

No. 34970

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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IN RE:

Civil Action No.: 08-AA-9

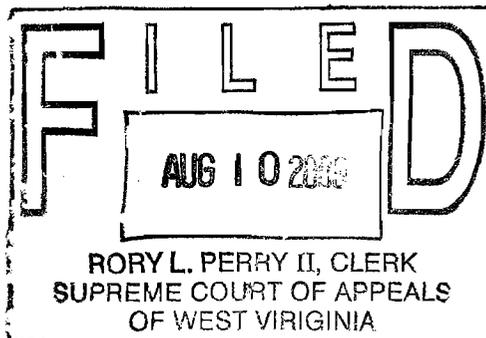
JOHN BRIAN HARRISON,

Appellee,

Vs.

JOSEPH CICCHIRILLO,  
Commissioner, West Virginia  
Division of Motor Vehicles,

Appellant.



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FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

HONORABLE DAVID R. JANES, JUDGE

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**BRIEF OF APPELLEE, JOHN BRIAN HARRISON**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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        b. It violates Due Process for the DMV to retroactively treat Harrison's 2003 no contest plea, as a "conviction" or for purposes of enhancement of a first revocation to a second revocation, when the DMV rendered a Final Dismissal Order of the prior revocation and failed to follow the statutory procedural steps set out in West Virginia Code §17C-5A-1a to revoke the petitioner's license and establish a "conviction".

        c. The Stump and Baker opinions do not address the retroactivity of the doctrine they adopted, and, although they did not explicitly overrule prior case law, it would be inequitable to apply the new principle of law adopted in those opinions retroactively to individuals who entered pleas of no contest in criminal cases in reliance upon the prevailing interpretation of that time, later to learn that he or she is subject to enhanced penalties for subsequent offenses based on a change in the law.

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No. 34970

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IN RE: Civil Action No.: 08-AA-9

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Appellee,

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JOSEPH CICCHIRILLO,

Commissioner, West Virginia

Division of Motor Vehicles,

Appellant.

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FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

HONORABLE DAVID R. JANES, JUDGE

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BRIEF OF APPELLEE, JOHN BRIAN HARRISON

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I.

STATEMENT OF THE KIND OF PROCEEDING

AND NATURE OF THE RULING BELOW

This is an appeal by Joe E. Miller, successor to Joseph

1.

Cicchirillo as Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "The DMV"), pursuant to West Virginia Code §29A-6-1, for review of the "Final Order Denying Respondent's Motion to Dismiss and Modifying License Revocation" (hereinafter, "Order") entered on March 31, 2009, by Judge David R. Janes, Judge of the Circuit Court of Marion County, West Virginia, as the result of proceedings conducted in an administrative appeal styled John Brian Harrison v. Joseph Cicchirillo, Commissioner, West Virginia Division of Motor Vehicles, Civil Action No. 08-AA-9. The "Order" of the Circuit Court modified the administrative "Order of Revocation" of the DMV to reduce the revocation period applicable to Mr. Harrison's driving privileges from a second revocation to a first revocation based upon, inter alia, findings and conclusions that:

A. The Appellee's 2003 plea of no contest did not trigger the automatic revocation of his license, because, prior to State ex rel. Stump v. Johnson, 217 W.Va. 733, 619 S.E.2d 733 (2005) and State ex rel. Baker v. Bolyard, 221 W.Va. 713, 656 S.E.2d 484 (2007), the DMV interpreted existing law to allow a challenge to administrative license revocation after a plea of no contest, and only convictions that resulted in license suspension or revocation were deemed to be valid predicate offenses for the purpose of enhancement of administrative penalties for subsequent offenses, per West Virginia Code §17C-5A-2(n).

B. The DMV failed to follow the procedural steps set out in West Virginia Code §17C-5A-1a to establish a "conviction" and revoke the Appellee's license for purposes of enhancement of the penalty for subsequent offenses.

