

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

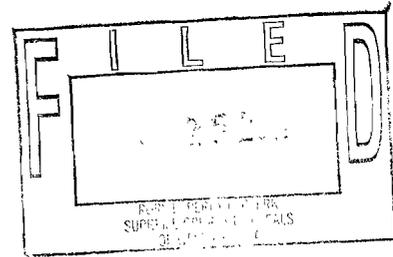
JOE E. MILLER, COMMISSIONER OF
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Appellant/Respondent below,

v.

DAVID K. SMITH,

Appellee/Petitioner below.



FROM THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

REPLY BRIEF

Respectfully submitted,

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Division of Motor Vehicles,

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STATUTES:

W. Va Code § 17C-5C-5	passim
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MISCELLANEOUS:

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JOE E. MILLER, COMMISSIONER OF
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Appellant/Respondent below.

v.

DAVID K. SMITH,

Appellee/Petitioner below,

REPLY BRIEF

ARGUMENT

- A. West Virginia Code § 17C-5C-5 permits Commissioner jurisdiction until at least October 1, 2010.

West Virginia Code § 17C-5C-5 (2010) provides (emphasis added):

(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.***

Code § 17C-5C-5(a) specifically provides that it governs “transition of the administrative hearing process from the Division of Motor Vehicles to the Office of Administrative Hearings[,] . . . ***no later than***

October 1, 2010.” Far from adding the statute, see Resp. Br. at 16, the Commissioner asks this Court to apply the statute.

Further, 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 (1st 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. And Ms. Dunn established by

interim policy that the Commissioner would retain jurisdiction over pre-June 11, 2010 incidents. Because the incident in this case predated June 11, 2010, the Commissioner—and not the Office of Administrative Hearings—has jurisdiction.

“Moreover, this Court has long held that, “[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made[.]” *Richards v. Harman*, 217 W. Va. 206, 211, 617 S.E.2d 556, 561 (2005) (quoting Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938)) and that when a court interprets a statute, the statute

should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syl. Pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908). Further, “[w]hen the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch[.]” Syl. Pt. 2, in part, *Stephen L.H. v. Sherry L.H.*, 195 W. Va. 384, 394, 465 S.E.2d 841, 851 (1995), *superseded by statute on other grounds as stated in Sharon B.W. v. George B.W.*, 205 W. Va. 594, 519 S.E.2d 877 (1999), and “existing statutes.” *O’Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 610, 425 S.E.2d 551, 565 (1992).

This Court has long recognized that “[t]he purpose of the administrative sanction of license revocation is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways[.]” *Shell v. Bechtold*, 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985), “to protect innocent persons” and to do so “as quickly as possible.” *In McKinney*, 218 W. Va. 557, 562, 625 S.E.2d 319, 324 (2005). *See also State v. Euman*, 210 W. Va. 519, 522, 558 S.E.2d 319, 322 (2001) (“We recognize that license revocation laws are intended to protect the innocent public.”).

Under the Respondent's theory, an entire administrative proceeding *sans* order could be completed prior to June 11 and yet the entire process then simply evaporates and must resume *ab initio*. This is certainly not "quickly" removing drivers from the highways of this state for the protection of the innocent public. Moreover, without any lag time, the Office of Administrative Hearings would not be able to hold hearings. Thus, drivers would be in limbo awaiting the full operation of the OAH. The Legislature was aware of this and inserted the October 1 deadline so as to allow the OAH to become a fully operational agency.

B. There are no constitutional or statutory violations here and the circuit court lacked the power to reverse the Commissioner.

Under West Virginia Code § 29A-5-4(g)(1), a 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, decision or order are . . . In violation of constitutional or statutory provisions." Because there was no constitutional or statutory violation, the circuit court lacks the power under the APA to reverse the Commissioner.

(1) While seizure of evidence in violation of the Fourth Amendment is a Fourth Amendment violation, introduction of that evidence does not constitute a Fourth Amendment violation.

The United States Supreme Court has concluded in many cases that while evidence seized in violation of the Fourth Amendment works a constitutional violation, the *introduction* of that same evidence does not work a constitutional violation. "The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong[;]' [t]he wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself[.]" *United States v. Leon*, 468 U.S. 897, 906, 104

S. Ct. 3405, 3411 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 354, 94 S. Ct. 613, 623 (1974)). “[T]he use of the fruits of a past unlawful search or seizure “”work[s] no new Fourth Amendment wrong[.]”” *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 1191 (1995) (quoting *Leon*, 468 U.S. at 906, 104 S. Ct. at 3411 (quoting *Calandra*, 414 U.S. at 354, 94 S. Ct. at 623)). “[w]hether . . . use of illegally obtained evidence . . . should be proscribed presents a question, not of rights, but of remedies.” *United States v. Calandra*, 414 U.S. 338, 354, 94 S. Ct. 613, 623 (1974). The Respondent cites to *Ullom v. Miller*, 227 W. Va. 1, 705 S.E.2d 111 (2010) and *Clower v Miller*, 223 W. Va. 535, 678 S.E.2d 41 (2009). Neither case is helpful to the Respondent.

