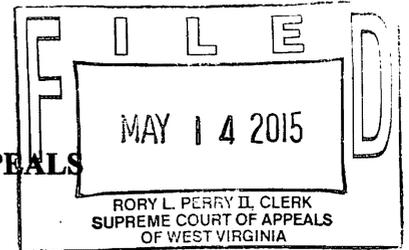


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
No. 14-0174



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JAMES EARL NOEL, JR.,

Defendant Below, Petitioner.

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

 I. THE DECISION OF THE U.S. SUPREME COURT IN *HEIEN V. NORTH CAROLINA*
 PROVIDES AN ADDITIONAL BASIS TO UPHOLD THE TRAFFIC STOP OF NOEL 3

 A. *Heien* Establishes that Law Enforcement Had Reasonable Suspicion to Stop Noel. 4

 B. This Court Should Interpret Article III, Section 6 of the Constitution of West Virginia
 Consistent with *Heien*. 7

 II. THE SEARCH OF THE CENTER CONSOLE WAS A REASONABLE SEARCH
 MOTIVATED BY A CONCERN FOR SAFETY..... 12

 III. THE EVIDENCE IN THE CONSOLE WOULD HAVE BEEN INEVITABLY
 DISCOVERED..... 15

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	12, 13
<i>Brinegar v. United States</i> , 338 U.S. 160 (1949)	4
<i>Cady v. Dombrowski</i> , 413 U.S. 433 (1973)	14
<i>Clower v. West Virginia Department of Motor Vehicles</i> , 223 W. Va. 535, 678 S.E.2d 41 (2009)	11
<i>Commonwealth v. Bailey</i> , 986 A.2d 860 (Pa. Super. 2009)	19
<i>Heien v. North Carolina</i> , 135 S. Ct. 530 (2014)	<i>passim</i>
<i>Hilton v. State</i> , 961 So.2d 284 (Fla. 2007)	6
<i>Humphreys v. State</i> , 694 S.E.2d 316 (Ga. 2010)	19
<i>Illinois v. Lafayette</i> , 462 U.S. 640 (1983)	14
<i>Illinois v. Rodriguez</i> , 497 U.S. 177 (1990)	8
<i>Michigan v. DeFillippo</i> , 443 U.S. 31 (1979)	5
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	<i>passim</i>
<i>Morris v. Painter</i> , 211 W. Va. 681, 567 S.E.2d 916 (2002)	15
<i>Navarette v. California</i> , 134 S. Ct. 1683	4
<i>Pauley v. Kelly</i> , 162 W. Va. 672, 255 S.E.2d 859 (1979)	9
<i>Rogers v. Albert</i> , 208 W. Va. 473, 541 S.E.2d 563 (2000)	7
<i>Skinner v. Railway Labor Executives' Ass'n</i> , 489 U.S. 602 (1989)	14
<i>State v. Andrews</i> , 91 W. Va. 720, 114 S.E. 257 (1922)	7

<i>State v. Brewer</i> , 204 W. Va. 1, 511 S.E.2d 112 (1998)	13
<i>State v. Bruner</i> , 143 W. Va. 755, 105 S.E.2d 140 (1958)	7
<i>State v. Buzzard</i> , 194 W. Va. 544, 462 S.E.2d 50 (1995)	8
<i>State v. Clark</i> , 232 W. Va. 480, 752 S.E.2d 907 (2013)	7, 10
<i>State v. Dunbar</i> , 229 W. Va. 293, 728 S.E.2d 539 (2012)	11
<i>State v. Duvernoy</i> , 156 W. Va. 578, 195 S.E.2d 631 (1973)	7
<i>State v. Flippo</i> , 212 W. Va. 560, 575 S.E.2d 170 (2002)	15, 16, 17, 19
<i>State v. Hawkins</i> , 167 W. Va. 473, 280 S.E.2d 222 (1981)	15
<i>State v. Hefner</i> , 180 W. Va. 441, 376 S.E.2d 647 (1988)	9
<i>State v. Lacy</i> , 196 W. Va. 104, 468 S.E.2d 719 (1996)	8
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	15
<i>State v. Lilly</i> , No. 14-0199, 2015 WL 1741690 (April 13, 2015)	11
<i>State v. Meadows</i> , 170 W. Va. 191, 292 S.E.2d 50 (1982)	10
<i>State v. Mullens</i> , 221 W. Va. 70, 650 S.E.2d 169 (2007)	9, 10
<i>State v. Peacher</i> , 167 W. Va. 540, 280 S.E.2d 559 (1981)	7
<i>State v. Stuart</i> , 192 W. Va. 428, 452 S.E.2d 886 (1994)	8, 10, 11
<i>United States v. Johnson</i> , 777 F.3d 1270 (11th Cir. 2015)	16, 17, 18
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	14
<i>United States v. Mendez</i> , 315 F.2d 132 (2d Cir. 2002)	19
<i>United States v. Montoya de Hernandez</i> , 473 U.S. 531 (1985)	14

