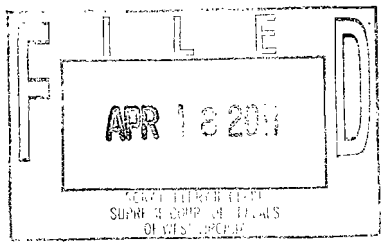
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0148



JOE E. MILLER, Commissioner
West Virginia Department of Transportation,
Division of Motor Vehicles,

Petitioner/Respondent below,

v.

MICHAEL CHENOWETH,

Respondent/Petitioner below.

FROM THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

Brief of Petitioner
~~PETITION FOR APPEAL~~

Respectfully submitted,

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Division of Motor Vehicles,

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FROM THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

PETITION FOR APPEAL

I. ASSIGNMENTS OF ERROR

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

B. **The Circuit Court erred because there was reasonable suspicion or probable cause for the initial seizure, the evidence of the Respondent's inebriation that was discovered during the course of that stop gave the police the right to expand the stop to include driving while under the influence.**

II. STATEMENT OF THE CASE

In the early morning of May 7, 2009, West Virginia State Police Trooper J.S. Pauley observed a 1991 Mercury stopped along the side of West Virginia Avenue protruding into the

roadway. App'x at 18, 33. The Mercury was stopped just past the entrance to a Fire House. App'x at 9. Trooper Pauley pulled in behind the Mercury, App'x at 18, 13, 14, turning his lights on to investigate further. App'x at 18, 15. Mr. Chenoweth was the driver of the Mercury, and while speaking to him, Trooper Pauley smelled alcohol on Mr. Chenoweth, observed he had bloodshot eyes, and that his speech was slow. App'x at 18, 34. Mr. Chenoweth was unsteady getting out of his car and standing. App'x at 18 , 34. Mr. Chenoweth failed the Horizontal Gaze Nystagmus Test, App'x at 18, 34, refused the walk and turn and one leg stand Field Sobriety Tests, App'x at 19, 34-35, and also failed the Preliminary Breath Test. App'x at 19, 35. A secondary breath test revealed that Mr. Chenoweth's blood alcohol content was %.155. App'x at 21, 36, 39.

In his request for a hearing before the Commissioner, Mr. Chenoweth did not request the presence of the investigating officer. App'x at 6, 21. The DMV held an Administrative Licence Revocation Hearing on January 7, 2010. App'x at 5. As a result of the hearing, the DMV Commissioner revoked Mr. Chenoweth's licence. App'x at 32. The circuit court disagreed and reversed the Commissioner. App'x at 4.

III. SUMMARY OF ARGUMENT

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

The Circuit Court concluded that West Virginia Code § 17C-5A-2(d) (2008) required a lawful arrest, which it did not. Also, 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.

B. The Circuit Court erred because there was reasonable suspicion or probable cause for the initial seizure, the evidence of the Respondent's inebriation that was discovered during the course of that stop gave the police the right to expand the stop to include driving while under the influence.

A police officer may initiate an investigation of a possible traffic or parking offence based upon reasonable suspicion and may issue a citation if probable cause exists. It is not necessary that an offence actually have occurred, it is sufficient to satisfy the Fourth Amendment's reasonableness standard that the facts are such as to warrant an investigation or a citation. An officer's reasonable mistake as to the facts such that a crime has not been committed does not negate probable cause or reasonable suspicion. And, the officer's discovery of evidence of an additional or different offense while within the legitimate scope of the original seizure provides a legitimate basis to expand the seizure to investigate the facts of the additional or different offence.

Here, once Trooper Pauley interacted with Mr. Chenoweth concerning the parking violation, Trooper Pauley's observed a smell of alcohol on Mr. Chenoweth's breath, his blood shot eyes, and his slow speech. This, coupled with Mr. Chenoweth's sitting behind the wheel of a car was more than sufficient to justify a further investigation to determine if Mr. Chenoweth was driving under the influence.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 19 oral argument is requested in this case. The circuit court erred in failing to apply settled law to this case and this case presents a narrow issue of law. This case is not suitable for

memorandum decision consideration because it asks this Court to reverse the circuit court. *See* R.A.P. 21(d).

