

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0148 J

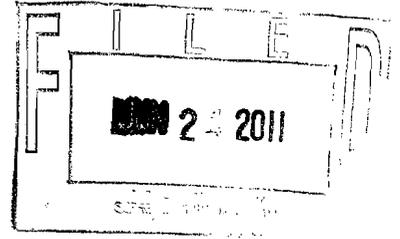
JOE E. MILLER, Commissioner
West Virginia Department of Transportation,
Division of Motor Vehicles,

Petitioner/Respondent below,

v.

MICHAEL CHENOWETH,

Respondent/Petitioner below.



REPLY BRIEF

Respectfully submitted,

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Division of Motor Vehicles,

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TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT	1
1. The issue here is not whether the Fourth Amendment applies, but whether the exclusionary rule is applicable to bar introduction of evidence seized in violation of the Fourth Amendment in a civil action, and Mr. Chenoweth has not responded to that issue	1
2. Reference to W. Va. Code § 17C-5-4(f) (2008) does not assist Mr. Chenoweth since it does not refer to justification for an initial traffic stop	4
3. <i>Clower</i> is not applicable here	10
4. Mr. Chenoweth cannot rely <i>Choma v. West Virginia Division of Motor Vehicles</i> , 210 W. Va. 256, 557 S.E.2d 310 (2000) since he did not bring any criminal adjudication to the Commissioner's attention	13
II. CONCLUSION	18

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Alderman v. United States</i> , 394 U.S. 165, 89 S. Ct. 961 (1969)	2
<i>Allen v. District of Columbia Rental Housing Commission</i> , 538 A.2d 752 (D.C. 1988)	18
<i>Arizona v. Evans</i> , 514 U.S. 1, 115 S. Ct. 1185 (1995)	2, 3
<i>Borunda v. Richmond</i> , 885 F.2d 1384 (9th Cir.1989)	17
<i>Brecht v. Abrahamson</i> , 944 F.2d 1363 (7th Cir. 1991), <i>aff'd</i> , 507 U.S. 619, 113 S. Ct. 1710 (1993)	2
<i>Breslin v. San Francisco</i> , 146 Cal. App. 4th 1064, 55 Cal. Rptr.3d 14 (2007)	18
<i>Brownsberger v. Dep' of Transport</i> , 460 N.W.2d 449 (Iowa 1990)	6
<i>Burgess v. Moore</i> , 224 W. Va. 291, 685 S.E.2d 685 (2009)	5
<i>Cain v. West Virginia Division of Motor Vehicles</i> , 225 W. Va. 467, 694 S.E.2d 309 (2010)	1
<i>Carroll v. Stump</i> , 217 W. Va. 748, 619 S.E.2d 261 (2005)	14
<i>Arnold v. Turek</i> , 185 W. Va. 400, 407 S.E.2d 706 (1991)	5
<i>Chevie v.</i> , 700 S.E.2d 815 (W. Va. 2010)	5
<i>Choma v. West Virginia Division of Motor Vehicles</i> , 210 W. Va. 256, 557 S.E.2d 310 (2000)	13, 14, 15
<i>Clower v. West Virginia Department of Motor Vehicles</i> , 223 W. Va. 535, 678 S.E.2d 41 (2009)	1, 10
<i>Compare State v. Hubble</i> , 146 N.M. 70, 206 P.3d 579 (2009)	11
<i>Compare State v. Legg</i> , 207 W. Va. 686, 536 S.E.2d 110 (2000)	9
<i>Davis v. United States</i> , No. 11-11328 (U.S. June 16, 2011)	2, 3
<i>Delaware v. Prouse</i> , 440 U.S. 648, 99 S. Ct. 1391 (1979)	5
<i>Etheridge v. City of New York</i> , 121 N.Y.S.2d 103 (Sup. Ct.1953)	16

<i>Fishbein v. Kozłowski</i> , 252 Conn. 38, 743 A.2d 1110 (1999)	8
<i>Fruehauf Corp. v. Huntington Moving & Storage Co.</i> , 159 W. Va. 14, 217 S.E.2d 907 (1975)	8
<i>Gibson v. Gibson</i> , 15 Cal. App. 3d 943, 93 Cal. Rptr. 617 (1971)	16
<i>Glynn v. State</i> , ___ P.3d ___, 2011 WL 1565448 (N.M. Ct. App.)	7
<i>Gordon J. v. Santa Ana Unified School District</i> , 162 Cal. App. 3d 530, 208 Cal. Rptr. 657 (1984)	3
<i>Gustafson v. Florida</i> , 414 U.S. 260, 94 S. Ct. 488 (1973)	5
<i>Hartman v. Robertson</i> , 703 S.E.2d 811 (N.C. Ct. App. 2010)	8
<i>Herring v. United States</i> , 129 S. Ct. 695 (2009)	3
<i>Illinois v. Gates</i> , 462 U.S. 213, 103 S. Ct. 2317 (1983)	3
<i>Illinois v. Wardlow</i> , 528 U.S. 119, 120 S. Ct. 673 (2000)	13
<i>Jones v. Director</i> , 291 S.W.3d 340 (Mo. Ct. App. 2009)	8
<i>Jordan v. Roberts</i> , 161 W. Va. 750, 246 S.E.2d 259 (1978)	14
<i>Kansas v. Ventris</i> , 129 S. Ct. 1841 (2009)	2
<i>Kellar v. James</i> , 63 W. Va. 139, 59 S.E. 939 (1907)	9
<i>Kessel v. Monongalia County General Hospital</i> , 220 W. Va. 602, 648 S.E.2d 366 (2007)	5
<i>Lopez v. Director</i> , 145 N.H. 222, 761 A.2d 448 (2000)	6
<i>Lowe v. Cicchirillo</i> , 223 W. Va. 175, 672 S.E.2d 311 (2008)	14
<i>Martin v. Kansas Department of Rev.</i> , 285 Kan. 625, 176 P.3d 938 (2008)	passim
<i>Mary D. v. Watt</i> , 190 W. Va. 341, 438 S.E.2d 521 (1992)	15
<i>Miller v. Hare</i> , 708 S.E.2d 531 (W. Va. 2011)	10
<i>Montgomery v. State Police</i> , 215 W. Va. 511, 600 S.E.2d 223 (2004)	15, 16, 17
<i>Estate of Moreland v. Dieter</i> , 395 F.3d 747 (7th Cir. 2005)	17
<i>Morgan v. Iowa Department of Transport</i> , 428 N.W.2d 675 (Iowa Ct. App. 1988)	6