<i>United States v. Seals</i> , 987 F.2d 1102 (5th Cir. 1993).....	19
<i>United States v. Virden</i> , 488 F.3d 1317 (11th Cir. 2007).....	16, 17, 18

Statutes

W. Va. Const. Article III, § 6.....	<i>passim</i>
W. Va. Code § 17B-2-5	17
W. Va. Code § 17C-15-1	5
W. Va. Code § 17C-15-1(a).....	6
W. Va. Code § 17C-15-36	5
W. Va. Code §§ 17C-15-1, 17C-15-36.....	6
W. Va. Code § 62-1A-10	15

Regulations

W. Va. Code St. R. § 91-12-2.....	6
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INTRODUCTION

As the State explained in its original Respondent's Brief, this Court should uphold Petitioner's convictions, which followed from his attempt to flee recklessly by car from a pursuing police officer, a lawful stop of his vehicle, and the eventual discovery of drugs in his vehicle. On August 23, 2013, Officer K.L. Adams of the Bluefield Police Department signaled to Petitioner James Earl Noel, Jr., to stop after Adams observed a large crack across Noel's windshield. App. II at 4, 6; App. I at 32. Noel did not stop but instead fled at a high rate of speed. App. II at 6–7. Adams eventually stopped Noel and began to question him. *Id.* at 7. Because Noel continued to act nervously and look toward the console of his vehicle, Adams thought that a weapon might be concealed in the console. *Id.* at 9. Though Adams had Noel in his control, he opened the console out of reasonable concern for his own safety. *Id.* at 9. Adams discovered a large amount of drugs in the console. *Id.* at 9–10. Adams then arrested Noel, and Noel was later convicted both of fleeing and of charges arising from the drugs. *Id.* at 9–10; App. III at 148. Noel appealed and challenged both the stop and the search of the console. Noel's claims fail for the reasons set forth in the State's original Respondent's Brief.

Pursuant to this Court's order of February 4, 2015, the State offers in this brief several supplemental arguments in support of Noel's convictions in light of both the recent U.S. Supreme Court decision in *Heien v. North Carolina*, 135 S. Ct. 530 (2014), and arguments made in Noel's supplemental brief. *First*, even if this Court rejects the State's other arguments regarding the lawfulness of the vehicle stop, it should follow the decision in *Heien* and find that Officer Adams had reasonable suspicion to stop Noel because it was reasonable for Adams to understand that a large crack across a windshield violates West Virginia law. *Second*, none of the arguments made in Noel's supplemental brief rebut the State's argument that the search of

the console in Noel's vehicle was a reasonable search to ensure the safety of Officer Adams. *Third*, even if this Court is persuaded by Noel and rejects the State's several arguments in support of the search, the drug evidence should not be subject to exclusion because it would have inevitably been discovered in an inventory search following Noel's arrest for fleeing.

SUMMARY OF ARGUMENT

I. Even if this Court rejects the arguments in the Respondent's Brief regarding the lawfulness of the stop, it should find the stop lawful under the U.S. Supreme Court's recent decision in *Heien*.

A. Under *Heien*, the stop of Noel based on a large crack across his windshield was consistent with the Fourth Amendment because any mistake of law involved in that stop was reasonable. West Virginia law prohibits driving a vehicle that is in an unsafe condition. An officer who must make a snap judgment could reasonably—even if mistakenly—conclude that a large crack across an entire windshield renders a vehicle unsafe in violation of state law.

B. Consistent with previous precedent, this Court should follow *Heien* in interpreting Article III, Section 6 of the Constitution of West Virginia. It is well settled that this Court usually gives Article III, Section 6, the same interpretation given to the Fourth Amendment by the Supreme Court of the United States. And there is no reason here to depart from that general practice. Indeed, this Court's jurisprudence interpreting Article III, Section 6, tracks the several principles underlying the Supreme Court's decision in *Heien*. Principally, like the Supreme Court of the United States, this Court has already acknowledged that searches may be premised on a reasonable mistake of *fact*, and there is no reason to treat mistakes of *law* differently.

II. As the State has argued previously, Officer Adams acted reasonably when he searched the console for a weapon and discovered the drugs, and nothing in Noel's supplemental brief is

plausibly to the contrary. Adams had a reasonable belief that Noel might try access the console and retrieve a weapon. As the U.S. Supreme Court explained in *Michigan v. Long*, 463 U.S. 1032, 1051 (1983), the officer's mere control over Noel at the time is not alone enough to undermine his reasonableness in conducting a limited search for weapons. Moreover, Adams was not required to place Noel in his police cruiser in lieu of searching the console. As long as the decision is reasonable, law enforcement officers are not required by the U.S. or West Virginia Constitutions to take the least intrusive approach.

