

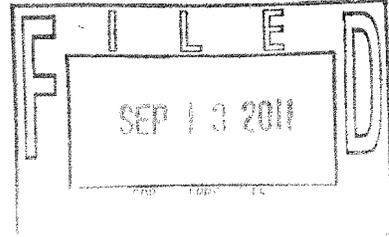
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO: 11-1241**

**JOHN R. HOLLAND, II, Petitioner Below,  
Petitioner,**

**vs.**

**JOE E. MILLER, COMMISSIONER, West  
Virginia Division of Motor Vehicles,  
Respondent Below, Respondent.**



**BRIEF OF PETITIONER UPON APPEAL**

A handwritten signature in black ink, appearing to be "W. Forbes", written over a horizontal line.

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**BRIEF OF PETITIONER UPON APPEAL**

**I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE  
LOWER TRIBUNAL**

This matter arises from a Petition for a writ of prohibition and/or writ of mandamus, that was filed in the Circuit Court of Kanawha County against Joe E. Miller, Commissioner of the DMV to prohibit the DMV from holding a second administrative hearing in the license revocation proceedings due to the DMV's having violated the Petitioner's constitutional rights to due process and equal protection of laws by continuing Petitioner's administrative hearing on numerous occasions without providing any reason on the notices of continuance provided by the DMV to Petitioner for such continuances; and further violating the statutory provisions of W.Va. Code § 17C-5A-2, by not holding said administrative hearing within the statutory deadline of 180 days.

The Circuit Court denied the Petitioner any relief by order entered May 12, 2011, citing this Honorable Court's recent decision in **Miller v. Hare, No.**

**35560, April 1, 2011**, as having rendered the Petitioner's request for a writ of prohibition as moot without any further findings and without addressing the other merits, points of law and arguments made by Petitioner in his petition below. It is from this order that the Petitioner now appeals. Petitioner filed a motion for reconsideration in Circuit Court on August 10, 2011, on the grounds that the case at bar is distinguishable from **Hare**, and further that the circuit court failed to consider all of the grounds raised by the petition; however, no ruling has been issued upon said motion as of the date of this filing.

The Petitioner submits that the Circuit Court erred in declaring this matter moot, and further submits that his case at bar is factually distinguishable from this Court's decision in **Hare, supra.**, as unlike **Hare**, herein the DMV failed to state any reasons on its notices of continuance/rescheduling to Petitioner for continuing the administrative hearings of petitioner, and thus, petitioner was denied due process of law and equal protection, and notice. Although Petitioner below, agreed to hold the lower tribunal's ruling on Petitioner's request for relief in abeyance until this Honorable Court's ruling in **Hare, supra**, the Petitioner submits that he did not agree and still does not agree that said decision is controlling or dispositive of the issues raised by Petitioner's petition below, nor herein. Petitioner submits that **Hare, supra**, while relevant to the issues presented, is factually distinguishable as further discussed herein, and that Petitioner is entitled to his requested writ of prohibition to prevent a second administrative hearing in

this matter and a writ of mandamus to reinstate his full driving privileges without any references to this license revocation having ever been issued.

For the reasons discussed herein, the Petitioner prays that this Honorable Court will reverse the Circuit Court's order denying him relief, and grant him a writ of prohibition and mandamus granting the relief requested.

## II. STANDARD OF REVIEW

“The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*.” Syl. pt. 1, ***Phillips v. W.Va. Div. of Motor Vehicles***, No. 35436, (W.Va. 2010), citing Syl. pt. 1, ***State ex rel. Callahan v. Santucci***, 210 W.Va. 483, 557 S.E.2d 890 (2001).

Petitioner further submits that this appeal involves an issue of statutory construction with respect to the mandatory statutory time limit of 180 days in which to hold an administrative hearing of license revocations as set forth in W.Va. Code § 17C-5A-2, and further requires a statutory interpretation of whether the DMV has shown “**good cause**” for the continual delay of the Petitioner's administrative hearing, which Petitioner submits the DMV has not. Thus, the Petitioner submits that these issues are questions of law, for which the standard of review is *de novo*.