C. The Due Process clause of the West Virginia State Constitution applies to civil administrative license revocation proceedings, in recognition of the important property interest inherent in drivers' licenses. Jordan v. Roberts, 161 W.Va. 750, 246 S.E.2d 259 (1978).

D. The most basic requirement embodied in the concept of Due Process is that the government must follow the process or

procedure set out by law, and, since the DMV failed to follow the statutory procedure set out in West Virginia Code §17C-5A-1a to revoke the Appellee's license and establish a "conviction" after his 2003 no contest plea, it violates Due Process for the DMV to now treat Appellee's 2003 no contest plea, as a "conviction" for enhancement of a "revocation" retroactively.

E. Although West Virginia Code §17C-5A-3a modified the law by adding prior "conviction(s)" as well as a prior "suspension(s)" or "revocation(s)", as a basis for enhanced penalties for subsequent offenses, West Virginia Code §17C-5A-3a does not define "conviction", nor does any other section of chapter 17C, article 5A define it, beyond the provisions of West Virginia Code §17C-5A-2, which only treat a "conviction" that results in a "suspension" or "revocation" as a valid predicate offense for enhancement of subsequent revocations.

F. The Stump and Baker opinions do not address the retroactivity of the doctrine they adopted, and, although they did not explicitly overrule prior case law, it would be inequitable to apply the new principle of law adopted in those opinions retroactively to individuals who entered pleas of no contest in criminal cases in reliance upon the prevailing interpretation of that time, later to learn that he is subject to enhanced penalties for subsequent offenses based on a change in the law. See, Bradley v. Appalachian Power Co., 163 W.Va. 332, 347, 258 S.E.2d 879, 887 (1979) (discussed and applied recently in Caperton v. A.T. Massey Coal Company, Inc., 2008-WV-0729.133, 2008 WL 918444 (W.Va.)).

G. The Appellee's 2003 plea of no contest is not a valid predicate offense for the purpose of enhancing the revocation for his 2008 offense because the D.M.V. failed to follow the procedure prescribed by law to establish a "conviction" and "suspend or revoke on the basis of a conviction" with respect to Harrison's 2003 plea, and it is inequitable to apply the new principle of law adopted in Stump and Baker retroactively.

## II.

### STATEMENT OF THE FACTS

Appellee Below, John Brian Harrison (hereafter, "Harrison") was arrested on August 7, 2003, on a D.U.I. charge in the City of Morgantown (Municipal Court Case No. 2003-DU-96598). On October 16, 2003, Harrison entered a plea of "no contest" to the charge. The "Disposition" of the Morgantown Municipal Court in

regard to this charge was attached to the Petition for Judicial Review as Exhibit #2, shows that Harrison did not enter a "Guilty Plea" nor was "Found Guilty".

Harrison contested the revocation of his driving privileges from his August 7, 2003 arrest, and by "Final Dismissal Order" dated at Charleston, West Virginia, Jan 13, 2004, was notified that "the Division's Order of Revocation, directed to you (Harrison) on August 15, 2003, is hereby dismissed", and his privilege to drive a motor vehicle in West Virginia was not revoked based on the October 16, 2003 plea of "no contest" regarding the August 7, 2003 arrest. A copy of the "Final Dismissal Order" was attached to the Petition for Review as Exhibit #3. Appellant did not receive any notification of the DMV's intention to utilize the "no contest" plea as a "conviction" for revocation purposes until August 29, 2008, nearly five (5) years after the DMV issued its "Dismissal Order", and even then such notification did not comply with the notice required by **West Virginia Code §17C-5A-1a(c)**.

