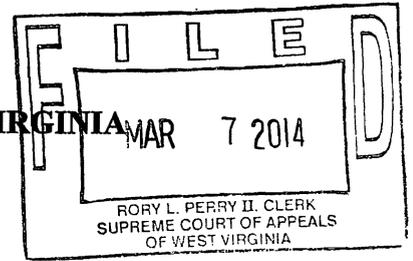


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

**Respondent Below, Petitioner,**

**v.**

**No. 13-0837**

**JIMMIE J. SIZEMORE, II**

**Petitioner Below, Respondent.**

**RESPONSE BRIEF OF RESPONDENT JIMMIE J. SIZEMORE, II**

Respectfully submitted,

JIMMIE J. SIZEMORE, II,

By Counsel,

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**B. Petitioner did not raise the affirmative defenses of insufficiency of process or insufficiency of service of process in his Answer or Motion to Dismiss before the Circuit Court. Instead, he made a general appearance, thus voluntarily waiving any objection to the sufficiency of process or service of process. Petitioner did not raise the process issue at all with the Circuit Court, and cannot raise it for the first time on appeal.**

**C. Petitioner initiated argument regarding the substance and merits of the Writ of Prohibition when Petitioner’s counsel presented arguments at the March 26, 2013 hearing. Only after Petitioner presented his substantive arguments on the merits of the Writ, did the Circuit Court and Respondent address the Writ. During the March 26, 2013 hearing, Petitioner was specifically asked if Petitioner desired more time or opportunity to present anything further through additional submissions or evidence regarding the substance of the Writ of Prohibition. Petitioner specifically advised the Circuit Court that he did not wish to submit anything further on the substance of the Writ of Prohibition. After that offer of more**

**time was rejected by Petitioner, the Circuit Court issued its ruling on the Writ of Prohibition.**

**D. The Circuit Court addressed and ruled on Petitioner’s Motion to Dismiss for Lack of Prosecution and Mootness at the March 26, 2013 hearing. The Circuit Court denied the Motion and stated its reasons for doing so.**

**E. The Circuit Court properly prohibited Petitioner from conducting a second hearing where a properly convened hearing had already taken place and Respondent had given testimony. Conducting a second hearing would be fundamentally unfair, a violation of state law, a violation of due process, and a violation of Petitioner’s own regulations.**

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

**A.** The Circuit Court had jurisdiction over the Writ of Prohibition proceedings pursuant to the Administrative Procedures Act, W.Va. Code §29A-5-1, et seq. A Petition for Writ of Prohibition seeking an extraordinary writ to prohibit and stay action by an administrative agency that would violate the Administrative Procedures Act codified at W.Va. Code §29A-5-1, et seq., does not constitute an “Action” as defined by W.Va. Code §55-17-2. Further, the Circuit Court is granted specific authority to issue a Writ of Prohibition pursuant to W.Va. Code §53-1-1, et. seq. Therefore, W.Va. Code §55-17-3 does not apply to require Respondent to give thirty days advance notice of the Petition for Writ of Prohibition to the chief officer of the government agency and the attorney general.

**B.** Petitioner did not raise the affirmative defenses of insufficiency of process or insufficiency of service of process in his Answer or Motion to Dismiss before the Circuit Court. Instead, he made a general appearance, thus voluntarily waiving any objection to the sufficiency of process or service of process. Petitioner did not raise the process issue at all with the Circuit Court, and cannot raise it for the first time on appeal.

**C.** Petitioner initiated argument regarding the substance and merits of the Writ of Prohibition when Petitioner’s counsel presented arguments at the March 26, 2013 hearing. Only after Petitioner presented his substantive arguments on the merits of the Writ, did the Circuit Court and Respondent address the Writ. During the March 26, 2013 hearing, Petitioner was specifically asked if Petitioner desired more time or opportunity to present anything further through additional submissions or evidence regarding the substance of the Writ of Prohibition. Petitioner specifically advised the Circuit Court that he did not wish to submit anything further on the substance of the Writ of Prohibition. After that offer of more time was rejected by Petitioner, the Circuit Court issued its ruling on the Writ of Prohibition.

