

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0353

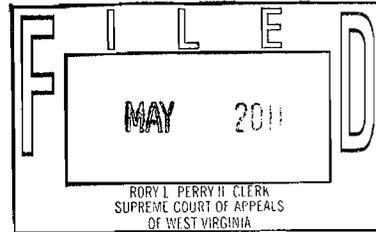
JOE E. MILLER, Commissioner
of the West Virginia Division
of Motor Vehicles,

Petitioner Herein/Respondent Below,

v.

JOHN B. EPLING,

Respondent Herein/Petitioner Below.



PETITIONER'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR	1
A. This Court should overrule <i>Choma v. West Virginia Division of Motor Vehicles</i> , 210 W. Va. 256, 557 S.E.2d 310 (2000)	1
B. The circuit court erred in finding that the Commissioner did not perform a proper analysis under <i>Muscatell v. Cline</i> , 196 W. Va. 548, 474 S.E.2d 518 (1996)	1
C. If this case should have been remanded, it should have been remanded to the Commissioner, not the Office of Administrative Hearings, since only the Commissioner has jurisdiction	1
II. STATEMENT OF THE CASE	1
A. The Stop	1
B. The Commissioner’s Order	2
C. The Circuit Court Order	2
III. SUMMARY OF ARGUMENT	3
A. This Court should overrule <i>Choma v. West Virginia Division of Motor Vehicles</i> , 210 W. Va. 256, 557 S.E.2d 310 (2000)	3
B. The circuit court erred in finding that the Commissioner did not perform a proper analysis under <i>Muscatell v. Cline</i> , 196 W. Va. 548, 474 S.E.2d 518 (1996)	3
C. If this case should have been remanded, it should have been remanded to the Commissioner, not the Office of Administrative Hearings, since only the Commissioner has jurisdiction	4
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	4
V. ARGUMENT	4
A. Choma should be overruled	6
1. Choma distorts and misapplies well-established precedent	7

2.	Choma's does not realize that there are compelling reasons for treating convictions and acquittals differently	10
3.	Choma reads double jeopardy principles into civil proceedings	17
B.	The circuit court erred in finding that the Commissioner did not perform a proper analysis under <i>Muscatell v. Cline</i> , 196 W. Va. 548, 474 S.E.2d 518 (1996)	19
C.	If this case should have been remanded, it should have been remanded to the Commissioner, not the Office of Administrative Hearings, since only the Commissioner has jurisdiction	22
VI.	CONCLUSION	25

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>Adkins v. Miller</u> , 187 W. Va. 774, 421 S.E.2d 682 (1992)	7
<u>Albrechtsen v. Wisconsin Department of Workforce Develop.</u> , 288 Wis. 2d 144, 708 N.W.2d 1 (2005)	23
<u>Allen v. District of Columbia Rental Housing Commission</u> , 538 A.2d 752 (D.C. 1988)	15
<u>Appalachian Power Co. v. State Tax Department</u> , 195 W. Va. 573, 466 S.E.2d 424 (1995) ..	25
<u>Association of American Railroads v. I.C.C.</u> , 298 U.S. App. D.C. 240, 978 F.2d 737 (1992) .	24
<u>Banker v. Banker</u> , 196 W. Va. 535, 474 S.E.2d 465 (1996)	6
<u>Borunda v. Richmond</u> , 885 F.2d 1384 (9th Cir.1989)	12
<u>Boston Housing Authority v. Guirola</u> , 410 Mass. 820, 575 N.E.2d 1100 (1991)	9
<u>Breslin v. San Francisco</u> , 146 Cal. App. 4th 1064, 55 Cal. Rptr.3d 14 (2007)	15
<u>Brown v. Gobble</u> , 196 W. Va. 559, 474 S.E.2d 489 (1996)	6
<u>Cain v. West Virginia Division of Motor Vehicles</u> , No. 101166 (W. Va. Feb. 11, 2011)	17
<u>Carroll v. Stump</u> , 217 W. Va. 748, 619 S.E.2d 261 (2005)	9
<u>Carte v. Cline</u> , 194 W. Va. 233, 460 S.E.2d 48 (1995)	19
<u>Mary D. v. Watt</u> , 190 W. Va. 341, 438 S.E.2d 521 (1992)	8; 10
<u>State v. Blake</u> , 197 W. Va. 700, 478 S.E.2d 550 (1996)	20
<u>United States v. Matos</u> , 781 F. Supp. 273 (S.D.N.Y.1991)	20
<u>Choma v. West Virginia Division of Motor Vehicles</u> , 210 W. Va. 256, 557 S.E.2d 310 (2000)	passim
<u>Clark v. Iowa Department of Rev. and Finance</u> , 644 N.W.2d 310 (Iowa 2002)	15