On August 8, 2008, Harrison was arrested in Taylor County, West Virginia and charged with "DUI Second Offense". On August 29, 2008, Harrison received an "Order of Revocation" issued to him, from the Director of Driver Services of the Division of Motor Vehicles, dated at Charleston, Aug 26, 2008. Said "Order of Revocation" notified Harrison that his driving privileges were being revoked, effective September 30, 2008, for Driving Under the Influence, as a "second" revocation, in West Virginia Division of Motor Vehicles File No. 307511B. Specifically said "Order of

Revocation" notified Harrison that his privilege to operate a motor vehicle in West Virginia would be revoked:

for the period of one (1) year and thereafter accompanied by successful completion of the Mandatory Alcohol Test and Lock Program pursuant to Chapter 17C, Article 5A, Section 3A of the Code of West Virginia, and completion of the Safety and Treatment Program, and thereafter according to any previous Order issued by this Division. Your privilege to drive in the State of West Virginia cannot be reinstated until you successfully complete both the Safety and Treatment Program and the Alcohol Test and Lock Program.

A copy of the "Order of Revocation" was attached to the Petition for Judicial Review as Exhibit #1.

Harrison complied with administrative procedures and requested an administrative hearing regarding the "Order of Revocation". Harrison also filed a "Petition for Judicial Review" seeking relief from the "Order of Revocation" of his driving privileges issued by the West Virginia Department of Motor Vehicles, on September 25, 2008.

On November 18, 2008, Judge Janes entered an Order Holding Action in Abeyance noting that the Petition for Judicial Review was premature because a Final Order had not been rendered from the DMV regarding his administrative appeal.

On February 13, 2009, Harrison entered a plea of "guilty" to the offense of D.U.I. First Offense (non-aggravated) in the Magistrate Court of Taylor County, West Virginia. It is stated in DMV's "Brief of Appellant", at page 3 thereof, that "the Clerk of Marion County Magistrate Court notified the Division that the disposition of Harrison's charge of Second Offense DUI was

guilty" is neither factual, nor true.

On March 7, 2009, Harrison received an "Order of Revocation" issued to him, from the Director of Driver Services of the Division of Motor Vehicles, dated at Charleston, March 6, 2009. Said "Order of Revocation" was the final order of the DMV which notified Harrison that his driving privileges were being revoked, effective April 10, 2009, based upon his being convicted in Taylor County Magistrate Court of the offense of DUI. This "Order of Revocation" cited the same enhanced revocation period as contained in the previous DMV Order issued to Harrison from the Director of Driver Services of the Division of Motor Vehicles, dated at Charleston, Aug 26, 2008.

On March 3, 2009, the DMV filed a Motion to Dismiss Harrison's Petition for Judicial Review with the Circuit Court of Marion County, West Virginia, arguing that Harrison's Petition for Judicial Review had been rendered moot by the mandatory, non-delegable obligation of the DMV to revoke Harrison's license upon conviction.

On March 10, 2009, Harrison moved the Circuit Court of Marion County, West Virginia, to Reinstate the Petition for Judicial Review to Active Status and for an Application for a Stay of the Decision Pending Appeal, which was granted by the Circuit Court on March 11, 2009. Harrison did not contest that administrative revocation was appropriate for the "conviction" based upon his guilty plea in Taylor County Magistrate Court on February 13, 2009, rather Harrison contended that the DMV's use of

his 2003 "no contest" plea as a prior conviction was inappropriate to use to enhance his administrative revocation to a "second" revocation, since he entered the plea prior to the Stump decision, had successfully challenged that administrative revocation and received a "Final Dismissal Order" from the DMV, and since the DMV failed to follow statutory procedure to revoke on the basis of a "conviction" regarding the 2003 charge.

On March 27, 2009, Judge Janes entered the "Final Order Denying Respondent's (DMV's) Motion to Dismiss and Modifying License Revocation" which is the subject of this appeal by the DMV.