**D.** The Circuit Court addressed and ruled on Petitioner’s Motion to Dismiss for Lack of Prosecution and Mootness at the March 26, 2013 hearing. The Circuit Court denied the Motion and stated its reasons for doing so.

**E.** The Circuit Court properly prohibited Petitioner from conducting a second hearing where a properly convened hearing had already taken place and Respondent had given testimony. Conducting a second hearing would be fundamentally unfair, a violation of state law, a violation of due process, and a violation of Petitioner’s own regulations.

## II. STATEMENT OF THE CASE

Petitioner failed to outline the crucial undisputed facts which distinguish this case from the *Hare* decision. Prior to the August 5, 2010 license revocation hearing, the arresting officer sought a continuance of the hearing because he had a pre-planned hunting trip. Jimmie J. Sizemore, II agreed to the continuance but the Commissioner's office **refused** to agree to the continuance. The hearing proceeded as scheduled, Jimmie J. Sizemore, II and his counsel appeared, the hearing examiner appeared. No one from the State appeared. The arresting officer did not appear. The State provided no explanation for the failure to appear at the hearing it refused to continue. Mr. Sizemore testified. Mr. Sizemore asked for a final order. The Commissioner refused to issue an order. Thereafter, the state scheduled a second hearing on the matter in violation of its own procedures. Mr. Sizemore sought a Writ to avoid this injustice.

The following allegations were asserted in support of the Writ of Prohibition (App. P. 47-55) and Respondent either admits or does not dispute (App. P.35-41) all of the following material facts:

1. On February 24, 2009, Jimmie J. Sizemore, II was arrested for first offense driving under the influence of alcohol by Sergeant R. L. Foster of the Nitro Police Department. A Statement of Arresting Officer was timely forwarded to the Division of Motor Vehicles (hereinafter "DMV").
2. Consequently, the DMV issued an initial order of revocation informing Mr. Sizemore that his license would be revoked in the future unless he timely filed a request for an administrative hearing.
3. Mr. Sizemore timely and properly requested an administrative hearing pursuant to

*W.Va. Code §17C-5A-2(d)*. Consequently, the initial order of revocation was stayed.

4. An administrative hearing was scheduled for August 5, 2010 by the DMV.

5. Prior to the hearing, a subpoena was issued and served by the DMV commanding the arresting officer to be present at the administrative hearing on August 5, 2010 at 11:30 a.m. at the DMV's office at the Kanawha Mall.

6. Upon receipt of the subpoena, the arresting officer sought a continuance of the hearing from the Commissioner because the arresting officer had prior plans to be out of town on the date of the hearing.

7. The arresting officer contacted counsel for Mr. Sizemore to inquire if Mr. Sizemore would consent to the continuance sought by the arresting officer. Mr. Sizemore consented to the continuance requested by the arresting officer.

8. Counsel for Mr. Sizemore contacted the Commissioner's office and advised that Mr. Sizemore had no objection to the hearing continuance requested by the arresting officer.

9. Despite the continuance request and consent of Mr. Sizemore to the motion for continuance, the Commissioner's office **denied** the arresting officer's request for a continuance.

10. Mr. Sizemore and his counsel appeared for the administrative hearing scheduled on August 5, 2010.

11. On August 5, 2010, an administrative hearing took place. Mr. Sizemore, his Counsel and the Hearing Examiner each appeared. Neither the arresting officer nor any witness or representative for the State appeared.

12. Based on the failure of the arresting officer, or any party for the State, to appear at that hearing, the Petitioner moved for dismissal of the revocation and requested that Petitioner be issued a full and valid license.

13. The Hearing Examiner refused to rule on Petitioner's motion, and instead declared that the matter would be brought to the Commissioner's attention.

14. The arresting officer went on a hunting trip and did not attend the administrative hearing.

15. Absent any motion or action from the State, the Commissioner re-scheduled the administrative hearing for March 31, 2011.