<u>Cohen v. Brown University</u> , 101 F.3d 155 (1st Cir. 1996)	24
<u>College v. Cline</u> , 202 W. Va. 599, 505 S.E.2d 662 (1998)	23
<u>Commonwealth v. Crawford</u> , 121 Pa. Cmwlth. 613, 550 A.2d 1053 (1988)	13
<u>Consumers Union v. Federal Reserve Board</u> , 736 F. Supp. 337 (D.D.C. 1990), <i>rev'd on other grounds</i> , 291 U.S.App.D.C. 1, 938 F.2d 266 (D.C. Cir. 1991)	24
<u>Conviction or Acquittal as Evidence of the Facts on Which It Was Based in Civil Action</u> , 18 A.L.R.2d 1287 (1951 & 1999 Supp.)	12
<u>Delgado v. Phelps Dodge Chino, Inc.</u> , 131 N.M. 272, 34 P.3d 1148 (2001)	6
<u>Dunkleberger v. Merit Systems Protection Board</u> , 130 F.3d 1476 (Fed. Cir. 1997)	23
<u>Eilers v. District of Columbia</u> , 583 A.2d 677 (D.C. 1990)	21
<u>Etheridge v. City of New York</u> , 121 N.Y.S.2d 103 (Sup. Ct.1953)	11
<u>Ferguson v. Gathright</u> , 485 F.2d 504 (4th Cir. 1973)	16
<u>Ferrell v. Cicchirillo</u> , No. 1:08cv220, 2009 WL 1468364 (N.D. W. Va. May 26, 2009)	19
<u>Fong Foo v. United States</u> , 369 U.S. 141, 82 S. Ct. 671 (1962)	16
<u>Fraga v. State Comp. Commissioner</u> , 125 W. Va. 107, 23 S.E.2d 641 (1942)	23
<u>Francis v. Astrue</u> , No. 3:09-cv-01826 (VLB), 2011 WL 344087 (D. Conn. Feb. 1, 2011) ...	21
<u>General Electric Co. v. Joiner</u> , 522 U.S. 136, 118 S. Ct. 512 (1997)	6
<u>Gibson v. Gibson</u> , 15 Cal. App. 3d 943, 93 Cal. Rptr. 617 (1971)	11
<u>Groves v. Cicchirillo</u> , 694 S.E.2d 639 (W. Va. 2010)	5
<u>Hill v. Hamilton-Wentworth Regional Police Serv. Bd.</u> , 2007 SCC 41, [2007] 3 S.C.R. 129, 87 O.R. (3d) 397, 285 D.L.R. (4th)	12
<u>Haney v. County Commission</u> , 212 W. Va. 824, 575 S.E.2d 434 (2002)	7
<u>Haywood v. Drown</u> , 129 S. Ct. 2108 (2009)	23

<u>Helvering v. Mitchell</u> , 303 U.S. 391, 58 S. Ct. 630 (1938)	19
<u>Horning v. District of Columbia</u> , 254 U.S. 135, 41 S. Ct. 53 (1920)	14
<u>James v. State</u> , 289 Ark. 560, 712 S.W.2d 919 (1986)	17
<u>Janasiewicz v. Board of Ed.</u> , 171 W. Va. 423, 299 S.E.2d 34 (1982)	7
<u>Jordan v. Roberts</u> , 161 W. Va. 750, 246 S.E.2d 259 (1978)	9
<u>In re Kanawha Val. Bank</u> , 144 W. Va. 346, 109 S.E.2d 649 (1959)	7
<u>Kelley v. Board of Trustees</u> , 35 F.3d 265 (7th Cir.1994)	24
<u>Lavernia v. Lynaugh</u> , 845 F.2d 493 (5th Cir. 1988)	22
<u>Leegin Creative Leather Prod. v. PSKS, Inc.</u> , 551 U.S. 877, 127 S. Ct. 2705 (2007)	7
<u>Long v. Weirton</u> , 158 W. Va. 741, 214 S.E.2d 832 (1975)	7
<u>Lowe v. Cicchirillo</u> , 223 W. Va. 175, 672 S.E.2d 311 (2008)	10, 16
<u>MC v. U.K.</u> , Nos. 11882/85, [ECHR1987]	13
<u>Martin v. Randolph County Board of Ed.</u> , 195 W. Va. 297, 465 S.E.2d 399 (1995)	22
<u>Mastrocola v. Southeastern Pa. Transport Authority</u> , 941 A.2d 81 (Pa. Cmwlth. Ct. 2008) ...	23
<u>McAdams v. Holden</u> , 349 So. 2d 900 (La. Ct. App. 1977)	14
<u>McCormick v. School District</u> , 370 F.3d 275 (2d Cir. 2004)	24
<u>In re McKinney</u> , 218 W. Va. 557, 625 S.E.2d 319 (2005)	10, 17
<u>Modi v. W. Va. Board of Medical</u> , 195 W. Va. 230, 465 S.E.2d 230 (1995)	6
<u>Montgomery v. State Police</u> , 215 W. Va. 511, 600 S.E.2d 223 (2004)	10, 12
<u>Estate of Moreland v. Dieter</u> , 395 F.3d 747 (7th Cir. 2005)	12
<u>Murphy v. Eastern American Energy Corp.</u> , 224 W. Va. 95, 680 S.E.2d 110 (2009)	7

<u>Muscatell v. Cline</u> , 196 W. Va. 548, 474 S.E.2d 518 (1996)	2, 4, 20
<u>N.L.R.B. v. Berger Transfer & Storage Co.</u> , 678 F.2d 679 (7th Cir.1982)	21
<u>N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.</u> , 174 F.3d 13 (1st Cir. 1999)	21
<u>N.L.R.B. v. Katz's Delicatessen of Houston St., Inc.</u> , 80 F.3d 755 (2d Cir.1996)	21
<u>National Fuel Gas Supply Corp. v. F.E.R.C.</u> , 258 U.S. App. D.C. 374, 811 F.2d 1563 (1987)	24
<u>Nelson v. West Virginia Public Employees Insurance Board</u> , 171 W. Va. 445, 300 S.E.2d 86 (1982)	14
<u>O'Bannon v. Town Ct. Nursing Ctr.</u> , 447 U.S. 773, 100 S. Ct. 2467 (1980)	8
<u>Payne v. Tennessee</u> , 501 U.S. 808, 111 S. Ct. 2597 (1991)	7, 19, 20
<u>People v. Christensen</u> , 864 N.Y.S.2d 845 (Sup. Ct. 2008)	17
<u>People v. McCutcheon</u> , 68 Ill. 2d 101, 368 N.E.2d 886, 11 Ill. Dec. 278 (1977)	17
<u>People v. Washington</u> , No. 234926, 2003 WL 178776 (Mich. Ct. App. Jan. 24, 2003)	14
<u>Powers v. Goodwin</u> , 170 W. Va. 151, 291 S.E.2d 466 (1982)	10
<u>In re Queen</u> , 196 W. Va. 442, 473 S.E.2d 483 (1996)	6, 15
<u>Shatz v. American Surety Co.</u> , 295 S.W.2d 809 (Ky.1955)	11
<u>Shell v. Bechtold</u> , 175 W. Va. 792, 338 S.E.2d 393 (1985)	19
<u>Shires v. Boggess</u> , 72 W. Va. 109, 77 S.E. 542 (1913)	9
<u>Shumate v. West Virginia Department of Motor Vehicles</u> , 182 W. Va. 810, 392 S.E.2d 701 (1990)	19
<u>Sims v. Miller</u> , No. 35673 (W. Va. May 13, 2011)	4
<u>Smart Document Solutions, LLC v. Virginia Farm Bur. Fire and Cas. Ins. Co.</u> , 2656-05-4, 2006 WL 1888605 (Va. Ct. App. July 11, 2006)	23
<u>South Carolina v. Gathers</u> , 490 U.S. 805, 109 S. Ct. 2207 (1989)	20