“Where the issue on appeal from the circuit court is clearly a question of law or involving interpretation of a statute, we apply a *de novo* standard of review.” Syl. pt. 2, ***Martin v. West Virginia Div. of Labor Contractor***

**Licensing Bd.**, 199 W.Va. 613, 486 S.E.2d 782 (W.Va. 1997), citing Syllabus point 1, **Chrystal R.M. v. Charlie A.L.**, 194 W.Va. 138, 459 S.E.2d 415 (1995).

This Court must also determine whether the Petitioner is entitled to the extraordinary relief requested below by assessing whether the DMV exceeded its statutory authority and abused its powers by granting numerous continuances without showing good cause on the record/notices of continuances that were provided to Petitioner thereon, and without availing itself of enforcement of the DMVs subpoenas in Circuit Court.

W.Va. Code § 53-1-1 provides that “[t]he 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.” “The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate.” **State ex rel. Nelson v. Frye**, 655 S.E.2d 137, 140 (W.Va. 2007).

In determining whether the writ requested should issue, this Court has further held that:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting

point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. *Id.* at 140-141 (citation omitted).

The standard for the issuance of a writ of mandamus is as follows:

Before the Supreme Court of Appeals may properly issue a writ of mandamus, three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. **State ex rel. Stull v. Davis**, Syllabus Pt. 1, 203 W.Va. 405, 508 S.E.2d 122 (W.Va. 1998).

Additionally, the Petitioner submits that the DMV routinely provides the Circuit Court with a record that differs from the record DMV provided to Petitioner at the administrative level, and that the DMV herein submitted their entire file to the Circuit Court without serving a copy of the same to Petitioner's counsel. There are numerous items in the Court's file, which were never provided to the Petitioner by the DMV prior to this appeal, nor during the pendency of these proceedings—specifically the records of the Bureau of Public Health were not provided to the Petitioner by the DMV, and the Court's file also contains internal memoranda of the DMV that relate to the DMV's reasons for the continual delay of Petitioner's administrative hearing, that the Petitioner was not privy to prior to filing his writ for extraordinary relief below, and which were not provided to the Petitioner by the DMV.

### **III. ASSIGNMENTS OF ERROR and ARGUMENT**

**Assignment of Error 1:** The Petitioner submits that in order to determine whether “**good cause**” exists for the DMV to have the authority to continue administrative hearings under its authority established by W.Va. Code § 17C-5A-2(c), that the reasons behind the DMV’s *sua sponte* granting said continuances should appear on the notices of continuances/rescheduling that DMV serves upon Petitioner and his counsel, as the DMV did not provide Petitioner with a copy of the record as it was submitted to the lower tribunal, and therefore, Petitioner was not privy to the internal memoranda of the DMV prior to examining the Circuit Court’s file in this matter. Therefore, the only notice provided by DMV to the Petitioner for the rescheduling of his hearings appears in the Notice of Continuance/rescheduling letters sent or faxed by the DMV, which do not contain ANY reason to justify said continuances or to constitute good cause. (See Appendix Record 2, attachments to writ of prohibition, see also Appendix Record 9, 11, 13, 15, 17). The DMV herein continually and improperly delayed holding Petitioner’s administrative hearing, instead of instituting process in Circuit Court that would have enforced the DMV’s subpoenas and compelled the investigating officer to appear. As a result the Petitioner has been forced time and time again to appear for his hearing, while the DMV failed to secure the officer’s attendance. The DMV’s failure to avail itself of the courts to enforce the subpoenas should not be allowed, and constituted a violation of the Petitioner’s due process rights which

should be reversed by this Honorable Court. Furthermore, the DMV should be required to place the reasons behind its continuances on the notices thereof, otherwise the DMV would be given blanket authority to continue such hearings for any reason, without notice, and with no regard for the statutorily mandated 180 day time limit established by the Legislature in W.Va. Code § 17C-5A-2. The Petitioner submits that “*good cause*” cannot be assumed from a silent record, if the Petitioner is to be afforded due process of law. Herein, the DMV failed to provide the reasons for continuing Petitioner’s hearing on its notices of continuance and the record provided by DMV to Petitioner at the administrative level, and the DMV *sua sponte* continued Petitioner’s hearing at least three times without providing ANY reason for said improper continuances and improperly delayed said hearing well beyond the statutory time limit. This Honorable Court, nor any court, cannot determine whether good cause existed for continuances when the reasons behind such continuances do not appear on the notices of continuance and the record provided by DMV to Petitioner, which does not contain all the internal memorandum relating to said continuances that the DMV submitted to the Circuit Court, and which the DMV failed to serve upon Petitioner. Furthermore, to allow the DMV to continue such hearings without providing any reason on its notices to Petitioner, is a blatant violation of the Petitioner’s constitutional rights to due process of law, notice and equal protection.

