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NO. 34864

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

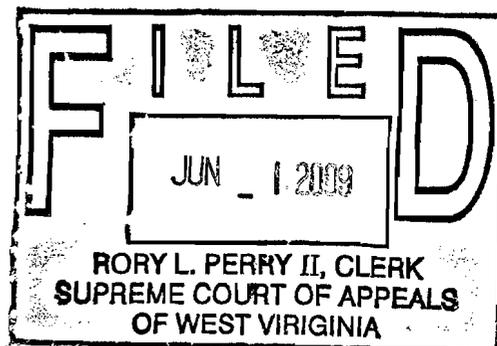
DEBBIE L. ULLOM,

Petitioner,

v.

JOSEPH CICCHIRILLO, COMMISSIONER  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Respondent.



BRIEF OF APPELLANT

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WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Appellant.

BRIEF OF APPELLANT

I.

INTRODUCTION

In this case, the circuit court reversed a DMV decision revoking the Appellee's driver's license for Driving under the Influence. The circuit court erred because: (1) it failed to adhere to the community caretaker doctrine under *Cady v. Dombrowski*, 413 U.S. 433 (1973) and *Wagner v. Hedrick*, 181 W. Va. 482, 383 S.E.2d 286 (1989); and, (2) it considered matters that were not before the Commissioner violating *Choma v. West Virginia Div. of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001) and its progeny.

II.

STATEMENT OF FACTS

At approximately 8:30 p.m. on June 21, 2006, Rec. at 62,<sup>1</sup> West Virginia State Police Trooper R.J. Busick was on routine patrol about one mile from Number 2 Ridge, at the

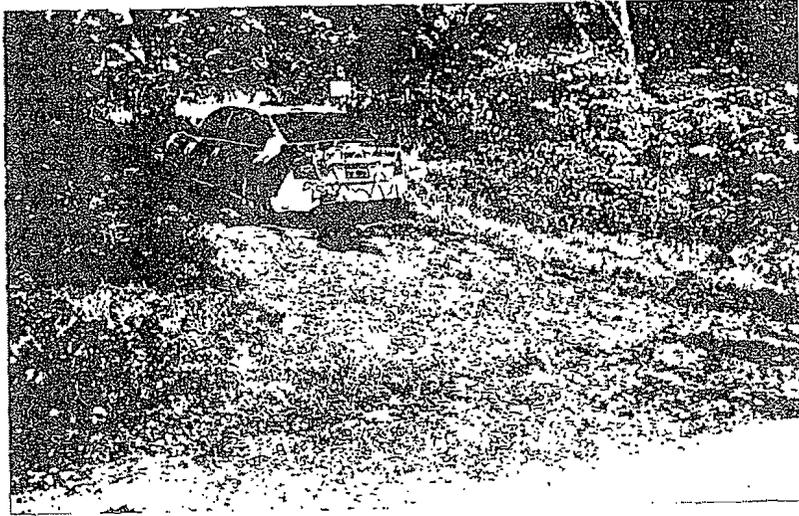
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<sup>1</sup>June 26, 2006 was a Monday. See *Keeper of Mountains Foundation v. United States Dep't of Justice*, No. 2:06-cv-00098, 2006 WL 1666262, at \*3 (S.D. W. Va. June 14, 2006).

Golden Ridge Intersection in Marshall County. Rec. at 56.<sup>2</sup> The evening was dusk. Rec. at 62. Trooper Busick saw a white Subaru with its parking lights on, *id.*, but without the engine running. Rec. at 61. Although the car did not show any damage or signs of distress, Rec. at 64, nor did Trooper Busick see it being driven, Rec. at 61, the location of where the Subaru was actually parked was off the road on a lane leading into a field, which lane was surrounded by trees and vegetation and further entry was blocked by a chain and which did not appear to be nor contained any indication that it was a designated traffic pull off site nor a standard parking area, and the car was perpendicular to the actual road:

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<sup>2</sup>The only witness at the revocation hearing was Trooper Busick. Ms. Ullom, who was present at the hearing, Rec. at 53 , did not testify nor produce any witnesses on her behalf.

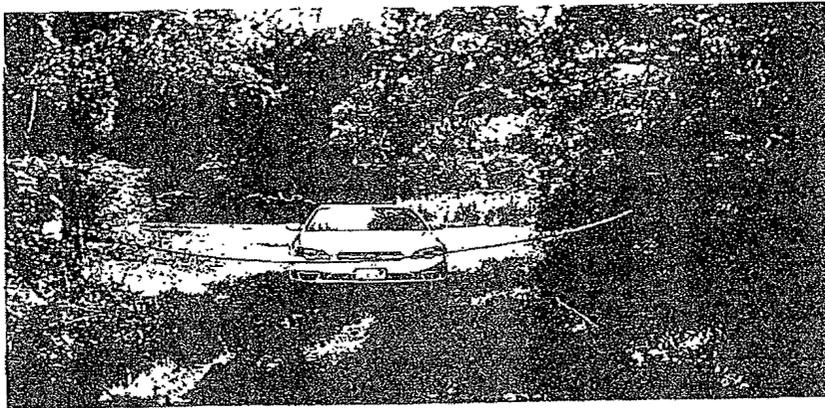


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REP EXHIBIT #1

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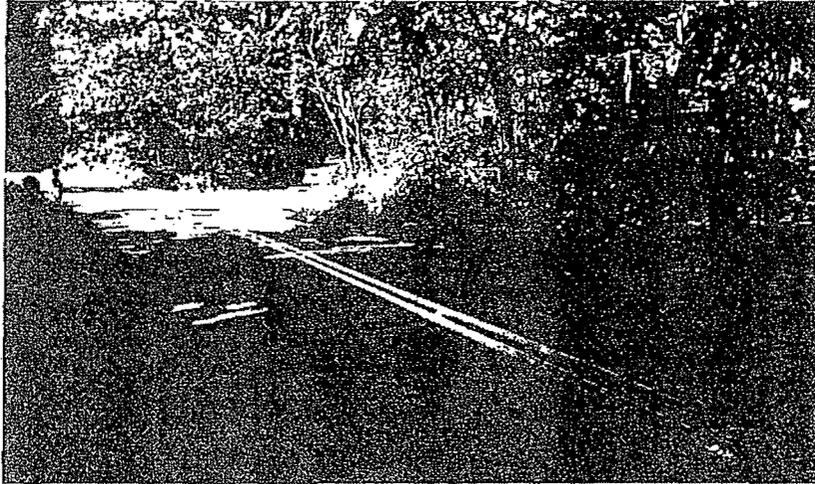


