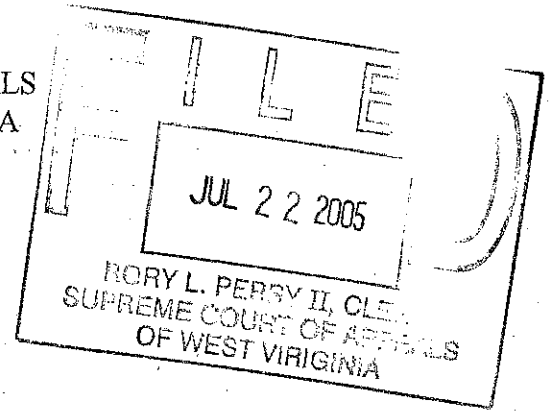


IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA



HAROLD PETRY, II,

Petitioner,

Petition No.: 051134
Civil Action No. Below: 05-MISC-50
(Circuit Court of Kanawha County)

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

Respondent.

AMENDED PETITION FOR APPEAL AND WRIT OF ERROR

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

Carter Zerbe
P. O. Box 3667
Charleston, WV 25336
W. Va. State Bar #4191

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THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER
TRIBUNAL

In this matter, Petitioner, Harold Petry, II, filed a Writ of Prohibition, Mandamus, and Application for Stay in the Circuit Court of Kanawha County seeking to prohibit the Respondent, Commissioner Stump, from holding a hearing on the revocation of Petitioner's driver's license, and requiring him to restore a permanent valid driver's license to him and to stay a hearing by Respondent Stump on the revocation until the matter was resolved in Circuit Court. Without allowing oral argument or an evidentiary hearing, on February 10, 2005, the Honorable Tod Kaufman, Circuit Judge of Kanawha County, summarily denied petition and dismissed it from his docket. (A copy of the order is included in the Appendix as Petitioner's Exhibit "A.")

STATEMENT OF FACTS

1. On November 20, 1998, in Cabell County, the Petitioner, Harold Ray Petry II, was charged with driving under the influence of alcohol by officer Timothy P. Goheen of the Huntington Police Department.
2. Presumably, the officer filed a Statement of Arresting Officer and an order of revocation was issued.¹
3. Petry timely requested a hearing and a hearing was held before Hearing Examiner Larry Mullet on February 16, 1999 at 2:00 p. m. at the office of the Division of Motor Vehicles, 801 Madison Avenue in Huntington. The undersigned attorney represented Petry at the hearing.
4. Testimony was taken from Goheen and Petry in a hearing that lasted several hours.

¹Neither the Statement of Arresting Officer nor the order of revocation was included in the DMV file provided to counsel by the Division of Motor Vehicles in response to the undersigned's request in October 2004. (See below).

Petry submitted photographs in support of his case including photographs of the holding room and intoxilyzer room to demonstrate that the officer could not have had him under constant observation for twenty minutes prior to administering the secondary chemical test to Petry as required by §64-10-7.3(a) of the Department of Health Rules and Regulations. Photographs of the scene were also taken and upon information and belief were also admitted into evidence.

5. At considerable expense, Petry had retained the services of Dr. Hawley Wells as an expert witness. Dr. Wells' deposition was taken and submitted into evidence on or about March 20, 1999.

6. On March 17, 1999 Petry, by the undersigned counsel, submitted Proposed Findings of Fact and Conclusions of Law. (See March 17, 1999 letter from the undersigned attorney to Larry Mullet Hearing Examiner included in the Appendix as Exhibit "B.")

7. On April 23, 2003, the Commissioner revoked Petry's driver's license for six months. The revocation was *not* based on the hearing as no decision had been rendered, but based upon the receipt of a "notice from the clerk of the below-named court that you were convicted of the following offense: DUI, Cabell County Magistrate Court." (A copy of the Order of Revocation is included in the Appendix as Exhibit "C.")

8. Petry did not find out that his driver's license had been revoked until the fall of 2004 when his employer performed a yearly DMV background check on its employees. Upon discovery of the revocation, Petry contacted the Department of Motor Vehicles and informed the Commissioner that the revocation was in error as he had not pled guilty to DUI, that the DUI charges had been dismissed. The Commissioner refused to dismiss the order of revocation so Petry contacted the undersigned attorney.