<u>United States v. Marrero-Ortiz</u> , 160 F.3d 768 (1st Cir. 1998)	18
<u>United States v. Wilson</u> , 420 U.S. 332, 95 S. Ct. 1013 (1975)	15
<u>Ward v. State Work. Comp. Commissioner</u> , 154 W. Va. 454, 176 S.E.2d 592 (1970)	22
<u>Webb v. W. Va. Board of Medical</u> , 212 W. Va. 149, 569 S.E.2d 225 (2002)	6
<u>Williams v. North Dakota State Highway Commissioner</u> , 417 N.W.2d 359 (N.D.1987)	13
<u>Wood v. Alaska</u> , 957 F.2d 1544 (9th Cir. 1992)	15
<u>Zara v. Ortiz</u> , No. 04-2322, 2005 WL. 1126795 (D.N.J. May 12, 2005)	17
<u>STATUTES:</u> *	
W. Va. Code § 17C-5C-5	23, 24, 25
W. Va. Code § 29A-5-4	5
<u>OTHER:</u>	
4 Wayne R. LaFave, et al., <i>Criminal Procedure</i> § 13.2(c) (3d ed.)	16
16C CJS <i>Constitutional Law</i> § 1503 n.7	11
<u>Fred C. Zacharias, The Uses and Abuses of Convictions Set Aside under the Federal Youth Corrections Act</u> , 1981 Duke L.J. 477, 501	18
<u>Honorable Patti B. Saris, Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective</u> , 30 Suffolk U. L. Rev. 1027, 1066 n.150 (1997)	17
<u>Meredith J. Duncan, The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform</u> , 2002 B.Y.U.L. Rev. 1, 52 n. 138	12
W. Va. C.S.R. § 4-5-4	7, 8, 22
W. Va. R. Evid. 606(b)	14

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PETITIONER'S BRIEF

I.

ASSIGNMENTS OF ERROR

- A. This Court should overrule *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2000).**
- B. The circuit court erred in finding that the Commissioner did not perform a proper analysis under *Muscattell v. Cline*, 196 W. Va. 548, 474 S.E.2d 518 (1996).**
- C. If this case should have been remanded, it should have been remanded to the Commissioner, not the Office of Administrative Hearings, since only the Commissioner has jurisdiction**

II.

STATEMENT OF THE CASE

A. The Stop

On August 16, 2009, Deputies Hicks and Caprio observed a car driving at a high rate of speed revving its engine. App'x at 4, 28. Deputy Caprio pursued the car and stopped it. App'x at 4, 28-29. Deputy Hicks followed and arrived while Deputy Caprio was processing Mr. Epling's

information. App'x at 4, 29. While speaking to Mr. Epling, Deputy Hicks determined that Mr. Epling's speech was clear and that he was not unsteady, but that Mr. Epling smelled of alcohol and Mr. Epling admitted to consuming four or five beers. App'x at 4, 16, 29. Deputy Hicks administered the three standard field sobriety tests; Mr. Epling failed the walk and turn, and the Horizontal Gaze Nystagmus, but passed the one legged stand. App'x at 4, 16-17. Mr. Epling refused a Preliminary Breath Test. App'x at 17. Deputy Hicks administered a Secondary Breath Test to Mr. Epling in accordance with the standards set forth in the DUI Information Sheet, which revealed that Mr. Epling had a Blood Alcohol Content of .111%. App'x at 5-6, 18. The DUI charge against Mr. Epling was dismissed. App'x at 69, 71, although no reason for the dismissal was adduced by Mr. Epling.

B. The Commissioner's Order

The Commissioner upheld the revocation. Specifically, the Commissioner noted that while Mr. Epling testified that as a medical student he was familiar with the Horizontal Gaze Nystagmus test, there was no evidence that this was the same as the training that Deputy Hicks received as a law enforcement officer. App'x at 7. The Commissioner further explained that he did not credit the testimony of Mr. Epling's witness that Mr. Epling was not intoxicated because the witness offered no reason to believe this other than knowing Mr. Epling for most of his life. App'x at 7. Finally, the Commissioner did not credit the dismissal of the criminal charges for DUI because there was no evidence as to why the Prosecuting Attorney dismissed the charges. App'x at 7.

C. The Circuit Court Order

The Circuit Court ordered the case remanded to the Office of Administrative Hearings for a new full evidentiary hearing, with specific directions to perform what it termed, "a proper analysis

under *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996) and *Choma v. WV Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001)” App’x at 1.

III.

SUMMARY OF ARGUMENT

A. This Court should overrule *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2000).

This Court has observed that “Syllabus Point 3 of *Choma* would appear to conflict with this Court’s time-honored precedent stating ‘[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.’ Syllabus, *Steele v. State Road Commission*, 116 W. Va. 227, 179 S.E. 810 (1935).” *Ullom v. Miller*, 277 W. Va. 1, ___ n.12, 705 S.E.2d 111, 124 n.12 (2010). While this Court did not go further, it indicated that *Choma* may have no vitality. *Id.*, 705 S.E.2d at 124 n.12 (“ In view of our disposition of this issue herein, we need not now consider the continued viability, if any, of Syllabus Point 3, of *Choma*. See also *Jordan v. Roberts*, 161 W. Va. 750, 246 S.E.2d 259 (1978).” Because *Choma* was an incorrect statement of law, failed to contain analysis of an important issue, is contrary to reason, incorrectly interpreted or misapplied laws or legal principles, contradicted a long tradition and prior case law, has proves unworkable, has been outstripped by more recent authority, and failed to reflect adequate consideration of the wider implications of its opinion, *Choma* should be overruled.