EXHIBIT 3

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KEEP EXHIBIT 3

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Rec. at 26-28. Trooper Busick parked his vehicle behind the Subaru, as specifically found by the circuit court, “to do a road safety check.” Rec. at 80. The circuit court also specifically found that “[w]hile asking the Petitioner [Respondent here] if she was having any problems, [Trooper Busick] observed the Petitioner’s eyes appeared bloodshot and glassy, . . . noticed her speech sounded slurred . . . observed the Petitioner exhibited unsteady motor skills, and . . . detected the odor of an alcoholic beverage on her breath. [Trooper Busick] observed the Petitioner was unsteady while walking.” Rec. at 80-81. Trooper Busick arrested the Respondent. Rec. at 81. Trooper Busick also observed that the seat of the Subaru was in an upright position corresponding to Ms. Ullom’s height, and that the keys were in the ignition. Rec. at 57. Trooper Busick did not testify that anyone other than Ms. Busick was in the car. Trooper Busick gave Ms. Ullom her *Miranda* warnings, and she told Trooper Busick that she had drunk four beers and had driven to the spot where he found her parked. Rec. at 57.

The Commissioner revoked Ms. Ullom’s license after a hearing. Rec. at 15-23. The circuit court reversed the revocation on two grounds that: (1) Trooper Busick lacked any reason to investigate the Respondent’s situation; and, (2) that the court afforded substantial weight to the Respondent’s acquittal under *Choma v. West Virginia Division of Motor Vehicles*, 210 W .Va. 256, 557 S.E.2d 310 (2001), even though this information was not before the Hearing Examiner (apparently because the criminal case had not been resolved at the time of the revocation hearing). Rec. at 86-87.

### III.

#### STANDARD OF REVIEW

Judicial review of decisions of the Commissioner are reviewed under the

Administrative Procedures Act, W. Va. Code § 29A-5-4. Syl. Pt. 1, *Johnson v. State Dep't of Motor Vehicles*, 173 W. Va. 565, 318 S.E.2d 616 (1984). Thus, “[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). Under the APA, “[t]he ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syllabus Point 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).’ Syllabus Point 2, *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002).” Syl. Pt. 3, *Lowe v. Cicchirillo*, \_\_\_ W. Va. \_\_\_, 672 S.E.2d 311, 313 (2008). “[T]he ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo*.” Syl. Pt. 2, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

#### IV.

#### ARGUMENT

##### **A. The Circuit Court erred in concluding that only an investigatory stop can justify a police officer’s actions.**

Here, the circuit court concluded that “an officer must have reasonable suspicion to make an investigatory stop of a vehicle[,]” Rec. at 84, and found that such suspicion did not exist. Rec. at 86-87. Thus, the circuit court refused to consider any evidence adduced

before the Commissioner relating to Ms. Ullom's intoxication on the evening at issue, apparently relying (without saying so) on the exclusionary rule. *See, e.g., State v. Farmer*, 193 W. Va. 84, 89, 454 S.E.2d 378, 383 (1994) ("the remedy for an illegal arrest is excluding any evidence obtained incident to the illegal arrest pursuant to the Fourth Amendment of the *United States Constitution*."); *Missouri v. Seibert*, 942 U.S. 600, 618 (2004) (Breyer, J., concurring) (under the "fruit of the poisonous tree" doctrine, evidence obtained subsequent to a constitutional violation leading to the evidence must be suppressed). The circuit court committed clear legal error in this regard.

While the circuit court was correct that an investigatory stop requires reasonable suspicion of criminal activity, *see, e.g., Syl. Pt. 5, in part, Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) ("For a police officer to make an investigatory stop of a vehicle the officer must have an articulable reasonable suspicion that a crime has been committed, is being committed, or is about to be committed."), the circuit court erred in considering Trooper Buskirk's conduct an "investigatory stop," which it was not—and which it did not need to be. "Not every contact between a police officer and a motorist requires a consideration of [reasonable suspicion] in the sense of whether or not the police officer suspected that the driver might be involved in the commission of an offence. This would ignore the reality of the larger role played by the police in our society." *R. v. Walsh* (Nfld. & Lab. P.C.), No. 1302A-00175, 2002 CanLII 8708 ¶ 30 n.9 (Nov. 15, 2002). "Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to the desire to prosecute for crime." *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (footnote omitted).

For example, in *State v. Boswell*, 170 W. Va. 433, 440, 294 S.E.2d 287, 293-94

(1982), this Court recognized that “[m]any activities unrelated to criminal investigations bring legitimate interplay between law enforcement officials and the public—such as traffic control, accident investigation, and health and rescue missions.” And when such interplay between police and a citizen results in the discovery of criminal activity, such evidence of criminal activity is admissible in administrative or judicial proceedings under both the federal and West Virginia Constitutions.

This was expounded on in *Wagner v. Hedrick*, 181 W. Va. 482, 489, 383 S.E.2d 286, 293 (1989), where this Court observed “[t]he more typical Fourth Amendment case involves a search that is initiated for the purposes of obtaining evidence of criminal activity. Certainly, however, we recognize that there are numerous instances in which the nature of a police officer’s duty requires that he engage in searches for reasons other than obtaining evidence of criminal activity.” As the Court continued, “[t]he policeman, as a jack-of-all-emergencies, has ‘complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses;’” by default or design he is also expected to ‘aid individuals who are in danger of physical harm,’ ‘assist those who cannot care for themselves,’ and ‘provide other services on an emergency basis.’ If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court.” *Id.*, 383 S.E.2d at 293 (quoting 2 WAYE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 5.4(c) at 525 (2d ed. 1987) (footnotes omitted.)). This “community caretaker function” was discussed by the United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973):

