IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

In re Petition of Kenneth D. Donley for Judicial Review of Administrative Decision Made by Roger Pritt, Commissioner, Department of Transportation, Division of Motor Vehicles, Suspending the License of Kenneth D. Donley to Operate a Motor Vehicle.

Case No.: 03-C-496-F

BRIEF IN SUPPORT OF PETITION

COMES NOW, Kenneth D. Donley, by Counsel, Kenneth E. Chittum and Patricia Kinder Beavers, and brings forth this Brief in Support of Petitioner's assertions pursuant to the Order of this Honorable Court. The Petitioner, Kenneth D. Donley, prays that this Honorable Court overturn the ruling of the Circuit Court of Mercer County, West Virginia and reinstate his privilege to operate a motor vehicle upon the roads of West Virginia and for attorney fees and costs and to grant any other relief that is permitted by law and that this Court sees as fair and just.

Respectfully Submitted,
KENNETH D. DONLEY,
By Counsel.

Kenneth E. Chittum/By PKB
Kenneth E. Chittum, Esq.

Patricia Kinder Beavers
Patricia Kinder Beavers, Esq.

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OF WEST VIRGINIA

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TABLE OF AUTHORITIES

W. Va. Code §17C-5A-2

W. Va. Code §17C-51-2(b)

Const. Art. 3 §§10, 17

Allen v. State, Human Rights Com'n. 1984, 325 S.E. 2d 99, 174 W.Va. 139.

State v. Foddrell, 171 W.Va. 54, 297 S.E.2d 829 (1982).

State v. Carrico, 427 S.E. 2d 474, 189 W.Va. 40.

TABLE OF EXHIBITS

Exhibit 1	W. Va. Code §17C-5A-2
Exhibit 2	Order of Revocation from DMV- December 11, 2001
Exhibit 3	Request for Identity Hearing
Exhibit 4	September 9, 2003 Final Order
Exhibit 5	May 4, 2004, Motion for Judgment
Exhibit 6	June 29, 2004, Response to Motion for Judgment
Exhibit 7	June 30, 2004 Motion to Strike
Exhibit 8	July 21, 2004 Memorandum of Law
Exhibit 9	October 26, 2004, Order from Mercer County Court

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BRIEF SUBMITTED IN SUPPORT OF THE APPEAL OF KENNETH D. DONLEY

Comes now the Petitioner, Kenneth D. Donley, by and through his counsel, Kenneth E. Chittum and Patricia Kinder Beavers, and submits this brief in support of his appeal from the Circuit Court of Mercer County, West Virginia wherein an Order granted in favor of the Respondent, Department of Transportation, Division of Motor Vehicles, Suspending the License of Kenneth D. Donley to Operate a Motor Vehicle, finding that the Department of Motor Vehicles technically complied with the statute of limitations requirements as set forth in West Virginia Code §17C-5A-2 (Exhibit 1). The Petitioner, Kenneth D. Donley, respectfully requests this Honorable Court to reverse the Circuit Court of Mercer County, West Virginia and to find that the statute of limitations had run and reinstate Petitioner's drivers license and award him attorneys fees and costs and such other relief this Honorable Court deems appropriate.

FACTS

On June 18, 1998, Petitioner Kenneth D. Donley pled guilty to second offense driving under the influence of alcohol. The Commissioner showed the Petitioner pled guilty on April 18, 1998 (Exhibit 2). On March 6, 2001, the Division of Motor Vehicles received a transcript of the Judgment of Conviction from the Magistrate Court Of Mercer County, West Virginia, a full *two years ten months and sixteen days* **after** his entering a guilty plea. On December 11, 2001, an Order of Revocation was entered. On December 18, 2001, an identity hearing was requested by the Petitioner (Exhibit 3). On January 15, 2002, the Division of Motor Vehicles entered an Order revoking Petitioner's driving privilege, a full *three years eight months and twenty eight days* **after** his entering a guilty plea. On March 4, 2002, the Commissioner sent a continuance to the Petitioner stating the rationale for not holding the identity hearing as scheduled was that no commissioner was available in the area to hold the hearing as scheduled on March 25, 2002. On September 9, 2002, an identity hearing was held wherein the Commissioner upheld the revocation of the Petitioner's driver's license. The identity hearing was held *eight months and nineteen days* **after** the request for the hearing on December 18, 2001. The Final Order revoking the

privilege to drive and upholding the lower court's decision was entered on September 9, 2003, *a full year* **after** the hearing (Exhibit 4).

On April 19, 2004, Petitioner and his counsel appeared before the Honorable Judge Knight, who was substituting for the Honorable Judge Frazier, in the Circuit Court of Mercer County, West Virginia after he filed an appeal from the Commissioner's ruling. Judge Knight heard arguments from Petitioner's counsel and requested a brief on the issues to be filed by April 29, 2004, from the Prosecution and the brief for the Petitioner being due two weeks thereafter.

