

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 11-0147  
(Circuit Court Civil Action No. 10-AA-77)

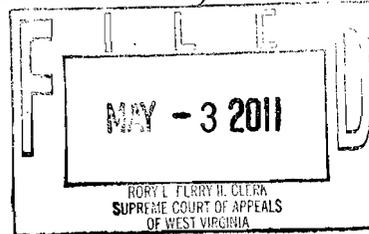
JOE E. MILLER, COMMISSIONER OF  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Appellant/Respondent below,

v.

DAVID K. SMITH,

Appellee/Petitioner below.



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FROM THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

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*Brief of Petitioner*  
PETITION FOR APPEAL

Respectfully submitted,

JOE E. MILLER, Commissioner,  
Division of Motor Vehicles,

By Counsel,

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

Scott E. Johnson, WWSB # 6335  
Assistant Attorney General  
DMV - Attorney General's Office  
P.O. Box 17200  
Charleston, WV 25317-0010  
scott.e.johnson@wv.gov  
(304) 926-3874

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**NO. 11-0147**  
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**Appellant/Respondent below,**

v.

**DAVID K. SMITH,**

**Appellee/Petitioner below.**

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**FROM THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA**

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**PETITION FOR APPEAL**

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**I. ASSIGNMENTS OF ERROR**

- A. The Commissioner retained jurisdiction over this case.**
- B. The Circuit Court erred in applying the exclusionary rule since it had no basis to apply the exclusionary rule.**

**II. STATEMENT OF THE CASE**

On July 9, 2009, State Police Senior Trooper Wooton and Corporal Gilly conducted what they termed a safety checkpoint. App'x at 14. David Smith, the Appellee herein, was stopped at the checkpoint. App'x at 14.. Mr. Smith had difficulty following directions, smelled of alcohol, had

glassy bloodshot eyes, slurred speech, was unsteady getting out of his car and standing, failed the three-standard Field Sobriety Tests, and refused a secondary breath test. App'x at 14-15, 37-38. Mr. Smith timely filed a hearing request.

An Administrative Licence Revocation hearing was held on March 31, 2010. App'x at 13. While the case was in the breast of the Hearing Examiner, the Legislature passed S.B. 186 which transferred the Commissioner's power to hold revocation hearings to a newly created Office of Administrative Hearings. The effective date of this statute was June 11, 2010. S.B. 186, though, also provided:

(a) In order to implement an orderly and efficient transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings, the Secretary of the Department of Transportation may establish interim policies and procedures for the transfer of administrative hearings for appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters, seventeen-A, seventeen-B, seventeen-C, seventeen-D and seventeen-E of this code, currently administered by the Commissioner of the Division of Motor Vehicles, no later than October 1, 2010.

(b) On the effective date of this article, all equipment and records necessary to effectuate the purposes of this article shall be transferred from the Division of Motor Vehicle to the Office of Administrative Hearings: *Provided*, That in order to provide for a smooth transition, the Secretary of Transportation may establish interim policies and procedures, determine the how equipment and records are to be transferred and provide that the transfers provided for in this subsection take effect no later than October 1, 2010.

W. Va. Code § 17C-5-5.

At the Administrative License Revocation hearing, the evidence established that the safety checkpoint did not comply with *State v. Sigler*, 224 W. Va. 608, 616, 687 S.E.2d 391, 399 (2009).<sup>1</sup>

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<sup>1</sup>In fairness to the Troopers involved in this case, the *Sigler* decision was not handed down until  
(continued...)

The Hearing Examiner held that the exclusionary rule did not apply to ALR hearings. App'x at 18-20.

The circuit court concluded that the Commissioner did not enjoy jurisdiction in this case because the Final Order was entered after June 11, 2010 and, in any event, the exclusionary rule did apply requiring that the evidence of intoxication not be considered.

### **III. SUMMARY OF ARGUMENT**

#### **A. The Commissioner enjoyed jurisdiction in this case.**

West Virginia Code § 17C-5C-5(a) & (b), the Commissioner enjoyed jurisdiction “no later than October 1, 2010” and transfers of records and material were to “take effect no later than October 1, 2010.” Because the revocation here was effective August 24, 2010, the Commissioner enjoyed the jurisdiction to impose it.