It is noted that the "Statement of Facts" set forth by the Appellant are merely a recitation of what was contained in the officer's DUI Information sheet, and that some of the procedures and facts were disputed and/or directly contradicted at the DMV administrative hearing held in this matter on December 4, 2008. However, since Appellee entered a plea of "guilty" in Taylor County Magistrate Court on February 13, 2009, to a first offense (non-aggravated) DUI, the 2009 "conviction" is not disputed. The dispute in the case at bar involves the DMV's use of Appellee's 2003 "no contest" plea as a prior conviction to enhance Appellee's revocation to a "second" revocation, when: Appellee's 2003 plea was entered prior to the Stump decision; Appellee successfully challenged his administrative revocation and received a "Final Dismissal Order" from the DMV in 2004; and, since DMV never followed statutory procedure to revoke on the basis of a "conviction" regarding the 2003 charge.

III.

ASSIGNMENT OF ERROR

WHETHER THE CIRCUIT COURT ERRED IN MODIFYING THE REVOCATION ORDER UPON A FINDING THAT THE COMMISSIONER ERRED IN USING HARRISON'S 2003 NO CONTEST PLEA AS A CONVICTION FOR PURPOSES OF ENHANCEMENT.

IV.

POINTS AND AUTHORITIES

- A. If a person is convicted for an offense defined in §17C-5-2 of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in this section...the person's license shall be revoked or suspended in accordance with the provisions of this section.

West Virginia Code §17C-5A-1a(a).

- B. The Clerk of the Court in which a person is convicted for an offense described in §17C-5-2 of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section shall forward to the commissioner a transcript of the judgment of conviction.

West Virginia Code §17C-5A-1a(b).

- C. If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted for an offense described in §17C-5-2 of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section.... the commissioner shall make and enter an order suspending the person's license to operate a motor vehicle in this state. The order shall contain the reasons for the revocation or suspension and the revocation or suspension periods provided for in section two [§17C-5A-2] of this article. Further, the order shall give the procedures for requesting a hearing which is to be held in accordance with the provisions of said section. The person shall be advised in the order that because of the receipt of a transcript of the judgment of conviction by the commissioner a

presumption exists that the person named in the transcript of the judgment of conviction is the person named in the commissioner's order and such constitutes sufficient evidence to support revocation or suspension and that the sole purpose of the hearing held under this section is for the person requesting the hearing to present evidence that he or she is not the person named in the transcript of the judgment of conviction. A copy of the order shall be forwarded to the person by registered or certified mail, return receipt requested. No revocation or suspension shall become effective until ten days after receipt of a copy of this order.

**West Virginia Code §17C-5A-1a(c).** (Underlining and bold added)

- D. The provisions of this section shall not apply if an order reinstating the operator's license of the person has been entered by the commissioner prior to receipt of the transcript of the judgment of conviction.

**West Virginia Code §17C-5A-1a(d).**

- E. For the purposes of this section, a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury.

**West Virginia Code §17C-5A-1a(e).**

- F. If the commissioner finds by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more by weight, but less than fifteen hundredths of one percent or more, by weight...the commissioner shall revoke the person's license for a period of six months or a period of fifteen days with an additional one hundred twenty days of participation in the Motor Vehicle Alcohol Test and Lock Program in accordance with the provisions of section three-a [§17C-5A-3a] of this article:... Provided, that if the commissioner has previously suspended or revoked the person's

license under the provisions of this section or section one [§17C-5A-1] of this article within the ten years immediately preceding the date of arrest, the revocation shall be ten years.

West Virginia Code §17C-5A-2(j). (Underlining added)

- G. For purposes of this section, where reference is made to previous suspensions or revocations under this section, the following types of criminal convictions or administrative suspensions or revocations shall also be regarded as suspensions or revocations under this section or section one [§17C-5A-1] of this article:

(1) Any administrative revocation under the provisions of the prior enactment of this section for conduct which occurred within the ten years immediately preceding the date of arrest;

(2) Any suspension or revocation on the basis of a conviction under a municipal ordinance of another state or a statute of the United States or of any other state of an offense which has the same elements as an offense described in section two [§17C-5-2], article 5 of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest; or

(3) Any revocation under the provisions of section seven [§17C-5-7], article 5 of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest.