9. On October 13, 2004, the undersigned requested a copy of Petry's complete file.
10. On October 19, 2004, the undersigned attorney provided the Commissioner with documentation demonstrating that Petry had not pled guilty to DUI but to reckless driving, and requested that Petry's file be corrected, that his driving privileges be immediately restored. (A copy of the undersigned's letter to Ed Janco, Manager of Legal Services, with attachment is included in the Appendix as Petitioner's Exhibit "D.")
11. On November 1, 2004, the undersigned received a fax from the Legal Section of the Division of Motor Vehicles stating that "Based upon receipt of the Corrected Abstract of Judgment in this matter, the Division has stayed the order of revocation in the matter." (A copy of the fax is included in the Appendix as Petitioner's Exhibit "E.")
12. Upon being informed by Janco that the Commissioner was considering holding a hearing in this matter, the undersigned informed Janco that a hearing had already been held. Janco requested documentation of that fact.
13. On December 23, 2004, the undersigned provided Janco with a copy of a cover letter demonstrating that the undersigned had filed Proposed Findings and Conclusions of Law on March 17, 1999. Janco indicated that the cover letter was sufficient documentation to establish that a hearing had been held.
14. Nevertheless, on January 4, 2005, the Commissioner issued a notice of hearing for March 7, 2005 at 9:30 a. m. (See copy of the notice of hearing included in the Appendix as Petitioner's Exhibit "F.")
15. Even though this case has been ripe for decision since March of 1999, the Commissioner has failed to render a decision up to the present time.

16. The Commissioner has not been able to find the tape of the original hearing, the evidence adduced therein, or portions of the file that were not computerized. Due to the Commissioner's negligence, evidence and other essential documents have been lost and cannot be duplicated. Upon information and belief, the holding room and the room containing the secondary chemical testing device have been rearranged and the Intoxilyzer 5000 has been replaced by the Intoximeter.

17. In February of 2000, over a year after he had been charged with DUI and a year after the hearing on the revocation of his driver's license and having heard nothing from the Commissioner, the Petitioner accepted a new job with Braley and Thompson as regional program supervisor. His job requires him to drive on a daily basis as he has multi-county responsibilities. If he loses his driver's license, he will not be able to perform his job duties, which could result in the loss of his job.

ASSIGNMENT OF ERROR

The Respondent Commissioner committed clear legal error in requiring Petry to defend the revocation of his driver's license after a delay of over six years as the delay is clearly presumptively prejudicial, and even if it wasn't, the Petitioner has suffered actual prejudice.

POINTS AND AUTHORITIES RELIED UPON

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<i>Smith v. Siders</i> , 155 W. Va. 193 183 S. E. 21d 433 (1971)	6
<i>McJunkin Corp. v. West Virginia Human Rights Commission</i> , 179 W. Va. 417, 369 S. E. 2d 720 (WV 1988)	6
<i>State ex rel. Peck v. Goshorn</i> , 162 W. Va. 420, 249 S. E. 2d 765 (WV 1978)	6
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<i>Dolin v. Roberts</i> , 317 S. E. 2d 801 (WV 1984)	7, 8
<i>Thomas v. Washington Gas Light Co.</i> , 100 S. Ct. 2647, 2666 (1980)	9
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<i>State v. Myers</i> , 828 P. 2d 1287 (Ha. 1992)	11
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<i>Adkins v. K-Mart Corp.</i> , 204 W. Va. 215; 51 S. E. 2d 840 (WV 1998)	12
<i>Trigon Ins. v. United States</i> , 204 F. R. D. 277 (E. D. Va. 2001)	12
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<i>Sylvestri v. General Motors Corp.</i> , 271 F. 3d 583 (4 th Cir. 2001)	12

STATUTES

§64-10-7.3(a) of the Department of Health Rules and Regulations	2
West Virginia Constitution art. III, §10	6
West Virginia Constitution art. III, §17	6
16A Am. Jur. 2d Constitutional Law §844, at 1049-50 (1979)	6
<i>West Virginia Code</i> §17C-5A-1(b)	7
<i>West Virginia Code</i> §17C-5A-2	12

ARGUMENT

This State's procedural due process provision, West Virginia Constitution art. III, §10, states that, "No person shall be deprived of life, liberty, or property, without due process of law. . . ." An important element of this procedural due process guaranty is found in West Virginia Constitution art. III, §17, which provides that "justice shall be administered without. . . delay." Therefore, "due process of law implies not merely an opportunity to be heard, but also opportunity to be heard with reasonable promptness. . ." 16A Am. Jur. 2d *Constitutional Law* §844, at 1049-50 (1979); *Allen v. State Human Rights Comm.*, 324 S. E. 2d 99, 116 (WV 1984).

Due process of law extends to actions of administrative offices and tribunals (See *Smith v. Siders*, 155 W. Va. 193 183 S. E. 21d 433 (1971); *McJunkin Corp. v. West Virginia Human Rights Commission*, 179 W. Va. 417, 369 S. E. 2d 720 (WV 1988) and is synonymous with fundamental fairness. *State ex rel. Peck v. Goshorn*, 162 W. Va. 420, 249 S. E. 2d 765 (WV 1978). Specifically, in Syllabus Point 1 of *Jordan v. Roberts*, 246 S. E. 2d 259 (1978), our highest court recognized that, "[a] driver's license is a property interest which requires protection of state's due process clause before its suspension can be obtained under implied consent law."