Because of the extensive regulation of motor vehicles and traffic, and also

because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

In short, “[t]here is nothing in either the state or federal Constitution that prohibits law enforcement from approaching, and engaging in conversation with, a motorist who they believe may be in need of assistance.” *State v. Long*, 713 N.E.2d 1, 5 (Ohio Ct. App. 1998). “[M]any federal and state courts have held that law enforcement officials may approach . . . citizens for community caretaking purposes in a variety of circumstances without running afoul of the Fourth Amendment and equivalent state constitutional provisions.” *Marin v. Albuquerque*, No. 02-1159 JB/DJS, 2004 WL 3426420, at \*4 (D.N.M. Aug. 10, 2004). “When an officer observes conduct that suggests a person may be injured or otherwise in need of assistance, the officer’s community caretaker function allows him to contact that person regardless of the lack of any articulable suspicion of criminal activity.” *Lancaster v. State*, 43 P.3d 80, 105 (Wyo. 2002). Indeed, courts have observed that not only are police officers permitted to act in their role as community caretakers, but are actually expected, *United States v. King*, 990 F.2d 1552, 1560 (10<sup>th</sup> Cir. 1993); *Winters v. Adams*, 254 F.3d 758, 764 (8th Cir. 2001), and obligated, *State v. Chrzanowski*, 905 N.E.2d 266, 272 (Ohio Ct. App.), and may be “considered derelict by *not* acting promptly to ascertain if someone needed help.” *State v. Gocken*, 857 P.2d 1074, 1080 (Wash. Ct. App. 1993) (emphasis in original).

“Recognizing that police conduct can fall within the community caretaker function, however, does not always place it beyond constitutional scrutiny[,]” *State v. Anderson*, 417 N.W.2d 411, 413 (Wis. Ct. App. 1987), for “[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.” *Camara v. Municipal Ct.*, 387 U.S. 523, 530-31 (1967). However, “[i]t is now a basic principle underlying most search and seizure questions that ‘[t]he *Fourth Amendment of the United States Constitution*, and Article III, Section 6 of the *West Virginia Constitution* protect an individual’s reasonable expectation of privacy.’” *State v. Aldridge*, 172 W. Va. 218, 221, 304 S.E.2d 671, 674 (1983) (citation omitted). Thus, under the Fourth Amendment and Article VI, § 6 of the West Virginia Constitution “not all searches and seizures are prohibited . . . [o]nly those which are unreasonable are prohibited.” *Sutherland v. Kroger Co.*, 144 W. Va. 673, 684, 110 S.E.2d 716, 723 (1959). Consequently, “[t]he Fourth Amendment’s ‘touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances.’” *State v. Williams*, 210 W. Va. 583, 590, 558 S.E.2d 582, 589 (2001) (quoting *Ohio v. Robinette*, 519 U.S. 33, 34 (1996)). See also *State v. Lacy*, 196 W. Va. 104, 112, 468 S.E.2d 719, 727 (1996) (quoting *Skinner v. Railway Labor Executives’ Assoc.*, 489 U.S. 602, 619 (1989) (citation omitted))(reasonableness ““depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.””); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 290-91 (arguing that reasonableness should be applied in community caretaker cases). “In community caretaking cases, as elsewhere, reasonableness has a fluid quality[,]” *Tinius v. Carroll County Sheriff Dep’t*, 321 F. Supp.2d 1064, 1075 (N.D. Iowa 2004), that “requires

a balancing of the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen.” *State v. Anderson*, 417 N.W.2d 411, 413 (Wis. Ct. App. 1987) (citation omitted), *rev’d on other grounds*, 454 N.W.2d 763 (Wis. 1990). “This test requires an objective analysis of the circumstances confronting the police officer, including the nature and reliability of his information, with a view toward determining whether the police conduct was reasonable and justified. This test also requires an objective assessment of the intrusion upon the privacy of the citizen.” *Id.* (citation omitted).

Most recently, the Wisconsin Supreme Court considered “[p]erhaps the best and clearest statement of what reasonableness means in this community caretaking context[.]” *Commonwealth v. Smigliano*, 694 N.E.2d 341, 347 (Mass. 1998) (Fried, J., concurring):

“[W]hen a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.”

*State v. Kramer*, 759 N.W.2d 598, 605 (Wis. 2009) (citation & footnote omitted). The balancing test is refined by examining: (a) the degree of the public interest and the exigency of the situation; (b) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (c) whether an automobile is involved; and (d) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. *Kramer*, 759 N.W.2d at 611.

**(1) Did a seizure occur?**

The gateway question in any Fourth Amendment or corresponding West Virginia

case is always whether a seizure occurred, for, “[w]ithout a seizure, there is no Fourth Amendment violation and, therefore, no need to even consider whether defendant’s conduct was unreasonable.” *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1256-57 (W. D. Mich. 1990); *Gomez v. Turner*, 672 F.2d 134, 139 (D.C. Cir. 1982) (“The fourth amendment is not implicated, however, unless there is a ‘seizure’ and the seizure is unreasonable.”). *See also State v. Bradshaw*, 193 W. Va. 919, 540, 457 S.E.2d 456, 477 (1995) (“absent a constitutional violation, the ‘fruits of the poisonous tree’ doctrine has no applicability.”).

In determining whether a ‘seizure’ under Section 6 of Article III [or the Fourth Amendment] has occurred we must consider “if, in view of all the circumstances surrounding the [encounter], a reasonable person would have believed that he was not free to leave.”” *State v. Todd Andrew H.*, 196 W. Va. 615, 620, 474 S.E.2d 545, 550 (1996) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). “The test [for seizure] is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.” *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). However, it is beyond cavil that a police officer’s mere approach and questioning of a driver in a parked car is not a seizure. *Boswell*, 170 W. Va. at 440, 294 S.E.2d at 294. *See also State v. Phipps*, No. 2006-P-0098, 2007 WL 2164528, at \* 3 (Ohio Ct. App. July 27, 2007) (collecting federal cases); *State v. Jordan*, 839 P.2d 38, 40 (Idaho Ct. App. 1992) (collecting state cases). “Generally, an officer on routine patrol is lawfully entitled to approach and investigate occupants of stationary vehicles.” *State v. Culbertson*, No. 2008CA38, 2009 WL 1111258, at \* 2 (Ohio Ct. App. Apr. 24, 2009) (quoting common

pleas' order). Here, though, Ms. Ullom points to the single fact that Trooper Busick parked his car behind hers as evidence of a seizure. Rec. at 65, 68.