Additionally, the Secretary of Transportation appointed Jill Dunn as his statutory representative to implement W. Va. Code § 17C-5C-1. Consequent to this appoint, Ms. Dunn authorized the DMV to retain jurisdiction over those cases arising from incidents occurring before June 11, 2010. Since the incident in this case occurred before June 11, 2010, the Commissioner enjoyed jurisdiction in this case.

#### **B. The Circuit Court erred in applying the exclusionary rule since it had no basis to apply the exclusionary rule.**

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<sup>1</sup>(...continued)

November 25, 2009, some three and one-half months after the stop in this case and *Sigler* specifically overruled *State v. Davis*, 195 W. Va. 79, 464 S.E.2d 598 (1995) (per curiam). Syl. Pt. 3, *State v. Sigler* 224 W. Va. 608, 687 S.E.2d 391, 393 (2009).

The judicially crafted exclusionary rule as a Fourth Amendment prophylactic does not apply to civil proceedings. An Administrative Licence Revocation is a civil proceeding. Consequently, the constitutionally based exclusionary rule does not apply here and the circuit court erred in applying it. Further, West Virginia Code § 17C-5A-2(d) (2008) did not require a lawful arrest.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Commissioner requests a Rule 20 argument in this case. This Court has not interpreted West Virginia Code §§ 17C-5-1 or 17C-5-5 and, therefore, this will be a case of first impression. Additionally, the Circuit Court of Raleigh County in *Shrader v. Miller*, No. 10-AA-26-B (Cir. Ct. Raleigh County, W. Va. Oct. 20, 2010), reached a result at odds with the decision of the case below.

#### **V. ARGUMENT**

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 71, 464 S.E.2d 589, 590 (1995) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions, or order are: “(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of West Virginia Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Groves v. Cicchirillo* 694 S.E.2d 639, 643 (W. Va. 2010)

(per curiam). “Whether a court has subject matter jurisdiction over an issue is a question of law.” *Snider v. Snider*, 209 W. Va. 771, 777, 551 S.E.2d 693, 699 (2001).

**A. The Commissioner retained jurisdiction over this case.**

“Jurisdiction relates to the power of a court, board or commission to hear and determine a controversy presented to it . . . .” Syl. Pt.3, *Coll v. Cline*, 202 W. Va. 599, 601, 505 S.E.2d 662, 664 (1998) (quoting Syl. Pt. 1, *Fraga v. State Comp. Comm’r*, 125 W. Va. 107, 23 S.E.2d 641 (1942)). “Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute[.]” *Haywood v. Drown*, 129 S. Ct. 2108, 2126 (2009) (Thomas, J., dissenting), making subject-matter jurisdiction a “threshold question[.]” *State ex rel. Orlofske v. Wheeling*, 212 W. Va. 538, 543, 575 S.E.2d 148, 153 (2002). *See also Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778, 120 S. Ct. 1858, 1865 (2000) (“Questions of jurisdiction, of course, should be given priority—since if there is no jurisdiction there is no authority to sit in judgment of anything else.”). Here, the circuit court concentrated on the June 11, 2010 effective date of the statute, without addressing the actual contents of the statute, which readily establish the Commissioner’s jurisdiction in this case.

West Virginia Code § 17C-5C-5 (2010) (emphasis added) deals with the transfer of the Commissioner’s revocation hearing authority to the Office of Administrative Hearings:

(a) In order to implement an orderly and efficient transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings, the Secretary of the Department of Transportation may establish interim policies and procedures for the transfer of administrative hearings for appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters, seventeen-A, seventeen-B, seventeen-C, seventeen-D and seventeen-E of this code,

currently administered by the Commissioner of the Division of Motor Vehicles, ***no later than October 1, 2010.***

(b) On the effective date of this article, all equipment and records necessary to effectuate the purposes of this article shall be transferred from the Division of Motor Vehicle to the Office of Administrative Hearings: *Provided*, That in order to provide for a smooth transition, the Secretary of Transportation may establish interim policies and procedures, determine the how equipment and records are to be transferred and ***provide that the transfers provided for in this subsection take effect no later than October 1, 2010.***