With respect to the quasi-judicial functions of administrative agencies, due process requires them to adjudicate matters properly submitted to them. See *Allen, supra*; *State ex rel. Cline v. Maxwell*, 189 W. Va. 362, 432 S. E. 2d 32 (WV 1993). More pointedly, in Syllabus Point 3 of *Dolin v. Roberts*, 317 S. E. 2d 801 (WV 1984), the West Virginia Supreme Court of Appeals noted that, “[u]nreasonable delay can result in denial of procedural due process in license suspension cases.”

Several times West Virginia’s highest court has addressed delay in the context of driver’s license suspension cases. In *Dolin, supra*, the license holder was arrested for DUI on March 27, 1982. On that same date the arresting officer mailed his Affidavit pursuant to *West Virginia Code* §17C-5A-1(b); however, he failed to attach the breathalyzer test results, and he had to re-mail the Affidavit. On August 11, 1982, the Commissioner entered the Revocation Order, which was received by Dolin on August 13, 1982, to which he promptly objected and requested a hearing. The Commissioner set the hearing for August 31, 1982, within the statutory twenty (20) day time limit. However, counsel for Dolin sought the Writ prior to the administrative hearing on the basis that the twenty (20) week delay between the arrest and the entry of the Suspension Order was a violation of Dolin’s procedural due process rights.

The Circuit Court found the twenty (20) week delay to be “grossly excessive” and a violation of the license holder’s procedural due process rights and awarded the Writ. However, this Court reversed on the basis that there is no mandatory time limit within which the Commissioner of the Department of Motor Vehicles must enter its initial Suspension Order in a DUI case, and the fact that *Dolin* did not make an allegation of prejudice in his Petition for a Writ of Prohibition. Additionally, this Court went on to state with respect to the denial of

procedural due process issue, that a person claiming prejudice must show either actual prejudice, if such delay is not prima facie excessive. (Emphasis added).

This Court stated that, “although we agree that unreasonable delays can result in the denial of procedural due process in license suspension cases, we disagree with the Circuit Court’s characterization of the twenty (20) week delay between arrest and suspension in this case as ‘grossly excessive.’” *Dolin*, at 805

Subsequently, in *State ex rel. Cline v. Maxwell*, 432 S. E. 2d 32 (WV 1993), the court had to address the same issue in the context of hearing delays in excess of six months. The Circuit Court had found that a six month delay was a *per se* deprivation of due process and ordered the Commissioner to restore the driver’s license to the driver and to dismiss the administrative charges. However, the Supreme Court of Appeals reversed. The court recognized the importance of an expeditious hearing as contemplated by the legislative scheme requiring hearings to be held within twenty days. The court also recognized that “[d]ue process requires a balance between the state’s interest in law enforcement and the citizens’ interest in being free from governmental harassment.” *Id.*, at 36. Although the court agreed with the Circuit Court that a six month delay by the department was “unreasonable,” it found “that the delay standing alone, is not sufficient to justify the dismissal of the licensee’s revocation proceedings.” *Id.*, at 37-38. (Emphasis supplied).

The court emphasized, however, that some delays are “presumptively prejudicial.” In that case, the burden shifts to the government to rebut the presumption. Even though it held that the Commissioner successfully rebutted the presumption, the court determined that in the case of one of the Petitioner’s, Dale R. Sinclair, a thirty-two month delay was presumptively prejudicial.

Applying the above principle to the situation herein, if a thirty-two month delay is presumptively prejudicial, the presumption is even stronger for a delay that now exceeds seventy-four months, and will be even longer before a decision is rendered. Certainly, one of the considerations in making long delays *prima facie* excessive is fading recollection as a result of the passage of time. As Justice William H. Rehnquist noted in *Thomas v. Washington Gas Light Co.*, 100 S. Ct. 2647, 2666 (1980), "a five year delay" could cause "misrecollections" and "forgetfulness," which could be just as "damaging" as the death of an important witness.² Of course, the longer the time lapse, the dimmer the memory. However, herein, as discussed below, poor recall is not the only way, or even the most significant way, that Petry has been damaged.

The fact that a hearing was originally held in February of 1999 merely compounds Petry's problems. While a decision was never rendered, he had every reason to believe that the financial and psychological burden of defending himself was behind him. The resurrection of these charges over six years later has caused him great mental stress and has already considerably increased his financial burden and will increase it further if forced once again to defend himself before the Commissioner.