As previously noted, the record filed by the DMV with the lower court, which the DMV failed to serve upon Petitioner, contains several internal

memoranda relating to the DMV's improper delay in holding Petitioner's administrative hearing to which Petitioner was not privy, prior to reviewing the Circuit Court's file due to DMV's failure of service thereof on Petitioner. (See *Appendix Record, Nos. 5, 6, 8, 10, 14, 22*). That being said, the internal memoranda further highlight the DMV's unfair, biased, arbitrary, and capricious treatment of Petitioner, and the DMV's own confusion as to how to enforce their own subpoenas. For example, the internal memorandum of Kathie Holland, Appendix Record, No. 5, reveals that the arresting officer failed to appear on three separate occasions for the administrative hearing, and that despite the continued failure to appear, the hearing examiner did not know how to compel the officer's attendance. The relevant portion of that document, reads as follows:

**“Again, Deputy K.M. Gaddy of the Kanawha County Sheriff's Department did not appear for this administrative hearing.**

1<sup>st</sup> hearing was scheduled for June 18, 2009, no appearance.

2<sup>nd</sup> hearing scheduled for September 23, 2009, no appearance.

**3<sup>rd</sup> hearing scheduled for today (February 17, 2010), again no appearance.**

**WHERE DO WE GO FROM HERE? I denied Counsel's motion to dismiss for the Investigating Officer's continued failure to appear.” (emphasis supplied herein, see Appendix Record No. 5).**

Thus, the Petitioner submits that he was subjected to a patently unfair and unequal application of the DMV's continuance policy, by the DMV's continual and improper delay of his administrative hearing. In this manner, the DMV violated Petitioner's rights to notice of the reasons behind the continuances,

due process of law, and equal protection, and therefore, to allow the DMV to schedule another administrative hearing in this matter, would further deny the Petitioner's constitutional rights, because the DMV still has not availed itself of the Circuit Court's procedure for enforcing the investigating officer to comply with the DMV's subpoenas as evidenced by the Appendix Record herein, specifically, the Appendix Record also shows that the DMV never availed itself of procedures in Circuit Court to enforce compliance with any of its subpoenas. **(See Subpoenas at Appendix Nos. 12, 16, 18, 21).** Further indication that the DMV still has failed to enforce compliance can be found specifically in the last "Subpoena" issued by the DMV of record on August 20, 2010 to Deputy K.M. Gaddy summoning his appearance at the November 17, 2010, **(See Appendix Record No. 21)**, and the lack of any indication that the DMV sought enforcement of said subpoena from the Circuit Court. The investigating officer was afforded three opportunities to appear for the administrative hearing, and failed to do so, and it is a violation of Petitioner's rights to equal protection, to allow the DMV to schedule yet another hearing, leaving the Petitioner in perpetual limbo. Further, it is a violation of due process and all concepts of fairness towards Petitioner to allow such conduct by the DMV. Thus, the Circuit Court's order, if not reversed, will allow the DMV to once again continually delay Petitioner's right to a hearing, despite the fact that the DMV has never once during the pendency of these proceedings at the administrative level availed itself of the procedural process in Circuit Court that would have compelled the officer's attendance, and therefore, the Circuit Court's Order is

clearly wrong and to allow it to stand would be a miscarriage of justice. “Justice delayed is justice denied.” ***State v. Bail***, 140 W.Va. 680, 88 S.E.2d 634 (1955). Additionally, from the internal memorandum quoted above, it appears the DMV’s personnel had no idea how to proceed, so they arbitrarily and capriciously continued the hearings, and continued to issue subpoena after subpoena to the officer without availing themselves of compliance measures in Circuit Court—such conduct deprives the Petitioner of due process. The DMV’s continued issuance of subpoenas, to which the officer never complied before, in the vain hope that *this time* the officer would show, without the DMV taking steps to enforce said subpoenas in Circuit Court, blatantly amounts to unfair, biased, and unequal treatment of the Petitioner, who had appeared on at least two occasions while the officer was under subpoena only to have the DMV once again reschedule the hearing. The DMV would be allowed to continue Petitioner’s right to a hearing indefinitely and in perpetuity, if a writ of prohibition is not issued herein to prevent the DMV from holding yet another administrative hearing in this matter. Thus, Petitioner was denied his constitutional rights to due process of law and equal protection of law by the DMV’s improper delay herein. As a result, the DMV improperly delayed the Petitioner’s administrative hearing, without good cause, beyond the statutory deadline set forth in W.Va. Code § 17C-5A-2, and therefore, the Circuit Court’s order denying the Petitioner’s request for a writ of prohibition to prevent the DMV from holding another administrative hearing in this matter is thus, clearly wrong in both fact and law.