Unfortunately for Ms. Ullom, she was already parked when Trooper Busick approached her. Rec. at 56. “[W]hen the police walk up to someone . . . sitting in a car that was already stopped (in other words, the police had nothing to do with the driver’s decision to pull over and park), there is no seizure at all.” *United States v. Williams*, 285 Fed. Appx. 284, 287 (7<sup>th</sup> Cir. 2008). See also *State v. Reese*, 388 N.W.2d 421, 423 (Minn. Ct. App. 1986) (“The facts of this case do not present a seizure issue which would mandate fourth amendment protection. The officers did not stop the vehicle, it was already stopped.”). Although Trooper Busick may have blocked Ms. Ullom’s car, “this does not constitute a seizure of a car already stopped.” *People v. Thomas*, 792 N.Y.S.2d 472, 475 (App. Div. 2005).

Additionally, at best, Trooper Busick blocked the Subaru. Rec. at 65. However, given the location, it is difficult to see where Trooper Busick could have more safely stopped. See Rec. at 26-28. See *People v. Thomas*, 792 N.Y.S.2d 472, 475 (App. Div. 2005) (“It appears from the record that the blocking of the car was simply incidental to the legitimate police approach to the vehicle for the purpose of asking defendant to move it.”); *Erickson v. Commissioner of Public Safety*, 415 N.W.2d 698, 701 (Minn. Ct. App. 1987) (“The actions of the officers in parking their vehicles, which may have incidentally blocked appellant’s vehicle, did not constitute a ‘seizure’ under the fourth amendment.”).

Finally, while “[a] law enforcement officer’s action to block a vehicle’s exit route is a factor a court may consider when determining if a seizure has occurred[.]” *State v. Willoughby*, \_\_\_\_ P.3d \_\_\_\_, \_\_\_\_, 2009 WL 1296105, at \*5 (Idaho May 12, 2009), other

factors include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980). Here, there is no evidence that Trooper Busick engaged in any conduct that might arguably support a claim of seizure; therefore, blocking Ms. Ullom’s vehicle likely did not constitute a seizure. *See United States v. Lovelace*, 357 F. Supp.2d 39, 42-43 (D.D.C. 2004) (“while the D.C. Circuit has evaluated investigatory stops involving the blocking of defendants’ vehicles to determine whether police conduct rose to the level of an arrest, other intimidating or threatening factors were present in those cases when they concluded a seizure had occurred.”). But, for the sake of argument, the Court can assume, without deciding, that a seizure occurred. *Kramer*, 759 N.W.2d at 606 (“[F]or purposes of our analysis, we will assume, without deciding, that a seizure took place for which there was neither probable cause nor reasonable suspicion.”).

**(2) Was Trooper Busick’s conduct a bona fide community caretaker function?**

“When evaluating whether a community caretaker function is bona fide, we examine the totality of the circumstances as they existed at the time of the police conduct.” *Kramer*, 759 N.W.2d at 608. Here, Trooper Busick was dealing with an automobile—perhaps the quintessential community caretaker situation as it was such a circumstance that begot the community caretaker doctrine. *See Cady*, 413 U.S. at 441.

In the case subjudice, Trooper Busick during a routine patrol on a two lane road and saw a car pulled off in a lane with a chain across it width on a ridge, surrounded by trees and vegetation in a desolate area with its parking lights on, but its engine off, as it was just

turning dark. The lane did not appear to be a designated traffic pull-off site nor a standard parking spot, nor did it contain any signs or evidence to this effect. Rec. at 26-28, 56, 62. This provided a justification for Trooper Busick (if not imposing upon him the duty) to stop and determine if anyone was in need of assistance. “[I]n fulfilling his role as a public servant and maintainer of roadway safety, an officer may stop and assist stranded motorists.” *State v. Percy*, No. 04 MA 265, 2006 WL 696134, at \*3 (Ohio Ct. App. Mar. 16, 2006). The Ohio Court of Appeals observed that it is not objectively unreasonable for a police officer to conclude that a car stopped abutting a cornfield “off the road at a place where cars are not normally stopped, not close to any human habitation, in the middle of the night” required investigation to “determine whether there was any problem requiring assistance.” *State v. Thayer*, No. 2667, 1990 WL 125704, at \*3 (Ohio Ct. App. Aug. 31, 1990). Thus, even if “[n]o criminal activity was apparent . . . given the isolated location and nighttime hour, it was reasonable for [Trooper Busick] as a community caretaker, to at least approach the driver and ask what the problem was.” *State v. Kiesecker*, No. 19173-7-III, 2001 WL 695526, at \*3 (Wash. Ct. App. June 21, 2001). Further, Trooper Busick did not approach Ms. Ullom in a manner consistent with a criminal investigation, but in a one evidencing concern for her well-being. Trooper Busick asked Ms. Ullom if everything was alright and if there were any problems. Rec. at 56. *See Kramer*, 759 N.W.2d at 610 (Officer’s “first contact with [defendant] was to offer assistance. He said, “Hi. Can I help you with something?” and “Just making sure no vehicle problems.”); *State v. Kiesecker*, No. 17173-7-III, 2001 WL 695526, at \*1 (Wash. Ct. App. June 21, 2001) (finding community caretaker satisfied—“Officer Martin testified he approached the vehicle “as if I were on a routine traffic stop, and inquired to the driver what the problem was.”); *People v. Ciesler*,

710 N.E.2d 1270, 1275 (Ill. Ct. App. 1999) (“It is undisputed that when Officer Berry initially approached defendant she did not suspect that defendant was committing an offense. Rather, she approached defendant no differently than any other citizen might have approached him to inquire if he needed assistance.”). Trooper Busick was conducting a community caretaker function.

**(3) Did the public need and interest outweigh the intrusion upon Ms. Ullom’s privacy?**

The balancing test examines: (a) the degree of the public interest and the exigency of the situation; (b) the circumstances of surrounding the seizure, including time, location, the degree of overt authority and force displayed; (c) whether an automobile is involved; and (d) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. *Kramer*, 759 N.W.2d at 611. In this case, all of these criteria are satisfied.

**a. The degree of the public interest and the exigency of the situation.**

Here, Trooper Busick was patrolling as night was descending. He came upon a car on a ridge located in lane surrounded by foliage and flora, distant from any houses or buildings—this desolate location is of great importance. *See Cady*, 413 U.S. at 443 (discussing “nonmetropolitan jurisdictions such as those involved here”); *id.* at 447 (drawing a distinction between “a metropolitan area” and “Kewaskum, Wisconsin.”); *R. v. Wilson*, [1990] S.C.R. 1291, 1292 (“While these facts might not form grounds for stopping a vehicle in downtown Edmonton or Toronto, they merit consideration in the setting of a rural community.”). Indisputably, “the public has a substantial interest in ensuring that police assist motorists who may be stranded on the side of a highway, especially after dark

and outside of an urban area when help is not close at hand. Since the public has a substantial interest in police offering assistance to motorists who may need assistance, especially after dark and in areas of the state's highways where assistance may not be near at hand, the first factor favors the conclusion that [Busick's] community caretaking function was reasonably performed." *Kramer*, 759 N.W.2d at 611.