West Virginia Code §17C-5A-2(p).

## VI.

### ARGUMENT

It is well recognized by this Court that "a driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution". David v. Commissioner of West Virginia Div. of Motor Vehicles, 219 W.Va. 493, 637 S.E.2d 591 (2006), Syl. Pt. 1; Petry v. Stump, 219 W.Va. 632 S.E.2d 353 (2006), Syl. Pt. 2; and, Abshire v. Cline, 193 W.Va. 180, 455 S.E.2d 549 (1995), Syl. Pt.1.

The procedure for revocation of a license is set forth, in pertinent part, by statute. **West Virginia Code §17C-5A-1a(a)**, states:

If a person is convicted for an offense defined in §17C-5-2 of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in this section...the person's license shall be revoked or suspended in accordance with the provisions of this section.

Underlining added.

**West Virginia Code §17C-5A-1a(b)**, states:

The Clerk of the Court in which a person is convicted for an offense described in §17C-5-2 of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section shall forward to the commissioner a transcript of the judgment of conviction.

**West Virginia Code §17C-5A-1a(c)**, states:

If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted for an offense described in §17C-5-2 of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section... the commissioner shall make and enter an order suspending the person's license to operate a motor vehicle in this state. The order shall contain the reasons for the revocation or suspension and the revocation or suspension periods provided for in section two [§17C-5A-2] of this article. Further, the order shall give the procedures for requesting a hearing which is to be held in accordance with the provisions of said section. The person shall be advised in the order that because of the receipt of a transcript of the judgment of conviction by the commissioner a presumption exists that the person named in the transcript of the judgment of conviction is the person named in the commissioner's order and such constitutes sufficient evidence to support revocation or suspension and that the sole

purpose of the hearing held under this section is for the person requesting the hearing to present evidence that he or she is not the person named in the transcript of the judgment of conviction. A copy of the order shall be forwarded to the person by registered or certified mail, return receipt requested. No revocation or suspension shall become effective until ten days after receipt of a copy of this order.

Underlining and bold added.

**West Virginia Code §17C-5A-1a(d)**, states:

The provisions of this section shall not apply if an order reinstating the operator's license of the person has been entered by the commissioner prior to receipt of the transcript of the judgment of conviction.

**West Virginia Code §17C-5A-1a(e)**, states: "For the purposes of this section, a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury."

The pertinent and present law regarding revocation proceedings of the West Virginia Department of Motor Vehicles is set forth in **West Virginia Code §17C-5A-2(j)**, which states:

If the commissioner finds by a preponderance of the evidence that the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more by weight, but less than fifteen hundredths of one percent or more, by weight...the commissioner shall revoke the person's license for a period of six months or a period of fifteen days with an additional one hundred twenty days of participation in the Motor Vehicle Alcohol Test and Lock Program in accordance with the provisions of section three-a [**§17C-5A-3a**] of this article:... Provided, that if the commissioner has previously suspended or revoked the person's license under the provisions of this section

or section one [§17C-5A-1] of this article within the ten years immediately preceding the date of arrest, the revocation shall be ten years:

Underlining added.

**West Virginia Code §17C-5A-2(p)**, continues:

For purposes of this section, where reference is made to previous suspensions or revocations under this section, the following types of criminal convictions or administrative suspensions or revocations shall also be regarded as suspensions or revocations under this section or section one [§17C-5A-1] of this article:

(1) Any administrative revocation under the provisions of the prior enactment of this section for conduct which occurred within the ten years immediately preceding the date of arrest;

(2) Any suspension or revocation on the basis of a conviction under a municipal ordinance of another state or a statute of the United States or of any other state of an offense which has the same elements as an offense described in section two [§17C-5-2], article 5 of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest; or

(3) Any revocation under the provisions of section seven [§17C-5-7], article 5 of this chapter for conduct which occurred within the ten years immediately preceding the date of arrest.