<i>Motor Vehicle Admin. v. Richards</i> , 356 Md. 356, 739 A.2d 58 (1999)	10
<i>Nevers v. State</i> , 123 P.3d 958 (Alaska 2005)	3
<i>Olson v. Com'r of Public Safety</i> , 371 N.W.2d 552 (Minn.1985)	3
<i>Pierce County v. Guillen</i> , 537 U.S. 129, 123 S. Ct. 720 (2003)	9
<i>Powers v. Goodwin</i> , 170 W. Va. 151, 291 S.E.2d 466 (1982)	15
<i>Queen</i> , 196 W. Va. 442, 473 S.E.2d 483 (1996)	17
<i>Riche v. Director of Rev.</i> , 987 S.W.2d 331 (Mo. 1999)	5, 10
<i>Shires v. Boggess</i> , 72 W. Va. 109, 77 S.E. 542 (1913)	15
<i>Smith v. State Work. Comp. Commissioner</i> , 159 W. Va. 108, 219 S.E.2d 361 (1975)	4
<i>State ex rel. Allen v. Bedell</i> , 193 W. Va. 32, 454 S.E.2d 77 (1994)	9
<i>State ex rel. DMV v. Sanders</i> , 184 W. Va. 55, 399 S.E.2d 455 (1990)	14
<i>State ex rel. Marshall County Commission v. Carter</i> , 225 W. Va. 68, 689 S.E.2d 796 (2010)	5
<i>State ex rel. U.S. Fidelity and Guaranty Co. v. Canady</i> , 194 W. Va. 431, 460 S.E.2d 677 (1995)	9
<i>State v. Baughman</i> , ___ N.E.2d ___, 2011 WL 282436 (Ohio Ct. App.)	2
<i>State v. Hacker</i> , 167 N.J. Super. 166, 400 A.2d 567 (Law Div. 1979)	16
<i>State v. Lussier</i> , 171 Vt. 19, 757 A.2d 1017 (2000)	3
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	17
<i>State v. Moore</i> , 165 W. Va. 837, 272 S.E.2d 804 (1980), overruled on other grounds by <i>Horton v. California</i> , 496 U.S. 128, 110 S. Ct. 2301 (1990)	6
<i>State v. Schofield</i> , 175 W. Va. 99, 331 S.E.2d 829 (1985)	2
<i>State v. Stone</i> , 165 W. Va. 266, 268 S.E.2d 50 (1980)	8
<i>State v. Wilmoth</i> , 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986)	3
<i>State v. Wimberly</i> , 988 So. 2d 116 (Fla. Dist. Ct. App.2008)	12

<i>State v. Wright</i> , 791 N.W.2d 791 (S.D. 2010)	11
<i>Steele v. State Road Commission</i> , 116 W. Va. 227, 179 S.E. 810 (1935)	14
<i>Tornabene v. Bonine ex rel. Arizona Highway Department</i> , 203 Ariz. 326, 54 P.3d 355 (Ct. App. 2002)	7
<i>Ullom v. Miller</i> , 705 S.E.2d 111 (W. Va. 2010)	1, 14
<i>United States v. Bowles</i> , 159 U.S. App. D.C. 407	17
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873, 95 S. Ct. 2574 (1975)	5
<i>United States v. Calandra</i> , 414 U.S. 338, 94 S. Ct. 613 (1974)	2
<i>United States v. Cashman</i> , 216 F.3d 582 (7th Cir. 2000)	12
<i>United States v. Chanthasouvat</i> , 342 F.3d 1271 (11th Cir. 2003)	12
<i>United States v. Coplin</i> , 463 F.3d 96 (1st Cir. 2006)	12
<i>United States v. Fowler</i> , 402 F. Supp. 2d 1338 (D. Utah 2005)	12
<i>United States v. Fox</i> , 393 F.3d 52 (1st Cir. 2004)	13
<i>United States v. Hickman</i> , 523 F.2d 323 (9th Cir. 1975)	12
<i>United States v. Jacobsen</i> , 466 U.S. 109, 104 S. Ct. 1652 (1984)	6
<i>United States v. Jimenez</i> , 602 F.2d 139 (7th Cir. 1979)	12
<i>United States v. Leon</i> , 468 U.S. 897, 104 S. Ct. 3405 (1984)	2, 9
<i>United States v. Patane</i> , 542 U.S. 630, 124 S. Ct. 2620 (2004)	2
<i>United States v. Payne</i> , 534 F.3d 948 (8th Cir. 2008)	13
<i>United States v. Rodriguez</i> , 596 F.2d 169 (6th Cir. 1979)	9
<i>United States v. Vega</i> , 94 Fed. Appx. 588, 592 (9th Cir. 2004)	13
<i>United States v. Williams</i> , 85 Fed. Appx. 341, 347 (4th Cir. 2044)	12
<i>Voorhees v. State</i> , 699 So. 2d 602 (Fla.1997)	3
<i>Wardlaw v. Pickett</i> , 303 U.S. App. D.C. 130, 1 F.3d 1297 (1993)	8