**b. The attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed.**

Here, Trooper Busick parked his car behind Ms. Ullom's and merely approached Ms. Ullom to ask if she needed assistance or to find out if anything was wrong. Rec. at 56. He did not use his police lights, did not shine a spotlight, did not use demanding words or actions, and did not use a coercive or threatening tone of voice. "The contact with [Ms. Ullom] to determine h[er] need of assistance was brief[,] and "it is hard to imagine [Busick] displaying less overt authority, or acting less coercively, than he did in this case." *Kramer*, 759 N.W.2d at 611. The circumstances further support a community caretaker stop

**c. Whether an automobile is involved.**

"Many communities look to their officers to assist citizens or render aid under a variety of circumstances. For example, officers often . . . give directions, . . . assist stranded motorists and render first aid." *State v. Chisholm*, 696 P.2d 41, 43 n.3 (Wash. Ct. App. 1985). Stranded drivers are particularly vulnerable and in need of assistance. *See, e.g. Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244 (Neb. 2003) (plaintiff was abducted, raped, and murdered after being stranded on the road following a tire malfunction); *People v.*

*Weaver*, 29 P.3d 103, 171 (Cal. 2001) (“defendant picked up a young couple stranded on the highway by car trouble, killed the young man in a sneak attack with a metal pipe, kidnapped and raped his female companion more than once (by his own admission) over the course of several hours, and then killed her as well.”); *In re Young*, No. 52731-2-I, 2007 WL 1464410, at \*1 (Wash. Ct. App. May 21, 2007) (“Young offered to help two women stranded by the side of the road with a disabled car. Young suggested the women get into his van to stay warm. When the two women refused, Young grabbed one of the women, pulled out a knife, held it to her crotch, and said “he would put his knife in her vagina and slice her clear up to her stomach if they did not get in the van.”).

Further, those most in need of aid, such as crime victims, may not be in a position to signal for it, *see, e.g., People v. Heath*, 853 N.Y.S.2d 400, 403 (App. Div. 2008) (unconscious victim placed in back seat of his car and car later abandoned in a hospital parking lot in a neighboring county where victim froze to death); *Swain v. State*, 181 S.W.3d 359, 363 (Tex. Ct. Crim. App. 2005) (battered victim died in trunk of her car after assailant placed battered victim in victim’s car, drove it to a secluded area, and abandoned it); *People v. Henry*, 518 N.Y.S.2d 44, 45 (App. Div.1987) (when victim tried to exit car, defendant struck her twice in the head, but was still exhibiting signs of life. When defendant was unable to determine if the victim was still alive, the defendant placed the body in the car’s trunk drove to Fort Lee, New Jersey, and abandoned the car), nor may drivers who suffer from medical emergencies. “The occupant of an already parked car may be intoxicated, he may be suffering from sudden illness or heart attack, or may be just asleep. Surely, it is within a responsible peace officer’s duty as it relates to the public to determine whether his assistance is needed.” *Kozak v. Commissioner of Pub. Safety*, 359 N.W.2d 625,

628 (Minn. Ct. App. 1984). *See, e.g., Anchorage v. Cook*, 598 P.2d 939, 941-42 (Alaska 1979) (“When [the officer] arrived on the scene, he had no knowledge of [the driver’s] identity or condition. . . . [The driver] could have been a person suffering a serious heart attack, a stroke victim, or someone suffering from some other condition, such as carbon monoxide poisoning, which if not quickly diagnosed and treated could result in irreparable harm or death.”); *State v. Boblick*, 93 P.3d 775, 777 (N.M. Ct. App. 2004) (“Testimony in the trial court indicated that while sitting in his car on the evening in question, he had eaten ice cream, which caused a disturbance in his blood-sugar level that rendered him temporarily unconscious.”); *cf. Duran v. Hyundai Motor America, Inc.*, 271 S.W.3d 178 (Tenn. Ct. App. 2008) (victim passed out in car due to carbon monoxide poisoning). All of which support the observation that “[t]o be valid, a welfare stop need not be in response to a request for assistance[,]” *Fleck v. Anchorage*, No. A-10100, 2008 WL 3876463, at \*2 (Alaska Ct. App. Aug. 20, 2008), and “[t]he fact that . . . individuals rarely not exhibiting any distress does not detract from the reasonableness of [the] decision to approach the car and determine if assistance [is] required.” *Morfin v. State*, 34 S.W.3d 664, 667 (Tex. App.2000). Attempting to preserve life and limb should be encouraged and not discouraged, commended and not condemned. *State v. Carlson*, 548 N.W.2d 138, 143 (Iowa 1996). *Cf. Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (“People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response.”). Here, Trooper Busick parked behind Ms. Ullom and simply walked up and asked what was wrong and if she needed help. This was the only reasonable approach that could be taken—to determine if the car was occupied and if so, to see if assistance was needed. *Kramer*, 759

N.W.2d at 611; *Kozak*, 459 N.W.2d at 628; *Thayer*, 1990 WL 125704, at \*3. Thus, “the third factor favors concluding that [Busick] reasonably performed his community caretaker function.” *Id.*

**d. The availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.**

“The 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.<sup>3</sup> Here, Trooper Busick approached the car to inquire if anything was wrong and if he could help. Rec. at 56. As Trooper Busick explained, he could not have known if the driver needed help until he asked. Rec. at 57. *See, e.g., City of Madison v. Engle*, No. 2008 AP 1996, 2008 WL 5335596, at \*4 (Wis. Ct. App. Dec. 23, 2008) (“the officers could not know what [the driver’s] situation was and whether he needed assistance without more information than they had”). Trooper Busick’s conduct was well within acceptable parameters. “Here, [Trooper Busick] simply walked up to [Ms. Ullom’s] driver-side window and asked if [s]he needed assistance. [T]hat was the only reasonable approach that [Busick] could take in performing this community caretaker function. He had to first determine if the vehicle was occupied and if so, to determine if assistance was needed.” *Kramer*, 759 N.W.2d at 612.