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

The DMV is required to conduct all hearings in an impartial manner. The procedural rules adopted and implemented by the Commissioner to ensure impartiality in the postponement or continuance of administrative hearings is set forth within *W.Va. CSR §91-1-3.7*. Pursuant to that regulation, postponements and continuances "...shall be enforced and applied to all parties equally."

If a driver fails to appear at a properly convened hearing, and prior thereto has failed to obtain a continuance or postponement of the hearing, the Commissioner's initial order of revocation is upheld against the driver. *W.Va. CSR §91-1-3.7.1*. Conversely, if the arresting officer fails to appear, and the driver appears, as occurred in Petitioner's case, the Division cannot revoke or suspend the driver's license based solely upon the arresting officer's affidavit or other documentary evidence.

*W.Va. CSR §91-1-3.7*. The DMV may not apply its

procedural rules for continuance and postponement in an unequal and disparate manner to the disadvantage of the driver and to the benefit of the DMV.

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

Respondent believes the issues presented on appeal can be decided on the briefs without the necessity of oral argument. In the event the appeal is scheduled for oral argument, Respondent requests the opportunity to respond to all issues raised by Petitioner.

## V. ARGUMENT

- A. **The Circuit Court had jurisdiction over the Writ of Prohibition proceedings pursuant to the Administrative Procedures Act, W.Va. Code §29A-5-1, et seq. A Petition for Writ of Prohibition seeking an extraordinary writ to prohibit and stay action by an administrative agency that would violate the Administrative Procedures Act codified at W.Va. Code §29A-5-1, et.seq., does not constitute an “Action” as defined by W.Va. Code §55-17-2. Further, the Circuit Court is granted specific authority to issue a Writ of Prohibition pursuant to W.Va. Code §53-1-1, et. seq. Therefore, W.Va. Code §55-17-3 does not apply to require Respondent to give thirty days advance notice of the Petition for Writ of Prohibition to the chief officer of the government agency and the attorney general.**

Petitioner relies upon *W.Va. Code* §55-17-3 as a basis for his assertion that the Circuit Court lacked jurisdiction because the attorney general was not provided notice 30 days prior to the filing of the Petition for Writ of Prohibition. That statute does not apply to proceedings where a statute authorizes a specific procedure for appeal or method for obtaining relief from an administrative ruling or proceeding. *W.Va. Code* §55-17-2 sets forth the definitions applicable to the provisions of *W.Va. Code* §55-17-3. *W.Va. Code* §55-17-2(1) defines “Actions” which require pre-suit notice to the attorney general as follows:

(1) “Action” means 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. Emphasis added.

*W.Va. Code* §53-1-1 and §53-1-2 specifically authorize that the writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power when the inferior court exceeds its legitimate powers. Because this statute authorizes a specific procedure and vests the circuit court with authority to grant relief from the rulings and proceedings of an administrative agency, this proceeding does not constitute an action subject to the 30 day pre-suit notice

requirements of *W.Va. Code* §55-17-3.

Additionally, administrative license revocation hearings fall within the purview of the Administrative Procedures Act, *W.Va. Code* §29A-5-1, et seq. and *W.Va. Code* §17C-5A-1, et seq. The Administrative Procedures Act at *W.Va. Code* §29A-5-4 specifically grants authority for judicial review by circuit courts over state agency decisions, including decisions of Petitioner. Additionally, *W. Va. Code* §17C-5A-2 provides for circuit court review of the Petitioner's conduct in complying with statutes, rules and regulations applicable to the revocation of licenses. Because this case was initiated in circuit court pursuant to statutory provisions that authorizes the circuit court to grant relief from Petitioner's rulings and decisions, this case falls within the exception in the definition of "Action". As this case is not an "action" as defined by *W.Va. Code* §55-17-2, there was no obligation to provide the 30 day pre-suit notice outlined in *W.Va. Code* §55-17-3 as that statute does not apply to this case.

