

070303

**BEFORE THE WEST VIRGINIA SUPREME COURT APPEALS**

**STATE OF WEST VIRGINIA ex rel.  
STATE OF WEST VIRGINIA,  
by MARK G. SERGENT, ROANE COUNTY  
PROSECUTING ATTORNEY,  
Petitioner,**

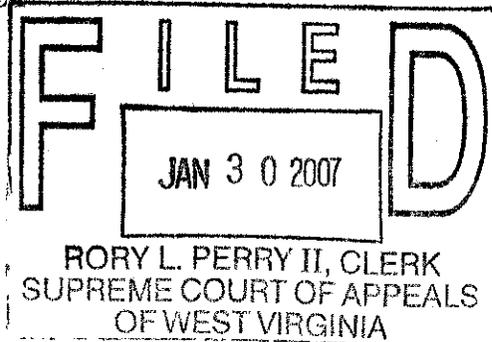
**Docket No.** \_\_\_\_\_

**v.**

**THE HONORABLE DAVID W. NIBERT  
CIRCUIT COURT JUDGE OF THE 5<sup>TH</sup> JUDICIAL CIRCUIT and  
ROBERT SARVER DEFENDANT  
Respondent,**

**PETITIONER FOR WRIT OF PROHIBITION  
MOTION FOR STAY AND MEMORANDUM OF LAW**

**MARK G. SERGENT  
ROANE COUNTY PROSECUTING ATTORNEY  
STATE BAR NO: 3337  
ROANE COUNTY COURTHOUSE  
P.O. BOX 734  
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## I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Respondent , the Honorable David W. Nibert is the presiding Judge over a felony criminal action in the Roane County Circuit Court, State of West Virginia vs. Robert Sarver, Felony Case Number: 05-F-42

The Respondent Robert Sarver is a criminal defendant indicted for the felony offense of Driving while License Revoked for Driving Under the Influence of Alcohol Third Offense, by the May 2005 Roane County Grand Jury. Respondent Robert Sarver is represented by the Fifth Judicial Circuit Public Defender Teresa C. Monk of Spencer, West Virginia.

The Respondent Robert Sarver Counsel filed a "Motion to Clarify Law" and the State filed a written reply upon the issue of the application of West Virginia Code §17B-4-3(b) to a criminal defendant who operated an All-Terrain Vehicle (ATV) on a public road under the Regulations of All-Terrain Vehicles West Virginia Code §17F-1-1et seq. when his license and privilege to drive a motor vehicle had previously been lawfully revoked or suspended.

The Honorable David W. Nibert entered an order dated the 5<sup>th</sup> day of December, 2005 stating that a driver of an all terrain vehicle on a public highway did not require the possession of a valid West Virginia operators license and a persons driving license being previously lawfully revoked for Driving Order the Influence did not violate West Virginia Code §17B-4-3(b). The State objected to the Courts ruling and the Court by various orders stayed the dismissal of the States pending indictment until the State could perfect an appeal.

## II. STATEMENT OF FACTS ON THE CASE

On May 25, 2005 Robert L. Sarver was indicted by the May 2005 Roane County Grand Jury, in a one count indictment for the felony offense of Driving While License Revoked for Driving under the influence of alcohol-third offence under the West Virginia Code § 17B-4-3(b). (Exhibit A)

Roane County Sheriff L. Todd Cole presented testimony that the Respondent Robert L. Starver was seen operating an all-terrain (4-wheeler) vehicle on a paved country/secondary road Ambler Ridge Road County Number: 19 and crossed a US highway (US 119) near Walton, Roane County, West Virginia.

A check of Respondent Robert L. Sarver's West Virginia driver license record revealed that Respondent Robert L. Sarver's license and privilege to drive a motor vehicle had been revoked for seven different violations and suspensions (listed below):

<u>Vocations/Suspensions:</u>	<u>Begin Date</u>	<u>End Date</u>
DUI- Court Conviction	09-29-00	Open
Driving Under the Influence	09-16-89	Open
Driving Under the Influence	04-10-02	Open
Implied Consent	04-10-02	Open

Implied Consent	12-04-96	Open
Mandatory Revocation-Conviction	04-04-02	Open
Unpaid Citation	02-21-97	Open

(From Exhibit E-Respondent's Driving Record)

Following the Respondent Robert L. Sarver's indictment, Teresa Monk counsel for the Respondent Robert L. Sarver filed a "Motion to Clarify Law" asking for the dismissal of the indictment (Exhibit B).

The State objected to the dismissal of the indictment and filed under this Court, "State's Reply to the Defendants Motion to Clarify Law." (Exhibit C) and stated that when a driver's license to drive a motor vehicle for Driving Under the Influence related suspension the drivers license and privilege to drive a motor vehicle is revoked and a defendant cannot operate a motor vehicle of any kind on the public roads of the State of West Virginia.