In *Ullom*, this Court did not address nor did the Commissioner raise, *see* Appellants’ Brief in *Ullom* available at www.state.wv.us/wvscs/briefs/march10/34864Appellant.pdf,¹ the argument that there is no Fourth Amendment violation by the introduction of illegally seized evidence. “[S]tare decisis governs the decision of the same question in the same way[.]” *Marguerite Coal Co. v. Meadow River Lumber Co.* 127 S.E. 644, 646 (W. Va. 1925), but a “question of law not brought to the attention of the Court, nor passed upon by it, cannot be considered as involving the same question.” *In re Kanawha Val. Bank*, 144 W. Va. 346, 382, 109 S.E.2d 649, 669 (1959). *See also Stanley v. Department of Tax and Revenue*, 217 W. Va. 65, 71 n.4, 614 S.E.2d 712, 718 n.4 (2005). *But see State v. Guthrie*, 194 W. Va. 657, 679 n.28, 461 S.E.2d 163, 185 n.28 (1995). *Ullom* took it as a premise that the Fourth Amendment applied, but

¹This is not necessarily unusual. Unlike private counsel, government lawyers think (and should think) strategically, including deciding what doctrinal arguments should be laid before a court. Rather than advancing every argument available to win a particular case, a government lawyer may only raise issues that the lawyer believes need to be resolved by a court and forgo arguments that other lawyers might feel obliged to make, ensuring the court actually deals with the issues the government lawyers believes should be addressed. Government lawyers may also forgo arguments in cases where the facts are particularly good for having the Court address a different issue. Seth Waxman, *Does the Solicitor General Matter?*, 53 Stan. L. Rev. 1115 (2001); Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 Marq. L. Rev. 477 (2009). Further, “[t]he Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272, 110 S. Ct. 1056, 1064 (1990).

“this Court is not bound by its prior assumptions.” *Lopez v. Monterey County*, 525 U.S. 266, 281, 119 S. Ct. 693, 702 (1999). Because the issue of whether the Fourth Amendment or the exclusionary rule applied to bar introduction of evidence was not squarely raised, Ullom does not support the Respondent.

In *Clower*, the Court held that a stop of a car to comport with the Fourth Amendment must be supported by at least reasonable suspicion. That is undeniably true, a stop made without at least reasonable suspicion violates the Fourth Amendment. *Martin v. Kansas Dep’t of Revenue*, 285 Kan. 625, 636, 176 P.3d 938, 947 (2008) (“A traffic stop is not magically converted to a ‘nonseizure’ when it leads to a civil or administrative rather than a criminal proceeding.”); *Tornabene v. Bonine ex rel. Arizona Highway Dep’t*, 203 Ariz. 326, 334, 54 P.3d 355, 363 (2002) (“Tornabene correctly asserts that the Fourth Amendment applies to ‘all vehicle stop situations,’ whether ultimately leading to criminal or civil proceedings.”). But the Fourth Amendment violation starts and ends at the stop, “[t]he United States Supreme Court has repeatedly held that the use of evidence obtained in violation of the fourth amendment does not violate the Constitution.” *Riche v. Director of Revenue*, 987 S.W.2d 331, 334 (Mo. 1999). *See also Kerr v. Pennsylvania State Bd. of Dentistry*, 599 Pa. 107, 116, 960 A.2d 427, 432 (2008) (quoting *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 362, 118 S.Ct. 2014 (1998) (citations omitted)) (“The United States Supreme Court has ‘emphasized repeatedly that the State’s use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.”).