Additionally, Respondent denies that his request in the Prayer for Relief which included a request for attorney's fees and costs, constitutes a potential "judgment" as defined by *W.Va. Code* §55-17-2(3). To the extent it could be construed in that manner, Respondent withdraws that request. The withdrawal of that request renders the state's potential exposure to a judgment that would require or otherwise mandate an increase in the expenditures of Petitioner, moot. Respondent also points out that the circuit court's Order does not award any attorney's fees and costs, or any other monetary amount against Petitioner. Thus, without potential exposure to a "judgment" as defined by *W.Va. Code* §55-17-2(3), there is no obligation to provide the 30 day pre-suit notice set forth within *W.Va. Code* §55-17-3.

**B. Petitioner did not raise the affirmative defenses of insufficiency of process or insufficiency of service of process in his Answer or Motion to Dismiss before the Circuit Court. Instead, he made a general appearance, thus voluntarily waiving any**

**any objection to the sufficiency of process or service of process. Petitioner did not raise the process issue at all with the Circuit Court, and cannot raise it for the first time on appeal.**

Petitioner asserts the circuit court did not have jurisdiction to rule because no summons was issued with the original Petition for Writ of Prohibition. Respondent denies that a Summons was required to be issued with the Petition for Writ of Prohibition because the Rule issued performs the function of process. See, *W.Va. Code* §53-1-5.

To the extent a Summons was required, Petitioner voluntarily waived the sufficiency of process or sufficiency of service of process by failing to raise the issue before the Circuit Court. Notably, *Rule 12(b)(4) and (5) of the West Virginia Rules of Civil Procedure* required Petitioner to assert its defenses of insufficiency of process or insufficiency of service of process in its responsive pleading or by motion. *Rule 12 (h)(1)* specifically provides that “A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion ..., or (B) if it is neither made by motion under this rule nor included in a responsive pleading... “. Petitioner filed both an Answer (App. At P. 35-41) and a Motion to Dismiss (App. 22-34) but did not raise either the affirmative defense of insufficiency of process or insufficiency of service of process in either document.

Additionally, Petitioner made a general voluntary appearance before the Circuit Court, instead of a special appearance to contest the sufficiency of process or sufficiency of service of process. A general appearance before a court without objection to any defect in process or the service of process is deemed a voluntary appearance before the court and a waiver of those defenses. See *F.C. Welch Co. v. Barrett Machine Co.*, 106 W.Va. 138, 145 S.E. 40 (1928). “The object of process is to cause a defendant to appear in court; and when a defendant

has made a general appearance the function of process has been accomplished and he can not voluntarily appear without objection and waive his right to answer a petition and then take advantage of the absence of the issuance of process against him.” *Manypenny v. Graham*, 149 W.Va. 56, 60-61, 138 S.E.2d 724, 728 (1964). “The object of process is to secure the appearance of the defendants in court. When that is done by general appearance, the function of process is accomplished.” *Id.*, quoting, *Root-Tea-Na-Herb Company v. Rightmire*, 48 W.Va. 222, 36 S.E. 369 (1900).

Even after the written pleading stage, Petitioner still did not raise the issue of process or insufficiency of service of process during the March 26, 2013 hearing. (App. Attachment 9, Transcript of Motion to Dismiss Hearing). Having never raised the issue in the circuit court, Petitioner may not raise this issue for the first time, on appeal before this Court.

**C. Petitioner initiated argument regarding the substance and merits of the Writ of Prohibition when Petitioner’s counsel presented arguments at the March 26, 2013 hearing. Only after Petitioner presented his substantive arguments on the merits of the Writ, did the Circuit Court and Respondent address the Writ. During the March 26, 2013 hearing, Petitioner was specifically asked if Petitioner desired more time or opportunity to present anything further through additional submissions or evidence regarding the substance of the Writ of Prohibition. Petitioner specifically advised the Circuit Court that he did not wish to submit anything further on the substance of the Writ of Prohibition. After that offer of more time was rejected by Petitioner, the Circuit Court issued its ruling on the Writ of Prohibition.**