Wood v. Alaska, 957 F.2d 1544 (9th Cir. 1992) 17

STATUTES:

W. Va. Code § 17C-5-4(f) passim

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Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System
in Need of Reform*, 2002 B.Y.U.L. Rev. 1, 52 n. 138 16

N.M. Code § 68-8-112(F) 7

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201-02 (2d ed. 1993) 2

W. Va. Const. Art. 3, § 6 1, 2

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REPLY BRIEF

I.

ARGUMENT

1. The issue here is not whether the Fourth Amendment applies, but whether the exclusionary rule is applicable to bar introduction of evidence seized in violation of the Fourth Amendment in a civil action, and Mr. Chenoweth has not responded to that issue.

Mr. Chenoweth cites *Clower v. West Virginia Department of Motor Vehicles*, 223 W. Va. 535, 541, 678 S.E.2d 41, 47 (2009), holding the Fourth Amendment applies to whether a traffic stop is permissible. DMV agrees¹; the Fourth Amendment² applies to traffic stops, whether those stops ultimately mature into civil or criminal cases. *Martin v. Kansas Dep't of Rev.*, 285 Kan. 625, 636, 176 P.3d

¹See *Cain v. West Virginia Div. of Motor Vehicles*, 225 W. Va. 467, 471, 694 S.E.2d 309, 313 (2010) (“In *Clower v. West Virginia Department of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), we recently had the opportunity to review what is required to make an investigatory traffic stop for purposes of complying with both the Fourth Amendment to the United States Constitution and Section 6, Article III of our state constitution.”).

²Because the Fourth Amendment and Article 3, § 6 of the West Virginia Constitution are generally construed in harmony, e.g., *Ullom v. Miller*, 705 S.E.2d 111, 118 n.7 (W. Va. 2010), and *Clower* considered the two provisions co-extensive, see *Cain*, 225 W. Va. at 471, 694 S.E.2d at 313, this reply brief uses the “Fourth Amendment” as encompassing both provisions.

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.”).

But to recognize that the Fourth Amendment, (which protects “personal rights[.]” *State v. Schofield*, 175 W. Va. 99, 104, 331 S.E.2d 829, 835 (1985); *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 966 (1969) (“Fourth Amendment rights are personal rights[.]”)), applies is not to answer the question here—whether the *exclusionary rule*, (which is “not a personal constitutional right of the party aggrieved[.]” *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974)),³ applies. As the United States Supreme Court has only recently declared, “exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred.” *Davis v. United States*, No. 11-11328, slip op. at 14 (U.S. June 16, 2011).

“When evidence [is] obtained in violation of the defendant’s Fourth Amendment rights, whether to apply the remedy afforded by the exclusionary rule has long been regarded as a separate inquiry.” *State v. Baughman*, ___ N.E.2d ___, ___, 2011 WL 282436, at *5 (Ohio Ct. App.). *See, e.g., Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185 (1995); *United States v. Leon*, 468 U.S. 897, 906-07, 104 S. Ct. 3405, 3412 (1984); *Illinois v. Gates*, 462 U.S. 213, 223, 103 S. Ct. 2317 (1983); 1 FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE 201-02 (2d ed. 1993). Since the

³The exclusionary rule is not found within the text of either the Fourth Amendment or Article 3, § 6 of the West Virginia Constitution. *See, e.g., Kansas v. Ventris*, 129 S. Ct. 1841, 1845 (2009) (“The Fourth Amendment . . . guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence; exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee.”); *Davis v. United States*, No. 11-11328, slip op. at 1 (U.S. June 16, 2011) (“The Fourth Amendment protects the right to be free from ‘unreasonable searches and seizures,’ but it is silent about how this right is to be enforced.”); *Brecht v. Abrahamson*, 944 F.2d 1363, 1371 (7th Cir. 1991) (“the exclusionary rule is an extra-constitutional device that helps motivate adherence to the fourth amendment, but that exclusion is not itself compelled by the Constitution”), *aff’d*, 507 U.S. 619, 113 S. Ct. 1710 (1993); 1 FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE 201 (2d ed. 1993) (noting that Article 3, § 6 is silent on the issue as well). *See also United States v. Patane*, 542 U.S. 630, 640, 124 S. Ct. 2620, 2628 (2004) (noting that the Fifth Amendment contains an exclusionary clause and is, unlike the Fourth Amendment, self-executing) (plurality opinion).

rule's "sole purpose . . . is to deter future Fourth Amendment violations[.]" *Davis v. United States*, No. 11-11328, slip op. at 6 (U.S. June 16, 2011), *see also id.* at 14 (emphasis in original) ("we have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement."), the United States Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." *Herring v. United States*, 129 S. Ct. 695, 700 (2009). "In other words, a Fourth Amendment violation is not synonymous[.]" *Voorhees v. State*, 699 So.2d 602, 610 (Fla.1997); *Evans*, 514 U.S. at 13, 115 S. Ct. at 1192, or co-extensive with the exclusionary rule. *See, e.g., State v. Wilmoth*, 22 Ohio St.3d 251, 257, 490 N.E.2d 1236, 1241 (1986) ("In summation, in this long series of decisions, the Supreme Court has restricted the application of the exclusionary rule so that it is not coextensive with the Fourth Amendment."); *Gordon J. v. Santa Ana Unified School Dist.*, 162 Cal. App.3d 530, 542, 208 Cal. Rptr. 657, 665 (1984) ("we concur with the idea that the Fourth Amendment and the exclusionary rule are not coextensive").

