

NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**F. DOUGLAS STUMP,
COMMISSIONER, WEST
VIRGINIA DIVISION OF MOTOR VEHICLES,**

Petitioner,

v.

**THE HONORABLE JACK ALSOP,
IN HIS OFFICIAL CAPACITY AS JUDGE OF
THE FOURTEENTH JUDICIAL CIRCUIT,
LONNIE D. ROSE, AND RITA M. TONKIN,**

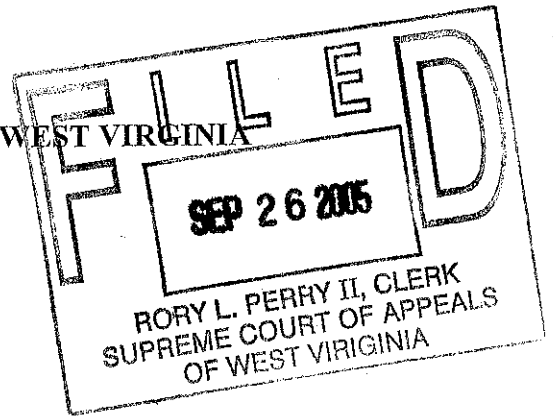
Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

**F. DOUGLAS STUMP, COMMISSIONER,
WEST VIRGINIA DIVISION OF MOTOR VEHICLES**

**DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL**

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Comes now the Petitioner, F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Assistant Attorney General, pursuant to the provisions of West Virginia Code §§ 53-1-1 and 53-1-2, and Rule 14 of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, and respectfully requests this Court to issue an order directed to the Respondents to show cause why a writ of prohibition should not issue barring the Respondent, the Honorable Jack Alsop, Judge of the Fourteenth Judicial Circuit, (hereinafter, "Judge Alsop"), from enforcing certain portions of its July 6, 2005 Final Order (hereinafter, "Final Order") (Exhibit 1) in the consolidated actions captioned *Rita Tonkin v.*

F. Douglas Stump, Commissioner, Division of Motor Vehicles, Civil Action No. 05-P-5 (Circuit Court of Gilmer County); and *Lonnie Rose v. F. Douglas Stump, Commissioner, Division of Motor Vehicles*, Civil Action No. 05-C-1 (Circuit Court of Braxton County) in which the Petitioner was ordered to “draft rules and regulations” and retaining jurisdiction to review the “proposed regulations which shall be submitted within ninety (90) days to this Court.” Final Order at 15. The present Petition is filed pursuant to the original jurisdiction of this Court. W. Va. Code §§ 51-1-2 and -3.

The extraordinary remedy of prohibition is sought herein on the grounds that the circuit court has exceeded its jurisdiction. In ordering the Division to draft regulations and by retaining jurisdiction of the matter to oversee and approve the regulations, Judge Alsop has exceeded his legitimate authority by exceeding his authority. In support of this Petition, the Petitioner states as follows:

1. The Division is a state agency with responsibility for, among other things, enforcing statutory provisions relating to the privilege to drive a motor vehicle in West Virginia. W. Va. Code Chapters 17B and 17C;
2. The Commissioner of the Division is the executive officer of the Division. As such, the Commissioner is an officer of the State of West Virginia who is appointed by, and serves at the will and pleasure of the Governor of West Virginia. W. Va. Code § 17A-2-2;
3. The Petitioner appears in his official capacity as the executive officer of the Division;
4. By Final Orders effective February 22, 2005, the Commissioner revoked the privileges to drive of Lonnie Rose (Exhibit 2) and Rita Tonkin (Exhibit 3).
5. In its Final Order of July 5, 2005, the circuit court erred in holding as follows:

3) The Commissioner shall forthwith cease and desist the unconstitutional procedures currently being implemented in revocation of license proceedings, as defined herein.

4) ...the commissioner shall draft rules and regulations, requiring the hearing examiner's recommendations to be signed and submitted to the Commissioner for his consideration.

5) Any decision by the Commissioner to modify, vacate, reverse, or reject, the hearing examiner's recommendations shall set forth written findings, to allow a meaningful appellate review.

6) This Court retains jurisdiction to review the proposed regulations which shall be submitted within ninety (90) days to this Court.

Final Order at 15.