It is clear that the commissioner never previously suspended or revoked Harrison's license under the provisions of **West Virginia Code §17C-5A-2(j)** or **§17C-5A-1** of this article within the ten years immediately preceding the date of arrest, and that the purported revocation is not a revocation under **West Virginia Code §17C-5A-2(p)**, and cannot be applied to enhance the revocation period under the facts of this case.

conviction prior to Stump. supra.

In University of West Virginia Bd. of Trustees on behalf of West Virginia University v. Fox, 197 W.Va. 91, 475 S.E.2d 91 (1996), this Court held "that when a court or administrative body is asked to recognize a conviction an admission of guilt of particular acts, the court must look beyond the conviction to determine whether it was based upon a trial on the merits or upon a plea of no contest. **Where the conviction was based upon a plea of no contest, it may not be considered an admission of guilt of particular acts**". Id, 475 page 95. Bold Added. The Court's statement that "[s]uch **might** be applicable where a statute attaches an enhanced criminal penalty for successive offenses or provides an administrative penalty in the event of a 'conviction'" Id., 475 S.E.2d at 96. However, at that time, and until the Court's ruling in Stump, supra, a "no contest" plea was not considered a "conviction" for purposes of automatic revocation. In fact, **West Virginia Code** §17C-5A-3(d) was added to the statute when it was amended in 2005.

The purpose and effect of the current statute will not be enhanced by applying a 2003 "no contest" plea as a conviction retroactively and substantial inequitable results will flow from applying a "no contest" plea entered prior to Stump as a "conviction" where administrative proceedings were held and the revocation "dismissed" by the DMV, and where the DMV further failed to follow its then existing guidelines to establish a "conviction" that it now desires to apply. If this Court upholds Appellee's

revocation under the facts of the case at bar, it must consider the enormous consequences of allowing pleas of "no contest" entered prior to Stump, supra, when an administrative hearing was held and an order of dismissal of the administrative "revocation" dismissed, and when the DMV has failed to comply with statutory notice and procedure as in the case at bar. Rule 32(d) of the West Virginia Rules of Criminal Procedure allow a plea of guilty to be withdrawn by motion at any time before sentence is imposed or imposition of sentence is suspended "upon a showing by the defendant of any fair and just reason". After that time, the defendant must either seek relief on direct appeal or by a petition for habeas corpus relief in order to have the plea vacated. A plea of guilty or no contest must be made voluntarily and intelligently, and if a defendant is not apprised of the consequences of his plea it can be challenged under the Due Process Clause. In 2003, at the time of entry of Appellant's plea of no contest, he would have understood that the entry of that plea would allow him to contest the administrative revocation of his license, as the DMV did not consider such pleas as convictions. If the effect of his no contest plea has changed since that time to allow the DMV to utilize it as a "conviction" for administrative purposes in order to enhance his administrative revocation, it results in a consequence not envisioned by any defendant at the time of his or her plea of "no contest" if entered prior to Stump, supra. The only fair and just recourse would be to allow every defendant who entered a plea of no contest to a DUI offense prior to Stump, to withdraw his or her former plea and

demand his right to trial by jury on the merits of the case regarding the former alleged offense. Thus, the only way to correct this manifest injustice would be overly burdensome on former defendants in such criminal actions, and potentially overburdensome on this Court. "On timely application, the Court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence" Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927). Under Rule 32(d) of the West Virginia Rules of Criminal Procedure, a court may allow a guilty plea to be withdrawn after sentencing to "correct manifest injustice". United States v. Miller, 406 F. 2d 1100(4th Cir. 1969); United States v. Lias, 173 F.2d 685 (4th Cir. 1949). This Court has recognized that "where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice". State v. Olish, 266 S.E.2nd 134 (W.Va. 1980), and taking away a person's property interest based on such a retroactive application would, or should, meet that standard. To hold contrary, would not be fair or just.