B. The circuit court erred in finding that the Commissioner did not perform a proper analysis under *Muscatell v. Cline*, 196 W. Va. 548, 474 S.E.2d 518 (1996).

The circuit court erred in concluding that the Commissioner did not perform a proper analysis under *Muscatell v. Cline*, 196 W. Va. 548, 474 S.E.2d 518 (1996). Here, the issue boils down to credibility determinations, and as this Court recently made clear in *Sims v. Miller*, No. 35673, slip

op. at 12 (W. Va. May 13, 2011), hyperelaboration in conducting a *Muscatell* analysis is not required when there is a simple credibility dispute, and, indeed, credibility disputes may be decided implicitly as well as explicitly.

C. If this case should have been remanded, it should have been remanded to the Commissioner, not the Office of Administrative Hearings, since only the Commissioner has jurisdiction.

The Commissioner had jurisdiction over this case when he rendered his Final Order. Consistent with this jurisdiction, if the Circuit Court properly remanded the case, it should have been remanded to the Commissioner, not the Office of Administrative Hearings. *

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 20 oral argument is requested in this case. This case presents the issue of whether a prior decision of this Court should be overruled; as such, it is a matter warranting Rule 20 consideration. 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 administrative 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. W. Va. Bd. of Med.*, 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.” *Brown*, 196 W. Va. at 563, 474 S.E.2d at 493 (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir.1993)).

A. *Choma* should be overruled.¹

Stare decisis, “the policy of the court to stand by precedent[.]” *Banker v. Banker*, 196 W. Va. 535, 546 n. 13, 474 S.E.2d 465, 476 n. 13 (1996), is an important judicial doctrine, *Janasiewicz v. Board of Ed.*, 171 W. Va. 423, 424, 299 S.E.2d 34, 36 (1982), it is not “an inexorable command[.]” *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 2609 (1991). “Although this Court is loathe to overturn a decision so recently rendered, it is preferable to do so where a prior decision was not a correct statement of law[.]” *Murphy v. Eastern American Energy Corp.*, 224 W. Va. 95, 101, 680 S.E.2d 110, 116 (2009), where it fails to contain analysis of an important issue, *State v. Guthrie*, 194 W. Va. 657, 679 n.28, 461 S.E.2d 163, 185 n.28 (1995); when it is contrary to reason, *In re Kanawha Val. Bank*, 144 W. Va. 346, 382, 109 S.E.2d 649, 669 (1959), when it incorrectly interpreted or misapplied laws or legal principles, *Janasiewicz*, , 171 W. Va. at 424, 299 S.E.2d at 36, when it contradicts a long tradition and prior case law, *Adkins v. Miller*, 187 W. Va. 774, 782 n.3, 421 S.E.2d 682, 690 n.3 (1992) (Neely, J., dissenting); *Guthrie*, 194 W. Va. at 676, 461 S.E.2d at 182; when it proves unworkable, *Long v. Weirton*, 158 W. Va. 741, 783, 214 S.E.2d 832, 859 (1975), and when it has been outstripped by more recent authority, *Leegin Creative Leather Prod. v. PSKS, Inc.*, 551 U.S. 877, 900, 127 S. Ct. 2705, 2721 (2007), and the pull of stare decisis is at its nadir when constitutional issues are concerned, *Adkins v. Miller*, 187 W. Va. 774, 782 n.3, 421

¹A petitioner need not present to a circuit court a request that a decision of this Court should be overruled because the circuit court lacks the authority to grant relief. *See, e.g., Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272, 276, 34 P.3d 1148, 1152 (2001). It should be noted that this issue was brought to the circuit court’s attention. App’x at 14.

S.E.2d 682, 690 n.3 (1992) (Neely, J., dissenting), because the Legislature is powerless to undue the Court's decision. *See, e.g., Haney v. County Comm'n*, 212 W. Va. 824, 828, 575 S.E.2d 434, 438 (2002).

Choma should also be readdressed as it is not limited to Administrative Drivers License Revocations. For example, among others, chiropractors, W. Va. C.S.R. § 4-5-4, dentists, *id.* § 5-5-4, hearing aid dealers, *id.* § 8-3-4, licensed practical nurses, *id.* § 10-2-12.1.b, medical imaging and radiation therapists, *id.* § 18-4-4, social workers, *id.* § 25-1-10.1.1, osteopaths, *id.* § 26-4-4.1, Emergency Services Personnel, *id.* § 64-48-10, and massage therapists, *id.* § 194-3-4, either must or may lose their licenses based on felony convictions. *Choma* could also be used to circumvent civil abuse and neglect cases. *Cf. Mary D. v. Watt*, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992) (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)

Thus, *Choma* should be revisited because it also fails to meet the requirement that “the scope and basis of a court’s opinion should reflect adequate consideration of the wider implications of its opinion.” Scott E. Johnson, *The Amicus Curiae Brief: A Quick Primer for the West Virginia Lawyer*, W. Va. Law. at 19 (Feb. 1999). It is now time to rid West Virginia of the albatross that is *Choma*.

1. *Choma distorts and misapplies well-established precedent.*

Choma attempted to support its truly made out of whole cloth decision by purporting to create a symmetry between civil and criminal proceedings allegedly grounded in the due process guarantee of “fundamental fairness.” 210 W. Va. at 260, 557 S.E.2d at 314. But platitudes such as fundamental fairness, “often submerge analytical complexities in particular cases.” *O’Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 793, 100 S. Ct. 2467, 2479 (1980) (Blackmun, J., concurring).