V. ARGUMENT

Review of the Commissioner's decision is made under the judicial review provisions of the Administrative Procedures Act. *Groves v. Cicchirillo,* 694 S.E.2d 639, 643 (W. Va. 2010) (per curiam). The APA's judicial review section, W. Va. Code § 29A-5-4, pertinently provides:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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.

"The '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." Syl. Pt. 3, *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996). Likewise, "deference . . . is the hallmark of abuse-of-discretion review." *General Elec. Co. v. Joiner,* 522 U.S. 136, 143, 118 S. Ct. 512, 517 (1997).

Additionally, a court can only interfere with a hearing examiner's findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.,* 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995). "[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently." *Brown v. Gobble,* 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). "This Court has recognized that credibility determinations by the finder of fact in an administrative proceeding are 'binding unless patently without basis in the record.'" *Webb v. West Virginia Bd. of Medicine,* 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.,* 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). In other words, an appellate court may only conclude a fact is clearly wrong when it strikes the court as "wrong with the 'force of a five-week-old, unrefrigerated dead fish.'" *Id.* at 563, 474 S.E.2d at 493 (quoting *United States v. Markling,* 7 F.3d 1309, 1319 (7th Cir.1993)). The determination of credibility extends to situations where a lower tribunal must judge live testimony against adverse documentary evidence, at least where the investigating officer is not subpoenaed and the arrest occurred between 2008 an d 2010. *See Plumley v. Miller*, No. 101186, slip op. at 2-3 (W . Va. Feb. 11, 2011) (Memorandum Decision).[1]

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[1]Since the DUI Information Sheet is admissible under Rule 803(8)(c), *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 75 n.10, 631 S.E.2d 628, 633 n.10 (2006), the DUI Information Sheet is entitled to be considered as any other evidence, its weight and credibility to be judged by the trier of fact, *see, e.g., Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986) ("The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact."); *Crompton-Richmond Co. Inc., Factors v. Briggs*, 560 F.2d 1195, 1202 n. 12 (5th Cir.1977) ("Of course, the weight accorded to such records is within the domain of the trier of fact."); *In re Munyan*,143 F.R.D. 560, 564 (D.N.J. 1992) ("the weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact."), and upon which the trier of fact may rely in rendering a decision. *State v. Williams,* 695 N.W.2d 23, 28 (Iowa 2005) ("Admissible hearsay can be used to support a conviction just as other admissible evidence. *See* Iowa R. Evid. 5.803(2) . . . .").

A. The Circuit Court Court erred in applying the exclusionary rule since it had no basis to apply the exclusionary rule.[2]

The Circuit Court in this case applied the exclusionary rule to an Administrative Licence Revocation applying *Cain v. West Virginia Division of Motor Vehicles,* 694 S.E.2d 309 (W. Va. 2010), *Clower v. West Virginia Dep't of Motor Vehicles,* 223 W. Va. 535, 541, 678 S.E.2d 41, 47 (2009), and West Virginia Code § 17C-5A-2(f) (2010). App'x at 4. Here, Mr. Chenoweth admitted that he was already stopped when Trooper Pauley pulled in behind him and that he did not stop because of Trooper Pauley. App'x at 10.

First, *Cain* is clearly not applicable here and actually undercuts Mr. Chenoweth's position. "Because Mr. C[henoweth]'s vehicle was parked at the time the arresting officer encountered Mr. C[henoweth], the standard governing the lawfulness of an investigatory traffic stop is clearly inapplicable to the case before us." *Cain,* 225 W. Va. at 471, 694 S.E.2d at 313. Second, West Virginia Code § 17C-5A-2(f) (2008 [the statute in effect at the time pertinent here]), does not require a finding of any lawful stop or a lawful arrest. *Cain,* 694 S.E.2d at 314 n.11 & 12.[3] Third, *Clower*

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[2]This issue was raised in the Respondent's Brief, App'x at 66-74, and was addressed in the Commissioner's Final Order, App'x at 29-30 , and the Circuit Court Order. App'x at 3-4.

