

## The Adequacy of Procedures in Driver's License Revocation Hearings

In recent years, the Utah Driver's License Division ("DLD") has increasingly adopted policies and practices that circumvent both basic due process rights and established legislative procedures that are designed to protect drivers from arbitrary governmental actions. Although DLD has a strong interest in promoting public safety, its concerns do not outweigh constitutional limits on government's ability to deprive persons of basic property rights absent sound procedures. DLD's current practices encourage police officers to flout the law, deprive drivers of sufficient notice, fail to deliver evidence to drivers, and presume guilt in the absence of evidence. DLD's lax oversight of police officers and its failure to follow legislative pronouncements causes serious hardships on Utah residents who rely on their driving privileges for their very livelihood.

Despite the common belief that driving is a privilege and not a right, DLD's actions violate basic constitutional requirements. Federal and state courts agree that a driver's license is a property right that demands fundamental due process protections. *Mackey v. Montrym*, 443 U.S. 1, 10 n. 7 (1979); *Ballard v. State, Motor Vehicle Division*, 595 P.2d 1302 (Utah 1979). As such, the state may only deprive a person of a driver's license after providing drivers notice, an opportunity to be heard, and access to the evidence against them. *Id.* Because due process principles apply to driver's license revocation proceedings, the distinction between a privilege and a right is meaningless. As detailed below, DLD's arbitrary procedures not only deprive persons of their due process protections when revoking driver's licenses but also impose severe burdens on drivers, their families, and employers. It fails to provide adequate notice of hearings, allows the police to withhold evidence, refuses to allow cross-examination of essential witnesses, and applies its own rules arbitrarily.

### I. DLD Fails to Allow Drivers Access to the Evidence Against Them

The most obvious constitutional violation in driver's license revocation proceedings is DLD's refusal to provide the evidence used against drivers. At a minimum, due process of law requires the state to disclose the evidence to be used against a person before the state can deprive that person of protected rights such as driving privileges:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, \* \* \* but also in all types of cases where administrative . . . actions were under scrutiny.

*Goldberg v. Kelly*, 397 U.S. 254, 270 (1970)

The Legislature has acknowledged this basic due process principle in the driver's license context. The rules outlined in the Utah Administrative Procedures Act apply to revocation hearings. Specifically,

these hearings are considered informal proceedings and must comply with Utah Code Annotated section 63-4-203 (2012). *Cordova v. Blackstock*, 861 P.2d 449, 451-452 (Utah Ct. App. 1993). Subsection (1)(f) of that statute provides that “[a]ll parties shall have access to information contained in the agency’s files and to all materials and information gathered in any investigation . . . .” Utah Code Ann. § 63G-4-203)(1)(f) (2012). Thus, before DLD can revoke driving privileges, it is constitutionally and statutorily required to disclose all of the evidence to the subject of the proceedings.

In many instances, DLD fails to provide the very evidence used to revoke driver’s licenses. Commonly, police officers withhold video recordings of the traffic stop in question until after DLD holds revocation hearings. Despite pleas from drivers and their attorneys, DLD hearing officers proceed with hearings based solely on the police officer’s statements. Similarly, hearing officers allow hearings to take place even when the police officer has not provided the driver the police report that contains the evidence that may support revocation. Instead, hearing officers commonly rely on the police officer’s statements at the hearing alone. Even when the driver maintains that the police officer does not remember the encounter correctly or that the officer erroneously followed established rules and procedures, DLD hearing officers revoke licenses without providing the driver an opportunity to challenge the evidence the strength of the evidence.

Of particular concern, revocation hearings regularly occur even though video recordings of traffic encounters are available but the police officer has not disclosed the video to the driver or to counsel. Hearing officers will revoke driver’s licenses even when video recordings are available but the officer refuses to view the recording. In essence, DLD would rather revoke a driver’s license based on the word of a police officer even though a brief viewing of a video contradicts the police officer’s account. Recent media reports about Utah Highway Patrol Trooper Lisa Steed demonstrate that Utah police officers are not always trustworthy when testifying about traffic stops and impaired driving. Despite this fact, DLD deprives drivers of the very evidence that will irrefutably prove or disprove the truth of the allegations.

Similarly, DLD commonly accepts as true police reports that refer to toxicology tests but do not identify the name of the person who performed the tests or that person’s qualifications. The collecting and testing of blood are scientific processes that require training and adherence to established protocols. Moreover, the state has the burden of establishing that test samples are handled properly and that state actors thoroughly maintain the chain of custody at all times. Without knowing the identity and qualifications of the person or persons who collected, handled, and tested blood samples, drivers have no way of knowing whether the state properly determined that the driver was impaired and should be deprived of driving privileges. Depriving persons of that evidence violates due process principles as well as state law.

The very essence of due process of law is to challenge the evidence used to deprive a person of property rights, including a driver’s license. *Goldberg*, 397 U.S. at 270; *Jennings v. Mahoney*, 404 U.S. 25 (1971). Access to evidence is essential to ensuring that the government does not arbitrarily or mistakenly take a person’s life, liberty, or property. Under current DLD practices, those assurances are absent.

## II. The Right to Cross-Examination in Driver’s License Revocation Proceedings

Of even more concern, DLD arbitrarily decides when drivers will be allowed to cross-examine the witnesses against them. The quote from *Goldberg* provided above goes on to address the vital role that cross-examination plays in hearings that determine whether the state may deprive a person of property rights:

[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

*Goldberg*, 397 U.S. at 270.