6. Pursuant to W. Va. Code §17A-2-9(b), Petitioner has the authority to promulgate rules.

7. Judge Alsop usurped the Commissioner's legislatively-granted rule-making authority and exceeded his authority in mandating the Commissioner to perform a discretionary executive function and in retaining jurisdiction.

WHEREFORE, based upon the foregoing, the Petitioner prays this Court to issue a rule directing the Respondents named herein to appear and show cause why a writ of prohibition should not issue to prevent them from proceeding in *Rita Tonkin v. F. Douglas Stump, Commissioner, Division of Motor Vehicles*, Civil Action No. 05-P-5 (Circuit Court of Gilmer County); and *Lonnie Rose v. F. Douglas Stump, Commissioner, Division of Motor Vehicles*, Civil Action No. 05-C-1 (Circuit Court of Braxton County) and from enforcing the Final Order of the circuit court entered July 5, 2005.

Respectfully submitted,

F. DOUGLAS STUMP,
COMMISSIONER, WEST
VIRGINIA DIVISION OF MOTOR VEHICLES,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



JANETE E. JAMES
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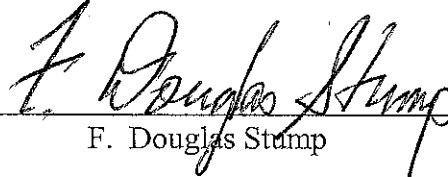
Respondents.

VERIFICATION

STATE OF WEST VIRGINIA;

COUNTY OF KANAWHA, to-wit:

I, F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles, upon being duly sworn, state that I have read and am familiar with the contents of the foregoing "Verified Petition for Writ of Prohibition" and that, to the best of my information, knowledge and belief, the facts and allegations set forth therein are true and accurate.



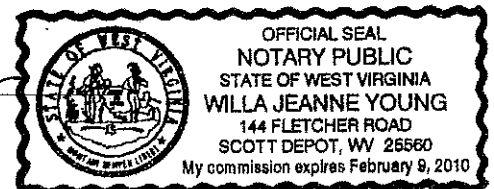
F. Douglas Stump

Taken, subscribed and sworn to before me this 23rd day of September, 2005.

My commission expires 2-9-2010.



NOTARY PUBLIC



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**MEMORANDUM OF LAW IN SUPPORT OF
"VERIFIED PETITION FOR WRIT OF PROHIBITION"**

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Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF
"VERIFIED PETITION FOR WRIT OF PROHIBITION"**

This memorandum is submitted in support of the Petitioner's "Verified Petition for Writ of Prohibition," filed contemporaneously herewith. The Petitioner, F. Douglas Stump, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), seeks a writ of prohibition to prevent the above-named Respondents from proceeding in the consolidated matters styled *Rita Tonkin v. F. Douglas Stump, Commissioner, Division of Motor Vehicles*, Civil Action No. 05-P-5 (Circuit Court of Gilmer County); and *Lonnie Rose v. F. Douglas Stump, Commissioner, Division of Motor Vehicles*, Civil Action No. 05-C-1 (Circuit Court of Braxton County). The aforementioned

actions are currently pending before the circuit court of Gilmer County, Respondent the Honorable Jack Alsop, Judge of the Fourteenth Judicial Circuit (hereinafter "Judge Alsop"), presiding. Relief in prohibition is sought pursuant to the original jurisdiction of the Supreme Court of Appeals of West Virginia. W. Va. Code §§ 51-1-3 and 53-1-2.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On or about January 28, 2005, Respondent Lonnie Rose, by counsel, instituted an action by filing a *Petition* in the Circuit Court of Braxton County. Respondent Rose sought reversal of the Final Order of the Commissioner revoking his license for driving under the influence (hereinafter, "DUI"). He complained, *inter alia*, that his due process rights were violated by the Commissioner because the Hearing Examiner who heard the case is not the Hearing Examiner who drafted the proposed final order for the Commissioner's review and signature.

On or about January 26, 2005, Respondent Rita Tonkin, by counsel, instituted an action by filing a *Petition* in the Circuit Court of Gilmer County. Respondent Tonkin sought reversal of the Final Order of the Commissioner revoking her license for DUI. She complained, *inter alia*, that her due process rights were violated by the Commissioner because the Hearing Examiner who heard the case is not the Hearing Examiner who drafted the proposed final order for the Commissioner's review and signature.