III. As an alternative, the State argued and the Circuit Court concluded that the drugs were admissible because they were found as part of a lawful inventory search, which the Petitioner has not disputed. App. II at 17, 30; Petitioner's Brief at 9–11. But even if this Court rejects all of the State's arguments in support of the legality of the search, the drugs found in the console are nevertheless admissible because they fall within the inevitable discovery exception to the exclusionary rule. Officer Adams already had all of the evidence that he needed to arrest Noel for fleeing. This arrest would have required impoundment of the vehicle and an inventory search, which would have uncovered the drugs in the console.

ARGUMENT

I. THE DECISION OF THE U.S. SUPREME COURT IN *HEIEN V. NORTH CAROLINA* PROVIDES AN ADDITIONAL BASIS TO UPHOLD THE TRAFFIC STOP OF NOEL

As the State explained in its Respondent's Brief, Officer Adams had several lawful bases to initiate a traffic stop of Noel. For one, Noel's severely broken windshield was a defect in violation of the safety standards required under West Virginia law. Respondent's Brief at 11. For another, Noel's reckless flight in his vehicle jeopardized the public's safety and created a clear justification for the stop. *Id.*

In addition to these arguments, *Heien* provides another, independent basis for the traffic stop. As explained below, even if this Court does not agree that Noel’s broken windshield was actually a violation of the law, it should uphold the traffic stop under *Heien* as a reasonable, if mistaken, understanding of the law by Officer Adams.

A. *Heien* Establishes that Law Enforcement Had Reasonable Suspicion to Stop Noel.

1. The Supreme Court of the United States held, in *Heien v. North Carolina*, that reasonable suspicion for a traffic stop under the Fourth Amendment may be based on a reasonable mistake of law. *Id.* at 536. A traffic stop constitutes a “seizure” under the Fourth Amendment and must be based on “reasonable suspicion.” *Id.* Reasonable suspicion is satisfied if a law enforcement officer has “‘a particularized and objective basis for suspecting the particular person stopped’ of breaking the law.” *Id.* (quoting *Prado Navarette v. California*, 134 S. Ct. 1683, 1687–88 (2014)). In *Heien*, a near-unanimous Supreme Court noted that it had affirmed in previous decisions that law enforcement officers may initiate searches and seizures based on mistakes of *fact* if “the mistakes [are] those of reasonable men.” *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). The Court went on to explain that “reasonable men make mistakes of *law*, too, and such mistakes are no less compatible with the concept of reasonable suspicion.” *Id.* (emphasis added). “Reasonable suspicion arises from the combination of an officer’s understanding of the facts *and* his understanding of the relevant law,” the Court explained. *Id.* (emphasis added). Thus, whether a mistake is one of fact or law, “the result is the same: the facts are outside the scope of the law.” *Id.* The Court concluded that “[t]here is no reason . . . why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by a similarly reasonable mistake of law.” *Id.*

The Supreme Court stressed that any other conclusion would be “hard to reconcile” with its decision in *Michigan v. DeFillippo*, 443 U.S. 31 (1979). *Heien*, 135 S. Ct. at 538. In that decision, the Court held that an arrest under a statute that was later declared unconstitutional did not violate the Fourth Amendment. *DeFillippo*, 443 U.S. at 33. Because the ordinance was later declared unconstitutional, DeFillippo’s conduct had *in fact* been lawful and the arresting officers were “wrong in concluding that DeFillippo was guilty of a criminal offense.” *Heien*, 135 S. Ct. at 538. Nevertheless, the Court held that the officers had probable cause for the arrest because “the . . . assumption that the law was valid was reasonable.” *Id.* In other words, the officers in *DeFillippo*, like the officer in *Heien*, had committed a reasonable “mistake of law.” *Id.*

2. In this case, as the State explained in its Respondent’s Brief, there is a reasonable argument that operating a vehicle with a crack that spans the full length of a windshield violates West Virginia law. Respondent’s Brief at 9–12. Two different provisions of the West Virginia Code require that a vehicle must not have any defect that makes the vehicle a potential danger to others. *See* W. Va. Code § 17C-15-1 (“[i]t is a misdemeanor for any person to drive or move . . . any vehicle . . . which is in such unsafe condition as to endanger any person, . . . or which is in any manner in violation of this article”); *id.* § 17C-16-1 (“[n]o person shall drive or move on any highway any motor vehicle . . . unless . . . said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon any highway”). In turn, another provision of the Code and the manual that governs the inspection of vehicles for operation in West Virginia (which has been incorporated into the Code of State Rules) both establish that a clear view through a windshield is necessary for the safe operation of a vehicle. *See* W. Va. Code § 17C-15-36 (bars driving a vehicle with any material on the windshield “which obstructs the driver’s clear view of the highway or any intersecting highway”); West Virginia State Police,

Official Motor Vehicle Inspection Manual (Revised 2010) (available at apps.sos.gov/adlaw/csr/readfile.aspx?DocId=15091&Format=PDF) (requiring the rejection of a vehicle for “glass that is broken or shattered . . . that impairs the vision of the driver” or for “any repair” in the area of the windshield wiper blades “larger than 3 [inches] in length”); *see also*, W. Va. Code St. R. § 91-12-2 (incorporating the vehicle inspection manual). Altogether these provisions require, as a matter of state law, a clear view through the windshield to ensure the safe operation of a vehicle. And as the Supreme Court of Florida has explained with respect to a similar law in its State, “whether a cracked windshield constitutes a violation” of such vehicle safety laws “is variable and must be evaluated on a case-by-case basis.” *Hilton v. State*, 961 So.2d 284, 295 (Fla. 2007).