On May 4, 2004, Petitioner, by and through his counsel, filed a Motion for Judgment **after the Prosecution failed to file the brief** as requested by the Court (Exhibit 5).

On June 29, 2004, the Prosecution filed a brief on the issues that was due on April 29, 2004 more than *sixty days* **after the due date** (Exhibit 6). Petitioner, by and through his counsel, filed a Motion to Strike the brief submitted by the Prosecution as being untimely filed on July 1, 2004 (Exhibit 7).

On July 9, 2004, the Petitioner and his counsel, appeared for a hearing on the Motion to Strike the Prosecutor's Brief as Being Untimely Filed and the Motion for Judgment on the Merits and a final determination of the

matter before the Honorable Judge John R. Frazier in the Circuit Court of Mercer County, West Virginia. At that time, Judge Frazier requested the parties to submit a brief on the due process aspects of the case and submit them to the Court. Judge Frazier continued the matter until September 23, 2004.

On July 21, 2004, Petitioner, by and through his counsel, filed a brief with the Court on the due process aspects of the case per the Court's request (Exhibit 8). **The Prosecution did not file a brief on the due process issues**.

On October 27, 2004, the Honorable Judge John R. Frazier rendered a decision upholding the Commissioner's decision to revoke the Petitioner's Driver's License and finding that technically the Commissioner complied with the statute of limitations and due process requirements (Exhibit 9).

ARGUMENT AND DISCUSSION OF LAW

The Respondent's argued, "...The commissioner may postpone or continue any hearing on the commissioner's own motion, or upon application for each person for good cause shown." West Virginia Code §17C-51-2(b). The Petitioner recognizes that he did receive a continuance in the matter on March 4, 2002, but the time delay between the entering of the guilty plea on June 18, 1998 and the Magistrate Court's sending the

transcript to the Division of Motor Vehicles on March 6, 2001 was more than the required one hundred eighty days statute of limitations wherein the Commissioner did not hold any type of hearing nor notify the Petitioner that his drivers license was revoked. A time lapse of over two years and eight months is clearly beyond the statute of limitations. **There was no testimony or reason provided by anyone why a delay of this magnitude occurred.**

The Petitioner contends that the Commissioner erred by finding that the hearing was held within the, "one hundred eighty days after the date upon which the commissioner received the timely written request therefore, unless there is a postponement or continuance." West Virginia Code §17C-51-2(b) (Exhibit 1). The failure of the Magistrate Court to provide the transcript of the Judgment of Conviction from the Magistrate Court Of Mercer County, West Virginia, a full *two years ten months and sixteen days* **after** his entering a guilty plea is clearly beyond the required one hundred eighty days statute of limitations.

The failure of the Division of Motor Vehicles to timely notify Petitioner of the suspension of his drivers license until December 11, 2001, when an Order of Revocation was entered more than *three years five months and twenty four days* **after** his guilty plea on June 18, 1998, is clearly beyond the required one hundred eighty days statute of limitations.

An identity hearing was held *eight months and nineteen days* **after** the request for the hearing on December 18, 2001 which is clearly beyond the one hundred eighty days statute of limitations.

The Final Order revoking the privilege to drive and upholding the lower court's decision was entered on September 9, 2003, *a full year* **after** the identity hearing and is clearly beyond the one hundred eighty days statute of limitations.

On April 19, 2004, Petitioner and his counsel appeared before the Honorable Judge Knight, who was substituting for the Honorable Judge Frazier, in the Circuit Court of Mercer County, West Virginia after he filed an appeal from the Commissioner's ruling. Judge Knight heard arguments from Petitioner's counsel and requested a brief on the issues **to be filed by April 29, 2004, from the Prosecution** and the brief for the Petitioner being due two weeks thereafter.

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On July 21, 2004, Petitioner, by and through his counsel, filed a brief with the Court on the due process aspects of the case per the Court's request. **The Prosecution did not file a brief on the due process issues**.

On October 27, 2004, the Honorable Judge John R. Frazier rendered a decision upholding the Commissioner's decision to revoke the Petitioner's Driver's License and finding that technically the Commissioner complied with the statute of limitations and due process requirements more than **five months four days** from the commencement of the appeal in the Circuit Court and more than **six years** after the commence of any type of proceeding in this matter (Exhibit 9).