Mr. Chenoweth does not argue that the exclusionary rule (as opposed to the Fourth Amendment) should not apply to civil proceedings.⁴ As set forth in DMV's initial brief, it should not. Indeed, 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, the exclusionary "rule is limited to criminal trials where the issue of guilt or innocence is being contested[.]" CLECKLEY, *supra*, at 202, and "has no application in civil cases." *Id.* at 207. The circuit court should be reversed.

⁴Although there is authority to support this position, it is certainly the minority viewpoint, *Martin v. Kansas Dep't of Revenue*, 285 Kan. 625, 645, 176 P.3d 938, 952 (Kan. 2008), and is of limited value here either because these minority position courts assume, without discussion, that the exclusionary rule applies to license revocation hearings, *Olson v. Com'r of Pub. Safety*, 371 N.W.2d 552 (Minn.1985), or reflect a different judgment as to the exclusionary rule's deterrent effect beyond that set forth in federal case law. *State v. Lussier*, 171 Vt. 19, 23, 757 A.2d 1017, 1020 (2000). *See generally Nevers v. State*, 123 P.3d 958, 964 (Alaska 2005).

2. Reference to West Virginia Code § 17C-5-4(f) (2008) does not assist Mr. Chenoweth since it does not refer to justification for an initial traffic stop.

Mr. Chenoweth cites to W. Va. Code § 17C-5-4(f) (2008)⁵ to support the circuit court. W. Va. Code § 17C-5A-2 (2008) (footnote added) requires the Commissioner to find:

(1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol . . . or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, 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.

Mr. Chenoweth claims that subsection 1 (referring to “[w]hether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol . . . or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight”) means that the investigating officer had to have reasonable suspicion to believe that a driver was DUI before effecting a stop. This is in error.

In interpreting any statute, the Court's obligation is to determine legislative intent, Syl. Pt. 1, *Smith v. State Work. Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975), that is, here, did the Legislature intend that W. Va. Code § 17C-5A-4 (2008), require a valid stop before evidence derived from the stop is admissible in an Administrative License Revocation? In determining legislative intent, it is necessary to “consider the precise words used by the Legislature.” *State ex rel. Marshall County Comm'n v. Carter*, 225 W. Va. 68, 74, 689 S.E.2d 796, 802 (2010). *Accord Burgess v. Moore*, 224 W. Va. 291, 297, 685 S.E.2d 685, 691 (2009). If those words are clear and unambiguous, the matter is at an end for

⁵Because the arrest in this case occurred in 2009, the 2008 version of the statute is controlling here.

“[p]lain statutory language must be applied as it is written.” *In re Chevie v.*, 700 S.E.2d 815, 820 (W. Va. 2010).

This is the case here. A “number of jurisdictions having statutory schemes similar to [West Virginia’s] have held that the exclusionary rule does not apply in administrative proceedings to suspend or revoke a driver’s license.” *Riche v. Director of Rev.*, 987 S.W.2d 331, 334 (Mo. 1999).

Here, the Legislature employed the term “reasonable grounds,” not the constitutional standard of “reasonable suspicion,” a standard arising long before enactment of the revocation statute, *e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S. Ct. 2574, 2582 (1975); *Gustafson v. Florida*, 414 U.S. 260, 266 n.4, 94 S. Ct. 488, 492 n.4 (1973), and of which the Legislature is presumed to have been aware. *Kessel v. Monongalia County Gen. Hosp.*, 220 W. Va. 602, 612, 648 S.E.2d 366, 376 (2007). It is significant, therefore, that the Legislature did not mimic the “reasonable suspicion” language when it drafted W. Va. Code § 17C-5A-2; it deliberately enunciated a different standard. *Cf. Arnold v. Turek*, 185 W. Va. 400, 404, 407 S.E.2d 706, 710 (1991) (“We have traditionally held that where a statute is amended to use different language, it is presumed that the legislature intended to change the law.”). The difference between the two standards was set forth by the Kansas Supreme Court.

In Syllabus Point 3 of *Martin v. Kansas Dep’t of Rev.*, 285 Kan. 625, 625, 176 P.3d 938, 941 (2008), the Kansas Supreme Court held that “‘reasonable grounds to believe’ a driver is under the influence and ‘reasonable suspicion’ sufficient for a traffic stop under constitutional law are distinct legal concepts.” Reasonable suspicion asks if the officer had legitimate grounds to effect a stop and ends at the moment the stop is effected; the discovery of evidence generated from the stop cannot be utilized to justify the stop, *e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 1657 (1984); *State v. Moore*, 165 W. Va. 837, 856, 272 S.E.2d 804, 815 (1980), *overruled on other grounds by Horton v. California*, 496 U.S. 128, 110

S. Ct. 2301 (1990). Reasonable grounds asks if the driver was DUI, and extends to evidence procured, before, during, and after a stop. *Martin*, 285 Kan. at 631 (A law enforcement officer's determination of reasonable grounds to believe a driver is intoxicated "demands consideration of the behavior of a driver before, during, and after he or she is behind the wheel."); *Morgan v. Iowa Dep't of Transp.*, 428 N.W.2d 675, 678 (Iowa Ct. App. 1988) (citation omitted), *statute modified as stated in Brownsberger v. Dep't of Transp.*, 460 N.W.2d 449 (Iowa 1990) ("The 'reasonable grounds' test is met where the facts and circumstances known to the officer at the time he was required to act warrant a prudent man in believing the offense has been or is being committed. Because there is no 'exclusionary rule' in an implied consent proceeding, the determination of whether reasonable grounds exist should be based on all the evidence introduced at the hearing, including evidence obtained even as a result of an unconstitutional stop.").

