally* 2 Am.Jur.2d Administrative Law § 140 (1994).

Here, upon receiving notice of the Commissioner's refusal to issue his automobile salesperson licensure, Mr. McCabe was granted the right to appeal his denial. App. at P. 50. A hearing was had wherein Mr. McCabe not only gave testimony in regard to the felony charge he pled guilty to a decade earlier, but further, presented letters of support from members of his community acknowledging that he was a respectable and trustworthy individual who has gone above and beyond for his community, notwithstanding the fact that he plead guilty to a crime over thirteen years ago. App. at P. 47; 40-46; 108-128.

Although Mr. McCabe set forth not only his own testimony regarding what happened in the past, but also the letters which further supported the fact that he would not be one to engage in any wrongdoing in the present or future, the Commissioner for the West Virginia Division of Motor Vehicles failed to take this information and evidence into consideration, and simply denied the appeal based on a literal reading of the statutory provision at hand, thus depriving Mr. McCabe of his due process rights.

This is evidenced by a reading of the Commissioner's October 19, 2018 Final Order which states:

> The Applicant accepted full responsibility for his actions and appeared to be sincerely remorseful regarding the decisions he made that led to his conviction;
>
> The Applicant submitted numerous letters in support of his ability to work as a salesman in the automobile industry;
>
> The Applicant has not had any related issues since 2006. ***Regardless,*** the Statute is very clear that an exemption cannot be given in this situation. (emphasis added).

App. at P. 27-28. From a review of this Order, it is evident that **no consideration whatsoever** was given to Mr. McCabe's current character or fitness to conduct business as an automobile salesperson at this point in time; rather, the Commissioner simply affirmed the denial, thus rendering the appeal hearing meaningless. Moreover, the fact that the hearing and evidence presented by Mr. McCabe was essentially meaningless is further supported by the statement of Mr. Bonham who represented the Petitioner at Mr. McCabe's hearing in which he stated:

> "so the Code, the way [sic] that Code West Virginia 17A-6-E(4) is written, the Commissioner will stand on the record as submitted. **It's an automatic denial** for a, when there is conviction for a felony, which Mr. McCabe self-reported indicated in his application. However, if the, according to the Code, if the felony did not involve financial matters, or the motor vehicle industry, the Commissioner may grant an exemption to this restriction." (emphasis added). App. at P. 110.

Accordingly, it is evident that no due process was actually given to Mr. McCabe as shown by the failure and inability to consider any evidence outside of the fact that Mr. McCabe previously pled guilty to a specific kind of felony. Regardless of the procedures that were technically in place, one thing is clear – if the procedures in place serve no purpose, as the denial is mandated by statute, the procedures are meaningless.

This failure and inability to investigate the reasons behind a denial is clearly in contradiction to the legislative purpose. Specifically, when looking at the legislative purpose

behind this statute, it is clear that the interest of the DMV in regulating automobile salesperson's licensing was "to protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles." W.Va. Code § 17A-6E-1(a).

However, the DMV's interpretation of the statute did nothing to further that purpose, and, if anything, it thwarted the will of the legislature by refusing to look beyond Mr. McCabe's prior felony conviction. Even Petitioner does not dispute that Mr. McCabe has had no legal issues since 2006. Mr. McCabe has proven his reputation and character in the community since that time, has worked in the automobile industry and worked in the mortgage industry. It is clear that there is no risk that he would engage in fraudulent activity in the future; and thus, the Circuit Court did not err in holding that the "outright denial of his license is not only unreasonable, but also fails to further the purpose of the statute at hand." App. at P. 140.

Next, Petitioner argues that the West Virginia Legislature has been given instruction regarding the "procedures by which laws may be enacted;" and thus it is implied that procedural due process was given to Respondent and all citizens when the subject statute was enacted. Pet. Br. at 14. While the Legislature may have been given general instruction regarding the procedures by which laws may be enacted, it is clear that "[a] statute may be constitutional as written yet be unconstitutionally applied in a given case." Syl. Pt. 2, *State ex rel. Miller v. Locke*, 162 W.Va. 946, 253 S.E.2d 540 (1979). The Circuit Court properly found that the subject statute was unconstitutionally applied with respect to Mr. McCabe's situation as the statute does not allow for any of the evidence or testimony set forth during the hearing to have an impact on his ability to obtain a salesperson license – a point confirmed by both the Commissioner and Mr. Bonham.