[3]In fact, the circuit court erred in how it applied even under the 2010 version of the statute. Under the 2010 version, there is no requirement for any lawful stop. Moreover, the use of "lawful arrest" or "lawful custody" does not relate to a predicate for revocation, but only a a predicate for secondary chemical testing. 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, but it 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

(continued...)

does not answer the question pertinent here–not whether the Fourth Amendment applies, (the question answered in *Clower*), but whether the exclusionary rule applies to 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)). 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 was not resolved in *Clower*.

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). There is "no provision expressly precluding the use of evidence obtained in violation of its commands." *United States v. Leon,* 468 U.S. 897, 906, 104 S. Ct. 3405, 3411 (1984). 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 (10th Cir. 2005) ("the exclusionary rule is not mandated by

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[3](...continued)
weight, but less than eight hundredths of one percent, by weight.

Id.

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), whose 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), but 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 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. 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."); *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613 at 621 (1974); ("[I]t does not follow that the Fourth Amendment requires adoption of every proposal 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," *United States v. Leon,* 468 U.S. 897, 907, 104 S. Ct. 3405, 3412 (1984), 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 imped[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. 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).

And, finally, in *Cain v. West Virginia Division of Motor Vehicles,* 694 S.E.2d 309 (W. Va. 2010), this Court observed that where a driver is already parked when there is an officer citizen encounter, the constitutional standard for a traffic stop is not implicated. *Id.* at 313 ("Because Mr. Cain's vehicle was parked at the time the arresting officer encountered Mr. Cain, the standard governing the lawfulness of an investigatory traffic stop is clearly inapplicable to the case before us.").

The Circuit Court erred in applying the exclusionary rule in this case and it should be reversed.

B. The Circuit Court erred because there was reasonable suspicion or probable cause for the initial seizure, the evidence of the Respondent's inebriation that was discovered during the course of that stop gave the police the right to expand the stop to include driving while under the influence.[4]

The Fourth Amendment is implicated only upon a police seizure. "If there is no detention-no seizure within the meaning of the Fourth Amendment-then no constitutional rights have been infringed." *Florida v. Royer,* 460 U.S. 491, 498, 103 S. Ct. 1319, 1324 (1983). A seizure "requires *either* physical force . . . *or,* where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1551 (1991). The unrefuted evidence in this case, indeed, the Respondent's own testimony, was that he did not stop as a result of any action on the part of Trooper Pauley. App'x at 10. Rather, he admitted that he was already stopped when Trooper Pauley pulled up behind him. App'x at 10. At best, a seizure did not occur until the Trooper pulled in behind Mr. Chenoweth and turned on his police lights.[5]

A seizure is constitutionally permissible where it is objectively reasonable. *See, e.g., State v. Williams,* 210 W. Va. 583, 590, 558 S.E.2d 582, 589 (2001) (per curiam) (citation omitted) ("the

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[4]This issue, although not raised by the Respondent in the circuit court, is properly before this Court since it was addressed both by the Commissioner in his Final Order, App'x at28, and the circuit court. App'x at 3-4. *See, e.g., United States v. Williams,* 504 U.S. 36, 41, 112 S. Ct. 1735, 1738-39 (1992); *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707, 388 U.S.App.D.C. 1, 9 (2009). Indeed, an appellate court may affirm the trial court on any basis apparent from the record, even if not raised below. 4 C.J.S. *Appeal and Error* § 297.

[5]The DMV will accept this as a working premise and the Court need not address here if, or under what conditions, the activation of police lights works a seizure. *See California v. Hodari D.*, 499 U.S. 621, 624 n.1 (1991). *Cf. Jacobs v. United States*, 981 A.2d 579, 582 (D.C. 2009) (describing situations where activations of police lights would not constitute a seizure).