Under *Heien*, this reasonable interpretation of the law is enough to justify the traffic stop of Noel. Even if he was wrong, Officer Adams could have made a reasonable mistake of law in concluding that the large crack across Noel’s windshield was a violation of West Virginia law. A crack across the windshield could obstruct a driver’s view and increase the likelihood of an accident, and the already broken glass could be more likely to shatter and injure passengers or others in the area of the vehicle. *See* W. Va. Code §§ 17C-15-1, 17C-15-36. A reasonable officer who must make a “quick decision” as a car “whizzes by,” *Heien*, 135 S. Ct. at 539, could conclude that these dangers violate the prohibition against operation of a vehicle “in such unsafe condition as to endanger any person,” W. Va. Code § 17C-15-1(a). As he must, Noel expressly concedes that “the arresting officer’s ‘mistake of law’ in apparently believing that operating a

vehicle with a cracked windshield afforded him probable cause for a traffic stop falls within the ambit of the decision in *Heien*.” Petitioner’s Supplemental Brief at 3.¹

B. This Court Should Interpret Article III, Section 6 of the Constitution of West Virginia Consistent with *Heien*.

1. Consistent with previous precedent, this Court should follow the U.S. Supreme Court’s decision in *Heien* because Article III, Section 6 of the Constitution of West Virginia is substantially similar to the Fourth Amendment of the U.S. Constitution. Article III, Section 6 provides that “[t]he rights of the citizens to be secure in their houses persons, papers and effects, against unreasonable searches and seizures, shall not be violated.” This Court has held that this provision, like the Fourth Amendment, “protect[s] an individual’s reasonable expectation of privacy.” Syl. Pt. 7, *State v. Peacher*, 167 W. Va. 540, 541, 280 S.E.2d 559 (1981). Accordingly, “[it] ‘should be given a construction in harmony with the construction of the federal provisions by the Supreme Court of the United States.’” *State v. Bruner*, 143 W. Va. 755, 766, 105 S.E.2d 140, 146 (1958) (quoting Syl. Pt. 2, *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257 (1922)); *see also State v. Clark*, 232 W. Va. 480, 493, 752 S.E.2d 907, 920 (2013) (“In most cases, this Court has ruled that the protections afforded West Virginia citizens under the search and seizure provisions of our State Constitution are co-extensive with those provided for in the Fourth and Fourteenth Amendments to the United States Constitution.”); *Rogers v. Albert*, 208 W. Va. 473, 479, 541 S.E.2d 563, 569 (2000) (“This Court has customarily interpreted Article III, § 6 of the West Virginia Constitution in harmony with federal case law construing the Fourth Amendment.”); *State v. Duvernoy*, 156 W. Va. 578, 582, 195 S.E.2d 631, 634 (1973)

¹ Although Noel concedes that Officer Adams had probable cause for the stop, and the State agrees, *see* Respondent’s Brief at 11, that higher standard need not be satisfied here. Decisions of the Supreme Court of the United States, *Heien*, 135 S. Ct. at 535–40, and this Court, *State v. Dunbar*, 229 W. Va. 293, 296–99, 728 S.E.2d 539, 542–45 (2012), have required only reasonable suspicion for a stop in circumstances similar to this case.

(“This Court has traditionally construed Article III, section 6 in harmony with the Fourth Amendment.”).

Indeed, this Court’s jurisprudence interpreting Article III, Section 6, tracks the several principles underlying the Supreme Court’s decision in *Heien*. In the context of traffic stops, this Court has followed the decisions of the Supreme Court of the United States to hold that the State Constitution permits law enforcement officer to “stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 1, *State v. Stuart*, 192 W. Va. 428, 429, 452 S.E.2d 886, 887 (1994). And this Court has looked to the same “touchstone . . . of reasonableness” that formed the basis of the *Heien* decision. *State v. Lacy*, 196 W. Va. 104, 115, 468 S.E.2d 719, 732 (1996) (quoting *Michigan v. Long*, 463 U.S. 1032, 1051 (1983)).