In *Lopez v. Director*, 145 N.H. 222, 224, 761 A.2d 448, 450 (2000), the court dealt with a "reasonable grounds" statute and said:

The statute requires only that prior to a person's license or right to operate being suspended, the division must find that the person was arrested and that the police officer had reasonable grounds to believe that the arrested person had been operating a vehicle upon the ways of this State while under the influence of intoxicating liquor. The trial court added an additional requirement, namely, that the constitutional validity of the stop must be established under prevailing criminal law.

The validity of the arrest or the traffic stop leading to the arrest is not required by RSA 265:91-b to be established in order to sustain an administrative license suspension. The trial court, however, determined that to consider whether or not reasonable grounds existed for finding that the plaintiff was operating a motor vehicle under the influence of intoxicating liquor, a "relevant factor" would be the constitutional validity of the stop and arrest of the operator. We disagree. A valid arrest and traffic stop, while vital to a criminal proceeding, is not a required predicate under the ALS statute.

In *Glynn v. State*, ___ P.3d ___, 2011 WL 1565448 (N.M. Ct. App.), the court examined N.M. Code § 68-8-112(F), which provided, in pertinent part, that when a driver requested a hearing before the Motor Vehicle Department on a license revocation, the Division was obligated to affirm the

revocation if it found, *inter alia*, “that the law enforcement officer had reasonable grounds to believe the driver was driving a motor vehicle while under the influence of intoxicating liquor or drugs[.]” The New Mexico Court of Appeals stated that the plain language of the statute “does not indicate that the validity of the traffic stop that resulted in a DWI arrest is an issue.” *Id.* at ____, 2011 WL 1565448, at * 5. “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 three elements are satisfied.” *Id.*, 2011 WL 1565448, at * 5.

Similarly, in *Tornabene v. Bonine ex rel. Arizona Highway Dep’t*, 203 Ariz. 326, 331, 54 P.3d 355, 360 (Ct. App. 2002), the court concluded statutory language that the Department could consider only if, *inter alia*, “[a] law enforcement officer had reasonable grounds to believe that the person was driving or was in actual physical control of a motor vehicle in this state either” was clear did not permit the Department to consider the constitutionality of the initial stop.

In *Hartman v. Robertson*, 703 S.E.2d 811, 813 (N.C. Ct. App. 2010), the North Carolina Court of Appeals interpreted North Carolina General Statutes, § 20–16.2(d) which provided, in pertinent part, that the DMV had to determine if “[a] law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense ...” The court found that “the propriety of the initial stop is not within the statutorily-prescribed purview of a license revocation hearing.” *Hartman*, 703 S.E.2d at 814.

Moreover, in *Jones v. Director*, 291 S.W.3d 340, 344 (Mo. Ct. App. 2009), the Missouri Court of Appeal’s dealt with a statute that pertinently provided that the court had the power to review, *inter alia*, whether the officer had reasonable grounds to believe the driver was driving while intoxicated. The

Court of Appeals found that “suppressing evidence in a civil license revocation proceeding based on a lack of reasonable suspicion to initially stop the vehicle is a misapplication of the law[.]” *Id.* at 341.

Of course, if the language of W. Va. Code § 17C-5A-2 is not plain and unambiguous, it must be read against the canon that the Legislature is not presumed to have altered the common law absent a clear indication it wishes to do so. *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 20, 217 S.E.2d 907, 911 (1975). *See, e.g., Fishbein v. Kozłowski*, 252 Conn. 38, 46, 743 A.2d 1110, 1115 (1999) (in interpreting DUI revocation statute, one factor is the relationship to existing legislation and the common law governing the same general subject matter). “At common law admissibility of evidence was not affected by the illegality of the means by which it was obtained.” *State v. Stone*, 165 W. Va. 266, 269, 268 S.E.2d 50, 53 (1980), *overruled on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991). *See also Wardlaw v. Pickett*, 303 U.S.App.D.C. 130, 135 1 F.3d 1297, 1302 (1993) (observing that the exclusionary rule did not exist at common law), *United States v. Rodriguez*, 596 F.2d 169, 173 n.9 (6th Cir. 1979) (same).

Being in derogation of the common law, W. Va. Code § 17C-5A-2 must be strictly construed, *see* Syl., *Kellar v. James*, 63 W. Va. 139, 59 S.E. 939 (1907), as must any statute that suppresses or restricts the admission of relevant and probative evidence and impedes the search for the truth. *See, e.g., State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W. Va. 431, 438, 460 S.E.2d 677, 684 (1995) (“As the attorney-client privilege and the work product exception may result in the exclusion of evidence which is otherwise relevant and material and are antagonistic to the notion of the fullest disclosure of the facts, courts are obligated to strictly limit the privilege and exception to the purpose for which they exist.”); *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 41, 454 S.E.2d 77, 86 (1994) (citations omitted) (“It is well recognized that a privilege may be created by statute. A statute granting a privilege is to be strictly construed so as “to avoid a construction that would suppress otherwise competent evidence.””); *Pierre*

County v. Guillen, 537 U.S. 129, 144-45, 123 S. Ct. 720, 730 (2003) (“We have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.”).

