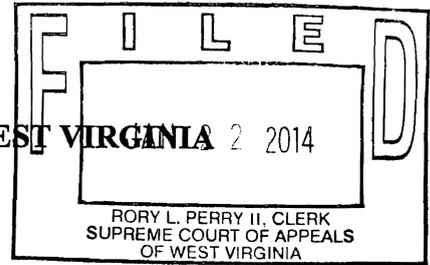


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**STEVEN O. DALE, ACTING COMMISSIONER  
OF THE WEST VIRGINIA DIVISION OF MOTOR  
VEHICLES,**

**Petitioner,**

**v.**

**NO. 13-0837**

**JIMMIE J. SIZEMORE, II,**

**Respondent.**

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**FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

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**BRIEF OF THE DIVISION OF MOTOR VEHICLES**

**Respectfully submitted,**

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Division of Motor Vehicles,**

**By Counsel,**

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## **I. ASSIGNMENTS OF ERROR**

- A. The circuit court lacked jurisdiction to issue a Rule to Show Cause [Order] or an *ex parte* stay.**
- B. Assuming *arguendo* that the circuit court had jurisdiction below, the court erred in hearing a matter not noticed for hearing before it.**
- C. Assuming *arguendo* that the circuit court had jurisdiction below, in its final order granting writ of prohibition, the circuit court erred in not mentioning the DMV's "Motion to Dismiss for Lack of Prosecution and Mootness" and in not granting said motion.**
- D. Assuming *arguendo* that the circuit court had jurisdiction below, the court erred in granting Mr. Sizemore's "Writ of Prohibition and Application for Stay."**

## **II. STATEMENT OF THE CASE**

On February 24, 2009, Mr. Sizemore was arrested for first offense driving under the influence ("DUI") of alcohol in Nitro, WV. (App<sup>1</sup>. at P. 93.) A Statement of Arresting Officer was timely forwarded to the Division of Motor Vehicles ("DMV,") and the DMV issued an Order of Revocation. (App. at P. 92.) Mr. Sizemore timely requested an administrative hearing and requested the investigating officer's attendance at said hearing. (App. at PP. 88-90.) The hearing was scheduled for July 31, 2009 (App. at P. 87), and on July 30, 2009, Mr. Sizemore's counsel requested an emergency continuance because he would be attending the funeral of his neighbor. (App. at P. 84.) The hearing was rescheduled for January 7, 2010. (App. at P. 80.) On January 4, 2010, Mr. Sizemore's counsel again requested a continuance of the administrative hearing because he "just found out today" that he had a case in the Kanawha County Magistrate Court which conflicted with Mr. Sizemore's administrative hearing on January 7, 2010. (A. R. at P. 78.) Even though it was Mr. Sizemore's second request for a continuance, it was granted, and the hearing was rescheduled for

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<sup>1</sup> App. refers to the Appendix filed contemporaneously with this Brief.

August 5, 2010, by the DMV. (A. R. at P. 69.)

Mr. Sizemore, his counsel, and the hearing examiner appeared for the hearing on August 5, 2010, and an administrative hearing took place even though neither the investigating officer nor any witness for the DMV appeared. (A. R. at P. 61.) Prior to the hearing, a subpoena was issued and served upon the arresting officer. (A. R. at P. 68.) Based upon the failure of the officer, or any witness for the State, to appear, Mr. Sizemore moved for dismissal of the revocation and requested his license be reinstated. (A. R. at P. 61.) At the hearing, Mr. Sizemore also refused to waive the appearance of the officer. *Id.* The hearing examiner declined to rule on Mr. Sizemore's motion, and instead, declared that the matter would be brought to the Commissioner's attention. *Id.*

The DMV re-scheduled the hearing for March 31, 2011. (A. R. at P. 59.) On March 30, 2011, Mr. Sizemore filed a "[Complaint for] Writ of Prohibition and Application for Stay" with the circuit court. (A. R. at PP. 47-55.) Mr. Sizemore sought to prohibit DMV from conducting a "second" administrative hearing in his DUI matter because the officer failed to appear at the first hearing. *Id.* On the same date, the circuit court entered a "Rule to Show Cause [Order]" and granted an *ex parte* stay of the administrative matter below. (A. R. at P. 46.) On April 19, 2011, the DMV filed an "Answer" to Mr. Sizemore's "[Complaint for] Writ of Prohibition and Application for Stay." (A. R. at PP. 35-41.) On January 30, 2013, the DMV filed a "Motion to Dismiss for Lack of Prosecution and Mootness" and noticed the same for hearing on March 26, 2013. (A. R. at PP. 22-34.) Mr. Sizemore never noticed his "[Complaint for] Writ of Prohibition and Application for Stay" for hearing.

