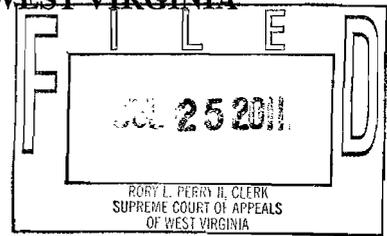


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

REPLY BRIEF

Respectfully submitted,

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

By Counsel,

**DARRELL V. McGRAW, JR.
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REPLY BRIEF

I.

ARGUMENT

A. *Choma* is ripe for overruling and *Sims v. Miller*, 709 S.E.2d 750 (W. Va. 2011) does not counsel otherwise.

Mr. Epling contends that there is no need to overrule *Choma* as this Court in *Sims v. Miller*, 709 S.E.2d 750, 759 (W. Va. 2011) found the burden was on the petitioner to show why the charges were dismissed. However, this does not actually deal with the question, can a prior criminal disposition ever be relevant to a subsequent administrative license revocation? The answer is no. And since irrelevant evidence cannot be used to justify an agency decision, *see* W. Va. Code § 29A-5-2(a) (irrelevant evidence is not admissible in a contested case), *Choma* should be overruled.

First, it has (before *Choma*) long been the law in this state that an acquittal in a criminal case was not admissible in a subsequent civil case arising out of the same facts, *Shires v. Boggess*, 72 W. Va. 109, 77 S.E. 542, 545 (1913), and that “[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 Comm'n, 116 W. Va. 227, 179 S.E. 810 (1935); *Accord Commonwealth v. Funk*, 323 Pa. 390, 400 n.6, 186 A. 65, 70 n.6 (1936) (“This precise point has been considered recently by the Supreme Court of West Virginia in the case of *Steele v. State Road Commission*, 179 S.E. 810, where it was held that the acquittal of a motorist of the charge of operating a motor vehicle while intoxicated did not preclude the road commission from revoking his license on the ground that he was unfit to operate an automobile.”); *Atkinson v. Parsekian*, 37 N.J. 143, 156, 179 A.2d 732, 739 (N.J. 1962) (citing *Steele*). *Cf. Q. v. Commissioner of Police*, [2003] EWCA 4 ¶ 37 (Civ. Ct.) (double jeopardy does not bar a subsequent professional disciplinary action after an acquittal). Further, *Powers v. Goodwin*, 170 W. Va. 151, 159, 291 S.E.2d 466, 474 (1982), 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* are consistent with pre-*Choma* law, rather than *Choma*. 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. This is because a criminal trial is not concerned with the

defendant's innocence, only his guilt.

“Courts do not find people guilty or innocent. They find them guilty or not guilty.” *People v. Ortiz*, 196 Ill.2d 236, 268, 752 N.E.2d 410, 430 (2001). And guilt is defined as the state proving its case against the defendant beyond a reasonable doubt. A “jury d[oes] not need an abiding belief in . . . innocence to acquit; the jury only needed an abiding belief in . . . guilt to convict.” *State v. Larios-Lopez*, 156 Wash. App. 257, 261, 233 P.3d 899, 901 (2010). “A criminal trial does not address ‘factual innocence.’ The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of actual innocence since it would not fall within the ambit or purpose of criminal law.” *R. v. Secretary of State*, [2011] UKSC 18 ¶ 23 (quoting *R. v Mullins-Johnson* [2007] 87 OR (3d) 425, 228 CCC (3d) 505, 50 CR (6th) 265, 231 OAC 64)). An acquittal does not “‘prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt[.]’” *Dowling v. United States*, 493 U.S. 342, 349, 110 S. Ct. 668, 672 (1990) (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361–62, 104 S. Ct. 1099, 1104 (1984)) (omissions and alterations in original). *See also Reed v. State*, 78 N.Y.2d 1, 7, 574 N.E.2d 433, 435 (1991) (“An acquittal of criminal charges is not equivalent to a 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 (Charron. J., dissenting on the cross-appeal) (““A verdict of not guilty is not a factual finding of innocence.”). A verdict of “not guilty” means that the jury believed the state did not carry its high burden of proof, *Dowling*, 493 U.S. at 349, 110 S. Ct. at 672-73; *Montgomery*, 215 W. Va. at 516, 600 S.E.2d at 228, or that the jury was exercising lenience toward the defendant. *United States v. Isom*, 886 F.2d 736,

738 (4th Cir. 1989), or that the jury confusion. *Cf. United States v. Powell*, 469 U.S. 57, 65, 105 S. Ct. 471, 476 (1984). And determining what prompted the verdict is beyond the reach of the Courts since jurors may not impeach their verdict, 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.”), nor may interrogatories be used in a criminal trial. *State v. Dilliner*, 212 W. Va. 135, 138-39, 569 S.E.2d 211, 214-15 (2002).