The circuit court erred in finding that only reasonable suspicion can provide a justification for police-citizen interaction. Rather, police officers may act even in the absence of reasonable suspicion or probable cause if acting in furtherance of a community

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<sup>3</sup>As noted above, Ms. Ullom points to the position of Trooper Busick’s car. However, as also discussed above, there appeared to be a perfectly legitimate justification for where Trooper Busick parked his car—his safety and that of any other motorists.

caretaking function. “[T]he public cannot always demand, or even expect, model police conduct, [but] it would doubtlessly have been surprised-and disappointed-if [Trooper Busick] had done less.” *State v. Carlson*, 548 N.W.2d 138, 143 (Iowa 1996).

Here, as a result of a proper community caretaker interaction, Trooper Busick noted physical signs of Ms. Ullom’s intoxication—the smell of alcohol, glassy, bloodshot eyes, slurred speech, and unsteadiness, Rec. at 56, and observed evidence that Ms. Ullom had been driving the vehicle since the seat corresponded to Ms. Ullom’s height and there were keys in the ignition, Rec. at 57, and there was no evidence that Ms. Ullom had any companion in the car. Further, after having been *Mirandized*, Ms. Ullom admitted to having had four beers and having driven to the spot where Trooper Busick found her and her car. Rec. at 57.

“Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver’s license for driving under the influence of alcohol.” Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). An officer need not actually see a defendant drive a car if the surrounding circumstances indicate the vehicle could not have gotten to where it was found without having been driven by the defendant in an intoxicated condition. Syl. Pt. 3, *Carte v. Cline*, 200 W. Va. 162, 163, 488 S.E.2d 437, 438 (1997). Here, the smell of alcohol, glassy, bloodshot eyes, slurred speech, and unsteadiness, coupled with the position of the driver’s seat and the keys, the absence of any other individuals in the car, the deserted area, and Ms. Ullom’s confession all gave Trooper Busick more than enough sufficient to probable cause to arrest Ms. Ullom for

driving under the influence, and provided more than sufficient substantial evidence to justify the Commissioner's revocation. *See Lowe*, \_\_\_ W. Va. at \_\_\_, 672 S.E.2d at 317 (officer's un rebutted testimony that driver smelled of an alcoholic beverage, that driver had bloodshot and glassy eyes, exhibited slurred speech, and was unsteady on his feet sufficient to justify license revocation); *see id.* at \_\_\_, 672 S.E.2d at 318 ("In the case at hand, we have the appellee's own written statement that he had consumed alcohol on the night in question and that he was operating the vehicle at the time of the accident. We also have the statement of an investigating officer that after the accident, he witnessed the smell of alcohol on the appellee, that the appellee had bloodshot and glassy eyes, slurred speech, and was unsteady on his feet. Therefore, we conclude that the circuit court erred in reversing the DMV's final order on this basis.); *Coffman v. West Virginia Div. of Motor Vehicles*, 209 W. Va. 736, 551 S.E.2d 658 (2001) (similar); *United States v. Black*, 240 Fed. Appx. 95, 100 (6<sup>th</sup> Cir. 2007) ("The smell of the alcohol, when paired with [the officer's] observation of Black in the driver's seat with the keys in the ignition, certainly gave rise to reasonable suspicion that Black was violating Tennessee law."); *State v. Eckert*, 181 N.W.2d 264, 267-68 (Neb. 1970) (evidence was sufficient to sustain DUI conviction where defendant's car was parked in the right-hand lane of a public highway approximately 8 miles north of Grant, Nebraska and defendant was slumped over the steering wheel in a drunken stupor, was alone in the motor vehicle and no other person was in proximity to the motor vehicle, the car was not moving and the engine was not running, and defendant stated that he had no recollection of what happened from the time he left Madrid until he was aroused by law enforcement officers at the time of his arrest); *Turner v. State*, 910 So.2d 598, 603 (Miss. Ct. App. 2005) (confession of drinking, use of controlled substance,

and driving constituted direct evidence of guilt); *Bohanan v. State*, 38 S.W.3d 902, 905 (Ark. Ct. App. 2001) (defendant's admission "that he had been drinking and shooting pool miles away, and given that he was the only person in the car, the jury could have reasonably concluded that he must have driven there."). The evidence presented at the administrative license revocation hearing was more than sufficient to justify the Commissioner's revocation. Therefore, the decision of the circuit court should be reversed.

**B. The Circuit Court erred by not remanding this case back to the Commissioner to allow for development of the purported evidence.**

The circuit court acknowledged that Ms. Ullom's "acquittal" was "not before the Commission [sic] when he rendered the final decision." Rec. at 85. Notwithstanding this, the circuit court decided to consider the matter itself, relying on *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001). Rec. at 85. The Circuit Court's unilateral action does not comport with *Choma* or its progeny.

A court should not consider evidence *de hors* of the record. It is generally impermissible for an appellate court to consider evidence not before the trier of fact. See W. Va. Code § 29A-5-4(f) ("The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court."). In fact, as this Court has explained, to vest the power to develop new evidence *vel non* in a reviewing court runs afoul of the separation of powers doctrine. *Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995). The record in this case is devoid of any evidence concerning the criminal proceedings. At best, the Petition for Appeal to circuit court contains an assertion that the charges against

Ms. Ullom were “dismissed,” Rec. at 3, but statements made by counsel in a petition are not evidence and cannot be used to support a trial court’s findings of fact. *See, e.g., Wood ex rel. United States v. American Institute in Taiwan*, 286 F.3d 526, 534 (D.C. Cir. 2002) (“The district court did make several factual findings regarding Institute funding, including some findings based on assertions in the Government’s brief. Statements by counsel, of course, are not evidence.”); *Singh v. I.N.S.*, 213 F.3d 1050, 1054 n.8 (9<sup>th</sup> Cir. 2000) (“statements in motions are not evidence and are therefore not entitled to evidentiary weight”); *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248, 1249 n.1 (3d Cir. 1970) (“We have repeatedly held that statements by counsel in briefs or in court are not evidence.”).