On March 26, 2013, Mr. Sizemore, his counsel, and the undersigned appeared before the

circuit court on the DMV's "Motion to Dismiss for Lack of Prosecution and Mootness." (C.C. Tr<sup>2</sup>. at P. 1.) The circuit court heard argument from both parties and ruled from the bench that the DMV's "Motion to Dismiss for Lack of Prosecution and Mootness" was denied (C.C. Tr. at P. 15) and that Mr. Sizemore's request for a writ was granted with his license to be immediately reinstated. (C.C. Tr. at P. 16.) The circuit court ordered Mr. Sizemore's counsel to prepare the order. *Id.* On April 15, 2013, the undersigned sent a letter inquiring about the status of the final order (App. at P. 14), and again on May 30, 2013, the undersigned inquired about the status of the order. (App. at P. 10.) On October 8, 2013, the circuit clerk of Kanawha County entered the order from the March 26, 2013 hearing. (App. at PP. 2-8.)

### **III. SUMMARY OF ARGUMENT**

The circuit court lacked jurisdiction to consider Mr. Sizemore's [Complaint for] Writ of Prohibition and Application for Stay because he failed to provide the DMV with thirty days' pre-suit notice; therefore, the Rule to Show Cause [Order] and *ex parte* stay were invalid. The DMV filed a notice of hearing for its motion to dismiss for lack of prosecution and mootness, yet Mr. Sizemore did not notice the merits of his petition for hearing. Accordingly, the merits should not have been heard until properly noticed. The circuit court failed to make a finding as to any good cause Mr. Sizemore may have had to neglect to prosecute his petition for writ of prohibition for almost two years. Further, the circuit court erred in granting the writ of prohibition because Mr. Sizemore was not prejudiced by any delay in the administrative process.

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<sup>2</sup> C.C. Tr. refers to the Circuit Court transcript of the March 26, 2013, hearing on the DMV's Motion to Dismiss.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure (2010), the DMV requests oral argument because this matter involves issues of first impression and issues of fundamental public importance. Also, the parties would benefit from the opportunity to answer questions from the Court.

#### **V. ARGUMENT**

**A. The circuit court lacked jurisdiction to issue a "Rule to Show Cause" or an *ex parte* stay.**

The circuit court lacked jurisdiction to hear the matter below because Mr. Sizemore failed to provide the DMV with 30 days' pre-suit notice as is required by statute. Specifically, W. Va. Code § 55-17-3(a)(1) (2008) provides the following:

Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired. Upon receipt, the chief officer of the government agency shall forthwith forward a copy of the notice to the President of the Senate and the Speaker of the House of Delegates. The provisions of this subdivision do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.<sup>3</sup>

This section of the Code does not exclude extraordinary writs in the requirement to provide notice to the State: it does specifically exclude injunctive relief where there is a showing that delay could cause irreparable harm if this statute were followed. West Virginia Code § 55-17-2(1) (2002) defines "Action" as

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<sup>3</sup> The DMV qualifies as a "government agency" under this Code provision.

a proceeding instituted against a governmental agency in a circuit court or in the supreme court of appeals, except actions instituted pursuant to statutory provisions that authorize a specific procedure for appeal or similar method of obtaining relief from the ruling of an administrative agency and actions instituted to appeal or otherwise seek relief from a criminal conviction, including, but not limited to, actions to obtain habeas corpus relief.

Therefore, the statute also exempts from the notice requirement administrative and criminal appeals, including the extraordinary remedy of habeas corpus. The extraordinary remedies of prohibition and mandamus are not excluded from the definition of “action.”

Assuming *arguendo* that pre-suit notice is only required when a particular relief, as defined in W. Va. Code § 55-17-3(b)(1) (2008), is requested, such an argument must also fail here. West Virginia Code § 55-17-3(b)(1) (2008) states,

Notwithstanding any procedural rule or any provision of this code to the contrary, in an action instituted against a government agency that seeks a judgment, as defined in section two of this article, the chief officer of the government agency which is named a party to the action shall, upon receipt of service, forthwith give written notice thereof, together with a copy of the complaint filed, to the President of the Senate and the Speaker of the House of Delegates.

Here, there is a burden on the chief officer of the agency, when the action is finally filed and seeks a judgment, to then serve a copy of the complaint that was filed upon the Legislature. There is no duty whatsoever in subsection (b)(1) for the filing party (here, Mr. Sizemore.) Subsection (b)(1) gives direction to the agency to give a copy of the complaint to the Legislature *if* a judgment is sought.