Second, one could argue that the decision of a Prosecuting Attorney in what to charge is relevant, one could argue that . . . but it would be wrong. In *In Re McKinney*, 218 W. Va. 557, 562, 625 S.E.2d 319, 324 (2005), this Court said:

We believe 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. While this Court understands the concern that our holding herein will interfere with the ability of prosecutors to dispose of drunk driving cases with plea bargains, thus potentially overloading trial court dockets, we deem this concern subordinate to our duty to apply statutory law as the Legislature plainly intended. We also believe this concern to be subordinate to the substantial legislative policy of protecting innocent persons from dangerous drunk drivers.

And, 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*, 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).

Third, if a judge or magistrate acquits, the basis leading them to the decision are immune from examination. Syl. Pt. 3, *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 535 S.E.2d 727 (2000) (“Judicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts.”).

Finally, the ultimate question is why an acquittal or dismissal in a criminal case should have any bearing in a civil revocation proceeding. Aside from the fact the burdens of proof are different which permit parallel proceedings, *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).”); *Thomas v. Western Australia*, [1893] UKPC 50, 52 (Trinidad & Tobago) (“when the result is an acquittal, it can hardly be conclusive of anything beyond that particular prosecution.”), it is the Commissioner

who is charged with revoking and defending the revocation; the Prosecuting Attorney is not in privity with the Commissioner. *See State v. Miller* 194 W. Va. 3, 13, 459 S.E.2d 114, 124 (1995) (“we agree with the State that there is no privity between the prosecuting attorney’s office and the Department of Health and Human Resources, which was represented by the Attorney General’s Office in the grievance proceedings.”). And this Court has rejected the idea that the Commissioner is subordinate to the Prosecuting Attorney. Syl. Pt. 3, *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005) (“Neither a prosecuting attorney, law enforcement officer nor any other person has the authority to enter into an agreement that would prevent the Commissioner of the West Virginia Department of Motor Vehicles from carrying out his or her legislative responsibilities or to prevent or impede a law enforcement officer from presenting evidence of the arrest in the Commissioner’s license revocation administrative hearing.”). *See also Restatement (Second) of Judgments* § 36 cmt. f (“In some circumstances, a prior determination that is binding on one agency and its officials may not be binding on another agency and its officials. The problem is analogous to that in determining the capacity in which the underlying transactions were conducted where private parties are concerned. If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.”).

B. *Muscatell v. Cline*, W. Va. 588, 474 S.E.2d 518 (1996) should not be read as the Circuit Court and Respondent read it.

Muscatell v. Cline, W. Va. 588, 474 S.E.2d 518 (1996) does not require the painfully and minutely detailed reading that the Respondent gives it. It is readily apparent from the review of

decisions of this Court, see, e.g., *Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam); *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995); *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)), other Courts addressing the issue, *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999); *N.L.R.B. v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir.1996); *N.L.R.B. v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir.1982), *Lavernia v. Lynaugh*, 845 F.2d 493, 500 (5th Cir. 1988), that credibility findings may be implicit. Indeed, this Court in somewhat different contexts has observed that explicitness is not required if the required discloses that the Court performed its duties. See, e.g., *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 762 n.6, 601 S.E.2d 75, 82 n.6 (2004) (emphasis deleted) (“We note that a failure to expressly articulate how 404(b) evidence is probative does not mandate automatic reversal. If the basis for the admission of the evidence is otherwise clear from the record, we can affirm the circuit court.”).

C. The DMV has jurisdiction over any remand.

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.

An agency is entitled to deference in implementing a statute, “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.” *Consumers Union v. Federal Reserve Bd.*, 736 F. Supp. 337, 340 (D.D.C. 1990) (citations omitted), *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). This wide discretion was not recognized or applied by the Circuit Court. As such, any remand should be to the Commissioner not the OAH.

II.

CONCLUSION

The Circuit Court should be reversed.

Respectfully submitted,

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

By Counsel,

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



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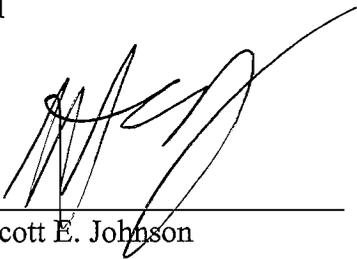
JOHN B. EPLING,

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 25th day of July, 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:

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



Scott E. Johnson