Mr. Donley's due process rights were violated. "Under the constitutional provisions providing that "No person shall be deprive of life, liberty, or property without due process of law ***, " "and under the constitutional provision that "justice shall be administered without ***delay," administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted." Const. Art. 3 §§10,17. Allen v. State, Human Rights Com'n., 1984, 325 S.E.2d 99, 174 W.Va. 139. The Division of Motor Vehicles is an administrative agency of the State of West Virginia performing quasi-judicial functions by suspending the Petitioner's privilege to drive a motor vehicle. The Division of Motor Vehicles has an affirmative duty to dispose promptly of matters properly submitted which it did not do in the case at bar. Petitioner, Kenneth D. Donley, suffered undue time delays and did not at any time waive his right to a speedy trial. The Division of Motor Vehicles and the Magistrate Court clearly and irrequivocably violated the affirmative duty to dispose of this matter in a timely matter thus violating Mr. Donley's due process rights.

The Court previously provided, "A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of delay; (2) the reasons for the

delay; (3) the ...[petitioner's] assertion of his rights; and (4) prejudice to the ...[petitioner]. The balancing of the conduct of the ...[petitioner] against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the ... [petitioner] has been denied a speedy trial." Syl. Pt. 2, State v. Foddrell, 171 W.Va. 54, 297 S.E.2d 829 (1982). State v. Carrico, 427 S.E.2d 474, 189 W.Va. 40.

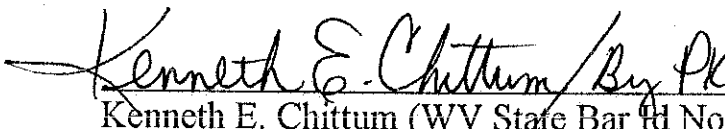
The delays set forth above clearly document the lengthy and unnecessary delays in this matter. The Magistrate Court never articulated a reason for the delay from the time of the entering of the guilty plea until the time that the Division of Motor Vehicles received the transcript. The Division of Motor Vehicles only articulated one reason for the undue delay that included the unavailability of a Commissioner to come and hear the matter. However, the Petitioner suffered from the time delay from March 4, 2002 continuance until the hearing on September 9, 2002 for a total of six months and five days which is well beyond the one hundred eighty days statute of limitations. The petitioner did assert his rights by appealing the matter to the Circuit Court of Mercer County, West Virginia within the allowable time for the appeal. The Petitioner was prejudiced by the actions of the Division of Motor Vehicles because he has been without a license to

drive an automobile since his license was revoked by the DMV. Then to compound the matters, the Circuit Court gave an extension of two weeks to the Prosecution to file a brief, (but failed to do so until eight (8) weeks after the deadline), on the underlying Petition. There have been additional delays in this matter as the Court requested the parties to file a brief on the Constitutional issues implicated and then to return for yet another hearing on the matter.

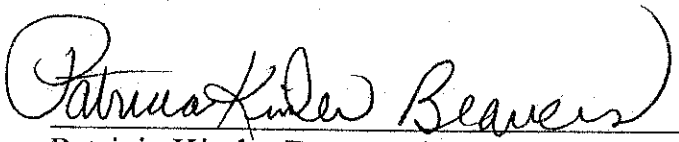
Therefore, the ruling of the Trial Court should be reversed and the Court should Order that the Commissioner failed to comply with the statutory one hundred eighty day hearing requirement as set forth by West Virginia Code §17C-51-2(b) and that the due process requirements were not complied with and reinstate Kenneth D. Donley's drivers license.

WHEREFORE, Petitioner, Kenneth D. Donley, prays that this Court will reverse the judgment of the Trial Court that the Commissioner technically complied with the statutory one hundred eighty day hearing requirements set forth by West Virginia Code §17C-51-2(b) and that the due process requirements were not complied with and reinstate Kenneth D. Donley's drivers license. The Petitioner asks this Court for attorney fees and costs and to grant any other relief that is permitted by the law and that this Court sees as fair and just.

RESPECTFULLY SUBMITTED,
Kenneth D. Donley,
By Counsel.



Kenneth E. Chittum (WV State Bar Id No. 6168)
Attorney At Law



Patricia Kinder Beavers (WV State Bar Id No. 9488)
Attorney At Law

P.O. Box 650
3000 Cumberland Road
Bluefield, WV 24701
(304) 327-2550

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CERTIFICATE OF SERVICE

I, Kenneth E. Chittum, counsel for the Plaintiff, in the foregoing action, hereby certify that I have this day served a true copy of the **BRIEF SUBMITTED IN SUPPORT OF THE APPEAL OF KENNETH D. DONLEY** upon John Bonham, Esq., by placing same in the United States Mail, postage prepaid, addressed as follows:

Mr. John Bonham, Esq.
West Virginia Attorney General's Office
State Capitol
1900 Kanawha Blvd., E.
Charleston, WV 25304

Dated this the 1st day of March, 2005.

Kenneth E. Chittum By PKB
Kenneth E. Chittum