When a statute is plain and unambiguous, it is the judicial duty to apply, not construe it, Syl. Pt 2, *State v. Elder*, 152 W. Va. 571, 571, 165 S.E.2d 108, 109 (1968), and a court may not delete, subtract, or disregard words contained in the statute. *Banker v. Banker*, 196 W. Va. 535, 456-47, 474 S.E.2d 476-77 (1996); *62 Cases v. United States*, 340 U.S. 593, 596, 71 S. Ct. 515, 518 (1951) (“ . . . Congress expresses its purpose by words. It is for us to ascertain-neither to add nor to subtract, neither to delete nor to distort.”).<sup>2</sup> The critical date for the transition is not June 11, but October 1,

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<sup>2</sup>The jurisdictional issue was raised below. App’x at 45-46. While this particular theory was not raised “[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” *State v. Blake*, 197 W. Va. 700, 706 n.10, 478 S.E.2d 550, 556 n. 10 (1996) (citations omitted). See *United States v. Rapone*, 327 U.S.App.D.C. 338, 131 F.3d 188 (1997) (discussed in *State v. Jason H.*, 215 W. Va. 439, 446, 599 S.E.2d 862, 869 (2004) (Davis, J., dissenting)) (appellant who had repeatedly demanded a jury trial only on constitutional grounds in trial court allowed to argue the right to a jury trial based on statutory grounds in appeals court). This is especially when the parties and the lower court overlook statutory authority. See *West Virginia Dep’t of Health and Human Resources v. Hess*, 189 W. Va. 357, 361, 432 S.E.2d 27, 31 (1993) (“Unfortunately, both the trial court and the parties overlook W. Va. Code, 59-1-15 (1923), which directly prescribes the proper procedure.”); *Chittum v. City of Morgantown*, 96 w. Va. 260, 122 S.E. 740, 741 (1924) (“The section of the general statute of 1921 to which we have just referred, and the one which we think must control our decision, seems to have been overlooked by counsel and the parties . . . .”); *Marks v. Mitchell*, 90 W. Va.702, 111 S.E. 763, 764 (1922) (“The court below, as well as counsel for the parties, seem to have overlooked the fact that under the first paragraph of section 1 of chapter 135, Code (Code Supp. 1918, § 4981), an order quashing an attachment is an appealable order; such an order cannot be reviewed in this court upon certificate, as provided in the second paragraph of that section.”).

2010. Since the Commissioner's Final Order was undisputably entered before October 1, 2010, (i.e., no later than August 24, 2010), the Commissioner indisputably had jurisdiction.

Additionally, West Virginia Code § 17C-5A-5 specifically empowers the Secretary of Transportation to "establish interim policies and procedures for the transfer of administrative hearings for appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles" to OAH. A specific delegation of authority is the zenith of agency power. *Association of American Railroads v. I.C.C.*, 298 U.S.App.D.C. 240, 243, 978 F.2d 737, 740 (1992). "[W]here [the Legislature] has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference." *McCormick v. School Dist.*, 370 F.3d 275, 288 (2d Cir. 2004) (quoting *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir.1994)). *Accord Cohen v. Brown Univ.*, 101 F.3d 155, 195 (1<sup>st</sup> Cir. 1996). *See also Consumers Union v. Federal Reserve Bd.*, 736 F. Supp. 337, 340 (D.D.C. 1990) (citations omitted) ("The need for deference is all the more compelling where the Board is not only charged with administering the statute, but where Congress has specifically delegated authority to the Board to elucidate a specific provision of the statute by regulation."), *rev'd on other grounds*, 291 U.S.App.D.C. 1, 938 F.2d 266 (D.C. Cir. 1991). "[T]his explicit delegation of power to an agency compels a court to give deference to the agency's conclusions even on 'pure' questions of law within that domain[.]" *National Fuel Gas Supply Corp. v. F.E.R.C.*, 258 U.S.App.D.C. 374, 380-81, 811 F.2d 1563, 1569-70 (1987), and even where authority is only implied, "[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995).