“Judges are not free, in defining ‘due process,’” to impose . . . ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.” *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 2049 (1977) (quoting *Rochin v. California*, 342 U.S. 165, 170, 72 S. Ct. 205, 209 (1952)). Such limitations on the judicial power in due process issues includes considering any relevant precedents and then assessing the several interests at stake. *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 24-25, 101 S. Ct. 2153, 2158 (1981). And, as 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[.]”

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. This particular reasoning has been explicitly rejected by other courts. *See, e.g., Boston Housing Auth. v. Guirola*,

410 Mass. 820, 827 n.9, 575 N.E.2d 1100, 1105 n.9 (1991) (“Although due process may require the application of issue preclusion to bar the relitigation of a suppression order in a subsequent criminal proceeding between the same parties, there is no such requirement where the subsequent proceeding is civil.”). Additionally, 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, ¶59, 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. Similarly, this Court observed subsequent to *Choma*

the purpose of speedily removing intoxicated drivers from our public roadways would be greatly frustrated if the Division's revocation powers were totally dependent on the discretion of local prosecutors in choosing how to charge drunk drivers and whether to accept pleas to lesser charges—a discretion based primarily on the exigencies of the criminal justice system, not the protection of innocent drivers.

In re McKinney, 218 W. Va. 557, 562, 625 S.E.2d 319, 324 (2005). Furthermore, in *Lowe v. Cicchirillo*, 223 W. Va. 175, 182, 672 S.E.2d 311, 318 (2008), Justice Starcher, the author in *Choma*, dissented by asserting that the majority had “sidestep[ed] the clear holding of *Choma*.” These points evidence that *Choma* was inconsistent with prior case law, is undercut by more recent authority, and has proved unworkable.

2. *Choma's does not realize that there are compelling reasons for treating convictions and acquittals differently.*

Choma asserted that due process requires that convictions and acquittals be treated as having identical consequences, that it is unconstitutional to find a DUI criminal conviction justifies an automatic license revocation, but not to afford some effect of a DUI criminal acquittal in a civil license revocation proceeding. But “differences and distinctions in treatment offend the constitutional guaranty of due process only when such variations are arbitrary and without a rational basis.” 16C CJS *Constitutional Law* § 1503 n.7. There is no inconsistency or fundamental unfairness in treating convictions and acquittals differently since “[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)). See also *Shatz v. American Sur. Co.*, 295 S.W.2d 809, 814 (Ky.1955) (“There are sound reasons why a judgment of acquittal should not be admissible in a civil action of this nature.”). Because a conviction proves an act *was* committed, but an acquittal does not prove an act *was not* committed,

it is rational and sound to treat convictions and acquittals differently.

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. 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.) “A verdict of not guilty is not a factual finding of innocence.” *Hill v. Hamilton-Wentworth Regional Police Serv. Bd.*, 2007 SCC 41, [2007] 3 S.C.R. 129, 87 O.R. (3d) 397, 285 D.L.R. (4th) 620, 50 C.R. (6th) 279, 64 Admin. L.R. (4th) 163, 230 O.A.C. 260. Hence, as the vast majority of jurisdictions have held, evidence of an acquittal is not relevant in a subsequent civil proceeding based on the exact same acts because the acquittal does not prove (i.e., it is not relevant to) innocence. *See generally State Farm Fire & Cas. Co. v. Carter*, 154 Md. App. 400, 411, 840 A.2d 161, 168 (2003) (“Our research reveals that many jurisdictions have addressed the issue of whether a prior acquittal or nol pros is admissible in a subsequent civil case involving the same operative facts. Almost without exception, when the acquittal is not an element of the civil claim, these jurisdictions prohibit admission of an acquittal or a nol pros in a later civil proceeding involving the same or similar underlying conduct.”); *MC v. U.K.*, Nos. 11882/85, [1987] ECHR 33 (“It is a general feature of legal systems in States which are Parties to the Convention that parallel civil and criminal proceedings may be initiated against a person and, by virtue of the different standards of proof normally observed in such proceedings, acquittal at the end of a criminal trial, because the accused has not been shown to be guilty of an offence beyond all reasonable doubt, does not necessarily preclude that same person’s civil liability on the balance of probabilities (cf. criminal proceedings for a road traffic

offence and civil proceedings for negligence following a car accident).”). In sum, since ALR proceedings “are civil in nature, separate and distinct from the criminal proceedings which may ensue from an arrest, . . . dismissal or acquittal of a related criminal charge is irrelevant to the disposition of the administrative proceedings.” *Williams v. North Dakota State Highway Comm’r*, 417 N.W.2d 359, 360 (N.D.1987). *See also Commonwealth v. Crawford*, 121 Pa. Cmwlth. 613, 616, 550 A.2d 1053, 1054 (1988) (“an acquittal of the criminal charge of driving under the influence is of no consequence to the outcome of the civil proceeding.”).

Further, refuting the idea that a jury verdict of acquittal is (or should be) evidence of innocence is the fact that a jury may have misunderstood the trial court’s instructions, *State v. Newman*, 162 Wis.2d 41, 52, 469 N.W.2d 394, 398 (1991), as well as the fact that “the jury has the power to bring in a verdict in the teeth of both law and facts[.]” *Horning v. District of Columbia*, 254 U.S. 135, 138, 41 S. Ct. 53, 54 (1920), *abrogated on other grounds by United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995), and may decide to acquit a defendant “even though it believes beyond a reasonable doubt that he was guilty of that offense,” *People v. Washington*, No. 234926, 2003 WL 178776, at *2 (Mich. Ct. App. Jan. 24, 2003), such as compassion or a desire to be lenient to the defendant, *Standefer v. United States*, 447 U.S. 10, 22, 100 S. Ct. 1999, 2007 (1980), or as an act of jury nullification. *State v. Morgan Stanley & Co.*, 194 W. Va. 163, 173, 459 S.E.2d 906, 916 (1995); *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 455 n.7, 300 S.E.2d 86, 96 n.7 (1982). And DMV would have no way to establish that the acquittal was the result of these impermissible factors since they are all intrinsic to the verdict. *See W. Va. R. Evid. 606(b)*; Syl. pt. 3, *State v. Scotchel*, 168 W. Va. 545, 285 S.E.2d 384 (1981) (“Ordinarily, a juror’s claim that he was confused over the law or evidence and therefore participated in the verdict on an incorrect premise

is a matter that inheres in or is intrinsic to the deliberative process and cannot be used to impeach the verdict.”); *McAdams v. Holden*, 349 So.2d 900, 902 (La. Ct. App. 1977) (juror could not testify that sympathy for defendant influenced jury’s verdict). 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.”); *Clark v. Iowa Dep’t of Rev. and Fin.*, 644 N.W.2d 310, 320 (Iowa 2002) (“The administrative law judge may base the decision upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant.”); *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.”).