Finally, it should be understood that W. Va. Code § 17C-5A-2 does not authorize (nor can it authorize) police to violate Fourth Amendment rights. *Compare State v. Legg*, 207 W. Va. 686, 536 S.E.2d 110 (2000) (statutory reading allowing random stops to conduct game kill surveys unconstitutional). By the time the issue reaches the Commissioner (or, now, the Office of Administrative Hearings), the violation has already occurred, *see Leon*, 468 U.S. at 906, 104 S. Ct. at 3411 (citations omitted) (violation of the Fourth Amendment is “fully accomplished”¹ by the unlawful search or seizure itself, and admission of the evidence “works no new Fourth Amendment wrong”); with out any control by the Commissioner as to the actual violation. *See Miller v. Hare*, 708 S.E.2d 531, 534 n.7 (W. Va. 2011) (police officer’s failure to appear at hearing is not imputed to DMV); *Motor Vehicle Admin. v. Richards*, 356 Md. 356, 375, 739 A.2d 58, 69 (1999) (DMV “is a separate and independent agency from the police department and has no control over the actions of police officers, [so that] imposing the exclusionary rule in license suspension proceedings would add little force to the deterrence of unlawful police action.”); *Riche v. Director of Rev.*, 987 S.W.2d 331, 335 (Mo.1999) (en banc) (“Imposing the exclusionary rule in civil license revocation and suspension proceedings would have little force in deterring unlawful police action, because the director of revenue has no control over the actions of local police officers”).

Any permissible reading of subsections 1 and 2 show they work in tandem. Subsection 1 requires the officer to develop reasonable grounds to believe the driver was DUI (either before, during, or after the stop), while subsection 2 requires later evidence that the driver actually committed the offence. By no permissible reading of subsection 1 can it be said that the Legislature intended the

validity of the initial stop to be a question in an Administrative License Revocation proceeding. The circuit court should be reversed.

3. *Clower* is not applicable here.

Mr. Chenoweth relies on *Clower* to assert that there is no reasonable suspicion in this case. However, there are differences of substantial magnitude between this case and *Clower*.

In *Clower*, a police officer was approximately two city blocks behind Clower's vehicle, saw Mr. Clower make a right turn without signaling, and arrested Clower for it, even though no other traffic was affected by the turn. 223 W. Va. at 537, 678 S.E.2d at 43. The officer relied solely on W. Va. Code § 17C-8-9. This court held that § 17C-8-9 had to be read in conjunction with W. Va. Code § 17C-8-8(a) which only criminalized making an unsignaled turn if other traffic was affected. *Clower*, Syl. Pt. 3. In *Clower*, the officer did not stop Clower to investigate or because he mistakenly believed he was affected by the turn, but because the officer believed the conduct he observed was a crime, but no statute, ordinance, rule, or other official declaration of criminality existed. Compare *State v. Hubble*, 146 N.M. 70, 78, 206 P.3d 579, 587 (2009) ("Deputy Francisco made no mistake about the applicable rules of law relating to the mandatory use of turn signal. Instead, he had to determine whether certain *facts*—the relative positions of the vehicles and their direction of travel—constituted a scenario where he may have been affected by Defendant's movement. Thus, any mistakes regarding these factual judgments would be classified as mistakes of fact and not mistakes of law." *Clower* was a simple recognition that a mistake of law can not give rise to a reasonable suspicion— that if the conduct an officer sees (or reasonably thinks he sees) is not criminalized by a statute or ordinance or some other official declaration, then the conduct cannot give rise to reasonable suspicion. See *State v. Wright*, 791 N.W.2d 791, 797 n.2 (S.D. 2010) ("A majority of courts have held that an officer's mistake of law, no matter how reasonable, cannot provide objectively reasonable grounds for a stop.").

On the other hand, if the officer sees (or reasonably believes he sees) conduct which would create a reasonable suspicion of a crime, even if an investigation proves that the facts as he believed them to be are wrong, an investigatory stop is not invalidated. As long as the officer correctly understands the law, he may incorrectly judge the facts and still be acting constitutionally in initiating a stop.⁶ A “contrary result would contravene the very purpose of the investigatory . . . stop which is to ‘allow the officer to confirm or deny (his) 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)), the very conundrum that *Terry* resolved. 392 U.S. 1, 17, 88 S. Ct. 1868, 1878 (1968). Even if mistaken in their belief as to what the facts actually were, “that the officers were factually mistaken did not render the stop illegal.” *United States v. Williams*, 85 Fed. Appx. 341, 347 (4th Cir. 2044) (citation omitted). “[A]n objectively reasonable suspicion, even if found to be based on an imperfect perception of a given state of affairs, may justify a *Terry* stop[.]” *United States v. Coplin*, 463 F.3d 96, 102 (1st Cir. 2006), with “[g]reat deference . . . given to the judgment of trained law enforcement officers ‘on the scene.’” *United States v. Chanthasouvat*, 342 F.3d 1271, 1276 (11th Cir. 2003). *Accord State v. Wimberly*, 988 So.2d 116, 119 (Fla. Dist. Ct. App.2008); *United States v. Fowler*, 402 F. Supp.2d 1338, 1340 (D. Utah 2005). All that is required is “an objectively reasonable appraisal of the facts-not a meticulously accurate appraisal.” *Coplin*, 463 F.3d 96 at 101. *See also United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000) (“Careful measurement after the fact might reveal that the crack stopped just shy of the threshold for ‘excessive’ cracking or damage; but the Fourth Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one.”). *If there was any error here, it was on of fact, not of law.*

⁶ In fact, practically all courts agree that mistakes of fact justify stops, the distinction being that the minority of courts go further and hold that mistakes of law also justify stops. *See State v. Wright*, 791 N.W.2d 791, 797 n.2 (S.D. 2010).