Thus, even if the delay had not been *prima facie* excessive, Petry has suffered actual prejudice as a result of the Commissioner's negligence. Aside from the factors enunciated above, Petry is prejudiced by the fact that the Commissioner has lost or destroyed the transcript of the original hearing, all the evidence submitted in connection therewith, including photographs

²The undersigned needs to disclose that after hearing nothing from the Commissioner five years after the hearing date, Petry's files were placed in storage. Upon moving, these files were dispersed and the undersigned has not been able to locate his notes as well as other documents.

of the scene of the incident, photographs of the intoxilyzer,³ and the room in which it is located, and the holding room in which Petry was held before submitting to the secondary chemical test. The Commissioner has also lost or destroyed the deposition of Petry's expert witness, which had been entered into the record. One of the witnesses who Petry had subpoenaed to the hearing is no longer available. There may be more evidence missing. Neither the Petitioner nor the undersigned attorney can remember all the evidence that was submitted into evidence.

Because of the negligence of the Respondent, Petry's hearing on February 16, 1999 failed to resolve the issue of whether he would or would not lose his license. If the Respondent had acted timely in rendering a decision, the issue could have been resolved before the hearing examiner, Larry Mullet, left the agency in July 2002. Certainly, the hearing record and exhibits were available up until his departure. If they weren't, then Respondent delayed three years in informing Petry of the problem.

Also, as pointed out above, there is the increased financial burden to Petry. If he has to defend himself in another hearing, the cost to him will more than double and may even triple.

In addition, he has to put his life on hold again and he may lose his job. After waiting more than a year for the Commissioner to render a decision, he accepted a new job requiring him to travel throughout a number of West Virginia counties.

Recently, he was considering moving to Pennsylvania to take a similar occupation in that state. Because of the resurrection of the charges against him herein, he has to put those plans on hold.

³The intoxilyzer is no longer in the designated secondary chemical test. It has been replaced by the intoximeter.

In *Maxwell, supra*, relying on the principles enunciated in *State ex rel. Leonard v. Hey*, 269 S. E. 2d 394 (WV 1980), the court held that when the delay is not presumptively prejudicial, the “effects of the delay [is] to be determined ‘by weighing the reasons for the delay against the impact of the delay upon the defendant’s ability to defend himself.’” *Id.*, at 38. The court held that because none of licensees asserted “that the delay hampered their ability to defend themselves,” the Circuit Court erred in requiring the dismissal of the license revocation procedures.

In this case, not only is the delay presumptively prejudicial thereby shifting the burden to the Commissioner to demonstrate lack of prejudice, even if that presumption did not apply, Petry asserts actual prejudice, and as noted above, this prejudice is multiple and obvious. Here, when the effect of the delay is weighed against the reason for the delay, Petry’s entitlement to the relief requested herein becomes manifest. While the Circuit Court apparently viewed the Petitioner’s assertions so meritless it declined to even hold a hearing on his petition, the Circuit Court’s summary dismissal of the petition is nevertheless manifest error. As the court in *Maxwell* stressed, quoting *Grady v. Corbin*, 495 U. S. 508, 524, 110 S. Ct. 2084, 2095, 109 L. Ed. 2d 548 (1990), “[t]he tragedy of drunk driving ‘cannot excuse the need for scrupulous adherence to our constitutional principles.’” *Id.*, at 37.

When actual prejudice is demonstrated, some jurisdictions have recognized that even a four year delay warrants dismissal of a license suspension proceedings on due process grounds. See e.g., *Gombocz v. Commonwealth*, 849 A. 2d 284 (Pa. 2004). In *State v. Myers*, 828 P. 2d 1287 (Ha. 1992), the Hawaii Court of Appeals held that a delay of three years in issuing a final order of revocation was an unreasonable delay that supported voiding a revocation order.

There is still another reason for granting Petry relief in this matter. While spoliation is still an inchoate doctrine in this jurisdiction (See *Hannah v. Heeter*, etc. 584 S. E. 2d 260 (W. Va. 2003); *Adkins v. K-Mart Corp.*, 204 W. Va. 215; 51 S. E. 2d 840 (WV 1998)), the facts of this case are almost a perfect fit. The Division had exclusive control of the evidence, testimony, and exhibits admitted into evidence at the hearing; the Division had a duty to preserve the evidence; Petry has suffered substantial prejudice as a result of the spoliation; and the spoliated evidence was vital to Petry's defense. It has long been recognized that the spoliation of evidence can result in sanctions against the culpable party. *Trigon Ins. v. United States*, 204 F. R. D. 277 (E. D. Va. 2001); *Arndt v. First Union National Bank, et al.*, 2005 WL 1330534 (N. C. App. June 7, 2005); *Sylvestri v. General Motors Corp.*, 271 F. 3d 583 (4th Cir. 2001). As the Fourth Circuit stated in *Sylvestri*,

“Spoliation refers to the destruction of material, alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. The right to impose sanctions for spoliation arises from the court's inherent power to control the judicial process, and the underlying policy of preservation of the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”

The appropriate sanction in this case would be the dismissal of the revocation and restoration of a valid permanent driver's license to Petry.