Moreover, like the U.S. Supreme Court, this Court has already acknowledged that searches may be premised on a reasonable mistake of *fact*, and there is no reason to treat mistakes of *law* differently. For instance, the inquiry into consent looks not to whether a person gave actual consent but only to whether an officer had information that would “warrant a man of reasonable caution in the belief” that voluntary consent had been obtained—even if the officer turns out to have been mistaken. *State v. Buzzard*, 194 W. Va. 544, 550, 462 S.E.2d 50, 56 (1995) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990)). And as the U.S. Supreme Court explained in *Heien*, reasonable mistakes of law should be treated similarly. “Whether the facts turn out to be not what was thought or the law turns out to be not what was thought,” the result is the same: a search based on a reasonable mistake. *Heien*, 135 S. Ct. at 536. Nothing in Article III, Section 6 supports the conclusion that “this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly

reasonable mistake of law.” *Id.* Consider this case as an example. It should not make a difference whether the officer mistakenly concluded that a crack violated the statute as a matter of law or, because of poor visibility, mistakenly believed as a matter of fact that a small crack was large enough to pose a safety hazard.

And lastly, this Court has also relied on the U.S. Supreme Court’s decision in *DeFillippo* such that it would be “hard to reconcile” not following *Heien*. *See Heien*, 135 S. Ct. at 538. In *State v. Hefner*, 180 W. Va. 441, 376 S.E.2d 647 (1988), this Court cited *DeFillippo* for the proposition that “[t]he validity of an arrest made in good faith reliance on an ordinance is not even affected by a subsequent judicial determination that the ordinance is unconstitutional, and evidence obtained in a search incident to such arrest is generally held to be admissible at trial.” *Id.* at 445, 376 S.E.2d at 651. As the Supreme Court explained in *Heien*, this conclusion depends on an understanding that a reasonable mistake of law does not invalidate the probable cause for an arrest. *Heien*, 135 S. Ct. at 538. That conclusion cannot be reconciled with a holding that a reasonable mistake of law invalidates the (lesser) reasonable suspicion required for a traffic stop.

2. To be sure, this Court has held that “[t]he provisions of the Constitution of the State of West Virginia may, *in certain instances* require higher standards of protections than afforded by the Federal Constitution” under the Fourth Amendment. Syl. Pt. 1, *State v. Mullens*, 221 W. Va. 70, 72, 650 S.E.2d 169, 171 (2007) (quoting Syl. Pt. 2, *Pauley v. Kelly*, 162 W. Va. 672, 672, 255 S.E.2d 859, 861 (1979)) (emphasis added). But this case does not present the type of situation where this Court has found it necessary to deviate from its general rule of interpreting Article III, Section 6 to be coterminous with the Fourth Amendment. In *Mullens*, for example, this Court held that “[i]t is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person’s home by employing an informant to

surreptitiously use an electronic surveillance device to record matters occurring in that person's home without first obtaining a . . . court order . . .” Syl. Pt. 2, *Mullens*, 221 W. Va. at 72, 650 S.E.2d at 171. The Court relied on its “long history of protecting the sanctity of the home from warrantless searches and seizures” and a “bright line this Court has historically drawn between searches and seizures in the home, versus searches and seizures outside the home.” *Id.* at 90–91, 650 S.E.2d 189–90. That historical approach to the interpretation of the Constitution conflicted with a decision by the U.S. Supreme Court that “stands for the proposition that a person does not have an expectation of privacy regarding conversations held in his/her home with a third party,” *id.* at 76–77, 650 S.E.2d at 175–76, and this Court followed its historic approach. *See Clark*, 232 W. Va. at 494, 752 S.E.2d at 921 (explaining that *Mullens* “f[ound] that this state has a long history of protecting its citizens from unfettered state intrusion into the privacy of a citizen’s home, and that the [U.S.] Supreme Court’s prior decisions on this issue did not reflect the same approach to the issue”).

As relevant here, this Court does *not* have a long history of providing broader protection under the West Virginia Constitution from traffic stops than that afforded by the U.S. Supreme Court under the Fourth Amendment. Instead, this Court has traditionally followed the U.S. Supreme Court’s decisions. For instance, in *Stuart* this Court addressed a situation in which it had previously “stated [that] ‘[t]he Fourth Amendment requires that a car cannot be stopped without probable cause,’” and had “applied a probable cause standard.” *Stuart*, 192 W. Va. at 431, 452 S.E.2d at 889 (quoting *State v. Meadows*, 170 W. Va. 191, 193, 292 S.E.2d 50, 52 (1982)). In an opinion by Justice Cleckley, this Court followed intervening precedent of the U.S. Supreme Court and held that “[p]olice officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle

has committed, is committing, or is about to commit a crime” under both the West Virginia and Federal Constitutions. Syl. Pt. 1, *Stuart*, 192 W. Va. at 429, 452 S.E.2d at 887. The Court overruled its previous decision to the extent that decision conflicted with the intervening decisions of the U.S. Supreme Court. *Id.*