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. *Id.* Here there was testimony from Mr. Chenoweth that Trooper Pauley stopped next to Chenoweth’s car for 10 to 15 seconds, App’x at 11, which is indicative of the Trooper’s viewing of the situation and need to investigate further, especially since this stop occurred at night. *See, e.g., United States v. Payne*, 534 F.3d 948, 951 (8th Cir. 2008) (“it was dark outside, making it difficult for Lewis to fully scan the vehicle for a front license plate”); *United States v. Fox*, 393 F.3d 52, 59 (1st Cir. 2004) (“Although he tried, he was unable to determine whether it had a functioning plate light. Thus, there was justification for stopping the vehicle to investigate, as the stop was supported by a reasonable and articulable suspicion that the vehicle was traveling in violation of a traffic law.”). It is, thus, of no relevance that Mr. Chenoweth testified he was not in violation of the law for “*Terry* accepts the risk that officers may stop innocent people.” *Illinois v. Wardlow*, 528 U.S. 119, 126, 120 S. Ct. 673, 677 (2000). *See also Fox*, 393 F.3d at 59 n.6 (“Although the owner of the vehicle Fox was driving testified that she checked the vehicle’s plate light shortly after the stop and found it to be in working order, her testimony is of no consequence. Bergquist was permitted to stop the vehicle because he reasonably believed it to be likely that the plate light was not functioning.”). The investigatory stop here was supported by a reasonable suspicion that Mr. Chenoweth committed a traffic infraction—parking his car more than 18 inches from the curb in violation of W. Va. Code § 17C-13-4(a). *United States v. Vega*, 94 Fed. Appx. 588, 592 (9th Cir. 2004). The circuit court should be reversed.

4. **Mr. Chenoweth cannot rely *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2000) since he did not bring any criminal adjudication to the Commissioner's attention.**

Mr. Chenoweth seeks to rely on *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2000). *Choma*, though, is not dispositive. In *Lowe v. Cicchirillo*, 223 W. Va. 175, 182, 672 S.E.2d 311, 318 (2008) (per curiam), this Court said:

Upon reviewing the final order in its entirety, we believe that it shows that the DMV did consider the criminal proceedings and gave appropriate weight to the evidence as presented. The DMV properly found that this evidence did not outweigh other evidence in the record, and correctly found that there was sufficient evidence to show that the appellee was driving under the influence on December 10, 2005, justifying the six-month revocation of his driver's license.

These are the exact considerations raised, discussed, and considered by the Hearing Examiner here. App'x at 25-26.

Moreover, *Choma* should be overruled. This Court recognized in *Ullom v. Miller*, 277 W. Va. 1, n.12, 705 S.E.2d 111, 124 n.12 (2010), *Choma* “would appear to conflict with this Court's time-honored precedent[,]” since “[i]t is the general rule that a judgment of acquittal in a criminal action is not *res judicata* in a civil proceeding which involves the same facts.” Syl., *Steele v. State Road Commission*, 116 W. Va. 227, 179 S.E. 810 (1935).

As early as 1978, this Court observed that “[t]here is a clear statutory demarcation between the administrative issue on a suspension and the criminal issues on a charge of driving while under the influence.” *Jordan v. Roberts*, 161 W. Va. 750, 757, 246 S.E.2d 259, 263 (1978). And since then, this Court has “consistently held, license revocation is an administrative sanction rather than a criminal penalty.” *State ex rel. DMV v. Sanders*, 184 W. Va. 55, 58, 399 S.E.2d 455, 458 (1990) (per curiam). Indeed, this Court held in Syllabus Point 2 of *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005), “[a]dministrative license revocation proceedings for driving a motor vehicle under the influence . . . are

proceedings separate and distinct from criminal proceedings arising from driving a motor vehicle under the influence” *Choma*, though, stated that “the separate procedures are connected and intertwined in important ways.” *Choma*, 210 W. Va. at 260, 557 S.E.2d at 314. *Choma* then went on to aver that if a criminal conviction triggers revocation “then fundamental fairness requires that proof of an acquittal in that same criminal DUI proceeding should be admissible and have weight in a suspension proceeding.” *Id.*, 557 S.E.2d at 314. The symmetry *Choma* drew between an acquittal and a conviction was never the law in West Virginia and is contrary to reason.

In 1913 this court held that it was not error for a circuit court to refuse to admit into evidence in a civil assault case the defendant’s acquittal of the same assault in the criminal case. *Shires v. Boggess*, 72 W. Va. 109, 77 S.E. 542, 545 (1913). In *Powers v. Goodwin*, 170 W. Va. 151, 159, 291 S.E.2d 466, 474 (1982), this Court held that a public official’s conviction was

conclusive proof that the official was not acting in good faith and was outside the scope of his official duties [while] exoneration either by a preliminary dismissal or a verdict of not guilty in an ordinary criminal prosecution is not necessarily conclusive proof that the official acted in good faith and was within the scope of his official duties.