The March 26, 2013 hearing was convened on Petitioner’s Motion to Dismiss. Petitioner was invited by the Court to proceed with the presentation of the Motion to Dismiss. Petitioner’s counsel began argument and immediately turned to arguing the merits of Respondent’s Writ of Prohibition. (App. Attachment 9, Transcript of Motion to Dismiss Hearing, P.2-7) In that regard, Petitioner’s counsel immediately turned to arguing the holding in the *Hare* case and its application to the facts of Respondent’s case. Because Petitioner’s oral

argument focused almost entirely on the Hare case, when Petitioner was finished presenting, the Court made inquiry of Respondent's counsel regarding the significance of the *Hare* decision. (App. Attachment 9, Transcript of Motion to Dismiss Hearing, P.8). The focus of the Court was clearly directed by Petitioner to the substantive issues set forth in the Writ of Prohibition. The focus and argument by Petitioner's counsel caused the Court to hear the substance of the Writ and Respondent's counsel to answer the Court's inquiries on those matters. (App. Attachment 9, Transcript of Motion to Dismiss Hearing, P.8-12.)

Once the Court had provided both parties great latitude in presenting all the argument they desired to present, the Court specifically asked the parties if they wished to submit anything further on the Writ and if they required additional time. Petitioner's counsel said no. (App. Attachment 9, Transcript of Motion to Dismiss Hearing, P. 15) The hearing transcript provides in pertinent part as follows:

Court: The only issue I need to resolve is whether or not anyone wishes to send anything further as far as the substance of the writ of prohibition.

I don't know if you do, how much time you need or how you want to handle that?

Ms. Skorich,: I don't believe so, Your honor.

(App. Attachment 9, Transcript of Motion to Dismiss Hearing, P. 15).

Notably, Petitioner made absolutely no objection to the Court proceeding with ruling on the Writ of Prohibition. Petitioner voiced no objection to proceeding with the Court's ruling because it had not been noticed for hearing. Petitioner did not ask for the opportunity to present additional written submission, present additional evidence, or reconvene at a later scheduled hearing. Instead, Petitioner declined the Court's specific invitation to take more time

or submit more evidence or argument. Petitioner should not be permitted to raise some lack of opportunity to present argument or evidence on appeal when he specifically declined the Circuit Court's invitation to take more time or submit more evidence below.

**D. The Circuit Court addressed and ruled on Petitioner's Motion to Dismiss for Lack of Prosecution and Mootness at the March 26, 2013 hearing. The Circuit Court denied the Motion and stated its reasons for doing so.**

Rule 41(b) of the *West Virginia Rules of Civil Procedure* does not compel dismissal of cases, instead, it grants the Circuit Court discretion to dismiss the case. Circuit Courts have been warned to use this discretion in only flagrant cases as it is a harsh sanction. *Howerton v. Tri-State Salvage, Inc.* 210 W.Va. 233, 557 S.E.2d 287 (2001). Even in the *Caruso* case, so heavily relied upon by Petitioner, this Court recognized what a harsh sanction dismissal for lack of prosecution is, and in doing so, the Court reversed the Rule 41(b) dismissal. See *Caruso v. Pearce*, 223 W.Va. 554, 678 S.E.2d 50 (2009). The Circuit Court below, exercised its discretion not to issue a Rule 41(d) dismissal and specifically stated its ruling that this case did not rise to the level of a dismissal for lack of prosecution. (App. Attachment 9, Transcript of Motion to Dismiss Hearing, P.14-15)

The Court further concluded that the *Hare* decision did not render the Writ of Prohibition moot as the facts of Respondent's case are uniquely and distinctly different from those presented in *Miller v. Hare*, 227 W.Va. 337, 708 S.E.2d 531 (2011). Once again, the Court articulated its reasoning for the distinction and the denial of the Motion to Dismiss for Mootness on the record at the March 26, 2013 hearing. (App. Attachment 9, Transcript of Motion to Dismiss Hearing, P.14). The Court further articulated the distinctions in the *Hare* decision within the Final Order entered October 8, 2013. (App. P. 2-9) Thus, Petitioner received received a full hearing and ruling on its Motion to Dismiss below.