The Secretary of Transportation designated Jill Dunn, Esquire, as his designee to fulfill the Secretary's obligation under West Virginia Code § 17C-5-1 et seq. App'x at 53. And Ms. Dunn established by interim policy that the Commissioner would retain jurisdiction over pre-June 11, 2010 incidents. App'x at 54. The Commissioner enjoyed jurisdiction in this case and the circuit court should be reversed.

**B. The Exclusionary Rule Does not Apply in Civil Proceedings.<sup>3</sup>**

If the Commissioner lacked jurisdiction, the case is at an end because “[w]henver it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket[.]” Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.* 158 W. Va. 492, 211 S.E.2d 705 (1975), and “lack of jurisdiction . . . voids [any] ruling ab initio.” *Dishman v. Jarrell*, 165 W. Va. 709, 713, 271 S.E.2d 348, 350 (1980). Because the circuit court enjoyed jurisdiction, this Court must address whether the exclusionary rule applies to administrative license revocation proceedings, which are not criminal, but civil. *Cain v. West Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 473, 694 S.E.2d 309, 315 (2010). *See also Shumate v. West Virginia Dep't of Motor Vehicles*, 182 W. Va. 810, 813, 392 S.E.2d 701, 704 (1990) (citation omitted) (“It is also well established that a proceeding to revoke a driver's license is a civil not a criminal action.”). It should not. “In the complex and turbulent history of the rule, the [Supreme] Court never has applied it to exclude evidence from a civil proceeding, federal or state.” *United States v. Janis*, 428 U.S. 433, 447, 96 S. Ct. 3021, 3029 (1976). *See also Hudson v. Michigan*, 547 U.S. 586, 611-12, 126 S. Ct. 2159, 2175 (2006) (citations omitted) (“The Court has declined to apply the exclusionary rule only: (1) where there is a specific reason to believe that

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<sup>3</sup>This issue was raised in the Appellant's Brief to the Circuit Court, App'x at 45-46, and in the Commissioner's Final Order. App'x at 18-20.

application of the rule would ‘not result in appreciable deterrence,’ or (2) where admissibility in proceedings other than criminal trials was at issue[.]”). Such is supported by practicalities and precedent.<sup>4</sup>

First, the circuit court relied on the *Clower v. West Virginia Dep’t of Motor Vehicles*, 223 W. Va. 535, 541, 678 S.E.2d 41, 47 (2009). *Clower* does not answer the question pertinent here—not whether the *Fourth Amendment* applies to all government conduct whether in the civil or criminal context, (the question answered in *Clower* that it does)<sup>5</sup>, but whether the *exclusionary rule* applies in civil as well as criminal proceedings. “Whether the exclusionary sanction is appropriately imposed in a particular case, . . . is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’” *United States v. Leon*, 468 U.S. 897, 906-07, 104 S. Ct. 3405, 3412 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223, 103 S. Ct. 2317, 2324 (1983)). *See also Wolf v. Colorado*, 338 U.S. 25, 28-29, 69 S.Ct. 1359, 1361-62 (1949) (“Accordingly, we have no hesitation in saying that were a State

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<sup>4</sup>This issue is not just of concern to DMV. Other proceedings, such as child abuse and neglect proceedings and juvenile dependency proceedings, or professional licensing disciplinary cases could be impacted if the exclusionary rule is extended beyond its criminal law tethers. *Cf. In re Corey P.*, 269 Neb. 925, 697 N.W.2d 647, 655 (2005) (holding that the exclusionary rule is inapplicable in juvenile protection proceedings because such application “may lead to an erroneous conclusion that there has been no abuse or neglect, leaving innocent children to remain in unhealthy or compromising circumstances”); *State ex rel. Dep’t of Human Services v. W.L.P.*, 345 Or. 657, 202 P.3d 167 (2009) (exclusionary rule does not apply in juvenile dependency proceeding); *Kerr v. Pennsylvania State Bd. of Dentistry*, 599 Pa. 107, 110, 960 A.2d 427, 429 (2008) (the exclusionary rule associated with the Fourth Amendment does not apply to a civil disciplinary proceeding of the State Board of Dentistry); *People v. Harfmann*, 638 P.2d 745 (Colo.1981) (rule inapplicable in lawyer disciplinary proceedings).