Again, assuming *arguendo* that pre-suit notice only applied if Mr. Sizemore sought a type of remedy defined in W. Va. Code § 55-17-2(3) (2002), then Mr. Sizemore still has not complied with the statute. West Virginia Code § 55-17-2(3) (2002) defines “judgment” as an order or decree of a court which would:

- (A) Require or otherwise mandate an expansion of, increase in, or addition to the services, duties or responsibilities of a government agency;
- (B) Require or otherwise mandate an increase in the expenditures of a government agency above the level of expenditures approved or authorized before the entry of the proposed judgment;
- (C) Require or otherwise mandate the employment or other hiring of, or the contracting with, personnel or other entities by a government agency in addition to the personnel or other entities employed or otherwise hired by, or contracted with or by the government agency;
- (D) Require or otherwise mandate payment of a claim based upon a breach of contract by a government agency; or
- (E) Declare an act of the Legislature unconstitutional and, therefore, unenforceable.

In his *Prayer for Relief*, Mr. Sizemore sought an award of “attorney fees and costs.” (App. at P. 54.)

Such attorney fees and costs, if granted, would have mandated an increase in the expenditures of the DMV above the level of expenditures approved before entry of any judgment by the circuit court.

Therefore, even if this Court were to interpret W. Va. Code § 55-17-3(a) (2008) to only apply to actions seeking a judgment, the definition of judgment in W. Va. Code § 55-17-2(3) (2002) was met by Mr. Sizemore’s requested relief in the matter below.

In *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007), this Court held that compliance with the pre-suit notification provisions set forth in W. Va. Code § 55-17-3(a) (2002) was a jurisdictional pre-requisite for filing an action against a State officer or agency. The failure to comply with the statutory notice requirements requires dismissal and “deprives the circuit court of jurisdiction[.]” *Motto*, 647 S.E.2d at 855. Petitioner may argue that *Motto* held that the statutory pre-suit notice requirements only apply to “certain types of suits;” however, the statute has already delineated which “types” of suits are applicable: any action against the State which is not an administrative appeal, a criminal appeal, habeas corpus, or injunctive relief where delay would cause irreparable harm.

The Legislature has spoken regarding the matter of pre-suit notice, and this Court has determined that there is no discretion to waive the mandatory notice. *Motto*, 647 S.E.2d at 855. “It is vital to the rule of law that legislative and appellate commands be honored.” *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996). *See also State ex rel. Allen v. Bedell*, 193 W. Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring) (observing that circuit courts cannot disregard, inter alia, the Rules of Civil Procedure.”) Because Mr. Sizemore failed to give the DMV 30 days’ pre-suit notice, the circuit court lacked jurisdiction below and erred in issuing an *ex parte* stay order against the DMV.

The circuit court further lacked jurisdiction because Mr. Sizemore failed to comply with the Rules of Civil Procedure by serving the DMV via first class mail and not via summons. Prior to April 6, 1998, the West Virginia Rules of Civil Procedure did not apply to extraordinary remedies. In 1998, this Court amended the Rules of Civil Procedure to make the Rules applicable to such proceedings.

It is worth noting that former West Virginia Rule of Civil Procedure 81(a)(5) provided that the Rules of Civil Procedure did not apply to proceedings under extraordinary writs, including the writ of certiorari. Rule 81(a)(5), however, was abrogated, and, in 1998, Rule 71B was adopted, section (a) of which states that the West Virginia Rules of Civil Procedure “govern the procedure for the application for, and issuance of, extraordinary writs.” F.D. Cleckley, R.J. Davis and L.J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* 3rd ed. § 71B (Juris Pub. 2008) (“As a result of Rule 71B(a), all extraordinary writ proceedings initiated in circuit courts are subject to the procedural demands of the rules of civil procedure.”)

*Jefferson Orchards, Inc. v. Jefferson County Zoning Bd. of Appeals*, 225 W. Va. 416, 421 n.4, 693 S.E.2d 781, 786 n.4 (2010). *See also Cable v. Hatfield*, 202 W. Va. 638, 642-43, 505 S.E.2d 701, 705-06 (1998) (“in recent amendments to the Rules of Civil Procedure, which became effective on April 6, 1998, Rule 81(a)(5) was repealed. Moreover, a new rule expressly stating that ‘[t]he West

Virginia Rules of Civil Procedure govern the procedure for the application for, and issuance of, extraordinary writs' was adopted as part of the 1998 amendments. W. Va. R. Civ. P. Rule 71B(a)"); *State ex rel. Parsons v. Zakaib*, 207 W. Va. 385, 389 & n.4, 532 S.E.2d 654, 658 & n.4 (2000).