Hence, the Petitioner submits that his case is distinguishable from ***Miller v. Hare, No. 35560, April 1, 2011***, and therefore, the Circuit Court's order which denied him relief is clearly wrong and should be reversed by this Honorable Court. Specifically, the DMV in Petitioner's case failed to provide Petitioner with notice of any reasons on the record it provided to Petitioner for its continuous delay of the Petitioner's administrative hearing beyond the 180-day statutory time limit set forth in W.Va. Code § 17C-5A-2, as shown by the letters from the DMV attached to Petitioner's petition for extraordinary relief below, (*See Appendix Record 2 attachments, Appendix Record Nos. 11, 13, 15, 17* ). The DMV's failure to provide good cause on the notices of continuance and the record provided to Petitioner for their sua sponte continual delay of the administrative hearing violated the statutory mandates and further violated the Petitioner's constitutional rights to due process and equal protection. The record in this matter fails to establish "good cause" as to why the DMV continuously and improperly rescheduled the Petitioner's hearing, without compelling the officer's attendance, thus, making Petitioner's case distinguishable from that of the driver's licensee in the recent ***Hare, supra***, decision of this Honorable Court.

Moreover, in his petition below, Petitioner asserted that his constitutional rights to equal protection of the law had been violated by the DMV's improper continuances in this matter and that the DMV routinely commits said violations; as the DMV requires driver's licensees, such as Petitioner, to state on the record their reasons for requesting a continuance, and driver's licensees

are only afforded one continuance, while in direct contrast of the rules pertaining to Petitioner, and others similarly situated, and in a blatant violation of the equal protection clause of the West Virginia Constitution, the DMV herein allowed itself to sua sponte continue the Petitioner's administrative hearing several times without providing **ANY reason on its notices of continuance** for doing so, and the DMV routinely operates in this manner. The Petitioner submits that although W.Va. Code § 17C-5A-2(c) grants the Commissioner the authority to *sua sponte* continue said hearings, that the DMV is also required to show "**good cause**" and that the DMV herein failed to do so. Additionally, the Petitioner below raised equal protection issues related to the DMV's continual violation of the statutory time deadline of 180 days in which to hold such administrative hearings versus the strict adherence to time deadlines that the DMV enforces against driver's licensees such as Petitioner, which were not addressed by the Circuit Court's decision denying Petitioner the relief requested.

Justice Albright eloquently summarized the disparity of the time limits imposed upon driver's licensees versus the time limits imposed upon the DMV in his concurring opinion in the case of **In re Petition of Donley**, 217 W.Va. 449 at 453, 618 S.E 458 at 462, (W.Va. 2005), as follows:

While I concur with the result reached by the majority, I write separately to recognize that principles of fairness suggest that the same promptness concerns that are imposed upon a defendant who requests a hearing in connection with administrative revocation of his operator's license should be similarly imposed upon the West Virginia Department of Motor Vehicles ("DMV"). To permit the DMV to grant itself

an extension of the 180-day deadline for revocation hearings that is mandated by West Virginia Code § 17C-5A-2(b) (2004) without providing for any limits on the length of such extensions encourages the establishment of a lopsided system—a system that proves inherently unjust for the defendant whose revocation proceedings are protracted, not because of his requests, but because of lengthy administrative delays. (footnote omitted herein). Barring express legislative amendment on this issue of timely scheduled hearings following the granting of a continuance requested by the DMV, it is likely that the system will continue to be tilted in favor of the DMV with regard to issues of timely action.