<sup>5</sup>Specifically, *Clower* observed, “[t]he Commissioner’s precise argument on this point is that while the Department of Motor Vehicles ‘has acquiesced in past years in requiring a showing of reasonable suspicion with regard to the stop of a vehicle, it was under no obligation to do so.’” 223 W. Va. at 541, 678 S.E.2d at 47.

affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order.”), *overruled on other grounds by Weeks v. United States*, 232 U.S. 283, 34 S. Ct. 341 (1914). Hence, all Fourth Amendment cases in such a circumstance are governed by a two step sequential process: (1) was the Fourth Amendment violated, and if so, (2) does the exclusionary rule apply?<sup>6</sup> And because “cases cannot be read as foreclosing an argument that they never dealt with[,]” *Waters v. Churchill*, 511 U.S. 661, 678, 114 S. Ct. 1878, 1889- 90 (1994) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S. Ct. 67, 69 (1952)), the issue of applicability of the exclusionary rule to civil ALR Hearings was not resolved in *Clower*. Thus, while “the Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. . . . the actual question we must consider is whether the exclusionary rule applies in administrative license revocation proceedings.” *Glynn v. New Mexico*, No. 29,453, slip op. at 12 (N.M. Ct. App. Jan. 20, 2011) (citation omitted). And a review of pertinent authority reveals that the exclusionary rule should not apply to ALRs.

Neither the Fourth Amendment nor Article III, § 6 “contain[] [any] provision expressly precluding the use of evidence obtained in violation of [their] commands.” *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 1191 (1995).<sup>7</sup> There is “no provision expressly precluding the use of

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<sup>6</sup>This sequential process is what distinguishes *Ullom v. Miller*, No. 34864 (Nov. 23, 2010) and renders the circuit court’s reliance on it as misplaced. *Ullom* was solely about whether the Fourth Amendment was satisfied in that case, and this Court held it was. Therefore, there was no reason to address the second issue of exclusionary rule applicability.

<sup>7</sup>There was no exclusionary rule at common law, 4 William Blackstone, *Commentaries on the Laws of England* \*286-92, and it took 123 years, from 1791 to 1914 for the United States Supreme Court to adopt the exclusionary rule in *Weeks v. United States*, 232 U.S. 283, 34 S. Ct. 341 (1914), see *People ex rel. Winkle v. Bannan*, 372 Mich. 292, 323, 125 N.W.2d 875, 891 (1964), and another 47 years, from *Weeks* to *Mapp* (continued...)

evidence obtained in violation of its commands.” *Leon*, 468 U.S. at 906, 104 S. Ct. at 3411. Thus, “the governments’ use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.” *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 362, 118 S. Ct. 2014, 2019 (1998). In sum, “[t]he exclusionary rule is not required by the Constitution[.]” *Brock v. United States*, 573 F.3d 497, 499 (7th Cir. 2009); *United States v. Nielson*, 415 F.3d 1195, 1202 (10<sup>th</sup> Cir. 2005) (“the exclusionary rule is not mandated by the Fourth Amendment.”); *United States v. Peoples*, 668 F. Supp.2d 1042, 1048 (W.D. Mich. 2009) (“the exclusionary rule is an extraordinary remedy not required by the text of the Fourth Amendment.”).

Notwithstanding this textual absence, the Supreme Court has judicially crafted an exclusionary rule, *McDonald v. Chicago*, 130 S. Ct. 3020, 3047 (2010), *Stone v. Powell*, 428 U.S. 465, 482, 96 S. Ct. 3037, 3046 (1976), *State v. Rummer*, 189 W. Va. 369, 386, 432 S.E.2d 39, 56 (1993) (Nelly, J., dissenting), which

prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search . . . [and] prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes “so attenuated as to dissipate the taint”

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<sup>7</sup>(...continued)