The Circuit Court on December 5, 2006 ruled that a defendant "cannot violate the provisions of [West Virginia Code] §17B-4-3(b) of operating a motor vehicle on a public roadway while one's privilege to do so has been suspended where one operates an all-terrain vehicle in conformity with the provisions of [West Virginia Code] §17F-1-1 et seq" (page 2 of 12-5-05 order). (Exhibit D)

The State objects to the Courts ruling and order of dismissal of the pending indictment before the Circuit Court.

### III. ISSUE PRESENTED

Whether the Circuit Court exceeded its legitimate power in ruling that operation of an all terrain vehicle, under West Virginia Code §17F-1-1 et. seq, by a person who driving privileges have been previously revoked under the requirements of West Virginia Code §17B-4-3(b) cannot commit an offense under West Virginia Code §17B-4-3(b) because the operation of an all terrain vehicle requires no West Virginia Drivers License.

### IV. AUTHORITY RELIED UPON

Shell v. Bechtold 175WV792,338S.E. 2<sup>nd</sup> 393(1985)

Hall v. Schlaegel WV Supreme Court #24581 (Jan. 1998 term)

West Virginia Code § 17B-4-3(b)  
 West Virginia Code § 17F-1-1 et. Seq.  
 West Virginia Code § 17B-1-1(b)  
 West Virginia Code § 17B-1-1(a)  
 West Virginia Code § 17B-1-1(P)  
 West Virginia Code § 17B-1-1(Q)

## V. ARGUMENT

The Circuit Court exceeded its legitimate power in ruling and dismissing a felony indictment against the Respondent Defendant Robert L. Sarver.

### A. The Legal Standard

The standard followed by this Court in determining whether to exercise its discretion to grant the extraordinary remedy of a writ of prohibition is:

to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. Pt. 3, in part, State ex rel. Canton v. Sanders, 215 W.Va. 755, 601 S.E.2d 75(2004), *citing* Syl. Pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744(1979.)

The extraordinary writ of prohibition is further limited, “Prohibition lies only 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 and may not be used as a substitute for [a petition for appeal] or certiorari.’ Syllabus Point 1, Crawford v. Taylor, 138 W.Va 207, 75 S.E. 2d 370 (1953).” Syl. Pt. 1 SER Booley v. Willett, 204 W.Va 662, 515 S.E.2d 825 (1999)

Prohibition does not lie to prevent a simple abuse of discretion:

‘A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers W.Va. Code 53-1-1’ Syl. pt.2 State ex rel. Peacher v. Sencindiver, 160W.Va. 314, 233 S.E.2d 425(1977)

Syl. Pt.1, State ex rel. Caton v. Sanders, supra, Syl. Pt. 2, State ex rel. Kees v. Sanders, 192 W.Va. 602, 453 S.E.2d 436(1994).

### B. **The Trial Court Exceeded its Legitimate Power in Ruling and Dismissing a Felony Indictment.**

Comes now the State of West Virginia and respectfully does state that West Virginia Code §17B-4-3(b) prevents and precludes a person with a “suspended” or “revoked” West Virginia driver’s license to operate any motor vehicle which would include an ATV (All Terrain Vehicle) irregardless of the fact that no drivers license is required to operate an ATV on the highways of West Virginia under West Virginia Code § 17F-1-et seq for the following reasons:

- (1) An ATV (All Terrain Vehicle) is a motor vehicle under the definitions of motor vehicle (§ 7B-1-1(b)) and vehicle (§ 17B-1-1(a)) in Chapter 17B of the West Virginia Code.
- (2) A person who operates an all terrain vehicle(ATV) while under the influence of alcohol can be prosecuted for Driving Under the Influence of Alcohol or other substances under West Virginia Code § 17C-5-2 et. seq.
- (3) A persons license who is "suspended" (§ 17B-1-1(p)) or "revoked" (§17B-1-1(q)) both has their license to operate a motor vehicle in this state temporarily withdrawn or terminated and their privilege to drive a motor vehicle is also temporarily withdrawn or terminated.
- (4) This Court has noted that both the drivers license and the privilege to drive a motor vehicle is both ended when a persons license is suspended or revoked in *Shell v. Bechtold*, 175 WV. 792,338 SE 2<sup>nd</sup> 393 (1985). In *Hall v. Schlaegel*, WV Supreme Court #24581 (Jan 1998 Term) the Supreme Court Stated:

The purpose of the administrative sanction or license revocation, as we stated in *Shell v. Bechtold*, 175 W.Va. 792, 338 S E 2d 393 (1985) "is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways." Id. at 796, 338 S.E. 2d at 396. This objective of removing substance-affected drivers from our roads in the interest of promoting safety and saving lives is consistent "with the general intent of our traffic laws to protect the innocent public." Id. Petitioner argues that these objectives would be furthered by requiring a driver to fulfill the statutory requirements for the reissuing of his/her license before he/she is no longer subject to the offense of driving while license revoked for DUI. We observe that the Legislature's inclusion of a separately-designated criminal offense for driving while license revoked for DUI is indicative of the societal importance attached to removing such motorists from our roadways...