Petitioner also argues that the Circuit Court erred in placing reliance on the caselaw set forth in *Freitag v. Carter*, 489 F. 2d 1377 (7th Cir. 1973) when determining that Mr. McCabe was not provided due process. *Freitag* involved the denial of a chauffer's license based on a finding of "infirmity of mind" on the part of Mr. Freitag. The Seventh Circuit held that in that case, Freitag's license was denied because of records from fourteen years earlier showing that he had visited a mental hospital. The Court held, "Carter's 'investigation' consisted of unearthing fourteen-year-old psychiatric records . . . and checking whether Freitag had been convicted of a disqualifying offense. At no time did Carter inquire into the plaintiff's present mental condition or show him the 'evidence' against him." *Id.* at 1382.

In *Freitag*, the investigation failed to look at outside circumstances of the plaintiff's present mental condition to determine whether he lacked "infirmity of the mind." *See id.* Accordingly, the Seventh Circuit affirmed the district court's holding that Freitag was not provided with due process of law in the denial of his application under the circumstances presented. *Id.* at 1384.

The Ohio County Circuit Court used this reasoning to draw a similarity to Mr. McCabe's situation where Mr. McCabe's **present** character was not taken into consideration in the determination of whether his salesperson licensure would be granted. Notwithstanding the clear relevance of *Freitag*, Petitioner suggests that the Court erred in considering this persuasive caselaw because "infirmity of mind" is a vague term whereas here the disqualifying offense was a felony of a specific nature. However, Petitioner's argument shows that Mr. Freitag was actually provided with more due process than Mr. McCabe; Mr. Freitag was not statutorily prohibited from obtaining his chauffeur's license simply because of his background. Instead, an inquiry into "infirmity of mind" was required. However, in this matter, the die is already cast. Mr. McCabe has no right to explain his present circumstances or even the events surrounding his conviction. As Petitioner

himself put it, "there is no question that Respondent committed the disqualifying act." Pet. Br. at P. 15.

Thus, the Circuit Court properly held that W.Va. Code § 17A-6E-4(c)**Error! Bookmark not defined.**(5) (2006), when applied to this set of facts, failed to provide due process of law to Mr. McCabe. As interpreted and applied by the DMV, the statute clearly fails to consider any outside evidence as to whether an exemption will be granted to someone who committed a felony involving financial matters or the automobile industry. As the Circuit Court recognized, Mr. McCabe offered definitive proof that he would not engage in similar conduct when employed in the motor vehicle industry again as he has, in fact, worked in both the motor vehicle industry and the financial industry since his conviction and committed no transgressions. The testimony given by Mr. McCabe at the hearing further demonstrates that he is not the type of person this statute aims to protect the public from:

> "However, I think, as my letters of recommendation will testify to, I have gone above and beyond, with my family, the church, the community. I've volunteered, I've been accepted as the athletic director for a middle school organization in the past, I've served on various boards that involve youth . . . so while I certainly regret and I have learned a lot, it has been a tough road to be able to support my family based on my felony conviction. I will say that the humility that I was shown has blessed me in a lot of ways to enhance my relationship with God, and to become a better person, a better father, a better husband, a better employee. And in filling out the application, I did know that there was nothing that was going to show up on my record. I did know that the search that you guys were going to execute was going to come back clean. However, at my age and the point of my family . . . I feel like the most important thing was to tell the truth, and the truth will always set you free. And although that I realize that there are some rules and regulations and guidelines that may not fall in my favor, that if the possibility does exist and I think the fact that I'm able to be here and be able to give me this time to speak my case, shows that there is someone that can grant an exception. I'm here to beg for mercy. I'm here to beg on behalf of myself, my wife, my ten children to please give me the opportunity to support my family."

App. at P. 112-113.

Clearly, the failure to afford due process in considering Mr. McCabe's present character is in violation of both the West Virginia and United States Constitutions.

### C. The Circuit Court did not err as a matter of law in finding that W. Va. Code § 17A-6E-4(c)(5) (2006) is overly broad.