*v. Ohio*, 367 U.S. 643 (1961), for the rule to be applied to the States, with an intervening decision in *Wolf v. Colorado*, 338 U.S. 25, 32, 69 S. Ct. 1359, 1364 (1949) overruled in *Weeks* specifically finding the rule does not apply against the States. West Virginia did not have an exclusionary rule until 1922, which this Court based upon *Weeks* and its progeny finding that “inasmuch as the provisions of our constitution cover the same subject and are in the exact language of the federal amendments, they ought to receive harmonious construction when applied to the actions of state officers.” *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257, 260 (1922). (But see *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007)). See *Wolf v. Colorado*, 338 U.S. 25, 37, 69 S. Ct. 1359, 1366 (1949) (observing that in *State v. Wills*, 91 W. Va. 659, 114 S.E. 261 (1922) this Court distinguished prior cases in light of *Weeks*), overruled on other grounds by *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961).

*Murray v. United States* 487 U.S. 533, 536-37, 108 S. Ct. 2529, 2533 (1988). The exclusionary rule is not an end unto itself, see *United States v. Harvey*, 711 F.2d 144 (9<sup>th</sup> Cir. 1983) (Anthony Kennedy, as Circuit Court Judge, dissenting from denial of rehearing en banc), rather, the rule's purpose is to deter police misconduct, *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 163 n.10, 451 S.E.2d 721, 729 n.10 (1994) (dicta),<sup>8</sup> and not to create a personal constitutional right. "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974).

"The fact that a Fourth Amendment violation occurred- *i.e.*, that a search or arrest was unreasonable-does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 129 S. Ct. 695, 700 (2009). Thus, "[i]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *Calandra*, 414 U.S. at 350, 94 S. Ct. at 621. "[T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 348, 94 S. Ct. at 620. Indeed, the

Fourth Amendment has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons and that when the public interest in presenting all the evidence which is relevant and probative is compelling, and the deterrent function served by exclusion is minimal, the exclusionary rule will not be invoked.

*Hughes v. Gwinn*, 170 W. Va. 87, 91, 290 S.E.2d 5, 9 (1982). Given that "[i]ndiscriminate application of the exclusionary rule . . . may well 'generat[e] disrespect for the law and

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<sup>8</sup>*Madden*, of course, dealt with litigation between two private parties, but the case that the Court cited to support its statement that "the exclusionary rule is not usually extended to civil cases[,] " was *County of Henrico v. Ehlers*, 237 Va. 594, 379 S.E.2d 457 (1989), and a county is a public party. See *Garrison v. Deschutes County*, 334 Or. 264, 272, 48 P.3d 807, 812 (2002).

administration of justice[,]” *Leon*, 468 U.S. at 908, 104 S. Ct. at 3412 (citation omitted), “[s]uppression of evidence . . . has always been our last resort, not our first impulse.” *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S. Ct. 2159, 2163 (2006). In addressing whether to extend the exclusionary rule to civil cases, the Supreme Court set forth a framework that weighs the likely social benefits of excluding illegally seized evidence, *i.e.* deterring police misconduct, against its likely costs, *i.e.*, the loss of probative evidence and the costs that flow from less accurate and more cumbersome adjudication that therefore occurs. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1041, 104 S. Ct. 3479, 3485 (1984) (citing *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021 (1976)).

Sufficient deterrence is effected on law enforcement through the suppression of evidence in the prosecution’s case in chief in the criminal proceeding, the enforcement of the criminal law being the officers’ primary focus, *Janis*, 428 U.S. at 458, 96 S. Ct. at 3034, and not the obtaining of evidence to be used in an administrative proceeding. *Scott*, 524 U.S. at 368, 118 S. Ct. at 2022. Indeed, the fact that police are wont to ignore issued subpoenas to attend ALR hearings is evidence that a license revocation is a not a motivating factor for police actions. *See Miller v. Hare*, No. 35560 (W. Va. Apr. 1, 2011) (failure of officer to appear at ALR hearing).<sup>9</sup> The fact that there might be some incremental effect on primary police conduct is not itself sufficient to trigger to exclusionary rule. *Id.*, 118 S. Ct. at 2022. (“We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.”); *Calandra*, 124 U.S. at 350, 94 S. Ct. at 621 (“[I]t does not follow that the Fourth Amendment requires adoption of every proposal