Although the statute governing driver's license revocation proceedings does not specifically require cross-examination, numerous courts, both nationally and locally, have ruled that this right is an essential due process element. In addition to providing drivers access to all "materials and information" as discussed above, Utah law mandates that the parties "shall be permitted to testify, present evidence, and comment on the issues." Utah Code Ann. § 63G-4-203(1)(c), (f) (2012). As written, this provision does not specifically require DLD to afford drivers the opportunity to cross-examine the witnesses against them. Nevertheless, the United States Supreme Court's rulings on driver's license revocation proceedings strongly suggest that cross-examination is constitutionally required. Although the Supreme Court has not had occasion to require cross-examination in the driver's license context, it has endorsed multiple state proceedings that provide for the right to confront and cross-examine accusers. *Mackey*, 443 U.S. at 4; *Jennings*, 404 U.S. at 26-27. Likewise, numerous state appellate courts have relied on these rulings to require cross-examination in driver's license proceedings. See, e.g., *Kempke v. Kansas Dept. of Revenue*, 133 P.3d 104, 119 (Kan. 2006); *Robison v. Administrative Director of Courts*, 3 P.3d 503, 509-510 (Hawaii App. 2000); *Mackler v. Alexis*, 181 Cal.Rptr. 613, 623-624 (Ct. App. 1982). The clear weight of authority demands cross-examination in revocation proceedings.

Although Utah appellate courts have had not addressed whether cross-examination is constitutionally required, numerous district court judges have agreed that due process of law requires cross-examination. In Utah, drivers may appeal the loss of a driver's license to a district court judge. Utah Code Ann. § 53-3-224 (2012). Several of Utah judges have ruled that because due process rights apply to driver's license revocation hearings, drivers must be afforded the right to cross-examine witnesses before the state can take away a person's driving privileges. UACDL maintains a file of numerous judges who have overturned license revocations because DLD failed to allow provide cross-examination.

Despite these consistent and repeated rulings, DLD refuses to allow cross-examination during revocation proceedings. DLD has not established any specific procedures for these hearings, nor has it decided, as a policy matter, whether to allow cross-examination. DLD hearing officers are left to their own devices and they haphazardly and arbitrarily decide whether and when to allow cross-examination. Depending on individual hearing officers and what part of the state the hearing is held, cross-examination may or may not be allowed at all. In especially egregious cases, hearing officers will ask police officers questions themselves in an effort to rehabilitate the officers' testimony but then deny drivers and their

counsel the right to cross-examine the officers. Such disparate treatment not only violates the right to cross-examination but also injects arbitrariness into a system that lacks established written procedures.

III. Final Note: The Unavailability of Driving Privileges For Purposes of Employment Sets Up Offenders for Failure and Defeats Rehabilitative Efforts.

In a related but separate topic, a gap in Utah law on driving privileges creates unnecessary burdens on offenders and defeats the goal of reducing recidivism. Currently, when a person loses driving privileges, that person cannot drive a motor vehicle for any purpose, including employment. This absolute restriction imposes undue hardships on drivers and their families. Drivers who depend on their driving privileges for employment are deprived of basic opportunities to earn a living, care for their families, and improve their lives. Absent available transportation to and from work, many residents cannot find and maintain employment. Not all residents have access to reliable public transportation or willing drivers to transport them to and from work every day. Such is especially true in rural areas of the state and places where work sites are located in remote locations. Examples of such work sites include mines, oil and gas fields, and large employers that attract workers from large geographical areas. Moreover, depriving persons of a driver's license automatically disqualifies them from numerous jobs that involve driving privileges. Further, the burden of not being able to drive punishes family members, acquaintances, and employers who rely on others for transportation. These ripple effects go well beyond the actual driver and indirectly affect the community as a whole.

Although criminal conduct may generally warrant losing driving privileges, barring offenders from driving to work inherently contradicts the goal of criminal sanctions. Criminal penalties almost always subject offenders to supervision by corrections officers either in lieu of incarceration or following a jail stay. One of the most important conditions of being released on supervision is maintaining full-time employment. But, if a person cannot drive to work or use a vehicle in his or her job, that person's employment prospects are severely limited. As a result, offenders who cannot drive to work or use a vehicle in their employment are far more likely to fail while on supervision. As a consequence, they will be incarcerated at great cost to the public.

Further, bans on driving to work indirectly encourage offenders to drive illegally without a valid license. When faced with the prospect of losing a job and being forced to return to jail, an offender may logically choose to drive illegally rather than being incarcerated. The need to provide a living for oneself and one's family could understandably compel a person to risk driving without a license to keep a job. Of course, this scenario is self-defeating because the goal of criminal penalties and incarceration is to deter and not to incentivize criminal conduct.

A far wiser solution to this problem would be to allow offenders to drive for the limited purpose of employment. To ensure that these drivers do not use controlled substances while driving, the law could require the use of interlock devices to detect alcohol and drugs. This measure would protect the public and deter offenders from using banned substances. The Legislature could also restrict driving privileges for employment purposes to those who submit to roadside testing as opposed to those who refuse drug or alcohol testing when they are first arrested. Under this approach, the law would encourage compliance with the law as opposed to simply penalizing those who break the law. Recidivism would decrease and the costs of enforcing the law and incarcerating offenders could be used for other purposes. Thus, ensuring the correct decisions are made that adhere to due process requirements is in everyone's best interests.