Finally, the Circuit Court properly held that W.Va. Code § 17A-6E-4(c)(5) violated both due process and equal protection provisions under the Fourteenth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution as a result of being both overly broad and overly narrow.

Specifically, the Circuit Court found that the statute is overly broad in that it "provides no exceptions at all for those who have committed felonies involving financial matters or the motor vehicle industry. Rather, it sets forth a strict prohibition against those individuals acquiring a license regardless of the situation or the facts surrounding their criminal history and/or current character." App. at P. 145. Although the Petitioner states that the statute is not overly broad as "it is directly related to the specific purpose of W.Va. Code § 17A-6E-1, *et seq.* – the protection of customers, dealers, banks and the State from fraudulent activity," this argument is unconvincing when applied to Mr. McCabe's situation. Pet. Br. at P. 16.

Accordingly, the Court did not err in holding that Mr. McCabe's application for licensure be granted notwithstanding the literal reading of the statute. The Circuit Court correctly relied on the principle set forth in *Click v. Click* in which this Court held, "[i]t is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syl. Pt. 2, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925).

Here, application of W.Va. Code § 17A-6E-4(c)(5) to prohibit Mr. McCabe from obtaining his salesperson licensure results in an injustice - that being the violation of Mr. McCabe's due process and equal protection rights. Specifically, because the subject statute strictly prohibits those individuals in Mr. McCabe's situation from acquiring a license regardless of the situation or the facts surrounding their criminal history and/or current character, it is clear that this statute fails to provide for such due process and violates the equal protection clause. Under the Fourteenth Amendment to the United States Constitution, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Likewise, and as set forth hereinabove, under Article III Section 10 of the West Virginia Constitution, "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." In addition, the West Virginia Supreme Court of Appeals has held, "[t]he concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the Fourteenth Amendment to the United States Constitution." *Israel v. Israel v. WV Secondary Schools Activities Com'n*, 182 W. Va. 454, 461, 388 S.E.2d 480, 487 (1989).

Here, the Circuit Court properly held that W.Va. Code § 17A-6E-4(c)(5) violates both the due process and equal protection clause as it "classifies certain individuals and prohibits them from obtaining their automobile salesperson licensure. This classification results in the preclusion of due process being afforded to said individuals . . . . Accordingly, both the due process and equal protection clauses under the Fourteenth Amendment are implicated in this situation." App. at P. 146.

In support of its holding that not only is the subject statute overly broad, but also, overly narrow, the Circuit Court relied on the principles set forth in *Smith v. Fussenich*, 440 F.Supp. 1077 (D. Conn. 1977), in which a statute prohibiting private investigators/security guards from obtaining employment if they had committed any felony was found to be unconstitutional. The Circuit Court in reviewing *Smith* found that the authority therein was persuasive in several respects, but most specifically, the Court cited to the following holding in *Smith* which is analogous to the situation at hand:

> the statute's across-the-board disqualification fails to consider probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation. We believe it is fair to assume that many qualified ex-felons are being deprived of employment due to the broad sweep of the statute. In regard to due process challenges of the statute, the Court went on to state, "we deem it appropriate to mention that the statute's irrebuttable presumption may well be impermissible as a violation of the Due Process Clause of the Fourteenth Amendment."

440 F.Supp. at 1081.

Petitioner attempts to distinguish the holding in *Smith* by stating that, unlike the statute in *Smith,* here W.Va. Code § 17A-6E-4(c)(5) disqualifies only felons who committed crimes involving the financial or automobile industry and also disqualifies non-felons from obtaining licensure if they committed fraud or repeatedly defaulted on financial obligations in the motor vehicle industry. Pet. Br. at 17. While it is true that the statutes are not identical with respect to the disqualifying crimes that had to have been completed, they are clearly analogous. Furthermore, the Petitioner fails to address or rebut the most important principle that the Circuit Court relied upon in finding *Smith* persuasive, that being the issue of non-rebuttable presumptions.

The unconstitutionality of "irrebuttable presumptions" is an area of law that the United States Supreme Court of Appeals has previously addressed. For example, in *Cleveland Bd. of*

*Educ. v. LaFleur*, 414 U.S. 632 (1974), the United States Supreme Court of Appeals held, "permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." *Id.* at 644. In *LaFleur*, the Court held that mandatory termination provisions of maternity rules violated the Due Process Clause of the Fourteenth Amendment "as they create a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties." *Id.* at 632.