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<sup>9</sup>This Court actually has or had pending some 13 cases dealing with what DMV terms OFTAs, or “Officer Failed to Appear” cases dealing with circumstances where law enforcement officers do not appear in response to administrative subpoenas issued by DMV for officers to appear at ALRs. Pending in front of the circuit courts are or were some 13 of these OFTA cases before the *Hare* decision. While not empirical, this presents strong anecdotal evidence that ALRs are not prime motivators for police officers.

that might deter police misconduct.”). Indeed, other means of deterrence, such as the threat civil rights suits, departmental discipline, and professional training, can prove far more valuable than the exclusionary rule. *Hudson v. Michigan*, 547 U.S. 586, 598-99, 126 S. Ct. 2159, 2167-68 (2006).

Against this is measured to social cost of the exclusionary rule. Clearly, application of the exclusionary rule results “substantial social costs,” *Leon*, 468 U.S. at 907, 104 S. Ct. at 3412, which sometimes include setting the guilty free and the dangerous at large, *Hudson*, 547 U.S. at 591, 126 S. Ct. at 2165, by “mak[ing] reliable and probative evidence unavailable; [thus] it impeded[ing] the truthfinding process; . . . [and] encouraging disrespect for law by seemingly focusing on procedure rather than the pursuit of truth and justice.” *Madden*, 192 W. Va. at 163 n.10, 451 S.E.2d at 729 n.10. Further, “[t]he purpose of this State’s administrative driver’s license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.” Syl. Pt. 3, *In re McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005). See also *Dixon v. Love*, 431 U.S. 105, 114, 97 S. Ct. 1723, 1728 (1977) (observing “the important public interest in safety on the roads and highways, and in prompt removal of a safety hazard”, i.e., drunk drivers). Applying the exclusionary rule in civil cases such as administrative license revocations would result in a proceeding “intended as an expeditious method of ridding the highways of dangerous drivers and of protecting the public . . . becom[ing] an intolerable burden on the bar and a cumbersome procedure.” *Ferguson v. Gathright*, 485 F.2d 504, 508 (4<sup>th</sup> Cir. 1973). See *Lopez-Mendoza*, 468 U.S. at 1041, 104 S. Ct. at 3485 (observing that secondary costs flow from, inter alia, “more cumbersome adjudication that therefore occurs.”). Thus, the United States Supreme Court has never extended the exclusionary rule beyond criminal proceedings, *Hudson*, 547 U.S. at 612, 126 S. Ct. at 2176 (Breyer, J., dissenting), and—as this Court has recognized—“the exclusionary rule is not usually extended to

civil cases.” *Madden*, 192 W. Va. at 163 n.10, 451 S.E.2d at 729 n.10. *See also* 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 207 (1993) (similar) And, of course, not extending the exclusionary rule to civil proceedings has precedential roots in this Court’s jurisprudence for in *Hughes v. Gwinn*, 170 W. Va. 87, 91, 290 S.E.2d 5, 9 (1982), this Court refused to extend the exclusionary rule to probation revocation hearings (admittedly with a limited exception not present here). *Cf. State ex rel. Doe v. Troisi*, 194 W. Va. 28, 34, 459 S.E.2d 139, 145 (1995) (exclusionary rule does not apply to grand jury proceedings).

“The majority of courts in other jurisdictions that have addressed this issue have concluded that the exclusionary rule does not apply in proceedings for the revocation of a driver’s license.”

*Glynn*, slip op. at 17. In short,

[a]ll of the above cited decisions clearly indicate that any benefits in applying the exclusionary rule to a driver’s license revocation hearing would substantially outweigh the social costs in doing so . . . By allowing drivers to challenge the constitutionality of traffic stops and arrests in a civil proceeding for purposes of applying the exclusionary rule, society’s goal of efficiently removing drunk drivers from the roads would be drastically undermined.

*Custer v. Kansas Dept. of Revenue*, No. 97,866, 2007 WL 4374037, at \* 1 (Kan. Ct. App. Dec. 14, 2007).