“State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution. In doing so, they are *not* free from the final authority of th[e Supreme] Court.” *Arizona v. Evans*, 514 U.S. 1, 8-9, 115 S. Ct. 1185, 1190 (1995). Since the United States Supreme Court is the final arbiter of the federal constitution under the Supremacy Clause, *see, e.g., Syl. Pt. 2, State ex rel Battle v. B. D. Bailey & Sons, Inc.*, 150 W. Va. 37, 146 S.E.2d 686 (1965); *Jaffree v. Board of School*

Comm'rs, 459 U.S. 1314, 1316, 103 S. Ct. 842, 843 (1983) (Powell, J., op. in chambers), “a state court can neither add nor subtract from the mandates of the United States Constitution,” *State v. Rissler*, 165 W. Va. 640, 644 n.1, 270 S.E.2d 778, 781 n.1 (1980); accord *North Carolina v. Butler*, 441 U.S. 369, 376, 99 S. Ct. 1755, 1759 (1979), this Court cannot read the Fourth Amendment to grant broader rights than the Supreme Court has. See *Arkansas v. Sullivan*, 532 U.S. 769, 772, 121 S. Ct. 1876, 1878 (2001) (per curiam); *Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 1219 (1975); *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 514, 583 S.E.2d 800, 811 (2002) (per curiam); *Abrams v. West Virginia Racing Commission*, 164 W. Va. 315, 318, 263 S.E.2d 103, 106 (1980). Both the precedents of the United States Supreme Court and this Court prohibit *Clower* from being read to apply a Fourth Amendment standard in a manner broader than the United States Supreme Court²

²Admittedly, this Court could read West Virginia Article III, § 6 in a manner broader than the Supreme Court has read Fourth Amendment, see, e.g., *State v. Flippo*, 212 W. Va. 560, 581 & n.25, 575 S.E.2d 170, 191 & n.25 (2002), although it is normally the case that Article III, § 6 should be read in a manner consistent with the United States Supreme Court’s understanding of the reaches of the Fourth Amendment. Syl. Pt. 2, *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257 (1922); *State v. Duvernoy*, 156 W. Va. 578, 582, 195 S.E.2d 631, 634 (1973); *State v. Jones*, 193 W. Va. 378, 383 n.6, 456 S.E.2d 459, 464 n.6 (1995). In any event, the Respondent has neither raised nor made any independent and separate argument supporting a claim that Article III, § 6 should be read more broadly than the Fourth Amendment. See *Kessel v. Monongalia County Gen. Hosp.*, 220 W. Va. 602, 616, 648 S.E.2d 366, 380 (2007) (“When presented with a recommendation from the Legislature to look to federal law in interpreting a statute or with our own precedent looking to federal law for guidance on a particular issue, several factors should guide our determination as to whether we should follow the federal courts’ direction or whether we should determine that our interpretation of West Virginia law should be unique.”). See also *State v. Mullens*, 221 W. Va. 70, 97, 650 S.E.2d 169, 196 (2007) (Benjamin, J., dissenting). As many other courts have observed, “[s]tate and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground.” *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Ct. Cr. App.1993). Accord *Kerr v. Pennsylvania State Bd. of Dentistry*, 599 Pa. 107, 114, 960 A.2d 427, 431 (2008) (“Because Appellant has not asserted an independent claim under the Pennsylvania Constitution, our review is limited accordingly.”); *In re Redevelopment Authority of Philadelphia*, 595 Pa. 241, 248 n. 3, 938 A.2d 341, 345 n. 3 (2007) (declining to address, *sua sponte*, an issue under the state constitutional analogue to a federal constitutional provision under review); *State v. Azania*, 865 N.E.2d 994, 998 n. 4 (Ind.2007) (where party cites Indiana Constitution but presents no separate argument based thereon, we resolve the federal claim and “express no opinion” about the state claim); *State v. Bozelko*, 119 Conn. App. 483, 496 n.5, 987 A.2d 1102, 1110 n.5 (2010) (“The appellate courts of this state consistently limit their review to federal constitutional claims, when the state constitutional claims are not accompanied by a separate and sufficient analysis.”); *Hagez v. State*, 131 Md. App. 402, 422, 749 A.2d 206, 217 (2000) (“because appellant has not presented a separate analysis of his double jeopardy claim under either Article 5 or common law, we confine our analysis to the application of the Fifth Amendment’s Double Jeopardy (continued...)”).

(2) The exclusionary rule is not a rule of constitutional stature and does not implicate individual or personal, constitutional rights.