It also should be kept in mind, that pursuant to *West Virginia Code* §17C-5A-2, the hearing on the revocation of a person's driver's license, “shall be held within one hundred eighty days after the date upon which the Commissioner received the timely written request unless there is a postponement or continuance.” From February 16, 1999 until March 7, 2005, the DMV failed to schedule a hearing. The Commissioner never sought a postponement or continuance.

Requiring the hearing to be held within a reasonable time not only protects the driver by affording him a speedy resolution of the issue of license revocation, but it also protects the traveling public from having its safety threatened by potentially harmful or impaired drivers. Thus, it is not only Petry's rights that are at stake here. To protect the public, the whole system is designed to facilitate a speedy resolution of a DUI driver's revocation issues. The officer is required to submit the charges (Statement of Arresting Officer) to the DMV within forty-eight hours of the arrest. The driver must request a hearing within ten days to avoid an initial revocation, and in any case, within thirty days to secure a hearing on the revocation. Originally, hearings were required to be held within twenty days until the legislature recognized that DMV's limited staffing could not accommodate such an expeditious schedule. Nevertheless, the thrust of West Virginia's implied consent law is to get the arrested driver off the highway as quickly as possible. Consequently, establishing a precedent that a delay of over six years is okay is not in the public interest. Indeed, the legislative history suggests that this was the primary purpose for requiring expedited hearings.

Thus, to allow the agency to delay a rehearing on the matter for over six years is not only highly prejudicial to Petry, it establishes a precedent which endangers the public by permitting the agency to indefinitely allow potentially dangerous drivers to keep driving.⁴

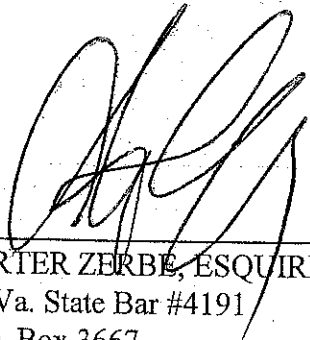
⁴Petry, however, is no threat to the public. Other than a moving traffic violation, he has no criminal record and the one DUI charge, which was dismissed in criminal court, sits in splendid isolation. Since his arrest, he has driven for over six years without incident.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays this honorable court to prohibit the Respondent from holding another hearing on the revocation of his driver's license, that his driver's license be permanently restored to him, that the hearing below be stayed pending the final resolution of the matter herein, that Petitioner be awarded attorney fees and costs, or whatever alternate relief this honorable court deems appropriate.

HAROLD PETRY, II

By Counsel



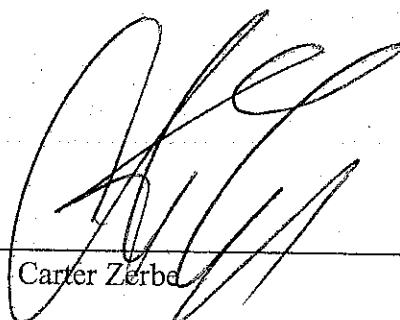
CARTER ZERBE, ESQUIRE
W. Va. State Bar #4191
P. O. Box 3667
Charleston, WV 25336
(304)345-2728

CERTIFICATE OF SERVICE

I, Carter Zerbe, counsel for Petitioner, do hereby certify that I have served a true and exact copy of the foregoing AMENDED PETITION FOR APPEAL AND WRIT OF ERROR by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

JANET JAMES, ASST. ATTY. GENERAL
Office of the Attorney General
Capitol Complex
1900 Kanawha Boulevard, East
Building 1, Room W435
Charleston, WV 25305

on this the 21st day of July 2005.



Carter Zerbe

APPENDIX

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Exhibit B - Letter to Larry Mullett, Hearing Examiner	2
Exhibit C - Copy of Order of Revocation	2
Exhibit D - Letter to Ed Janco, Manger of Legal Services	3
Exhibit E - Copy of fax from Legal Section, Division of Motor Vehicles	3
Exhibit F - DMV Notice of Hearing	3

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

2005 FEB 10 PM 3:35

CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

HAROLD PETRY, III,
Plaintiff,

v.