Further, nothing in the pertinent version of West Virginia Code § 17C-5A-2 (2008) required, as a predicate for license revocation, an arrest, much less a lawful arrest. *Cain v. West Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 472 n.11, 694 S.E.2d 309, 314 n.11 (2010) (“The current version of this statute [i.e., the 2008 version] no longer requires an arrest. Instead, the second finding that must be established is that a person committed a DUI offense. *See* W. Va. Code § 17C-5A-2(f) (2008).”). The circuit court, however, decided to apply the statute retroactively holding that it was

a procedural statutory change. Even if the statute did so apply as a matter of temporality, the circuit court failed to apply it correctly.<sup>10</sup>

The 2010 version of the statute provides that the OHA must make the following subsidiary findings:

(1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight; (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: *Provided*, That this element shall be waived in cases where no arrest occurred due to driver incapacitation; (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test; and (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

W. Va. Code § 17C-5A-2(f) (2010). “When the language chosen by the Legislature is plain, we apply, rather than construe, such legislative language[.]” *State ex rel. McGraw v. Combs Serv.*, 206 W. Va. 512, 519, 526 S.E.2d 34, 41 (1999) (citations omitted), and “[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). West Virginia Code § 17C-5A-2(f) (2010), “does not indicate that the validity of the traffic stop that resulted in a DWI arrest is an issue. . . . The plain language of the

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<sup>10</sup>*See supra*, fn. 2.

statute says nothing about the preliminary traffic stop. Thus, even assuming that an officer did not have reasonable suspicion to stop the driver's vehicle, the statute states that revocation of a driver's license will be upheld as long as the officer had reasonable grounds to believe the driver was DWI and the other . . . elements are satisfied." *Glynn*, slip op. at 10-11. Moreover, the use of lawful arrest or lawful custody does not relate to a predicate for revocation, but only a predicate for secondary chemical testing, (apparently to bring the DMV in line with W. Va. C.S.R. § 64-10-6.1, "[e]ach law enforcement agency shall designate a type of test, either breath, blood or urine for the purpose of administering a secondary alcohol breath analysis incidental to lawful arrest for the offense of driving a motor vehicle in this state while under the influence of alcohol."). An arrest is lawful based on whether the Preliminary Breath Test justified an arrest under West Virginia Code § 17C-5-5 or whether the other information justified an arrest. If an arrest is unlawful, there can be no secondary breath test used by the Commissioner, but this is not dispositive of the principal question, which is:

whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or did refuse to submit to the designated secondary chemical test, or did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight.

*Id.*

There is no basis for the Commissioner or the judiciary to ignore pertinent and reliable evidence in an ALR hearing. The circuit court should be reversed.

**VI. CONCLUSION**

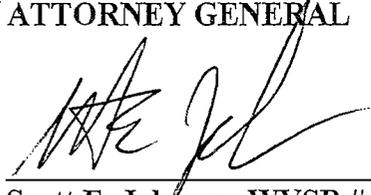
For the above-reasons, the circuit court should be reversed.

**Respectfully submitted,**

**JOE E. MILLER, Commissioner,  
Division of Motor Vehicles,**

**By Counsel,**

**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read 'SE Johnson', is written over a horizontal line.

**Scott E. Johnson, WVSB # 6335  
Assistant Attorney General  
DMV - Office of the Attorney General  
P.O. Box 17200  
Charleston, WV 25317-0010  
(304) 926-3874**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 11-0147  
(Circuit Court Civil Action No. 10-AA-77)

JOE E. MILLER, COMMISSIONER OF  
WEST VIRGINIA DIVISION OF  
MOTOR VEHICLES,

Appellant/Respondent below,

v.

DAVID K. SMITH,

Appellee/Petitioner below.

**CERTIFICATE OF SERVICE**

I, Scott E. Johnson, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **PETITION FOR APPEAL** on this 3rd day of May, 2011, by depositing it in the United States Mails, first-class postage prepaid addressed to the following, *to wit*:

Matthew L. Clark, Esquire  
Kayser Layne & Clark, PLLC  
701 Viand St.  
P.O. Box 210  
Point Pleasant, WV 25550

  
\_\_\_\_\_  
Scott E. Johnson