3. Finally, this Court’s decisions in *State v. Dunbar*, 229 W. Va. 293, 728 S.E.2d 539 (2012) (*per curiam*) and *Clower v. West Virginia Department of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), *superseded by statute on other grounds as stated in Miller v. Chenoweth*, 229 W. Va. 114, 117 n.5, 727 S.E.2d 658, 661 (2010), do not foreclose this Court from following *Heien*. In both of those decisions, this Court ruled that law enforcement officers lacked reasonable suspicion for a traffic stop based on an erroneous legal determination. *Dunbar*, 229 W. Va. at 299, 728 S.E.2d at 545 (absence of a “specific statutory violation” in that case deprived the officer of “the requisite reasonable suspicion”); *Clower*, 223 W. Va. at 541–43, 678 S.E.2d at 47–49 (officer lacked reasonable suspicion for a stop based on an “interpretation of that law” that was “clearly wrong”); *see also State v. Lilly*, No. 14-0199, 2015 WL 1741690, at *2–3 (April 13, 2015) (unpublished decision) (concluding that a stop based on a mistake of law lacked reasonable suspicion). But the State did not argue in those cases either specifically that the mistake of law was reasonable, or more generally that a reasonable mistake of law can form the basis for reasonable suspicion. *See* Brief of Respondent State of West Virginia, *State v. Dunbar*, No. 11-0555, 2011 WL 7790920 (July 28, 2011); Brief of Appellant West Virginia Department of Motor Vehicles, *Clower v. West Virginia*, No. 34329, 2008 WL 5584020 (Oct. 30, 2008). And this Court accordingly did not address the issue decided in *Heien*.

To the extent that this Court finds *Dunbar* and *Clower* irreconcilable with *Heien*, however, those decisions should be overruled. As in *Stuart*, this Court should follow its general

rule of interpreting Article III, Section 6 to be coterminous with the interpretation of the Fourth Amendment by the U.S. Supreme Court, and overrule any existing precedent that is inconsistent with the U.S. Supreme Court's more recent decision.

II. THE SEARCH OF THE CENTER CONSOLE WAS A REASONABLE SEARCH MOTIVATED BY A CONCERN FOR SAFETY.

A. As the State explained in its Respondent's Brief, the constitutional prohibition of unreasonable searches does not bar law enforcement officers from reasonable searches to ensure their own safety. Law enforcement officers may conduct a search without a warrant "incident to a lawful arrest." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). This exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* A search incident to arrest may include "a vehicle search when an arrestee is unsecured and within reaching distance of the vehicle" *Id.* at 346. In fact, a law enforcement officer may search "a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'" *Id.* at 346–47 (quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)).

Here, the State has explained, Officer Adams acted reasonably to ensure his own safety when he looked in the center console. Respondent's Brief at 12–14. Noel had been uncooperative and continued to look at the center console. *Id.* at 13. And, although he was handcuffed, Noel was within reaching distance of the car and could have accessed the passenger compartment. *Id.* at 13–14. The State continues to adhere to its position that the search was lawful for the reasons explained in its Respondent's brief, but because this Court's order invited the parties to rebrief this case, the State offers the following responses to two arguments advanced by Noel in his supplemental brief.

B. 1. Noel first argues that a concern for officer safety cannot support the search of the console because he was “in [the] complete control of the officer.” Petitioner’s Reply Brief at 4; Petitioner’s Supplemental Brief at 5. But this argument has been rejected by the Supreme Court of the United States. In *Long*, the Supreme Court refused the contention that officers could not search the interior of a vehicle for weapons simply because the suspect “was effectively under their control.” 463 U.S. at 1051. The Court explained that in every investigative detention “the suspect is ‘in the control’ of the officers,” *id.*, but searches of a vehicle for weapons may still be reasonable² when a suspect could “break away from police control and retrieve a weapon from his automobile.” *Id.*

The Supreme Court in *Long* permitted a search of the entire interior of a vehicle for weapons even though the officers in that case had a similar level of control to the control Officer Adams had over Noel. Long was intoxicated and had been removed from his vehicle. *Id.* at 1035–36. Two officers were at the scene, and although Long had not yet been handcuffed, the officers had confirmed that Long did not have weapons on his person. *Id.* at 1036. Despite the control exercised by two officers over a lone, intoxicated, and unarmed suspect, the Court held that the officers had “an articulable and objectively reasonable belief that the suspect [was] potentially dangerous.” *Id.* at 1051.

2. Noel argues, too, that the search could not be justified because “[t]he officer could have, had he wished, placed Mr. Noel in the backseat of his cruiser where he would obviously not be a threat to anyone.” Petitioner’s Reply Brief at 4; Petitioner’s Supplemental Brief at 5.

² While the State argued in its Respondent’s Brief that Officer Adams had probable cause for the search of the console and continues to adhere to that position, *see* Respondent’s Brief at 12–14, it is enough that an officer have a reasonable suspicion that a person is dangerous and might access the vehicle and gain immediate control of a weapon. *See Gant*, 556 U.S. at 346–47; *State v. Brewer*, 204 W. Va. 1, 4–5, 511 S.E.2d 112, 115–16 (1998).

Law enforcement officers are not required, however, to take the approach that leads to the least intrusion to comply with the Fourth Amendment and Article III, Section 6. The Supreme Court of the United States has “repeatedly stated . . . that ‘[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.’” *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 629 n.9 (1989) (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)). Such a test “could raise insuperable barriers to the exercise of almost all search and seizure powers” because a judge “can almost always imagine some alternative means” after the fact that would have accomplished the purpose of a search. *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–57 n.12 (1976); *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985)).