CASE NO. 05-MISC-50

F. DOUGLAS STUMP, COMMISSIONER,
Defendant.

ORDER

The Petition for Writ of Prohibition and Mandamus and Application for Stay, filed on February 4, 2005, has been reviewed by this Court and is hereby **DENIED**. For this reason, the case is **DISMISSED** from the docket of the Circuit Court.

The Circuit Clerk shall send a certified copy of this Order to the following:

Carter Zerbe, Esq.
Attorney at Law
Post Office Box 3667
Charleston, WV 25335-3667

Janet James, Esq.
Assistant Attorney General
1900 Kanawha Boulevard, E.
Building 1, Room W-435
Charleston, WV 25305

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10
DAY OF February, 2005.

ENTERED:

[Signature]

Tod J Kaufman
Judge

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

February 10, 2005

COPIES OF THIS ORDER:
- 1 to Plaintiff
- 1 to Defendant
- 1 to Clerk
- 1 to Court
- 1 to State
- 1 to County
- 1 to City
- 1 to Town
- 1 to Precinct
- 1 to School
- 1 to Other

[Handwritten initials]

Carter Zerbe

Attorney at Law

1021 Quarrier St. • Suite 505
P.O. Box 3667
Charleston, WV 25336
(304) 345-2728 • 1-800-303-3030
Fax: (304) 345-6886 • E-mail: SCZ3667@aol.com

Exh. B

March 17, 1999

The Honorable Larry Mullett, Hearing Examiner
Attn: Brenda
Department of Motor Vehicles
WV Department of Motor Vehicles
1800 Kanawha Boulevard East
Building Three
Charleston, WV 25317-0010

Re: Harold Petry

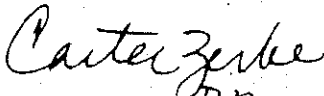
Dear Mr. Mullett:

Enclosed please find respondent's Proposed Findings of Fact, Discussion, and Conclusions of Law. The transcript of Dr. Well's deposition taken on March 16, 1999 will be coming by separate cover. We should be able to send that out by Monday.

Please be advised if the officer wants to cross-examine Dr. Wells, we will make him available via telephone. Otherwise, the case is ripe for decision.

Thank you for your attention and patience in this matter.

Very truly yours,


Carter Zerbe *BD*

CZ/bd
Enclosure



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Motor Vehicles

1800 Kanawha Boulevard East • Building Three
Charleston, West Virginia 25317-0010

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary

Roger Pritt
Commissioner

Harold Ray Petry, II
P. O. Box 5414
Huntington, WV 25701

FILE NUMBER: 276220A
LICENSE NUMBER: E449113
SUSPENSION DATE: May 28, 2003

ORDER OF REVOCATION

You are hereby notified that this Division has received notice from the clerk of the below-named court that you were convicted of the following offense: DUI, Cabell County Magistrate Court.

PRIOR OFFENSES: No Record

Pursuant to Chapter 17C, Article 5A, Section 1a of the Code of West Virginia your privilege to drive a motor vehicle in this state is revoked as of the effective date above.

REVOCATION PERIOD:

Six months, eligible in ninety days, and thereafter until you complete the Safety and Treatment Program and thereafter according to any previous order issued by this Division.

If your previously requested administrative hearing has not been held, it is hereby canceled. If your administrative hearing has been held, but no decision rendered, you are hereby notified that the above conviction constitutes sufficient evidence to uphold any previous order of revocation.

UPON your written request, the commissioner of Motor Vehicles will allow you an opportunity to have an administrative hearing on the **single issue** allowed by law, that you are not the person named in the transcript of conviction. Such written request must be filed with the Commissioner in person or by REGISTERED or CERTIFIED MAIL, return receipt requested, within thirty (30) calendar days from receipt of this ORDER. Although your request for a hearing will be honored if received within thirty (30) calendar days, your revocation is scheduled to begin on the effective day above. Upon receipt of a timely request, the order will be stayed until the resolution of the hearing.

DATED AT CHARLESTON, WEST VIRGINIA April 23, 2003

BY *David H. Boyd*
DIRECTOR

DHB: jm
Cc: R. Martin
Chief of Police

Carter Zerbe

Attorney at Law

800 Kanawha Boulevard East
P.O. Box 3667
Charleston, WV 25336
(304) 345-2728 • 1-800-303-3030
Fax: (304) 345-6886 • E-mail: SCZ3667@aol.com

October 19, 2004

WV - DMV
Capitol Complex
Attn: Ed Janco, Director of Legal Services
1800 Kanawha Boulevard, East
Building 3, Room 118
Charleston, WV 25317-0010


RE: Harold Petry
File No.: 276220A
& Criminal Action No.: 98M-8481

Dear Mr. Janco:

Enclosed please find the disposition and judgment order in the above-styled case, as well as Mr. Petry's guilty plea. As you can see, he did not plead guilty to DUI but reckless driving. Please correct his file and restore his driving privileges immediately.