Because the Rules of Civil Procedure apply to extraordinary writs, a summons was required to be served with the complaint. W. Va. R. Civ. P. 4(c)(1) (2007). "A summons is the actual device which gives a court jurisdiction over a defendant." F.D. CLECKLEY, R.J. DAVIS AND L.J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 4(b)[2] (3d ed. 2008). "Service of the summons without the complaint, or vice versa, it is insufficient to give a court jurisdiction over the defendant." *Id.* § 4(c)(1)[2]. *See also id.* § 4(b)[2] (footnote omitted) ("A summons is the actual device which gives a court jurisdiction over a defendant.") Since service of process requires service of both the complaint and summons, *id.* § 4[1], there was no service of process issued here, and therefore, there was no *in personam* jurisdiction here.

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process...and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.

*Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

Further, prior to 1998, W. Va. R. Civ. P. 81(a)(5) provided that extraordinary writ practice was not governed by the Rules of Civil Procedure and therefore, extraordinary writs were governed by statute. *See* W. Va. R. Civ. P. 81(a) (rescinded); *see also*, W. Va. Code §§ 53-1-2, 53-1-5 (1933). However, the enactment of Rule 71B and the rescission of Rule 81(a) had the effect of eliminating the Rule to Show Cause. Because W. Va. Code §§ 53-1-2 and 53-1-5 allow for a Rule to Show Cause that shifts the burden to the Respondent, it is in direct conflict with Rule 71B which maintains

the burden upon the plaintiff and only requires the defendant to answer the complaint. *Compare* W. Va. Code §§ 53-1-2, 53-1-5 *with* W. Va. R. Civ. P. 71B (2007).

To the extent that the statute conflicts with the Rules of Civil Procedure, the Rules of Civil Procedure prevail. *See Games-Neely ex rel. W. Va. State Police v. Real Property*, 211 W. Va. 236, 244-45, 565 S.E.2d 358, 366-67 (2002); Syl. Pt. 4, *State ex rel. Parsons v. Zakaib*, 207 W. Va. 385,386, 532 S.E.2d 654, 655 (2000); Syl. Pt. 2, *Cable v. Hatfield*, 202 W. Va. 638,639, 505 S.E.2d 701,702 (1998) (holding that the creation of Rule 71B superseded the prior statute as it related to demurrers.) Just as in *Cable* where Rule 71B eliminated demurrers, so to here, Rule 71B eliminated the Rule to Show Cause. Accordingly, the circuit erred in issuing a Rule to Show Cause and placing the burden of Mr. Sizemore's case upon the DMV.

**B. Assuming *arguendo* that the circuit court had jurisdiction below, it erred in hearing a matter not noticed for hearing before it.**

On March 30, 2011, Mr. Sizemore filed a "Writ of Prohibition and Application for Stay" with the circuit court below. (App. at P. 47.) On the very same day, the circuit court entered an *ex parte* "Rule to Show Cause" which stayed any further administrative proceedings below indefinitely as the circuit court failed to enter a date for a hearing on said order. (App. at P. 46.) At no time after Mr. Sizemore received his stay of the license revocation proceedings did he do anything to further his case; therefore, on January 30, 2013, twenty two months after the initial matter was filed, the DMV filed a "Motion to Dismiss for Lack of Prosecution and Mootness." (App. at P. 22.) On February 12, 2013, the DMV filed a "Notice of Hearing" on its motion. (App. at P. 16.) Said hearing was held on March 26, 2013. (C.C. Tr. at P. 1.) Mr. Sizemore, however, never filed a notice of hearing

on the merits of his “Writ of Prohibition and Application for Stay;” therefore, the matter was never properly before the circuit court for hearing on the merits.

West Virginia Rule of Civil Procedure 6(d)(1)(A) (2008) requires service of a notice of hearing at least nine (9) days before the time set for hearing if served by mail. The DMV complied fully with said Rule. Mr. Sizemore, however, never filed a notice of hearing pursuant to W. Va. R. Civ. P. 6.

This Court has found that the purpose of the notice requirement of “Rule 6(d) is to prevent a party from being prejudicially surprised by a motion.” *Daniel v. Stevens*, 183 W. Va. 95, 104, 394 S.E.2d 79, 88 (1990). In *Daniel*, this Court found that because the party opposing the motion was not prejudicially surprised by the issue presented in the motion, the lack of notice was harmless. In *Cremeans v. Goad*, 158 W. Va. 192, 210 S.E.2d 169 (1974), however, only three hours of notice was given for a hearing. This Court found that three hours is insufficient time to prepare for a hearing and noted that Rule 6(d) is not a hard and fast rule, but sufficient time must be provided so that the parties have time to prepare. The Syllabus of *Cremeans* states:

While the language of Rule 6(d) of the Rules of Civil Procedure clearly permits a reduction of the time requirements for notice of hearing, where a trial court, in so acting, reduces time requirements to the extent that the party entitled to notice is deprived of all opportunity to prepare for hearing, such action constitutes a denial of due process of law and is in excess of jurisdiction.