And, in *Mary D. v. Watt*, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992), this Court held that a not guilty verdict of sexual misconduct by a parent against an offspring was an insufficient basis for a judge to order visitation rights to the parent acquitted of the alleged sexual misconduct. Subsequent cases from this Court post-dating *Choma* erode *Choma*’s already chimerical underpinnings. In *Montgomery v. State Police*, 215 W. Va. 511, 515-16, 600 S.E.2d 223, 227-28 (2004) (per curiam), the appellant argued that “where a not guilty finding is returned, an accused is exonerated from the crime that he was charged with [and] the taint of the initial allegation is effectively removed.” This Court disagreed and concluded that such an exoneration was not a consequence of a not guilty finding.

Indeed, “[t]here are substantial reasons for [the] different treatment[.]” *Gibson v. Gibson*, 15 Cal. App.3d 943, 948, 93 Cal. Rptr. 617, 620 (1971) (quoting *Etheridge v. City of New York*, 121 N.Y.S.2d 103, 104 (Sup. Ct.1953)).

It is important to distinguish between legal innocence and actual innocence. To say that one is legally innocent of a crime is to say that based on the evidence presented in a court of law, the State failed to meet its burden of proving the defendant’s guilt beyond a reasonable doubt. The determination of legal innocence is grounded on one of the bedrock principles of our criminal justice system—that one is presumed innocent until proven guilty. The determination of legal innocence equates with a finding of ‘not guilty.’ Legal innocence does not mean that a defendant did not really commit the crime with which he has been charged. Rather, legal innocence means that the defendant was not determined by that jury during that court proceeding to be guilty beyond a reasonable doubt.

Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. Rev. 1, 52 n. 138. “[I]t is clear that it is unrealistic to equate a verdict of ‘not guilty’ with a ‘declaration of innocence.’” *State v. Hacker*, 167 N.J. Super. 166, 173, 400 A.2d 567, 570 (Law Div. 1979).

For example, in *Montgomery*, 215 W. Va. at 515-16, 600 S.E.2d at 227-28, the appellant argued that “where a not guilty finding is returned, an accused is exonerated from the crime that he was charged with [and] the taint of the initial allegation is effectively removed.” This Court disagreed. It noted that the acquittal resulted from evidentiary difficulties rather than a showing that the appellant “was shown not to have committed the acts upon which the criminal offense was based.” *Id.* at 516, 600 S.E.2d at 228. This Court then recognized that “[t]here are many reasons, including a higher burden of proof and stricter evidentiary rules, that may affect whether a criminal defendant is convicted.” *Id.*, 600 S.E.2d at 228. *See also State v. Miller*, 194 W. Va. 3, 10, 459 S.E.2d 114, 121 (1995) (before issue or claim preclusion applicable, “not only the facts but also the legal standards and procedures used to assess them must be similar.”).

Hence, a not guilty verdict is a “negative sort of conclusion lodged in a finding of failure of the prosecution to sustain the burden of proof beyond a reasonable doubt,” *Estate of Moreland v. Dieter*, 395 F.3d 747, 755 (7th Cir. 2005) (quoting *Borunda v. Richmond*, 885 F.2d 1384, 1387 (9th Cir.1989)), that is, the prosecution failed to prove its case. On the other hand, a “judgment of conviction is a positive finding, indicating that the state has successfully borne the extraordinary burden of proving the relevant facts beyond a reasonable doubt.” W.E. Shipley, *Conviction or Acquittal as Evidence of the Facts on Which It Was Based in Civil Action*, 18 A.L.R.2d 1287 § 6 (1951 & 1999 Supp.).

To allow an administrative licence revocation to be premised upon an acquittal would be to allow an administrative decision to be premised on irrelevant evidence, but due process does not permit a decision to be based on irrelevant evidence, *United States v. Bowles*, 159 U.S. App. D.C. 407, 414. 488 F.2d 1307, 1314 n.11 (1973) (“[t]o rely upon irrelevant evidence to support a particular verdict falls within the ‘sporting theory of justice,’ which Justice Douglas . . . remarked ‘cannot [be] raise[d] . . . to the dignity of a constitutional right [that] denies . . . due process[.]’”), *cf. Wood v. Alaska*, 957 F.2d 1544, 1549-50 (9th Cir. 1992) (observing that there is no constitutional right to present irrelevant evidence); nor is irrelevant evidence substantial evidence that will support an administrative decision under general precepts of administrative adjudication. *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996) (“‘Substantial evidence’ requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.”); *Allen v. District of Columbia Rental Housing Comm’n*, 538 A.2d 752, 753 (D.C. 1988) (only relevant evidence can constitute substantial evidence); *Breslin v. San Francisco*, 146 Cal. App.4th 1064, 1088, 55 Cal. Rptr.3d 14, 33 (2007) (“We cannot rely on irrelevant evidence when we consider whether substantial evidence supports the trial court’s finding that the charges were timely filed.”). The circuit court should be reversed.

II.

CONCLUSION

For the reasons set forth herein and in the initial brief, the circuit court should be reversed.

Respectfully submitted,

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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, Senior Assistant Attorney General and counsel for Joe E. Miller, Commissioner of the Division of Motor Vehicles, Petitioner, hereby certify that on the 23rd day of June, 2011, I served the foregoing *Reply Brief* 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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