When the Final Order was submitted to the Court regarding the Writ of Prohibition, Petitioner made no objection to the Order and did not raise the issue that any statement regarding the Motion to Dismiss being omitted from that Order. Petitioner also did not submit its own Order reflecting the Court's ruling on the Motion to Dismiss. Finally, Petitioner never asked Respondent's counsel or the Court to amend the Final Order to reflect the Motion to Dismiss rulings. Once again, having failed to raise these issues with the circuit court below, this issue is waived.

**E. The Circuit Court properly prohibited Petitioner from conducting a second hearing where a properly convened hearing had already taken place and Respondent had given testimony. Conducting a second hearing would be fundamentally unfair, a violation of state law, a violation of due process, and a violation of Petitioner's own regulations.**

The Circuit Court properly reviewed Mr. Sizemore's writ for extraordinary relief to determine whether the lower tribunal had exceeded its legitimate powers. In doing so, the Circuit Court properly exercised its authority under *W.Va. Code* §53-1-1. The Circuit Court properly considered the five factors set forth in *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). (App. P. 2-9) Those five factors served as general guidelines to assist the Circuit Court in determining whether a discretionary writ of prohibition should be issued. Pursuant to the *Hoover* decision, all five factors need not be satisfied, but the existence of clear error in the lower tribunal's order, the third factor, should be given substantial consideration and weight. The five factors include: "(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 manifests persistent disregard for either the procedural or substantive law; and (5)

whether the lower tribunal's order raises new and important problems or issues of law of first impression". Syllabus Point 4 *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). (1996).

The Circuit Court determined that the lower tribunal had exceeded its legitimate powers by reconvening a second hearing when a properly convened hearing had already taken place, Mr. Sizemore appeared with counsel and gave testimony, and for no reason or cause, the State failed to appear through a representative or call witnesses against Mr. Sizemore. The lower tribunal is not allowed to unequally or disparately apply its procedural rules to the benefit of the DMV and the detriment of the public appearing against it. (App. 2-9)

The Circuit Court's Final Order should be upheld as a proper use of its authority and within its jurisdiction to act to prevent irreparable harm to Mr. Sizemore.

Administrative license revocation hearings fall within the purview of the Administrative Procedures Act, *W.Va. Code* §29A-5-1 *et. seq* and *W.Va. Code* §17C-5A-1 *et. seq*. The DMV is required to conduct all hearings in an impartial manner. The procedural rules adopted and implemented by the Commissioner to ensure impartiality in the postponement or continuance of administrative hearings is set forth within *W.Va. CSR* §91-1-3.7. Pursuant to that regulation, postponements and continuances "...shall be enforced and applied to all parties equally." If a driver fails to appear at a properly convened hearing, and prior thereto has failed to obtain a continuance or postponement of the hearing, the Commissioner's initial order of revocation is upheld against the driver. *W.Va. CSR* §91-1-3.7.1. Conversely, if the arresting officer officer fails to appear, and the driver appears, as occurred in Petitioner's case, the Division cannot revoke or suspend the driver's license based solely upon the arresting officer's affidavit or other documentary evidence. *W.Va. CSR* §91-1-3.7. The DMV may not apply its procedural rules

rules for continuance and postponement in an unequal and disparate manner to the disadvantage of of the driver and to the benefit of the DMV.