In *Cremeans*, this Court further addressed the importance of adherence to the time requirements set forth in W. Va. R. Civ. P. 6:

Rule 6(d) permits parties and the courts flexibility in setting time for hearings—but this is beyond permissible limits. At the minimum, a party proceeding under Rule 6(d) must show that the opposing party had actual notice and some time to prepare to meet the questions raised by the motion. *Herron v. Herron, Supra*. Although the wording of Rule 6(d) indicates that it is not primarily for the benefit of the moving

party, under the above practice, the moving party needs notice just as does his adversary. The original movants in this case were given almost no notice of a hearing, and had no time to prepare for it. This is a denial of procedural due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article III, Section 10 of the Constitution of West Virginia. *Swallow v. United States*, 380 F.2d 710 (10th Cir.); *State ex rel. Battle v. Demkovich*, 148 W. Va. 618, 136 S.E.2d 895.

*Cremeans v. Goad*, 158 W. Va. 192, 195-96, 210 S.E.2d 169, 171 (1974).

This Court has further addressed non-compliance with W. Va. R. Civ. P. 6: "Given the language of Rule 6(d) permitting the reduction of notice requirements, we apply an abuse of discretion standard to the orders reducing Rule 6(d)'s notice requirements." *State ex rel. Ward v. Hill*, 200 W. Va. 270, 276, 489 S.E.2d 24, 30 (1997). In the matter before this Court, Mr. Sizemore provided no notice whatsoever of his intent to argue the merits before the circuit court, thus the DMV had no time to prepare for it, and the circuit court abused its discretion in entertaining a matter not noticed for hearing.

**C. Assuming *arguendo* that the circuit court had jurisdiction below, in its final order granting writ of prohibition, the circuit court erred in not mentioning the DMV's "Motion to Dismiss for Lack of Prosecution and Mootness" and in not granting said motion.**

On March 30, 2011, Mr. Sizemore filed a "Writ of Prohibition and Application for Stay" with the circuit court. (A. R. at PP. 47-55.) On April 19, 2011, the DMV filed an "Answer" to Mr. Sizemore's "Writ of Prohibition and Application for Stay." (A. R. at PP. 35-41.) On January 30, 2013, a full twenty-two months after Mr. Sizemore initiated the matter below, the DMV filed a "Motion to Dismiss for Lack of Prosecution and Mootness" and noticed the same for hearing on March 26, 2013. (A. R. at P. 22-34.)

At the hearing on the DMV's motion, counsel for the DMV argued that pursuant to syllabus point 1 of *Caruso v. Pearce*, 223 W. Va. 544, 678 S.E.2d 50 (2009), when responding to a motion to dismiss for failure to prosecute, the Petitioner bears the burden of going forward with evidence as to good cause for not dismissing the action. (C.C. Tr. at P. 7.) In syllabus point 1 of *Caruso*, this Court further found that if the petitioner does come forward with good cause, the burden then shifts to the respondent to show substantial prejudice to it in allowing the case to proceed.

In the instant matter, after the DMV's counsel argued that since the DMV filed the motion to dismiss for lack of prosecution, then pursuant to *Caruso*, Mr. Sizemore needed to show good cause for his lack of prosecution. (C.C. Tr. at P. 8.) Instead of addressing the issue of good cause for lack of prosecution, the circuit court next asked Mr. Sizemore's counsel how the instant matter is distinguished from *Miller v. Hare*, 227 W. Va. 337, 708 S.E.2d 531 (2011). (C.C. Tr. at P. 8.) Next, Mr. Sizemore's counsel argued the inapplicability of the *Hare* case (C.C. Tr. at PP. 8-12), and the DMV's counsel argued that Mr. Sizemore had not addressed the issue of good cause for not prosecuting his case. *Id.* at 12. In response, Mr. Sizemore's counsel stated that the issue is "almost comical" (*Id.*) and deflected the issue of good cause completely by arguing:

I filed this petition back in March of 2011. You know, again, I had contacted the DMV. Well, let me back up, Judge.

Let me go on. Before I ever filed this writ on the DMV, I called the DMV and just said, "Well, hey, won't you, based on the record before that, issue a final order?" They declined to do it and attempted to reset this.