The Fourth Amendment “contains no provision expressly precluding the use of evidence obtained in violation of its commands.” *Evans*, 514 U.S. at 10, 115 S. Ct. at 1191. Thus, “[t]he exclusionary rule is not required by the Constitution[.]” *Brock v. United States*, 573 F.3d 497, 499 (7th Cir. 2009). *See also United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006) (“the exclusionary rule is a judicially created, as opposed to constitutionally required, remedy for Fourth Amendment violations”); *United States v. Nielson*, 415 F.3d 1195, 1202 (10th Cir. 2005) (“the exclusionary rule is not mandated by the Fourth Amendment”). The Supreme Court has “rejected the suggestion that the exclusionary rule is ‘a necessary corollary’ of the fourth amendment and has specifically denied that the rule is required by the conjunction of the fourth and fifth amendments.” *United States v. Hernandez Camacho*, 779 F.2d 227, 230 (5th Cir. 1985) (quoting *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 3412-13 (1984)). Thus, “the exclusionary rule is not an individual[.]” *Herring v. United States*, 129 S. Ct. 695, 700 (2009), nor a “personal constitutional right.” *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 3048 (1976).

(3) Application of the exclusionary in administrative license proceedings is foreclosed by precedent from the United States Supreme Court, this Court, and academic commentary from a leader in the field of West Virginia criminal jurisprudence.

“The [United States Supreme] Court has declined to apply the exclusionary rule . . . where admissibility in proceedings other than criminal trials was at issue[.]” *Hudson v. Michigan*, 547 U.S. 586, 611-12, 126 S. Ct. 2159, 2175 (2006) (Breyer, J., dissenting). Further, this Court in *Hughes v. Gwinn*, 170 W. Va. 87, 91, 290 S.E.2d 5, 9 (1982), refused to apply the exclusionary rule to probationers, and this Court in *State ex rel. Doe v. Troisi*, 194 W. Va. 28, 34, 459 S.E.2d 139, 145 (1995), recognized that the

²(...continued
Clause”).

exclusionary rule does not apply to grand jury proceedings, and this Court in *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 163, 451 S.E.2d 721, 729 (1994) (dicta) stated that “the exclusionary rule is not usually extended to civil cases.” Further, as Professor (quondam Justice) Cleckley has explained, a simple “summary analysis of the rule is that evidence is not admissible in a criminal trial if it is obtained as the result of an unreasonable search or seizure[,]” or, in other words, as “one of the foremost scholars in criminal law in the entire country[,]” *State v. Taylor*, 215 W. Va. 74, 87, 593 S.E.2d 645, 658 (2004) (per curiam) (Davis, C.J., dissenting), has written, the exclusionary “rule is limited to criminal trials where the issue of guilt or innocence is being contested[,]” and has “no application in civil cases.” 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 202, 207 (1993).

In light of United States and West Virginia precedent, dicta, and academic discussion, there is no need to resort, as the Respondent does, to out of state law. See *Mountain America, LLC v. Huffman*, 224 W. Va. 669, 683, 687 S.E.2d 768, 782 (2009) (“Because this Court, in our existing precedent, has resolved the issue . . . we need not here analyze these particular arguments any further.”); *State ex rel. Cosner v. See*, 129 W. Va. 722, 736, 42 S.E.2d 31, 40 (1947) (“Though no prior decision by this Court, in which the question of the constitutionality of the challenged legislation has been passed upon, is available, recourse may be had to the decisions of the appellate courts of other jurisdictions in which somewhat similar statutes have been considered.”). Of course, many of the cases the Respondent cites are inappropriate in any event.

Initially, to say that there are a “number” of cases finding the exclusionary rule applicable in DMV revocation cases, Respondent’s Br. at 22, is somewhat of an overstatement since only “some other jurisdictions have applied the exclusionary rule to administrative license revocation and suspension proceedings.” *Riche v. Director of Revenue*, 987 S.W.2d 331, 334 (Mo. 1999) *Martin v. Kansas Dep’t of*

Revenue, 285 Kan. 625, 645, 176 P.3d 938, 952 (2008) (application of exclusionary rule in civil proceedings is a minority rule); *Glynn v. State*, 252 P.3d 742, 749 (N.M. Ct. App. 2011) (“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.”).

Moreover, *Olson v. Comm’r of Pub. Safety*, 371 N.W.2d 552 (Minn.1985), is of little utility as it “assume[d] without discussion that the exclusionary rule applies to license revocation hearings,” *Nevers v. State*, 123 P.3d 958, 964 & n.30 (Alaska 2005), as is *State v. Lussier*, 171 Vt. 19, 23, 757 A.2d 1017, 1020 (2000), which applied different calculus as to the exclusionary rule’s deterrent effect beyond that set forth in federal case law. *Nevers*, 123 P.3d at 964. And while the Respondent cites *Gikas v. Zolin*, 6 Cal.4th 841, 848, 25 Cal. Rptr.2d 500, 863 P.2d 745 (1993) (en banc), that case “did not quite answer the question whether the exclusionary rule ordinarily applies in DMV administrative proceedings,” *Park v. Valverde*, 152 Cal. App.4th 877, 884, 61 Cal. Rptr.3d 895, 900 (2007); subsequently, the California Court of Appeals did not find itself bound to accept the exclusionary rule in DMV revocations, rather finding that it generally did not. *Id.*, 61 Cal. Rptr.3d at 900. *Accord Department of Transp. v. State Personnel Bd.*, 178 Cal. App.4th 568, 577, 100 Cal. Rptr.3d 516, 522 (2009).