Additionally, an acquittal may be the result of a trial court’s incorrect rulings on evidentiary

or instructional matters inuring to the benefit of a criminal defendant and against the State, but which are, nevertheless, rendered unreviewable by a verdict or judgment in favor of the defendant. *United States v. Wilson*, 420 U.S. 332, 352, 95 S. Ct. 1013, 1026 (1975) (“A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited [sic] from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict[.]”); *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 672 (1962) (per curiam) (even an acquittal based upon an “egregiously erroneous foundation” cannot be appealed by the prosecution); *State v. Fisher*, 103 W. Va. 658, 138 S.E. 316, 317 (1927) (“If [a jury] acquit the defendant, even through a mistaken notion of the law and the evidence, the case is ended under our constitutional guaranty that no person shall be twice put in jeopardy for the same offense.”). If the Commissioner is required to give “substantial weight” to an acquittal or dismissal, the Hearing Examiner must review the file in the criminal case to determine if, for example, (1) the judge improperly instructed the jury to the advantage of the defendant, (2) the judge erred in suppressing evidence beneficial to the State, (3) the judge erred in making evidentiary rulings to the detriment of the State, (4) the judge erred in allowing improper opening or closing argument by defense counsel or (5) made any other errors that could have impermissibly benefitted the defendant and then determine if these errors were harmless. See *Lowe v. Cicchirillo*, 223 W. Va. 175, 182, 672 S.E.2d 311, 318 (2008) (acquittal of a criminal DUI is not dispositive of a civil ALR). Imposing these kinds of matters in a proceeding “intended as an expeditious method of ridding the highways of dangerous drivers and of protecting the public would become an intolerable burden on the bar and

a cumbersome procedure.” *Ferguson v. Gathright*, 485 F.2d 504, 508 (4th Cir. 1973).

Additionally, at issue in this case is not an acquittal, but a decision by the Prosecuting Attorney not to pursue charges. Such a prosecutorial choice is not necessarily reflective of a Prosecutor’s belief the defendant is innocent, but may be based upon the Prosecutor’s belief that there is not proof beyond a reasonable doubt to convict, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 752, 278 S.E.2d 624, 631 (1981), an expectation that a jury would refuse to convict notwithstanding proof of guilt beyond a reasonable doubt, 4 Wayne R. LaFave, et al., *Criminal Procedure* § 13.2(c) (3d ed.), an overwhelming case load and the need to prioritize cases within the resources available, Honorable Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge’s Perspective*, 30 Suffolk U. L. Rev. 1027, 1066 n.150 (1997), or many other reasons. *Id.*

Moreover, by allowing the Prosecuting Attorney to engage in prosecutorial decisions that affect a subsequent administrative proceeding also violates the principles of law set forth both pre and post-*Choma*. For example, in *State v. Miller*, 194 W. Va. 3, 13-14, 459 S.E.2d 114, 124-25 (1995), the Court found that a State administrative agency was not in privity with the Prosecuting Attorney, yet *Choma* places the DMV at the mercy of the Prosecuting Attorney. And in *In re McKinney*, 218 W. Va. 557, 562, 625 S.E.2d 319, 324 (2005) this Court observed that

the purpose of speedily removing intoxicated drivers from our public roadways would be greatly frustrated if the Division’s revocation powers were totally dependent on the discretion of local prosecutors in choosing how to charge drunk drivers and whether to accept pleas to lesser charges—a discretion based primarily on the exigencies of the criminal justice system, not the protection of innocent drivers.²

²And, a guilty plea to a lesser offense is not an acquittal of the higher, originally charged offense. See *James v. State*, 289 Ark. 560, 562, 712 S.W.2d 919, 921 (1986) (“The acceptance of a guilty plea to an offense is not an implicit acquittal of all greater included offenses of the crime.”); *People v. McCutcheon*,

In sum, an acquittal cannot be reliably said to represent anything other than a determination that the State did not prove its case beyond a reasonable doubt nor can a dismissal by the prosecutor because “cases are dismissed for a variety of reasons, many of which are unrelated to culpability.” *United States v. Marrero-Ortiz*, 160 F.3d 768, 775 (1st Cir. 1998). On the other hand, because of the numerous protections afforded a criminal defendant, a conviction can reliably be said to represent a determination that the State has provided its criminal case, that is, that the defendant committed the acts that underlay the criminal statute at issue. See, e.g., Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside under the Federal Youth Corrections Act*, 1981 Duke L.J. 477, 501. It is apparent that *Choma* was, at best, poorly reasoned.

3. *Choma reads double jeopardy principles into civil proceedings.*

An additional problem with *Choma* is that it can be read as a violation of yet another well established principle of West Virginia (and general) law. Justice Maynard wrote in his concurring opinion in *Choma* that “I hope Syllabus Point 3 of the majority opinion will help solve a problem which exists in West Virginia today wherein citizens are subjected to additional punishment even after they have been found innocent of crimes for which they were wrongfully charged.” 210 W. Va. at 261, 557 S.E.2d at 315 (Maynard, J., concurring). Justice Maynard appears to read *Choma* for the proposition that an acquittal in a criminal case should preclude a civil proceeding on the same facts.