In fact, the circuit court’s order expanded even beyond the statement in Ms. Ullom’s petition finding that the outcome was not simply a “dismissal,” but an “acquittal,” and there is a crucial distinction between acquittals and dismissals as “cases are dismissed for a variety of reasons, many of which are unrelated to culpability[.]” *United States v. Marrero-Ortiz*, 160 F.3d 768, 775 (1st Cir. 1998), so that “a dismissal is not equivalent to an acquittal.” *United States v. v. Rosen*, 343 F. Supp. 804, 806 (S.D.N.Y. 1972). Moreover, even if there was an acquittal, an acquittal is not in and of itself grounds for DMV to defer to the acquittal. While an “acquittal must be considered if entered into evidence at the administrative hearing, . . . it is not dispositive.” *Lowe*, \_\_\_ W. Va. at \_\_\_, 672 S.E.2d at 318. Other factors must be considered, *Lowe*, \_\_\_ W. Va. at \_\_\_, 672 S.E.2d at 318, yet the circuit court did not discuss any of the reasons that might impel a decision contrary to that of the jury (assuming a jury verdict). There are a multitude of reasons a jury verdict

should not be accepted by the Commissioner.<sup>4</sup>

“This Court has previously recognized that administrative license revocation proceedings and criminal DUI proceedings are two separate and distinct proceedings[.]” *Carroll v. Stump*, 217 W. Va. 748, 755, 619 S.E.2d 261, 268 (2005), that license revocations are civil in nature, *Shumate v. West Virginia Dep’t of Motor Vehicles*, 182 W. Va. 810, 813, 392 S.E.2d 701, 704 (1990), and that the burden on the Commissioner is only a preponderance. *Lowe*, \_\_\_ W. Va. at \_\_\_, 672 S.E.2d at 318. These are critical factors in the equation the Commissioner must consider.

For example, “[t]he Sixth Amendment to the Constitution guarantees a criminal defendant certain fair trial rights not enjoyed by the prosecution[.]” *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989). Therefore, “Government’s search for proof in a criminal case is hedged about by innumerable strictures, and the . . . many constitutional safeguards which surround an accused in a criminal prosecution and . . . create wide differences between the ‘bundle of legal principles’ which govern a criminal trial and those which apply to a civil suit.” *Neaderland v. C. I. R.*, 424 F.2d 639, 643 (2d Cir. 1970). See also *Sinha v. General Med. Council*, [2009] EWCA 80 (Civ. Div.). Thus, “an acquittal on

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<sup>4</sup>Of course, it is somewhat (no, it is *extremely*) difficult to know how to proceed under *Choma* since, as Professor (quondam Justice) Cleckley has explained, “[e]vidence in a related civil case that the prosecution failed to bring criminal charges or the fact that the party was acquitted is inadmissible and may very well constitute reversible error.” 1 FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA EVIDENCE § 4-10(C)(5) (4<sup>th</sup> ed. 2000). And, the universe of available case law from other jurisdictions that might prove helpful is fairly nil for, as the Maryland Court of Appeals has observed, “[o]ur research reveals that many jurisdictions have addressed the issue of whether a prior acquittal or nol pros is admissible in a subsequent civil case involving the same operative facts. Almost without exception, when the acquittal is not an element of the civil claim, these jurisdictions prohibit admission of an acquittal or a nol pros in a later civil proceeding involving the same or similar underlying conduct.” *State Farm Fire & Cas. Co. v. Carter*, 411, 840 A.2d 161, 168 (Md. Ct. App. 2003).

criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.” *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984); 1 FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA EVIDENCE § 4-10(C)(5) (4<sup>th</sup> ed. 2000) (footnote omitted) (“A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt: It does not necessarily establish the defendant’s innocence.”); *Reed v. State*, 574 N.E.2d 433, 435 (N.Y. 1991) (“where the subsequent proceeding is a civil one, involving a lower standard than proof beyond a reasonable doubt, an acquittal is not proof of innocence.”). *See also MC v. United Kingdom*, 11882/85, [1987] ECHR 33 (“The Commission finds, however, that a distinction must be made between civil proceedings and criminal proceedings arising out of the same events. It is a general feature of legal systems in States which are Parties to the Convention that parallel civil and criminal proceedings may be initiated against a person and, by virtue of the different standards of proof normally observed in such proceedings, acquittal at the end of a criminal trial, because the accused has not been shown to be guilty of an offence beyond all reasonable doubt, does not necessarily preclude that same person’s civil liability on the balance of probabilities (cf. criminal proceedings for a road traffic offence and civil proceedings for negligence following a car accident).”). Consequently, “[e]vidence of acquittal in a criminal action is generally irrelevant and inadmissible in a civil case involving the same incident ‘since it constitutes a negative sort of conclusion lodged in a finding of failure of the prosecution to sustain the burden of proof beyond a reasonable doubt.’” *Estate of Moreland v. Dieter*, 395 F.3d 747, 755 (7th Cir.2005) (quoting *Borunda v. Richmond*, 885 F.2d 1384,1387 (9th Cir.1989)); W.E. Shipley, *Conviction or Acquittal as Evidence of the Facts on Which It Was Based in Civil Action*, 18 A.L.R.2d 1287 § 6 (1951

& 1999 Supp.) (“There are stronger arguments for applying a different rule where, in a civil action, proof of a prior acquittal is offered as proof of the facts upon which it is based, than in the cases where evidence of a prior conviction is tendered, since a judgment of conviction is a positive finding, indicating that the state has successfully borne the extraordinary burden of proving the relevant facts beyond a reasonable doubt, whereas the acquittal does not purport to be a judgment of innocence, but is merely a negative statement that the proof necessary for a conviction was not forthcoming.”); 1 CLECKLEY, HANDBOOK ON WEST VIRGINIA EVIDENCE at § 4-10(C)(5) (similar).<sup>5</sup>

Additionally, an acquittal may be the result of a trial court’s incorrect rulings on evidentiary or instructional matters inuring to the benefit of a criminal defendant and against the State, but which are, nevertheless, rendered unreviewable by a verdict or judgment in favor of the defendant. *United States v. Wilson*, 420 U.S. 332, 352 (1975) (“A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited [sic] from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict[.]”); *State v. Fisher*, 103 W. Va. 658, 138 S.E. 316, 317 (1927) (“If [a jury] acquit the defendant, even through a mistaken notion of the law and the evidence, the case is ended under our constitutional guaranty that no person shall be twice put in jeopardy for the same offense.”). And, notwithstanding that “[i]t has long been recognized that criminal juries in