The Petitioner seeks a writ of prohibition to prevent the Respondents from enforcing certain terms of the circuit court's Final Order of July 6, 2005, in which Judge Alsop acted in excess of his legitimate authority. As discussed more fully below, the Petitioner respectfully asks this Court to exercise its original jurisdiction over this matter and enter an order directing the Respondents to show cause why a writ of prohibition should not issue to prevent them from proceeding in *Rita*

Tonkin v. F. Douglas Stump, Commissioner, Division of Motor Vehicles, Civil Action No. 05-P-5 (Circuit Court of Gilmer County); and *Lonnie Rose v. F. Douglas Stump, Commissioner, Division of Motor Vehicles*, Civil Action No. 05-C-1 (Circuit Court of Braxton County).

STATEMENT OF THE CASE

Tonkin

Respondent Tonkin was arrested for DUI on March 20, 1998, in Glenville, Gilmer County, West Virginia. Her privilege to drive was revoked by initial order of revocation dated March 26, 1998. Respondent Tonkin timely requested a hearing on the revocation, and after a continuance, a hearing was convened on June 3, 1998. Following issuance of the Final Order of the Commissioner effective July 24, 1998, the circuit court remanded the matter to the Division on April 4, 2000. After several continuances, the remand hearing was held on August 25, 2003, before Hearing Examiner Ramona Ward. The Final Order of the Commissioner was issued effective February 22, 2005, and upheld the revocation of Respondent Tonkin's license. Her Petition to the circuit court was filed on January 26, 2005.

Rose

Respondent Rose was arrested for DUI on February 8, 2001, in Sutton, Braxton County, West Virginia. Two initial orders of revocation were issued, one for refusal to submit to the secondary chemical test and one for DUI; both dated February 27, 2001. Respondent Rose timely requested a hearing on the revocations, and a hearing was convened on January 14, 2002 before Hearing Examiner Ramona Ward. The Final Order of the Commissioner was issued effective February 22, 2005, and upheld the DUI revocation of Respondent Rose's license, but found that there was

insufficient evidence regarding the implied consent revocation. His Petition to the circuit court was filed on January 31, 2005.

ISSUE PRESENTED

WHETHER, BY ORDERING THE PETITIONER TO PERFORM A DISCRETIONARY FUNCTION, THE PRESIDING JUDGE HAS ACTED IN EXCESS OF HIS LEGITIMATE AUTHORITY:

ARGUMENT

BY ORDERING THE PETITIONER TO PERFORM A DISCRETIONARY FUNCTION, THE PRESIDING JUDGE HAS ACTED IN EXCESS OF HIS LEGITIMATE AUTHORITY.

By ordering the Commissioner to draft "rules and regulations" and by retaining jurisdiction of the matter to oversee and approve same, Judge Alsop has exceeded the legitimate scope of his authority. Pursuant to Syllabus Point 1. in *Johnson v. State Dept. of Motor Vehicles*, 173 W.Va. 565, 318 S.E.2d 616 (1984):

"Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or 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." Syllabus Point 2, *Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

In these appeals from Final Orders of the Commissioner revoking the licenses of Respondents Rose and Tonkin, Judge Alsop had the options of affirming, remanding, reversing, vacating or modifying the final orders of the Commissioner. W. Va. Code § 29A-5-4. However, ordering the Petitioner to draft legislative rules was outside the scope of his authority. The Commissioner's authority to promulgate rules is statutory:

The commissioner may adopt and enforce any rules that are necessary to carry out the provisions of this chapter and any other laws the enforcement and administration of which are vested in the department.

W. Va. Code §17A-2-9(b).

The cases before Judge Alsop were appeals from Final Orders of the Commissioner revoking driver's licenses for DUI. On appeal, Respondents Tonkin and Rose raised the issue of whether it was proper for the Commissioner to issue an order drafted by a Hearing Examiner who was not the Hearing Examiner who heard the case. Judge Alsop found that the Division does not have authority for individuals other than the Hearing Examiner who heard the case to review and make proposed orders for the Commissioner's signature. Final Order of July 5, 2005 at 12.