68 Ill.2d 101, 108, 368 N.E.2d 886, 889, 11 Ill. Dec. 278, 281 (1977) (“a plea of guilty to a lesser included offense is not an acquittal of the greater offense”); *Zara v. Ortiz*, No. 04-2322, 2005 WL 1126795, 5 (D.N.J. May 12, 2005) (“where a judge accepts a defendant’s guilty plea to a lesser offense, that defendant is not ‘implicitly acquitted’ of the greater offense.”); *People v. Christensen*, 864 N.Y.S.2d 845, 855 (Sup. Ct. 2008) (“Neither Sussman’s plea to the lesser offense nor any vacatur of the guilty plea by this court is ‘the equivalent of an acquittal based on an adjudication as to the factual elements of the charge’”). See also *Cain v. West Virginia Div. of Motor Vehicles*, No. 101166, slip op. at 3-4 (W. Va. Feb. 11, 2011) (Memorandum Decision).

This is legally wrong on a number of grounds.

Justice Maynard's position extends double jeopardy protections to civil cases. But, the double jeopardy clause applies to successive *criminal* punishments or penalties. *State v. Myers*, 216 W. Va. 120, 124 n.3, 602 S.E.2d 796, 800 n.3 (2004), or, in other words, the double jeopardy clause only applies to criminal—not civil—proceedings. *State ex rel. Franklin v. McBride*, 701 S.E.2d 97, 106 (W. Va. 2009); *State ex rel. Rufus v. Easley*, 129 W. Va. 410, 414, 40 S.E.2d 827, 830 (1946), *overruled on other grounds by State ex rel. Toryak v. Spagnuolo*, 170 W. Va. 234, 292 S.E.2d 654 (W. Va. 1982). “The 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. The revocation provisions are not penal in nature.” *Shell v. Bechtold*, 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (citation omitted). *See also Shumate v. West Virginia Dep't of Motor Vehicles*, 182 W. Va. 810, 813, 392 S.E.2d 701, 704 (1990) (citation omitted). Indeed, in *Carte*, 200 W. Va. at 167, 488 S.E.2d at 442, this Court recognized that criminal law is not to be read into the civil administrative suspension statutes. *See also Carte v. Cline*, 194 W. Va. 233, 238, 460 S.E.2d 48, 53 (1995) (citation omitted) (observing that administrative license revocation process is “independent of the criminal justice system”). Hence, double jeopardy does not apply to a license revocation proceeding. *Ferrell v. Cicchirillo*, No. 1:08cv220, 2009 WL 1468364, at * 5 (N.D. W. Va. May 26, 2009). And the civil counterpart to double jeopardy is res judicata, *State v. Carroll*, 150 W. Va. 765, 768-69, 149 S.E.2d 309, 311 (1966), but, as demonstrated above, “acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.” *Helvering v. Mitchell*, 303 U.S. 391, 397, 58 S. Ct. 630, 632 (1938). *See also Syl., Steele v. State Road Comm'n*, 116 W. Va. 227,

179 S.E. 810 (1935) (“It 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.”).

“If there was ever a case that defied reason, it was [*Choma*] imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic.” *Payne v. Tennessee*, 501 U.S. 808, 834, 111 S. Ct. 2597, 2613 (1991) (citations omitted) (Scalia, J., concurring). *Choma* was grounded not in precedent or reasoning, but in thinly veiled *ipse dixit*. “We provide far greater reassurance of the rule of law by eliminating than by retaining such a decision.” *South Carolina v. Gathers*, 490 U.S. 805, 825, 109 S. Ct. 2207, 2218 (1989) (Scalia, J., dissenting), *majority opinion overruled by Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597 (1991). *Choma* should be overruled and the circuit court reversed.

B. The circuit court erred in finding that the Commissioner did not perform a proper analysis under *Muscatell v. Cline*, 196 W. Va. 548, 474 S.E.2d 518 (1996).

The circuit court ordered this case remanded over the Commissioner’s objection. App’x at 90.

In Syllabus Point 6 of *Muscatell*, this Court held:

[w]here there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.

As this Court recognized in *Sims*, *Muscatell* must be understood in its factual context. In *Muscatell*, the investigating officer gave two different explanations for why he stopped a car. Hence, *Muscatell* was a situation where there was a direct conflict in the testimony of a *single* witness. This raises questions concerning the veracity of *both* statements. *Cf. State v. Blake*, 197 W. Va. 700, 706,

478 S.E.2d 550, 556 (1996) (witness's prior inconsistent statement raises doubts about the truthfulness of both of the witness's statements). Hence crediting either statement without explaining why the ALJ credited one over the other indicates that the ALJ relied on facially questionable testimony, i.e., testimony from a witness who basically impeached himself—and such testimony cannot constitute reliable evidence on the whole record because each is equally questionable. Cf. *United States v. Matos*, 781 F. Supp. 273, 281 (S.D.N.Y.1991) (“The direct contradiction between these statements and his present affidavit clearly demonstrates that he was either lying then or that he is lying now. Nevertheless, Matos has offered no reason for believing that the prior statements were false and that the present statement is true.”). *Muscatell* requires an ALJ to explain why he chose to believe a witness whose testimony has unusual problems beyond the simply inconsistencies inherent in the testimony of every witness testifying, perhaps months or years after the events at issue. See *Eilers v. District of Columbia*, 583 A.2d 677, 685 (D.C. 1990) (“In light of the unusual problems with Officer Braswell’s testimony, we think that this is a case in which the hearing examiner should have offered a specific, cogent reason for crediting it and for rejecting the contrary evidence offered by Mr. Eilers and his witness.”). This is not the usual situation, though; generally the conflict is between the testimony of two (or more) separate witnesses, and that is the situation at hand.