It is well settled that a search is constitutional so long as the actions of law enforcement officers are reasonable, even if a less intrusive approach was possible. The decision of the U.S. Supreme Court establishing the community caretaker exception to the Fourth Amendment is illustrative. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Court upheld the search of the trunk of a car for a revolver. 413 U.S. at 439–48. The Court “rejected the contention that the public could equally well have been protected by the posting of a guard over the automobile.” *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). And the Court explained that “[t]he fact that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means does not, by itself, render the search unreasonable.” *Cady*, 413 U.S. at 447.

As the State explained in its Respondent’s Brief, Officer Adams’s decision to search the console for a weapon instead of placing Noel in the back of the police cruiser was reasonable. Officer Adams was asking Noel questions to try to understand why he had fled, but Noel continued to look at the console in the vehicle and appeared nervous. App. II at 9. In this

situation, it was reasonable for Officer Adams to check the console instead of cutting off questioning to put Noel in the back of his cruiser.³

III. THE EVIDENCE IN THE CONSOLE WOULD HAVE BEEN INEVITABLY DISCOVERED.

As an alternative to search to ensure officer safety, the State further argued in its Respondent's Brief that the search of the console was valid as part of a lawful inventory search. Respondent's Brief at 14-16. This argument was originally offered at the suppression hearing before the circuit court and accepted by that court, was made again in the Respondent's Brief, and is unrebutted by Petitioner on appeal. App. II at 17, 30; Respondent's Brief at 14-16. As a result, Noel has waived any argument that the inventory search was unlawful. *Morris v. Painter*, 211 W. Va. 681, 685, 567 S.E.2d 916, 920 (2002) (quoting *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621(1996) (“[A]lthough we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing . . . but not supported with pertinent authority, are not considered on appeal.”)).

A. But even if this Court disagrees with the State and concludes that the search of the console was illegal, the drug evidence discovered in the console should be deemed admissible under the inevitable discovery exception to the exclusionary rule. The exclusionary rule “usually precludes” the use of illegally obtained evidence “in a criminal proceeding against the victim of the illegal search and seizure.” *State v. Flippo*, 212 W. Va. 560, 578 n.20, 575 S.E.2d 170, 185 n.20 (2002). A “generally recognized exception[] to the exclusionary rule” applies, however, when “the evidence would inevitably have been discovered.” Syl. Pt. 2, *State v. Hawkins*, 167

³ Noel has waived the argument that the search in this case lacked “probable cause or another lawful basis” under West Virginia Code § 62-1A-10, by making only passing reference to that argument. *See Morris*, 211 W. Va. at 685, 567 S.E.2d at 916; Petitioner's Brief at 10. But even if this argument had been raised the search would have had a “lawful basis”—whether probable cause, reasonable suspicion, or some other basis—for all the reasons explained in Respondent's Brief and this brief.

W. Va. 473, 474, 280 S.E.2d 222, 224 (1981). “Under the inevitable discovery rule,” evidence obtained in violation of the Fourth Amendment and Article III, Section 6 “is not subject to the exclusionary rule if it is shown that the evidence would have been discovered” using lawful means. Syl. Pt. 3, *Flippo*, 212 W. Va. at 563, 575 S.E.2d at 173.

This Court has adopted the minority view of the inevitable discovery exception, which requires the State to prove three facts by a preponderance of the evidence for the exception to apply. *First*, the State must show “that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct.” Syl. Pt. 4, *Flippo*, 212 W. Va. at 563–64, 575 S.E.2d at 173–74. *Second*, the State must show “that the leads making the discovery inevitable were possessed by the police at the time of the misconduct.” *Id.* *Third*, the State must show “that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct.” *Id.* This last requirement is met when “the police would have discovered the evidence ‘by virtue of ordinary investigations of evidence or leads already in their possession.’” *United States v. Johnson*, 777 F.3d 1270, 1274 (11th Cir. 2015) (quoting *United States v. Virden*, 488 F.3d 1317, 1323 (11th Cir. 2007)).

A straightforward application of this test establishes that law enforcement would have inevitably discovered the drugs in the center console of the vehicle. At the time that Officer Adams opened the center console, he already had all of the evidence that led to Noel’s arrest and conviction for fleeing in a vehicle. Officer Adams had signaled with his lights and sirens for Noel to stop, and Noel had instead led Officer Adams on a high-speed chase through traffic and residential neighborhoods. App. II at 6; App. III at 75–77. And Noel’s arrest for fleeing alone would have required the impoundment of his vehicle and an inventory search of his car because

no one was available to remove the vehicle. App. II at 10. In addition, Officer Adams had discovered that Noel could not operate a vehicle in West Virginia because his driver's license had been revoked, and that fact also would have required an inventory search and impoundment. *Id.* at 7–8; *see also*, W. Va. Code § 17B-2-5 (“No person . . . may drive any motor vehicle upon a street or highway in this state or upon any subdivision street used by the public generally unless the person has a valid driver's license . . .”). Given these facts, there was more than “a reasonable probability” that the drug evidence in the center console would have been discovered in a lawful inventory search flowing from evidence “possessed by [Officer Adams] at the time” that he opened the center console. Syl. Pt. 4, *Flippo*, 212 W. Va. at 564, 575 S.E.2d at 174.