So I filed that writ, and again, you know, what's my interested [*sic*] in proceeding further? So again, I don't think there's any mootness here. It's within a year from – I guess within two years from the time that I found [*sic*] this.

And again, my client is charged with first offense driving under the influence. He's not been charged since then. He wasn't previously charged.

This was a one time thing with a case that factually, we think that we won at the administrative level. And again, Judge, I don't think there's any mootness whatsoever in these [*sic*] particular instance.

(C.C. at PP. 12-13.)

The DMV's counsel then pointed out to the circuit court that the DMV's motion was also for lack of prosecution and that "Mr. Wallace danced around everything but the good cause for not going forward with this matter." *Id.* at 13. Without Mr. Sizemore's counsel uttering another word about good cause for his lack of prosecution or presenting any evidence regarding good cause for the delay in prosecution, the circuit court ruled, "...I don't think this rises to the level of a dismissal for lack of prosecution, and so I'm denying the motion on that basis as well." *Id.* at 15. Neither from the bench nor in its "Opinion and Order Granting Writ of Prohibition and Application for Stay" did the circuit court make any findings regarding Mr. Sizemore's burden of going forward with evidence as to good cause for not dismissing the action.

Syllabus point 1 of *Caruso* is quite clear that the "Plaintiff bears the burden of going forward with **evidence** as to good cause for not dismissing the action..." [Emphasis added.] It is clear from the record that Mr. Sizemore not only failed to make an argument about his lack of prosecution, but it failed to present any evidence whatsoever as to any good cause that he may have had for not prosecuting his case. Assuming *arguendo* that Mr. Sizemore will argue that his counsel's deficient proffer was adequate to show good cause, he still cannot prevail here. This Court recently addressed the issue of a proffer being insufficient when evidence must be presented.

"A proffer is not evidence, *ipso/facto*." *U.S. v. Reed*, 114 F.3d 1067, 1070 (10th Cir.1997); *See also, Crawley v. Ford*, 43 Va.App. 308, 597 S.E.2d 264 (2004); *Jones v. U.S.*, 829 A.2d 464 (D.C.2003); *Parker v. US.*, 751 A.2d 943 (D.C.2000). Moreover, a "proffer is not evidence unless the parties stipulate that a proffer will suffice." *Ford v. State*, 73 Md.App. 391, 404, 534 A.2d 992, 998 (1988).

*State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876, 881 (2013). The lack of evidence of good cause presented by Mr. Sizemore, and the lack of a finding of good cause by the circuit court is clear error in light of this Court's opinion in *Caruso*.

**D. Assuming *arguendo* that the circuit court had jurisdiction below, the court erred in granting Mr. Sizemore's "Writ of Prohibition and Application for Stay."**

The facts of this case are undisputed. Mr. Sizemore was arrested for DUI (App. at P. 93), requested an administrative hearing, and requested the investigating officer's attendance at said hearing. *Id.* at 88-90. After the first hearing was scheduled, Mr. Sizemore asked for and received a continuance. *Id.* at 84. The hearing was rescheduled, and Mr. Sizemore was again granted a continuance. *Id.* at 78. Mr. Sizemore, his counsel, and the hearing examiner appeared on the next scheduled date, and an administrative hearing took place even though neither the investigating officer nor any witness for the DMV appeared. *Id.* at 61. Prior to the hearing, a subpoena was issued for and served upon the arresting officer. *Id.* at 68. At the hearing, Mr. Sizemore refused to waive the appearance of the officer, and the hearing examiner, refusing to rule on Mr. Sizemore's motion to dismiss, declared that the matter would be brought to the Commissioner's attention. *Id.* The DMV re-scheduled the hearing, and Mr. Sizemore asked the circuit court for a writ of prohibition so that the administrative matter would not continue.

"Prohibition lies only to restrain inferior courts from proceedings 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." Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). *See also*, Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

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 or 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 Syl. Pt. 4. Here, Mr. Sizemore failed to prove the factors for obtaining a writ of prohibition, and circuit court erred in its final order by not even addressing the factors for prohibition.