However, Judge Alsop was constrained in his final order to the cases before him. Although the holdings in paragraphs 1) and 2) of his Final Order (at 15) are within the scope of his authority, (he found that the procedure used in the *Rose* and *Tonkin* cases was violative of the Respondents' due process rights, and reversed the orders against them accordingly), the judge erred in making the holdings in paragraphs 3) through 6). He ordered the Commissioner to "cease and desist" his practice of implementing license revocations, ordering the commissioner to promulgate a rule requiring the hearing examiner's recommendations to be signed and submitted to the Commissioner for his

consideration, and requiring that should the Commissioner issue an order which changed in any way the proposed order submitted to him by the Hearing Examiner, that he set forth the changes in writing. Finally, the circuit court retained jurisdiction of the matter in order to review the proposed regulations. Final Order at 15.

Judge Alsop's Final Order transgresses the separation of powers doctrine¹, an issue with which this Court dealt with in *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981):

What the Legislature has attempted to do here is to invest itself with the power to promulgate rules having the force and effect of law outside the constitutional limitations imposed upon the legislative branch in the exercise of that power. In effect, the Legislature abdicates in favor of the executive its power to make rules and then asserts that because the rule-making power so delegated is legislative in nature, it may step into the role of the executive and disapprove or amend administrative regulations free from the constitutional restraints on its power to legislate. ... Such a mechanism for legislative review of executive action may properly be called an "extra-legislative control device" for it permits the Legislature to act as something other than a legislative body to control the actions of the other branches. This is in direct conflict with our constitutional requirement of separation of powers. ... While the Legislature has the power to void or to amend administrative rules and regulations, when it exercises that power it must act as a legislature through its collective wisdom and will, within the confines of the enactment procedures mandated by our constitution. It cannot invest itself with the power to act as an administrative agency in order to avoid those requirements.

279 S.E.2d 633. In the present cases, Judge Alsop had the power to find that the Division's application of its rules violated the due process rights of Respondents Tonkin and Rose, and perhaps to find that its rules are otherwise flawed; however, he exceeded his authority when he invested

¹Article V, section 1 of the West Virginia Constitution provides: "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature."

himself with the power to compel an administrative agency to perform a statutorily-created executive function, to-wit, drafting a rule the substance of which was dictated by the circuit court.

It has long been recognized that “[p]rohibition will lie to prohibit a judge from exceeding his legitimate powers.” Syl. pt. 2, *State ex rel. Winter v. MacQueen*, 161 W. Va. 30, 239 S.E.2d 660 (1977); see also, *State ex rel. Stewart v. Alsop*, 207 W.Va. 430, 533 S.E.2d 362 (2000) (per curiam).

This Court has also held, in Syllabus Point 3, *State ex rel. F. Douglas Stump, Com'r, WV Div. of Motor Vehicles v. Hon. Gary L. Johnson*, ___ W.Va. ___, ___ S.E.2d ___, No. 32651 (filed July 7, 2005):

1. “The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction.’ Syl. *State ex rel. Vineyard v. O’Brien*, 100 W. Va. 163, 130 S.E. 111 (1925).” Syllabus Point 1, *State ex rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S.E.2d 480 (2004).

Thus, Judge Alsop’s actions are subject to restraint through a writ of prohibition. West Virginia Code § 53-1-1 provides that a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.”

If a writ of prohibition is not issued, the Division will be forced to promulgate a rule dictated by the circuit court, which will then be subjected to legislative rule-making (W. Va. Code § 29A-3-2). Prohibition lies to prevent such a wasteful and unwarranted exercise. “Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner’s rights as to make a remedy by

appeal inadequate, will a writ of prohibition issue.' Syl. pt. 2, *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973)." Syllabus point 1, *State ex rel. Williams v. Narick*, 164 W.Va. 632, 264 S.E.2d 851 (1980).

CONCLUSION


WHEREFORE, based upon the foregoing, the Petitioner respectfully requests that a rule to show cause issue against the Respondents to demonstrate why a writ of prohibition should not be granted to prevent the Respondents from proceeding in and from enforcing the order entered therein on July 5, 2005.

Respectfully submitted,

**F. DOUGLAS STUMP,
COMMISSIONER, WEST
VIRGINIA DIVISION OF MOTOR VEHICLES,**

By counsel,

**DARRELL V. MCGRAW, JR.
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