Fourth Amendment's 'touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances.'"); *State v. Mullens,* 221 W. Va. 70, 106, 650 S.E.2d 169, 205 (2007) (Benjamin, J., dissenting) ("It is equally clear that the Fourth Amendment applies only to unreasonable searches and seizures.").[6] Seizures are generally reasonable in two circumstances, an investigatory stop supported by reasonable suspicion or a full blown arrest supported by probable cause. *United States v. Atwell*, 470 F. Supp.2d 554, 571 (D. Md. 2007).

An investigatory stop is permissible when police have a reasonable suspicion that a crime might be afoot and wish to investigate further to ascertain what is actually occurring. This so called "*Terry* stop," (because it finds its antecedent in *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868 (1968)), allows police to briefly detain individuals based upon reasonable suspicion to investigate, rather than upon probable cause to arrest. "[T]he likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard[.]" *United States v. Arvizu,* 534 U.S. 266, 274, 122 S. Ct. 744, 751 (2002). In other words, *Terry* "does not require proof that a crime has occurred; it demands only such facts as are necessary to support a reasonable suspicion that a crime may have occurred. The purpose of a *Terry* stop is not to accuse, but to investigate[,]" *Pepper Pike v. Parker,* 145 Ohio App.3d 17, 20, 761 N.E.2d 1069, 1071 (2001) (citations omitted), and a "contrary result would contravene the very purpose of the investigatory *Terry* -type stop which is to 'allow the officer to confirm or deny (his)

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[6]The measure of reasonableness is an objective, not a subjective standard. *See State v. Sigler*, 224 W. Va. 608, 616, 687 S.E.2d 391, 399 (2009); *Muscatell v. Cline,* 196 W. Va. 588, 600, 474 S.E.2d 518, 530 (1996) (citing *Whren v. United States,* 517 U.S. 806, 812, 116 S. Ct. 1769, 1774 (1996) and *State v. Todd Andrew H.*, 196 W. Va. 615, 621 n. 9, 474 S.E.2d 545, 551 n. 9 (1996)). Although *Sigler* did not address the majority decision in *Muscatell, Sigler* is certainly much more consistent with Justice Workman's well-supported and reasoned dissent than the majority decision in *Muscatell,* which was grounded not in precedent or reasoning (indeed, was patently contrary to precedent), but in platitudes and thinly veiled *ipse dixit.*

suspicions by reasonable questioning, rather than forcing in each instance the 'all or nothing' choice between arrest and inaction'" *United States v. Jimenez,* 602 F.2d 139, 143 (7th Cir. 1979) (quoting *United States v. Hickman,* 523 F.2d 323, 327 (9th Cir. 1975)). Hence a *Terry* seizure need only be supported by reasonable suspicion,

> a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Muscatell v. Cline, 196 W. Va. 588, 596, 474 S.E.2d 518, 526 (1996). The circuits that have considered the question whether a parking violation justifies a *Terry* stop have found no legally meaningful distinction between a parking and a moving violation. *See United States v. Choudhry,* 461 F.3d 1097, 1103-04 (9th Cir.2006); *Flores v. City of Palacios,* 381 F.3d 391, 402-03 (5th Cir.2004); *United States v. Copeland,* 321 F.3d 582, 594 (6th Cir.2003); *United States v. Thornton,* 197 F.3d 241, 248 (7th Cir.1999). Because the Hearing Examiner's finding of fact must be sustained, *see Plumley v. Miller*, No. 101186, slip op. at 2-3 (W. Va. Feb. 11, 2003) (Memorandum Decision) (where the petitioner does not request the investigating officer, the Hearing Examiner may credit the DUI Information sheet over the live testimony of the petitioner), this Court must accept that Mr. Chenoweth's car was protruding into the street.