In 2007, this Court considered the case of State ex rel. Baker v. Bolyard, 221 W.Va. 713, 656 S.E.2d 464 (2007), and affirmed the Circuit Court's upholding of the revocation of driving privileges based on a driver's no contest plea. However, several distinctions exist between Bolyard, supra, and the case at bar. First, in Bolyard, the no contest plea was entered after the decision in Stump. Secondly, entwined in Bolyard, supra, was the

fact that in May of 2006, an amendment to 91 C.S.R. § 5-14.1 provided, inter alia, that "For purposes of this rule, a plea of nolo contendere stands as neither an admission of guilt nor a conviction for administrative hearing purposes." This 2006 amendment to the Code of State Rules was initiated in an attempt to correct and return the administrative effect of a no contest plea to the same posture as it held before the decision in Stump, supra.

A third distinction between Bolyard, supra, and the case at bar is that the Court in Bolyard, supra, found that the defendant's October 27, 2005, no contest plea triggered the mandatory revocation provisions of West Virginia Code §17C-5A-1a because Appellant's DUI charge and plea occurred during the "window" of time between this Court's decision in Stump and the effective date of 91 C.S.R. § 5-14.1. This specific factual interpretation in Bolyard, supra, is restated again near the end of its discussion:

As there can be no question that Appellant's DUI arrest, conviction and administrative license revocation all occurred after the Court's decision in Stump and prior to any attempt to alter the applicable administrative rules governing license revocations due to DUI convictions, the decision of the Circuit Court of Greenbrier County must be affirmed.

Bolyard, supra, at 469

Thus, the facts in Bolyard, supra, are vastly different from the case at bar. In the instant case: 1) Harrison's plea of no contest was entered before the Court's decision in Stump; 2) the Municipal Court Clerk "Disposition" sent to the DMV after the

Harrison's October 2003 plea of no contest, clearly did not indicate "Found Guilty" or "Entered Plea of Guilty" on that document; 3) Harrison's no contest plea occurred during the period of time that the West Virginia DMV did not consider a no contest plea a conviction for purposes of automatic revocation; and, 4) Harrison's administrative challenge to the license revocation resulted in the West Virginia Department of Motor Vehicles rendering a Final Dismissal Order on January 13, 2004, notifying him that his driving privileges were not revoked. Lastly, there has never been any effective revocation since the DMV failed to follow the procedure required under **West Virginia Code §17C-5A-1a(c)** regarding a purported "conviction".

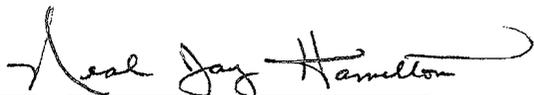
RELIEF REQUESTED

Wherefore, based on all of the foregoing it is respectfully requested that this Court deny the petition for appeal in the instant case and affirm the ruling of the Circuit Court of Marion County, West Virginia.

RESPECTFULLY SUBMITTED:

John Brian Harrison,  
Appellee Below

By Counsel



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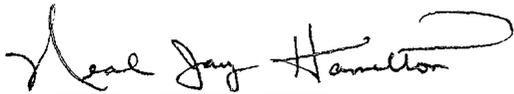
Counsel for John Brian Harrison, Appellee Below

CERTIFICATE OF SERVICE

I do hereby certify that on the 7<sup>TH</sup> day of AUGUST, 2009,  
I served the foregoing BRIEF OF APPELLEE, JOHN BRIAN HARRISON upon  
the opposing party by sending a true and accurate copy thereof to  
their counsel of record, Janet E. James, at her office address of:

Janet E. James  
assistant Attorney General  
Office of the Attorney General  
State Capitol Complex  
Building 1, Room W-435  
Charleston, WV 25305

by United States mail, first class, postage prepaid.



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