Moreover, Officer Adams was “actively pursuing a lawful alternative line of investigation to seize the evidence” before he opened the console. *Id.* Officer Adams had stopped Noel and questioned Noel specifically about why he had fled, and was in the process of taking Noel into custody. The evidence would have been discovered “by virtue of ordinary investigations” to determine the inventory of the vehicle that would have followed from this alternative ground for inquiry and arrest. *Johnson*, 777 F.3d at 1274 (quoting *Virden* 488 F.3d at 1323).

B. The application of the same test by the Eleventh Circuit in a materially indistinguishable case is illustrative. *See Flippo*, 212 W. Va. at 579–81, 579 S.E.2d at 189–91 (adopting the narrow view of the inevitable discovery rule established by the Eleventh Circuit). In *Johnson*, the Eleventh Circuit held that the inevitable discovery exception to the exclusionary rule applied when a law enforcement officer had decided to arrest a suspect for driving with a suspended license, but before he made the arrest, the officer reached into the vehicle and removed a cloth to discover a sawed-off shotgun. 777 F.3d at 1273–77. The officer then made

the arrest and conducted an inventory search of the vehicle. *Id.* at 1273. The officer later had to have the truck impounded when he could not find another registered owner. *Id.*

The Court explained that the district court had not clearly erred when it concluded that there was a reasonable probability that the evidence would have been discovered from lawful means based on information known to the officer at the time. *Id.* at 1274. Although the officer had not concluded that there was no one to whom the vehicle could be released and that he would have to impound the vehicle when he performed the illegal search, he had discovered that the suspect's license was suspended and he could not return the truck to the suspect. *Id.* These facts would have eventually required the officer to impound the truck and perform an inventory search whether or not the officer had discovered the contraband before that search. *Id.* So, too, here.

Furthermore, as here, the officer's actions constituted active pursuit of an alternative line of investigation. The Eleventh Circuit rejected the argument that the officer was not "actively pursuing any lawful means [of discovery] at the time of the illegal conduct" because the officer "had not yet initiated procedures to have the truck impounded and searched." *Id.* (quoting *Virden*, 488 F.3d at 1323). The Court explained that "[a]ctive pursuit' does not require that police have already planned the particular search that would obtain the evidence." *Id.* It only requires "that the police would have discovered the evidence 'by virtue of ordinary investigations of evidence or leads already in their possession.'" *Id.* A broader interpretation of the requirement of active pursuit "would put the government in a 'worse position than had the police misconduct not occurred.'" *Id.* at 1275 (quoting *Virden*, 488 F.3d at 1323).

C. The conclusion that the inevitable discovery exception should apply to this case is consistent too with decisions by several other federal and state courts applying the same test.

See, e.g., United States v. Mendez, 315 F.2d 132, 134–39 (2d. Cir. 2002) (search of glove compartment of vehicle that would later be searched for inventory and impounded due to arrest for separate offense falls within inevitable discovery exception); *United States v. Seals*, 987 F.2d 1102, 1104–08 (5th Cir. 1993) (search for inventory and impoundment after arrest would have led inevitably to discovery of evidence in trunk of car); *Humphreys v. State*, 694 S.E.2d 316, 331 (Ga. 2010) (explaining that the Court “need not determine whether the search of [a] Jeep after [an] arrest was valid under *Gant*” when the evidence would have been discovered in an inventory search); *Commonwealth v. Bailey*, 986 A.2d 860, 863 (Pa. Super. 2009) (inevitable discovery exception applied to search of center console because it would have been searched as part of an inventory search after arrest for different offense); *see also Flippo*, 212 W. Va. at 579, 575 S.E.2d at 189 (citing decisions from a number of jurisdictions that apply the same standard for the inevitable discovery).

CONCLUSION

For the foregoing reasons and those stated in the State’s original Respondent’s Brief, the decision of the Circuit Court to deny Noel’s motion to suppress should be affirmed and the guilty verdict rendered by the Mercer County jury should be upheld.

Respectfully submitted,

STATE OF WEST VIRGINIA

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Dated May 14, 2015

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0174

State of West Virginia,

Plaintiff Below, Respondent,

v.

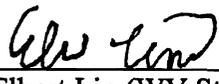
James Earl Noel, Jr.,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Elbert Lin, Solicitor General and counsel for Respondent, verify that on May 14, 2015, I served a copy of *State of West Virginia's Supplemental Response Brief* upon all parties as indicated below by U.S. Mail:

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