(4) West Virginia Code § 17C-5-2 (2010) is inapplicable to this case.

At the time of Mr. Smith’s arrest, West Virginia Code § 17C-5-2 provided that in his final order the Commissioner:

shall make specific findings as to: (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 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 (3) whether the tests, if any, were administered in accordance with the provisions of this article and article five of this chapter.

The 2010 version of the statute provides that the Office of Administrative Hearings shall make the following findings:

(1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been [DUI]; (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.

A statute is not procedural and cannot be retroactive if it affects substantive rights. *Mildred L.M. v. John O.F.*, 192 W. Va. 345, 352 n.10, 452 S.E.2d 436, 443 n.10 (1994). A substantive right deals “with creation of duties, rights, and obligations[.]” *Id.*, 452 S.E.2d at 443 n.10 (quoting *Shiflet v. Eller* 228 Va. 115, 120, 319 S.E.2d 750, 754 (1984)). Procedure “prescribes methods of obtaining redress or enforcement of rights.” *Id.*, 452 S.E.2d at 443 n.10 (quoting *Shiflet*, 228 Va. at 120, 319 S.E.2d at 754). A procedural amendment changes *how* a party must prove a case, while a substantive amendment changes *what* a party must prove. “It is well established that a statute is substantive if it . . . imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right.” *Pratte v. Stewart*, 125 Ohio St.3d 473, 480, 929 N.E.2d 415, 422 (2010). Thus, “[i]t has been stated repeatedly that new legislation should not generally be construed to interfere with existing . . . rights of action [or] suits[.]” *Mildred L.M. v. John O.F.*, 192 W. Va. 345, 351 n. 10, 452 S.E.2d 436, 442 n. 10 (1994) (emphasis and citation omitted). And, finally, even if the changes are considered procedural or remedial, they cannot be applied to a pending case for “[i]f a new procedural or remedial provision would, if applied in a pending case, attach a new legal consequence to a completed event, then

it will not be applied in that case unless the Legislature has made clear its intention that it shall apply.” *Public Citizen, Inc. v. First Nat. Bank*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996). From 2008 to 2010, the Commissioner was required to find that the driver committed a DUI offense, not that the driver was lawfully arrested. *Cain v. West Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 472 n.12, 694 S.E.2d 309, 314 n.12 (2010).³

CONCLUSION

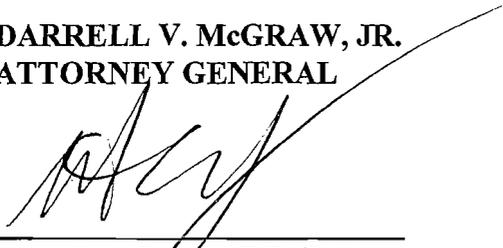
The circuit court should be reversed.

Respectfully submitted,

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

By Counsel,

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



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³Even if the 2010 version of the statute applied, it would be of no avail to the Respondent. While *State v. Clower*, 223 W. Va. 535, 678 S.E.2d 41 (2009), it did not have the benefit of the case upon which DMV relies in dealing with the lawful arrest language here. *Glynn v. State, Taxation and Revenue Dept., Motor Vehicle Div.* 252 P.3d 742, 750 (N.M. App. 2011). 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 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 driver drove drunk.

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.

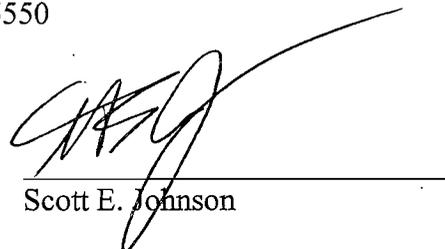
DAVID K. SMITH,

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 **REPLY BRIEF** on this 25th day of July, 2011, by depositing it in the United States Mails, first-class postage prepaid addressed to the following, *to wit*:

Matthew L. Clark, Esquire
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Point Pleasant, WV 25550



Scott E. Johnson