Our statutory scheme requires the conclusion that until such time as a driver whose license has been revoked for driving under the influence has complied with the West Virginia Code § 17C-5A-3(b), he/she remains subject to prosecution for driving while under the influence pursuant to West Virginia Code § 17B-4-3(b), not with-standing the fact that the statutory period of revocation has elapsed. As the court observed in *Brude*, While the motor vehicle has become a part of our economic and

social fabric, it is still a demanding ding and dangerous instrumentality. The motor vehicle exacts a tremendous toll in terms of death, disability, damage, and demands upon our natural resources. The privilege of using such an instrumentality cannot be granted promiscuously and cannot be granted without limitation as to continuation of the privilege. 222 N. W. 2d at 298 (footnote omitted). (Emphasis Added)

(5) At his arrest Robert Saver's drivers license was suspended and revoked for the following reasons :

- \* Implied Consent
- \* DUI
- \* Manditory Revocation
- \* DUI Court Conviction
- \* Unpaid Citation
- \* Implied Consent
- \* DUI

and therefore both his license and privilege to drive a motor vehicle in Roane County were suspended and terminated when he choose to drive and operate an ATV upon the States highways.

(6) Since Robert Sarver's privilege to drive a motor vehicle was terminated he cannot lawfully drive any motor vehicle whether or not a license is required to operate the same.

(7) Robert Sarver can lawfully be prosecuted for Driving while License Suspended or Revoked for DUI under West Virginia Code § 17B-4-3(b).

(8) The West Virginia Legislature in enacting the all terrain vehicle (ATV) law, West Virginia Code §17F-1-1 et seq did not in any way, repeal, modify, or exclude the operation of West Virginia Code§17B-4-3(b) et seq applying to a situation when a suspended or revoked driver who drives a motor vehicle being an all terrain vehicle from being prosecuted for Driving While License is suspended or revoked for DUI.

(9) Once a driver whose license and privilege to drive in this State has been lawfully suspended or revoked: HE OR SHE CANNOT DRIVE A MOTOR VEHICLE IN THIS STATE IN ANY MANNER OR BY ANY MEANS. The fact that an all terrain vehicle (ATV) requires no drivers license for its operation makes no difference under West Virginia Code §17B-4-3(b).

- (10) The Legislature in passing all terrain vehicle regulation did not intend to reward a previously revoked or suspended driver with the "new" right to operate an all terrain vehicle as a substitute for a motorcycle, car, or truck.
- (11) Public safety and the operation of the rules of statutory interpretation does not support the Trial Court's decision that West Virginia Code §17F-1-1 et seq voids West Virginia Code § 17B-4-3(b) when applied to an all terrain vehicle operator who has previously had his or her licence and privilege to drive in this State for public safety and protection.

The State respectfully believes that the Circuit Court exceeded its legitimate powers by ordering the dismissal of a felony indictment against a criminal defendant when West Virginia Chapter 17B-4-3(b) is still in effect and has not expressly been repealed, overruled, or modified by the passage of West Virginia Code Chapter 17F-1-1 et seq.

#### VI. PRAYER

The State of West Virginia by and through the Roane County prosecuting attorney respectfully prays that the Honorable Supreme Court accept this writ of prohibition and prohibit the Honorable David W. Nibert Circuit Judge of the Fifth Judicial Circuit from dismissing Roane County Circuit Court Case No. 05-F-42 and issue a stay during the pendency of this proceeding

State of West Virginia  
By Counsel

  
Mark G. Sergent #WV 3337  
Prosecuting Attorney  
P.O. Box 734  
Spencer, WV 25276

**CERTIFICATE OF SERVICE**

I, Mark G. Sergent, prosecuting Attorney, hereby certify that service of the foregoing Amended Petition was made upon counsel of the Respondents by hand delivery a true and exact copy thereof as follows:

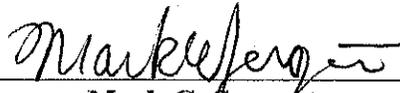
**Hand Delivery**

Honorable Judge David W. Nibert  
2<sup>nd</sup> Floor Roane County Courthouse  
200 Main Street  
Spencer, WV 25276

**Hand Delivery**

Teresa Monk  
2<sup>nd</sup> Floor First Neighborhood Bank Building  
Spencer, WV 25276

This the 30<sup>th</sup> day of January 2007.



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**Mark G. Sergent  
Prosecuting Attorney**

STATE OF WEST VIRGINIA,

COUNTY OF ROANE, To-wit:

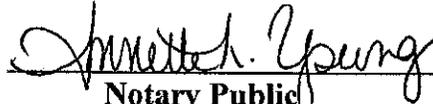
VERIFICATION

Mark G. Sergent, a credible person, the Prosecuting Attorney in and for Roane County, West Virginia, named in the Information above, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be on information, he believes them to be true.

  
\_\_\_\_\_  
Mark G. Sergent  
Roane County Prosecuting Attorney

Subscribed and sworn to before me this 29 day of January, 2007.

My commission expires: October 5, 2015.

  
\_\_\_\_\_  
Annette L. Young  
Notary Public