First, the circuit court failed to look at other available remedies before letting Mr. Sizemore escape license revocation for driving while under the influence of alcohol. Mr. Sizemore appeared and testified at the scheduled administrative hearing. (C.C. Tr. at P. 11.) The hearing examiner continued the hearing because the investigating officer had been subpoenaed, and Mr. Sizemore refused to waive the officer's appearance. (App. at P. 61.) Since Mr. Sizemore had already testified, and because the statement of the arresting officer was required to be admitted into the administrative record pursuant to W. Va. § 29A-5-2 (1964) and *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006), then the DMV can issue a final order without further hearing. Mr. Sizemore even raised such a disposition at the hearing on the DMV's motion to dismiss: "Before I ever filed this writ on the DMV, I called the DMV and just said, "Well, hey, won't you, based on the record before that, issue a final order?" (C.C. Tr. at P. 12.) Instead of dismissing the administrative matter completely, the circuit court had the option of remanding the matter to the

DMV for issuance of a final order based upon Mr. Sizemore's testimony and the administrative record. A remand to the DMV would not require any further effort or expense for either of the parties involved.

In addition, because Mr. Sizemore had already testified and had been subject to cross-examination, the circuit court could have remanded the matter for further hearing solely for the purpose of taking the testimony of the arresting officer. If Mr. Sizemore's license revocation was upheld, he had available to him the right to judicial review pursuant to W. Va. Code § 29A-5-4, *et seq.* Again, the circuit court failed to consider any other available remedy.

Next, Mr. Sizemore failed to show how he will be damaged or prejudiced in a way that is not correctable on appeal if the administrative hearing took place. It is undisputed that Mr. Sizemore had already testified and was subject to cross-examination at the administrative hearing that was convened. (C.C. Tr. at PP. 11-12.) In *Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011), this Court held:

when the party asserts that his constitutional right to due process has been violated by a delay in the issuance of the revocation order by the Commissioner of the Division of Motor Vehicles, he must demonstrate that he has suffered actual and substantial prejudice as a result of the delay. Once actual and substantial prejudice from the delay has been proven, the circuit court must then balance the resulting prejudice against the reasons for the delay.

While *Moredock* addressed the delay between the conclusion of an administrative hearing and the entry of a final order, it is still applicable here because *Moredock* reasons that the driver's ability to prepare or defend his case must be impaired as a result of the delay in hearing. Mr. Sizemore has never alleged that he was prejudiced by delay and, in fact, informed the circuit court that he had already testified and been subject to cross-examination. Therefore, he cannot claim that

the passage of time has affected his recall of the events on the night he was arrested for DUI. Moreover, if the passage of time would somehow affect the officer's ability to recall the events of his arrest, such inability could only work in Mr. Sizemore's favor during cross-examination of the officer. Clearly, Mr. Sizemore has not shown how he would be prejudiced with going forward with the administrative process.

The only factor regarding the granting of a writ of prohibition which the circuit court endeavored to address is whether the continuance granted by the tribunal below was error as a matter of law. However, the circuit court erred in its distinguishing of the facts in *Hare, supra*, from the facts in the case at bar. Specifically, the circuit court found that

the arresting officer sought a pre-hearing continuance of the license revocation hearing. Petitioner [Mr. Sizemore] consented to the continuance, but the Commissioner denied the investigating officer's prehearing continuance request. The Commissioner's action in denying the investigating officer's prehearing continuance request, the Commissioner's failure to appear for the hearing and present evidence in support of the State's case, followed by the Commissioner's decision to schedule a second hearing, demonstrates a persistent disregard by the Commissioner of procedural law.

(App. at P. 7.)

Factually, the chronology of events in the instant matter and in the *Hare* case are almost identical. In *Hare*, the driver was arrested for DUI, timely appealed his license revocation, and requested the attendance of the investigating officer at the administrative hearing. 227 W. Va. at 338-339, 708 S.E.2d at 532-533. Mr. Sizemore was also arrested for DUI, timely appealed his license revocation and requested the attendance of the officer. In *Hare*, the officer was subpoenaed as was the officer in this matter. A notable difference between the two cases is that in *Hare*, the driver did not continue the matter twice before the parties convened for an administrative hearing. In *Hare*,

when the hearing convened on the date first scheduled, the officer failed to appear, and Mr. Hare's counsel moved to dismiss the revocation, but that motion was not granted. Similarly, in the instant matter, on the scheduled hearing date, Mr. Sizemore and his counsel appeared for hearing, but the officer failed to appear. Mr. Sizemore's counsel moved to dismiss the matter, but the motion was denied. The *Hare* matter was continued for further hearing as was the matter before this Court.

The final order of the circuit court below found that the facts of *Hare* are distinguishable from Mr. Sizemore's case noting only that the officer here had requested a continuance prior to the hearing and that continuance was denied. There was no evidence introduced at the hearing before the circuit court to establish that the investigating officer made a "prehearing" continuance request, and more importantly, the administrative record contains evidence to the contrary. On the date that Mr. Sizemore appeared before the hearing examiner and the officer failed to appear, the hearing examiner wrote a Memorandum stating that "Sergeant Foster did not attend the hearing and I am not aware of any continuances that he may have requested or been granted with respect to the scheduled hearing date." (App. at P. 61.) Accordingly, the evidence in the instant matter shows that there is no substantive factual difference between this case and *Hare* save for the fact that Mr. Sizemore was granted two continuances below and Mr. Hare never requested any continuances.