In this latter situation, (the type involved here)³ elaborate or extended analysis is not required. *Sims*, slip op. at 12-13. While the circuit court claimed the Commissioner did not do a “proper” analysis under *Muscatell*, the circuit court cited no “law requiring the ALJ to use particular words

³App’x at 90 (“THE COURT: I think it’s clear. If you look at page 7 [of the Commissioner’s Order], that’s not a discussion about *Muscatell* about why—it says—and I don’t why it didn’t say what you just said: After judging the credibility of the witnesses, I found this. It doesn’t say.”).

or to write a minimum number of sentences or paragraphs.” *Francis v. Astrue*, No. 3:09-cv-01826 (VLB), 2011 WL 344087, at * 4 (D. Conn. Feb. 1, 2011). Indeed, an ALJ is not required to make “‘explicit credibility findings’ as to each bit of conflicting testimony, so long as his factual findings as a whole show that he ‘implicitly resolve[d]’ such conflicts.” *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (quoting *N.L.R.B. v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir.1982)). *Accord N.L.R.B. v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir.1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his “treatment of the evidence is supported by the record as a whole.”). *See also Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) (emphasis added) (“The ALJ, who *apparently* disbelieved the plaintiff’s recollection of the circumstances leading up to the continuance, did not exceed permissible bounds in accepting testimony of the defendant’s witnesses about this exchange.”).

When, as is the case here, a trial court fails to render express findings on credibility but makes a ruling that depends upon an implicit determination that credits one witness’s testimony as being truthful, or implicitly discredits another’s, such determinations are entitled to the same presumption of correctness that they would have been accorded had they been made explicitly.

Lavernia v. Lynaugh, 845 F.2d 493, 500 (5th Cir. 1988). In short, “[a]n appellate court may not set aside the factfinder’s resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents.” *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995).⁴ Here, the question of whether the HGN was properly administered was a question of fact that the trier of fact resolved

⁴And, “of course, . . . the weight of the proof in any case is not to be measured on the basis of the number of witnesses supporting or opposing a pertinent factual proposition.” *Ward v. State Work. Comp. Comm’r*, 154 W. Va. 454, 459, 176 S.E.2d 592, 595 (1970).

against Mr. Epling. While Mr. Epling argued that there was no evidence that Deputy Hicks had been trained in administering the HGN, as a law enforcement officer, Deputy Hicks must be trained to properly administer roadside sobriety tests. W. Va. C.S.R. § 149-2-8.3.c.3; *id.* § 149-2-13.4. Moreover, Deputy Hicks certified on the DUI Information Sheet that he administered the test consistent with the directions on the DUIS. Further, as a certified law enforcement officer in West Virginia, Deputy Hicks is trained to recognize signs of drug or alcohol intoxication. *Id.* § 149-2-8.3.c.1. Mr. Epling's witness admitted he had no special training in determining intoxication. App'x at 48.

The circuit court imposed an impermissibly high burden unsupported by law and should be reversed.

C. If this case should have been remanded, it should have been remanded to the Commissioner, not the Office of Administrative Hearings, since only the Commissioner has jurisdiction.

“Jurisdiction relates to the power of a court, board or commission to hear and determine a controversy presented to it” Syl. Pt.3, *Coll v. Cline*, 202 W. Va. 599, 601, 505 S.E.2d 662, 664 (1998) (quoting Syl. Pt. 1, *Fraga v. State Comp. Comm’r*, 125 W. Va. 107, 23 S.E.2d 641 (1942)). “Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute.” *Haywood v. Drown*, 129 S. Ct. 2108, 2126 (2009) (Thomas, J., dissenting). Subject matter jurisdiction cannot be waived or conferred upon an administrative tribunal by assent or agreement of the parties. *See, e.g., Dunklebarger v. Merit Systems Protection Bd.*, 130 F.3d 1476, 1480 (Fed. Cir. 1997); *Mastrocola v. Southeastern Pa. Transp. Auth.*, 941 A.2d 81, 88 (Pa. Cmwlth. Ct. 2008); *Smart Document Solutions, LLC v. Virginia Farm Bur. Fire and Cas. Ins. Co.*, 2656-05-4, 2006 WL 1888605, at *3 (Va. Ct. App. July 11, 2006); *Albrechtsen v. Wisconsin Dep’t of Workforce Develop.*, 288 Wis.2d 144, 162, 708 N.W.2d 1, 10 (2005). The circuit court ordered this case remanded to the Office of

Administrative Hearings. Assuming any remand is correct, this case should have been remanded back to DMV who is the only entity with subject-matter jurisdiction to adjudicate this case.

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

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

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

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.⁵ And Ms. Dunn established by interim policy that the Commissioner would retain jurisdiction over pre-June 11, 2010 incidents.⁶ Because the incident in this case predated June 11, 2010, the Commissioner—and not the Office of Administrative Hearings—has jurisdiction.

⁵A copy of this designation is attached hereto and this Court is requested to take judicial notice of it as a public record. *See State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W. Va. 696, 698 n.12, 619 S.E.2d 209, 211 n.12 (2005) (taking judicial notice of a public record).

⁶A copy of this memorandum is attached hereto and this Court is requested to take judicial notice of it as a public record. *See State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W. Va. 696, 698 n.12, 619 S.E.2d 209, 211 n.12 (2005) (taking judicial notice of a public record).

VI.

CONCLUSION

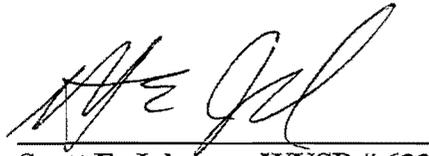
For the above reasons, the circuit court should be reversed.

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. 11-0353

**JOE E. MILLER, Commissioner
of the West Virginia Division
of Motor Vehicles,**

Petitioner Herein/Respondent Below,

v.

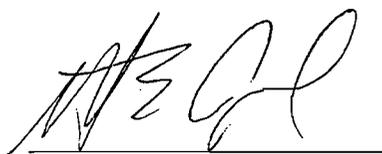
JOHN B. EPLING,

Respondent Herein/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 27th day of May, 2011, I served the foregoing PETITIONER'S BRIEF upon the following by depositing true and correct copies thereof in the United States Mails, First Class Postage Prepaid addressed as follows:

Gregory W. Sproles, Esquire
Breckinridge, Davis, Sproles & Chapman
509 Church Street
Summersville, WV 26651



Scott E. Johnson