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<sup>5</sup>And, because “the jury has the power to bring in a verdict in the teeth of both law and facts[.]” *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920), *abrogated on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995), a jury may simply acquit on the basis of lenity and in such circumstances a not guilty verdict does not even establish the jury’s belief that the prosecution failed to carry its burden of proof. *United States v. Espinosa-Cerpa*, 630 F.2d 328, 332 (5<sup>th</sup> Cir. 1980).

the United States are free to render ‘not guilty’ verdicts resulting from compromise, confusion, mistake, leniency or other legally and logically irrelevant factors[.]” *United States v. Espinosa-Cerpa*, 630 F.2d 328, 332 (5<sup>th</sup> Cir. 1980) (citing *Dunn v. United States*, 284 U.S. 390, 393-94 (1932) (Holmes, J.)), “[t]he prosecution can never appeal the sufficiency of evidence when a judge or jury acquits a defendant, regardless of how ‘manifestly wrong,’ ‘unjust,’ or irrational the factfinder’s verdict may appear to be.” *Watson v. State*, 204 S.W.3d 404, 444 (Tex. Crim. App. 2006) (Cochran, J., dissenting). Thus, “[t]he State . . . may not appeal a valid acquittal ‘no matter how overwhelming the evidence against the defendant may be.’” *State v. Larsen*, 834 P.2d 586, 589 (Utah Ct. App. 1992) (quoting *State v. Musselman*, 667 P.2d 1061, 1064 (Utah 1983)). *See also Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam) (even an acquittal based upon an “egregiously erroneous foundation” cannot be appealed by the prosecution).

The record of a prior criminal proceeding must be before the trier of fact in an administrative license revocation in order to determine whether the acquittal was the result of compromise, confusion, mistake, leniency, legally and logically irrelevant factors, legal error, or was manifestly wrong, unjust, irrational, or unsupported by the evidence. Otherwise the acquittal or not guilty judgment is probative of nothing—it is irrelevant—and “[t]o rely upon irrelevant evidence to support a particular verdict falls within the ‘sporting theory of justice,’ which Justice Douglas . . . remarked ‘cannot [be] raise[d] . . . to the dignity of a constitutional right [that] denies . . . due process[.]’” *United States v. Bowles*, 488 F.2d 1307, 1314 n.11 (D.C. Cir. 1973).<sup>6</sup> And these factors must be consider first by the

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<sup>6</sup>Convictions, therefore, are considered to have produced a more reliable result than an acquittal or dismissal. Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside under the Federal Youth Corrections Act* 1981 DUKE L.J. 477, 501 (1981). It is for this reason that the Rules of Evidence exempt from the hearsay bar judgments of conviction, but not judgments of acquittal. W. Va. R. Evid. 803(22). *See* 7 JAMES A. ADAMS & JOSEPH P. WEEG, IOWA PRAC., EVIDENCE § 5.803:22 n.7 (2008 ed.) (“The burden of proof beyond a reasonable doubt imposed on the State in  
(continued...)”)

Commissioner and not by a reviewing court.

Second, in Syllabus Point 3, *Choma* held that “[i]n administrative proceedings under *W. Va. Code*, 17C-5A-1 *et seq.*, the commissioner of motor vehicles must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the commissioner, when evidence of such results is presented in the administrative proceeding.” Syllabus point 3, therefore, requires “*the commissioner of motor vehicles*” to consider the results of a criminal proceeding “*when evidence of such results is presented in the administrative proceeding.*” “*Choma* requires the *commissioner* only to give ‘consideration’ to the results of any criminal prosecution[,]” *Adkins v. Cline*, 216 W. Va. 504, 513, 607 S.E.2d 833, 842 (2004) (per curiam) (emphasis added), and it would constitute a usurpation of the Commissioner’s duties to have the circuit court consider the criminal proceedings. Thus, when the issue of a criminal case result is not considered by the Commissioner because that evidence does not yet exist at the time of the revocation hearing, the appropriate course of action is not for the circuit court to step into the Commissioner’s shoes, but to remand the case back to the DMV for such consideration. *See id.* at 513-14, 607 S.E.2d at 842-43 (“We consequently affirm the decision of the lower court and permit remand to the DMV Commissioner, as ordered by the lower court, for reevaluation of the Appellees’ cases and the entry of an order decided in accordance with the requirements of *Choma*.”). *See also Moten v. Stump*, 220 W. Va. 652, 659, 648 S.E.2d 639, 646 (2007) (per curiam) (Albright, J., concurring) (second hearing mandated if criminal case concludes in the licensee’s favor

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<sup>6</sup>(...continued)

a criminal case imparts a greater reliability to the requisite fact findings of guilt than does a criminal case acquittal based on insufficiency of the evidence[.]”); 23 RONALD I. MESHBESHER, MINN. PRAC., TRIAL HANDBOOK FOR MINN. LAWYERS § 16:30 (2008 ed.) (“The hearsay exception under Rule 803(22) applies only to convictions used to prove facts essential to the prior judgment. Trustworthiness is assumed from the fact that such judgments are based on the reasonable doubt standard.”).

after the DMV hearing). For the above reasons, this case should be remanded back to the Commissioner.

V.

**CONCLUSION**

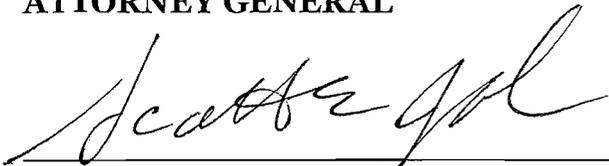
For the above reasons, the decision of the circuit court should be reversed and this case remanded back to the DMV Commissioner for a new hearing solely to consider issues relating to the criminal case.

**Respectfully submitted,**

**WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES, JOSEPH  
CICCHIRILLO, COMMISSIONER,**

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NO. 34864

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DEBBIE L. ULLOM,

Appellee,

v.

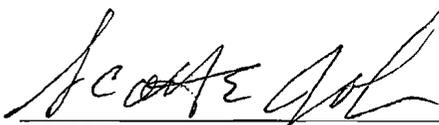
JOSEPH CICCHIRILLO, COMMISSIONER  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Appellant.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General, and counsel for Respondent, do hereby certify that the foregoing *Brief of Appellant* was served upon petitioner by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 1st day of June, 2009, addressed as follows:

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