As a matter of law, this case is also identical to *Hare*. This Court held in *Hare*,

[w]hen the investigating officer failed to appear at the administrative revocation hearing in this case, the Commissioner took the position that it had the necessary authority under both the applicable statutes and regulations to grant a continuance of his own accord notwithstanding the fact that a continuance had not been requested by either the licensee or the officer. We agree. Given the statutory duty imposed on the DMV to secure the investigating officer's presence at the hearing once Mr. Hare had requested his attendance, Deputy Martin qualified as an individual essential to the resolution of the revocation proceeding. *See* W. Va. Code § 17C-5A-2(d) (2008); 91 C.S.R. § 1-3-8.3. Barring the licensee's decision to forego his request to have Deputy Martin attend the hearing, the Commissioner was obligated to secure the

officer's attendance at the revocation proceeding. Consequently, the necessary good cause for continuing Mr. Hare's revocation proceeding was present.

227 W. Va. at 341, 708 S.E.2d at 535.

Here, the investigating officer failed to appear at the first hearing held, yet Mr. Sizemore testified at the hearing. Because Mr. Sizemore refused to waive the officer's appearance after requesting the same, the DMV was obligated, by both statute and administrative rule, to continue the hearing and to secure the officer's attendance at the next scheduled administrative hearing. Clearly, this matter is factually and legally on point with *Hare*.

Further, the circuit erred in not considering this Court's decision in *Holland v. Miller*, 230 W. Va. 35, 736 S.E.2d 35 (2012) which held that

[i]n the context of a license revocation proceeding conducted pursuant to West Virginia Code § 17C-5A-2, ascertaining whether the facts support a good cause basis for granting any continuance requires a careful examination of whether the delay was unreasonable or excessive under the circumstances, and any prejudice to the licensee shall be a factor considered in making the determination of whether the delay was unreasonable or excessive.

*Id.* at syllabus point 4. Here, Mr. Sizemore did not allege, and the circuit court did not find, that there was unreasonable or excessive delay.

In deciding to grant Mr. Sizemore's [complaint for] writ of prohibition, the circuit court also failed to consider whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law. Admittedly, the issue of the DMV continuing administrative license revocation hearing in order to secure the investigating officer was oft repeated in the period from 2008-2010. However, as this Court determined in *Hare*, the DMV has a statutory duty to continue the administrative hearing in order to secure the officer's attendance - especially when the driver requests the officer's attendance and refuses to waive his request.

Finally, in the circuit court's haste to reverse Mr. Sizemore's license revocation, it failed to consider the true issue in administrative license revocation proceedings. West Virginia Code § 17C-5A-2(e) (2008) provides: "The principal question at the hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol..." Subsection (f) of that section sets forth the findings necessary to support the initial revocation:

In the case of a hearing in which a person is accused of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or accused of driving a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, ...the commissioner shall make specific findings as to: (1) Whether the investigating law-enforcement officer had **reasonable grounds** to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, ...; (2) whether the person **committed an offense involving driving under the influence of alcohol**, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (3) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

(Emphasis added).

In *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), this Court recognized that it is only the evidence of intoxication and consumption which is truly relevant to the question of whether a person was DUI. There is no basis for rescinding the revocation of Mr. Sizemore's driver's license: he committed the offense of driving under the influence of alcohol.

## VI. CONCLUSION

For the reasons outlined above, the DMV respectfully requests that this Court grant its *Petition for Appeal* and remand this matter to the DMV for further hearing.

Respectfully submitted,  
Steven O. Dale, Acting Commissioner,  
Division of Motor Vehicles,

By Counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL

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

**STEVEN O. DALE, ACTING COMMISSIONER  
OF THE WEST VIRGINIA DIVISION OF MOTOR  
VEHICLES,**

**Petitioner,**

**v.**

**NO. 13-0837**

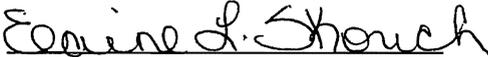
**JIMMIE J. SIZEMORE, II,**

**Respondent.**

**VII. CERTIFICATE OF SERVICE**

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 22<sup>nd</sup> day of January, 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Michael K. Wallace, Esquire  
P. O. Box 8980  
South Charleston, WV 25303

  
Elaine L. Skorich