Here, because of the language of the statute, there is no opportunity for Mr. McCabe to argue that his fundamental right to employment should not be taken away; nor was there ever an opportunity for Mr. McCabe to argue that his due process rights were being violated at the time he pled guilty in 2005 because W.Va. Code § 17A-6E-4(c)(5) had not been enacted. Notably however, even if an opportunity for argument was given, the very language of the statute precludes this argument from having any effect or impact because it is absolute in nature. This statutory provision, W.Va. Code § 17A-6E-4(c)(5), constitutes the very definition of an irrebuttable presumption – i.e., simply because Mr. McCabe falls within a specific class of persons, he is prohibited from obtaining licensure. This is a presumption which the United States Supreme Court of Appeals has held time and time again to be unconstitutional. Notably, Petitioner does not address the unconstitutionality of "irrebuttable presumptions" and thus it is presumed that the Petitioner agrees with this reliance by the Circuit Court on the United States Supreme Court of Appeals precedent with respect to the same. Accordingly, the Circuit Court did not err in finding "[t]his Court cannot simply affirm Respondent's Final Order without considering any factors surrounding Mr. McCabe's background. Such a ruling would be a clear disregard of due process and therefore unconstitutional under both the United States and West Virginia Constitutions." App. at P. 149.

Additionally, the Circuit Court's ruling is consistent with this State's public policy in favor of reintegrating rehabilitated ex-offenders into the mainstream of society. As set forth in *Webb v. County Court*, 113 W.Va. 474, 476, 168 S.E. 760, 761 (1933):

> Society must be protected from law violators, and their punishment must be just—commensurate with the seriousness of the offense. But the state does not punish malefactors in vengeance. She does not entertain against them throughout the years a spirit of vindictiveness, nor is the state relentless or unforgiving. It is the anxious desire of the state that those of her citizens who have transgressed her laws, suffered convictions, and paid the penalty of the law, shall profit from their unfortunate experience and thereafter make of themselves good citizens by leading lives of uprightness and usefulness. Society is interested in such result, and not in placing forever the brand of iniquity upon the forehead of one who in the frailty of humanity has departed from the narrow path.

### D. The Circuit Court did not err in finding that W.Va. Code § 17A-6E-4(c)(5) (2006) is overly narrow.

Lastly, Petitioner asserts that the Circuit Court's holding that W.Va. Code § 17A-6E-4(c)(5) is overly narrow in contravention to the due process and equal protection clause is based on a misreading of the subject statute. Specifically, Petitioner avers that because under W.Va. Code § 17A-6E-4(c)(4), a person who has committed a fraudulent act or omission or repeatedly defaulted in financial obligations in connection with the buying, selling, leasing, rental or otherwise dealing in motor vehicles, recreational vehicles or trailers is also prohibited from obtaining licensure, this demonstrates the statutory scheme within W.Va. Code § 17A-6E-4(c) is not overly narrow.

Although Respondent is correct that this language does in fact exist, it describes and relates to conduct that arises "in connection with the buying, selling, leasing, rental or otherwise dealing in motor vehicles," which is similar to that set forth in subsection (c)(5). Thus, it is clear that both this provision and W.Va. Code § 17A-6E-4(c)(5) remain overly narrow as their classifications preclude due process to said individuals who fall under these analogous categories in their attempt

to retain their fundamental right to earn a living, while allowing others who may have been guilty of crimes of moral turpitude to obtain licensure. Accordingly, both the due process and equal protection clause under the Fourteenth Amendment are implicated in this situation and in a situation that may be presented under W.Va. Code § 17A-6E-4(c)(4). Thus, the Circuit Court did not err in finding that W.Va. Code § 17A-6E-4(c)(5) is overly narrow.

## CONCLUSION

In sum, because the four assignments of error set forth by Petitioner are without merit, Respondent, Timothy McCabe, asks that this Court affirm the Ohio County Circuit Court's Order which reversed the October 19, 2018 Order of the Commissioner of the West Virginia Department of Motor Vehicles.

TIMOTHY R. McCABE, Respondent

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