The regulations allow each party the equal opportunity to request a continuance in writing, based on good cause, at least five days prior to the hearing. Alternatively, the parties can file an emergency continuance request in writing, which must be received no later than five days following the hearing date. *W.Va. CSR §91-1-3.8*. There is no dispute that the August 5, 2010 hearing was properly noticed and convened. Further, there is no dispute that no continuance or postponement was sought on behalf of the state, for good cause, or on an emergency basis prior to or within five days after the August 5, 2010 hearing. Finally, there is no dispute that Mr. Sizemore appeared for the August 5, 2010 hearing but the arresting officer and the State did not appear. No regulations or procedural rules allow the Commissioner to conduct a second hearing or reschedule a properly convened and held hearing regarding driving privileges. Allowing the Commissioner to arbitrarily convene a second hearing after a properly convened hearing has been held, without compliance with the regulations established for hearing continuances and postponements, would render those regulations meaningless.

The Commissioner may not engage in one-sided application of the procedural rules and regulations to favor itself and the State to the detriment of Mr. Sizemore. The West Virginia Supreme Court of Appeals has strictly forbidden such partial, disparate, and non-neutral application of rules and regulations. In that regard, the Supreme Court has stated “especially because because the important property interest of a driver’s license is at stake, the DMV must conduct license suspension hearings in a fashion that assures the due process right of licensees to a tribunal tribunal where both sides are able to fully and fairly present their evidence before a neutral hearing hearing examiner who does not act to favor or advance the cause of either side.” *David v.*

*Commissioner of the W.Va. DMV*, 219 W.Va. 493, 637 S.E.2d 591 (2006). The Commissioner's decision to arbitrarily schedule a second hearing after a properly convened hearing had already occurred, in violation of its own procedures, is so one-sided and patently unfair that it renders that decision clearly erroneous.

The *Miller v. Hare*, 227 W.Va. 337, 708 S.E.2d 531 (2011) decision is significantly distinguishable from the facts presented in this case because the arresting officer in Mr. Sizemore's case sought a pre-hearing continuance of the license revocation hearing. Mr. Sizemore consented to the continuance, but the Commissioner denied the arresting officer's 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. While the Commissioner does have the authority to continue a hearing on its own motion, it may not exercise its authority to deny a pre-hearing continuance request and then, post hearing, schedule a second hearing when the first hearing does not proceed in a manner that benefits the Commissioner. Such partial application of the procedural rules violated Mr. Sizemore's due process rights.

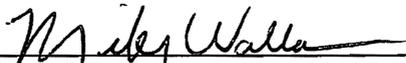
## VI. CONCLUSION

The DMV may not apply its procedural rules for continuance and postponement in an unequal and disparate manner to the disadvantage of the driver and to the benefit of the DMV. Where it takes actions that are so one-sided and patently unfair to the rights of drivers, such as Mr. Sizemore, the circuit court's Writ of Prohibition should stand to protect the due process rights of Respondent.

**WHEREFORE**, the Respondent, Jimmie J. Sizemore, II, respectfully requests that this Court dismiss Petitioner's, Steven O. Dale, Acting Commissioner of the West Virginia Division of Motor Vehicles, notice of appeal, and for such other and further relief as this Honorable Court deems appropriate.

**Jimmie J. Sizemore, II,**

**By Counsel**

  
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(304)926-6650  
*Counsel for Respondent*

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

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

**Respondent Below, Petitioner,**

**v.**

**No. 13-0837**

**JIMMIE J. SIZEMORE, II**

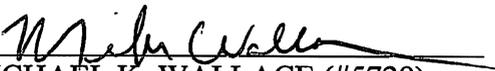
**Petitioner Below, Respondent.**

**CERTIFICATE OF SERVICE**

I, Michael K. Wallace, counsel for Respondent-Petitioner, do hereby certify that I have this 7th day of March, 2014, served the foregoing **"RESPONSE BRIEF OF RESPONDENT JIMMIE J. SIZEMORE, II"** upon the Petitioner-Respondent by placing the same in the United States Mail **via certified mail** addressed to Petitioner-Respondent's counsel as follows:

Elaine Skorich, Esq.  
WV Attorney General's Office  
P.O. Box 17200  
Charleston, WV 25317

Steven O. Dale, Acting Commissioner  
WV Division of Motor Vehicles  
P.O. Box 17300  
Charleston, WV 25317

  
MICHAEL K. WALLACE (#5729)