While the DMV had a legitimate basis for continuing the revocation hearing—the unavailability of a hearing examiner on the date originally selected for the hearing--the continuation of the hearing for another six months seems patently unreasonable. A thirty- or sixty-day continuance in this situation might prove acceptable, **but to permit an entire year to pass between the defendant's request for the hearing and the holding of the revocation hearing seems excessive when the legislative scheme involved mandates the holding of such hearings within a 180-day period, barring demonstration of good cause for a continuance.** See W.Va. Code § 17C-5A-2(b). *(emphasis supplied herein).*

This Honorable Court has long recognized and held 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. Syllabus Pt. 1, ***Abshire v. Cline***, 193 W.Va. 180, 455 S.E.2d 549. Petitioner submits that the ruling of the lower tribunal was clearly wrong as it upheld the DMV’s violation of Petitioner’s rights to due process.

In ***David v. Commissioner of West Virginia Div. of Motor Vehicles***, 219 W.Va. 493, 637 S.E.2d 591, (W.Va. 2006), this Honorable Court awarded

the appellant therein, attorneys fees and expenses due to the DMV's denial of due process to the appellant. The ***David***, Court held as follows:

Where the West Virginia Department of Motor Vehicles has improperly delayed a driver's license revocation proceeding held pursuant to W.Va. Code, 17C-5A-2 (2004) and thereby denied due process of law to a licensee, a party who has incurred substantial expenses as a result of the improper delay and denial may recover the party's expenses so incurred from the Department in order to place the party in the position in which he or she would have been absent the improper delay and denial by the Department. ***Id. Syllabus Pt. 1.***

The Petitioner submits that in the instant case, this Honorable Court should award him attorney fees and travel expenses that he incurred as a result of the DMV's improper continuances of his administrative hearing.

#### **IV. CONCLUSION**

Therefore, Petitioner submits that the Circuit Court's decision was clearly wrong in fact and law and that the lower court erred in declaring this matter moot, as Petitioner submits that his case at bar is distinguishable from this Court's decision in ***Miller v. Hare, supra***, for all the reasons set forth herein, and that petitioner was denied due process of law and equal protection by the DMV, and therefore, Petitioner is entitled to his requested writ of prohibition to prevent a second administrative hearing in this matter and a writ of mandamus to reinstate his full driving privileges without any references to this license revocation having ever been issued. Therefore, for all the foregoing reasons, the Petitioner submits that ***Hare, supra***, is factually distinguishable and not controlling on the outcome of Petitioner's requested relief.

This Honorable Court should reverse the lower court's order as Petitioner's case is factually distinguishable from this Court's decision in **Hare, supra**, and raises substantial constitutional issues of due process and equal protection of the Petitioner's rights that were not addressed by the decision of the Circuit Court, as discussed herein.

Wherefore, the Petitioner prays that this Court will grant him a writ of prohibition which prohibits the DMV from holding any further hearings upon this driver's revocation, and issue a writ of mandamus requiring the DMV to dismiss the license revocation proceedings, fully reinstate Petitioner's driving privileges as though this revocation never took place, and award Petitioner his attorneys fees and costs, and such further relief as the Court deems just and equitable.

**Respectfully submitted,**  
**JOHN HOLLAND, II, Petitioner, .**  
**By Counsel:**



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**Docket No. 11-1241**

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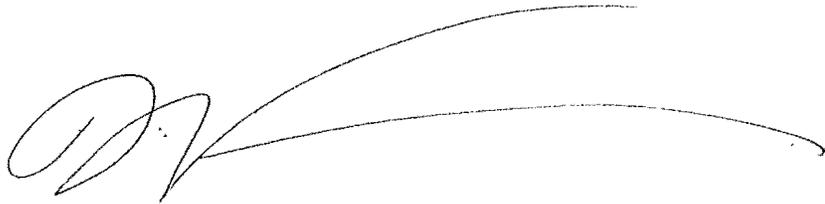
**vs.**

**Joe E. Miller, Commissioner  
of the West Virginia  
Division of Motor Vehicles,  
Respondent.**

**CERTIFICATE OF SERVICE**

I, William C. Forbes, hereby certify that true copies of the foregoing "*Brief of Petitioner Upon Appeal*" and the "*Appendix Record*" were duly served upon counsel of record for the respondent, by depositing the same in the regular U.S. mail, postage pre-paid, on this the 13<sup>th</sup> day of September, 2011, addressed as follows:

Janet James, Esquire  
Senior Assistant Attorney General  
P.O. Box 17200  
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