Thank you for your attention to this matter.

Very truly yours,


Carter Zerbe

CZ/sc

Enclosures

cc: Harold Petry w/o enclosures

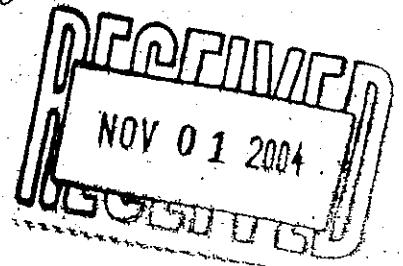
Division of Motor Vehicles
Legal Section
1800 Kanawha Boulevard, E. State Capitol Building 3
Charleston, West Virginia 25317-0010

Phone 304-558-3611
Facsimile 304-558-4285



FAX COVER SHEET

Sandy
FYI
orig. Fax put in
file



To: Carter Zerbe
Attorney at Law

Date: November 1, 2004

FAX: (304) 345-6886

From: Edward J. Jancó
Manager

Pages: 1 (incl. cover sheet)

Re: Harold Petry File No. 276220-A

Based upon receipt of the corrected
Abstract of Judgment in this matter, the
Division has stayed the Order of Revocation
in this matter.

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WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Motor Vehicles

1800 Kanawha Boulevard East • State Capitol Building Three
Charleston, West Virginia 25317-0010
TELEPHONE 304-558-4162

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary

F. Douglas Stump
Commissioner

JANUARY 4, 2005

HAROLD RAY PETRY II
P O BOX 75322
CHARLESTON WV 25375

DIV. OF MOTOR VEHICLES
HEARING NOTICE

FILE NUMBER: 276220A

LICENSE NUMBER: E449113

DEAR MR. PETRY:

A HEARING REGARDING THE SUSPENSION OF YOUR DRIVER'S LICENSE, HAS BEEN SCHEDULED FOR MARCH 7, 2005, AT 09:30 A.M., AT THE DIVISION OF MOTOR VEHICLES, 801 MDISON AVENUE, HUNTINGTON, WV.

IF YOU INTEND TO CHALLENGE THE RESULTS OF ANY SECONDARY CHEMICAL TEST OF THE BLOOD, BREATH, OR URINE, OR IF YOU INTEND TO CROSS-EXAMINE THE INDIVIDUAL OR INDIVIDUALS WHO ADMINISTERED THE TEST OR PERFORMED THE CHEMICAL ANALYSIS, YOU MUST NOTIFY THE COMMISSIONER AT LEAST TEN (10) DAYS PRIOR TO THE HEARING DATE, OTHERWISE, THE RESULTS OF THE SECONDARY CHEMICAL TEST WILL BE ADMITTED AS EVIDENCE AT THE HEARING AND YOU WILL NOT BE ALLOWED TO CHALLENGE THE RESULTS.

IF YOU INTEND TO CHALLENGE COMPLIANCE WITH SOBRIETY CHECKPOINT OPERATIONAL GUIDELINES, YOU MUST NOTIFY THE COMMISSIONER IN WRITING AT LEAST TEN (10) DAYS PRIOR TO THE HEARING DATE OR THE SOBRIETY CHECKPOINT CANNOT BE CHALLENGED.

THE SCOPE OF THE HEARING SHALL BE WHETHER YOU DROVE A MOTOR VEHICLE IN THIS STATE WHILE UNDER THE INFLUENCE OF ALCOHOL, CONTROLLED SUBSTANCES OR DRUGS, OR DID DRIVE A MOTOR VEHICLE WHILE HAVING AN ALCOHOL CONCENTRATION IN YOUR BLOOD OF EIGHT HUNDRETHS OF ONE PERCENT (.08) OR MORE, BY WEIGHT.

ANY REQUEST FOR A CONTINUANCE MUST BE SUBMITTED IN WRITING AND MUST BE RECEIVED BY THE DIRECTOR OF LEGAL SERVICES DIVISION, DIVISION OF MOTOR VEHICLES, BUILDING 3, ROOM 118, CAPITOL COMPLEX, CHARLESTON, WV 25317, AT LEAST FIVE DAYS PRIOR TO THE SCHEDULED HEARING DATE. EACH REQUEST FOR A CONTINUANCE MUST CONTAIN A WRITTEN STATEMENT SHOWING GOOD CAUSE AS TO WHY THE HEARING SHOULD BE CHANGED. THIS REQUEST WILL NOT BE GRANTED BY TELEPHONE. FAILURE TO APPEAR AT THE HEARING WITHOUT A CONTINUANCE WILL CAUSE THE SUSPENSION OR REVOCATION TO BE UPHELD AND AUTOMATIC ASSESSMENT OF THE HEARING COSTS.