While the scope of a *Terry* seizure is normally limited to the reasonable suspicion prompting the stop and may not extend longer than required to effectuate the purpose of the stop, *Florida v. Royer,* 460 U.S. 491, 500, 103 S. Ct. 1319, 1325-26 (1983) (plurality op.), law enforcement is not required to ignore evidence of other or different offenses they discover within the permissible scope of the stop. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1050, 103 S. Ct. 3469, 3481 (1983) ("If,

while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances."); *City of Fairborn v. Orrick,* 49 Ohio App.3d 94, 95-96, 550 N.E.2d 488, 490 (1988) (dicta) ("Of course, anything that the police officer discovers during the course of an investigation that is within the scope of his articulable and reasonable suspicion may give rise to additional suspicions; he is not required to turn a blind eye to those things that he observes while conducting a reasonable investigation."). Thus, police may expand the scope of the original traffic infraction investigation if:

> (1) . . . facts that emerge during the police officer's investigation of the original offense create reasonable suspicion that additional criminal activity warranting additional present investigation is afoot, (2) the length of the entire detention is reasonable in light of the suspicious facts, and (3) the scope of the additional investigation is reasonable in light of the suspicious facts, meaning that it is reasonable to believe that each crime investigated, if established, would likely explain the suspicious facts that gave rise to the reasonable suspicion of criminal activity.

United States v. Pack, 612 F.3d 341, 358 (5th Cir. 2010).

An arrest differs from a *Terry* seizure based on the fact that a *Terry* seizure is not an accusation, but an arrest is. "An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." *Terry,* 392 U.S. at 26, 88 S. Ct. at 1882. Thus, because an arrest operates with long term consequences, it must be supported by probable cause. Pertinently, though, an arrest and a *Terry* seizure share at least one attribute– if, during an arrest supported by probable cause, information

come to light indicating an additional or different offense, the police may further investigate that evidence. *United States v. Pena-Montes,* 589 F.3d 1048, 1053 (10th Cir. 2009). *See also Becker v. Board of Trustees Clearcreek Tp.*, No. 3:05cv00360, 2008 WL 4449375, at * 13 (S.D. Ohio Sept. 30, 2008) ("Officer Cornett properly initiated the stop based on probable cause of a traffic violation, expanded his investigation upon reasonable suspicion of intoxication and reasonably arrested Plaintiff after his lack of balance, continued odor in the cruiser and Becker's refusal to perform a field sobriety test."); *State v. McConkey,* No. A-07-771, 2008 WL 352326, at * 3 (Neb. Ct App. Feb. 5, 2008) ("These traffic violations, no matter how minor, created probable cause to stop McConkey. Once McConkey was stopped, Requejo was justified in expanding the scope of the stop for additional investigation based upon his detection of the odor of alcohol coming from inside the vehicle, McConkey's bloodshot eyes, and McConkey's admission to having consumed alcohol during the evening."); *Rubeck v. State,* 61 S.W.3d 741, 745 (Tex. App. 2001) ("We conclude that Olvera observed Appellant commit a traffic violation and that he had probable cause to stop Appellant's vehicle when he observed the traffic violation. He had reasonable suspicion to further detain Appellant to investigate for driving while intoxicated when he detected the strong odor of an alcoholic beverage on her breath and noted that her speech was slurred."). Here, whether considered an investigatory stop or a stop based upon probable cause, Trooper Pauley's actions were constitutionally reasonable and, hence, permissible.

West Virginia Code § 17C-13-4(a) requires that "every vehicle stopped or parked upon a roadway where there are adjacent curbs shall be so stopped or parked with the right-hand wheels of such vehicle parallel to and within eighteen inches of the right-hand curb," and makes a violation thereof a misdemeanor. Here, Trooper Pauley indicated on the DUI Information Sheet that Mr.

Chenoweth's car was protruding into the roadway. While Mr. Chenoweth disputed this, the Hearing Examiner was entitled to credit the DUI Information Sheet over Mr. Chenoweth's testimony. *Plumley*, No. 101186, slip op. at 2-3. *See* Syl. Pt. 3, *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W. Va. 70 & 75 n.10, 631 S.E.2d 628 & 633 n.10 (2006).[7]

And, even if Trooper Pauley was wrong, and the protrusion did not violate the statute because Mr. Chenoweth's car was parked within the requisite distance to the curb, "a mistake of fact does not preclude a finding of reasonable suspicion." *United States v. Stewart,* 604 F. Supp.2d 676, 679 n.11 (S.D.N.Y. 2009). *Accord Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311 (1949) (probable cause-"Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part."); *United States v. Cousins,* 291 Fed. Appx. 497, 499 (4th Cir. 2008) (per curiam). One can "be not guilty of the traffic offense, but the evidence found as a result of the search might still be admissible if the officer has reasonable suspicion that the facts he observed constituted a traffic offense." *Robinson v. State,* No. 25498, 2011 WL 192752, at *10 (Tex. App. Nov. 17, 2010). *See also Lanigan v. East Hazel Crest*, 110 F.3d 467, 474 (7th Cir. 1997) ("Although Lanigan was eventually found not guilty of the violation, that does not diminish the fact that Officer Wasek had a reasonable suspicion that Lanigan had violated the statute."); *State v. Panza*, 2010WL1425638, at * 5 (N.J. Super. Ct. App. Div. Apr. 12, 2010) ("Even if the driver is subsequently found not guilty of the traffic violation, so long as the officer had an articulable and reasonable suspicion that the offense was committed, the initial stop was proper"). In sum, "[t]o have an objectively reasonable suspicion,

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[7]The Hearing Examiner credited the DUIIS over Mr. Chenoweth's testimony, explaining that if Trooper Pauley was lying, he could easily have come up with a more compelling explanation of the stop than the protruding of Mr. Chenoweth's car into the street. App'x. at 27.

an officer does not have to determine that a suspect has in fact violated the law." *United States v. Montes-Hernandez,* 350 Fed. Appx. 862, 867-68 (5th Cir. 2009). Indeed, "[t]he whole point of an investigatory stop, as the name suggests, is to allow police to *investigate*[,]" *Gallegos v. City of Los Angeles,* 308 F.3d 987, 991 (9th Cir. 2002) (emphasis in original), and, "[a]n officer is not required to disregard information which may lead him or her to suspect independent criminal activity during a traffic stop." *State v. Morlock,* 289 Kan. 980, 996, 218 P.3d 801, 811 (2009). "If the officer develops reasonable suspicion of additional criminal activity during his investigation of the circumstances that originally caused the stop, he may further detain its occupants for a reasonable time while appropriately attempting to dispel this reasonable suspicion." *United States v. Pack,* 612 F.3d 341, 350 (5th Cir. 2010). *See also United States v. Givan,* 320 F.3d 452, 458 (3d Cir. 2003) ("After a traffic stop that was justified at its inception, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation."); *Tate v. State,* 946 So.2d 376, 382 (Miss. Ct. App. 2006) ("If, during a proper investigative stop, the officer develops reasonable, articulable suspicion of some criminal activity in addition to than that initially suspected, the permissible scope of the stop expands to include the officer's investigation of the newly suspected criminal activity."). Such was at least the case here and the Commissioner should be affirmed.

VI. CONCLUSION

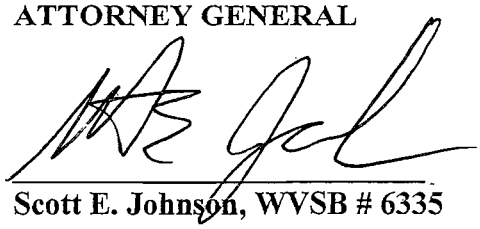
For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

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

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 11-0148

JOE E. MILLER, Commissioner
West Virginia Department of Transportation,
Division of Motor Vehicles,

Petitioner/Respondent below,

v.

MICHAEL CHENOWETH,

Respondent/Petitioner below.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Assistant Attorney General and counsel for Joe E. Miller, Commissioner of the Division of Motor Vehicles, Petitioner, hereby certify that on the 15th day of April, 2011, I served the foregoing PETITION FOR APPEAL upon the following by depositing true and correct copies thereof in the United States Mails, First Class Postage Prepaid addressed as follows:

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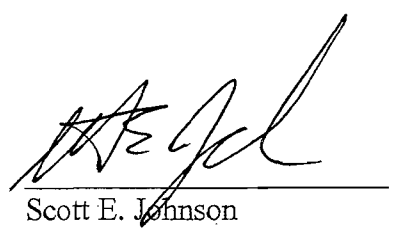

Scott E. Johnson