**SECONDARY CHEMICAL TEST
HAS BEEN CHALLENGED**

DIRECTOR

CARTER ZERBE ESQ
PO BOX 3667
HUNTINGTON WV 25336

Supreme Court of Appeals of West Virginia
DOCKETING STATEMENT

FILED

2005 MAY 11 PM 2:01

Style of Case (use style from final order)

HAROLD PETRY, II

Plaintiff

v

F. DOUGLAS STUMP, COMMISSIONER

Defendant

CATHY...
KANAWHA CO. CIRCUIT COURT
Type of Action:
Civil
Criminal

Petitioner(s):

Plaintiff(s)

Defendant(s)

Circuit Judge: Tod Kaufman

Circuit
Number:

County: Kanawha

TIMELINESS OF APPEAL

Date of entry of judgment or order appealed from: **February 10, 2005**

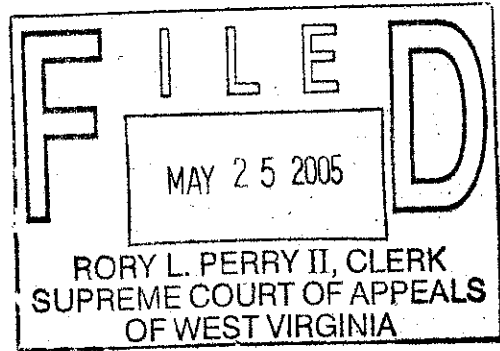
Filing date of any post-judgment motion filed by any party pursuant to R. Civ. P. 50(b), 52(b), or 59: **N/A**

Date of entry of order deciding post-judgment motion: **N/A**

Date of filing of petition for appeal: **May 10, 2005**

Date of entry of order extending appeal period: **N/A**

Time extended to:



FINALITY OF ORDER OR JUDGMENT

Is the order or judgment appealed from a final decision on the merits as to all issues and parties?

YES NO

If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)?

YES NO N/A

Has the defendant been convicted? YES NO N/A

Has a sentence been imposed? YES NO N/A

Is the defendant incarcerated? YES NO N/A
Has this case previously been appealed? YES NO

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court?

YES NO

If yes, cite the case and the manner in which it is related on a separate sheet.

CASE INFORMATION

State generally the **nature of the suit**, the **relief sought**, and the **outcome below**. [Attach an additional sheet, if necessary.]

After being arrested for DUI on November 20, 1998, your Petitioner, Harold Petry, II, timely requested a hearing on the revocation of his driver's license and a hearing was duly scheduled by the West Virginia Division of Motor Vehicles on February 16, 1999. Evidence was adduced including photographs and expert testimony on behalf of Petry was admitted into evidence.

On January 4, 2005, the Respondent notified Petry that they were conducting another hearing because the original transcript and evidence had been lost.

Petry filed a Writ of Prohibition and Mandamus and Application for Stay in the Circuit Court of Kanawha County asserting that Petry had been irreparably harmed by the actions of the Commissioner. Without holding a hearing or taking any evidence, by order dated February 10, 2005, Judge Tod Kaufman summarily denied Petry's petition.

Petitioner seeks to prohibit Respondent from holding another hearing on the revocation of his driver's license, and that his driver's license be permanently restored to him.

State the **issues to be raised on appeal**. [Attach an additional sheet, if necessary. Use carriage returns to number the issues in a manner corresponding with the petition for appeal.]

Enter text here. Use carriage returns as necessary. Select and delete this text before continuing. Use "TAB" to move between fields in the form.

The Circuit Court of Kanawha County committed reversible error by summarily dismissing Petitioner's Writ of Prohibition and Mandamus, and Application for Stay as the Commissioner committed clear legal error by attempting to hold a hearing on the revocation of Petitioner's license after losing the record of the original hearing and waiting over five years later to reschedule a hearing.

List the Petitioner(s) name: Harold Petry, II

If incarcerated, provide institutional address:

Name of attorney or pro se litigant filing Docketing Statement: Carter Zerbe

ATTORNEY PRO SE

Will you be handling the appeal? YES NO

If so, provide firm name, address, and telephone number: Carter Zerbe Law Office
P. O. Box 3667
Charleston, WV 25336
(304)345-2728

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature: 

WV Bar No. 4191

Date: 5/10/05

Remember to Attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the order or judgment from which the appeal is taken.
3. A Certificate of Service.

