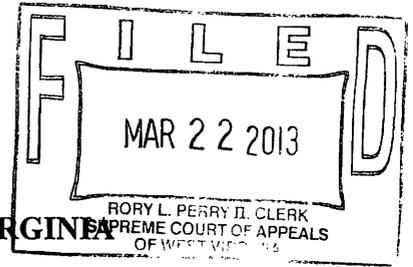


NO. 12-1509



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JOE MILLER, COMMISSIONER,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

Petitioner Below, Petitioner,

v.

CHAD DOYLE,

Respondent Below, Respondent.

PETITIONER'S BRIEF

**STEVEN O. DALE, ACTING COMMISSIONER ,
WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,**

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WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner Below, Petitioner,

v.

CHAD DOYLE,

Respondent Below, Respondent.

PETITIONER'S BRIEF

Now comes the Petitioner, Steven O. Dale, Acting Commissioner and successor to Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Senior Assistant Attorney General, and submits this brief in the above-captioned case pursuant to the Court's *Scheduling Order*. Petitioner seeks reversal of the *Final Order Denying Petition for Judicial Review* (hereinafter, "Order") entered by the circuit court of Kanawha County on November 20, 2012.

ASSIGNMENTS OF ERROR

- A. The circuit court erred in conflating a lawful stop with a lawful arrest - the latter of which is a factor in determining the admissibility of the secondary chemical test.**
- B. The circuit court erred in applying the exclusionary rule to the instant civil, administrative license revocation proceeding in violation of this Court's recent decisions in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229W. Va. 302, 729 S.E.2d. 137 (2012).**

- C. **This Court should reconcile its holding in *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009) regarding a valid stop with its holdings in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229W. Va. 302, 729 S.E.2d. 137 (2012) which state that the exclusionary rule does not apply to civil, administrative license revocation proceedings.**

STATEMENT OF THE CASE

At 3:20 a.m. on November 5, 2010, Officer Benjamin Anderson of the Charles Town Police Department notified Investigating Officer Trooper First Class Martin Glende of the West Virginia State Police (hereinafter, "Tpr. Glende") that he had stopped Respondent's car on Route 51 in Charles Town, Jefferson County, West Virginia because he observed the Respondent fail to obey a traffic control device while operating a motor vehicle under the influence of alcohol. Trooper Glende went to the scene and approached the Respondent. Respondent stated he was coming from the racetrack.

Respondent had the odor of alcohol on his breath; his eyes were bloodshot; he admitted drinking "five beers"; Respondent failed the horizontal gaze nystagmus test, the walk-and-turn, and the one-leg stand tests; he failed the preliminary breath test with a blood alcohol content of .12 and the Intoximeter result showed that Respondent had a blood alcohol content of .107. Tpr. Glende was trained to administer field sobriety tests in 2003. A.R. at 24-30.

The Petitioner issued an initial Order of Revocation on December 21, 2010. Respondent timely requested a hearing from the Office of Administrative hearings ("OAH"). The administrative hearing was held on March 31, 2011. At the hearing, investigating Officer Glende appeared and testified. The Respondent did not appear. A.R. Tr. Of OAH Hearing.

By Final Order entered December 16, 2011, the OAH rescinded the Petitioner's initial order of revocation.

Petitioner appealed the OAH's Final Order to the circuit court of Kanawha County on January

17, 2012. Respondent filed a response to the petition on April 27, 2012. A hearing was held before the Honorable Louis H. Bloom on May 24, 2012. A.R.Tr. Of Circuit Court Proceeding.

On November 20, 2012, the circuit court entered a *Final Order Denying Petition for Judicial Review*. A.R. at 2. The present appeal ensued.

SUMMARY OF ARGUMENT

The circuit court below found that W. Va. Code § 17C-5A-2 requires a finding that a lawful arrest was made, and the circuit court determined that based upon this Court's previous decision in *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009), a lawful arrest is dependent upon the legality of the initial traffic stop. When the circuit court misapplied *Clower*, it also applied the criminal exclusionary rule and ignored all evidence of DUI in contravention to this Court's holdings in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d. 137 (2012).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Commissioner requests a Rule 20 argument in this case. There are issues of first impression herein, and Petitioner submits that this matter warrants further inquiry by this Court.

ARGUMENT

This Court has previously established the standards for our review of a circuit court's order deciding an administrative appeal as follows:

On appeal of an administrative order from a circuit court, this Court is

bound by the statutory standards contained in W. Va.Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

A. The circuit court erred in conflating a lawful stop with a lawful arrest, the latter of which is a factor only in determining the admissibility of the secondary chemical test.

The circuit court excluded the evidence showing that Patrolman Anderson stopped the Respondent's vehicle for failure to obey a traffic signal, and upheld the OAH's rescission of Respondent's license revocation because it found that this purported lack of evidence meant there was no lawful arrest. This is in error because that evidence was in the record, and because evidence of the stop of the vehicle is not necessary to uphold a revocation, and because evidence of a lawful arrest is not necessary to uphold the revocation.

The evidence admitted at the administrative hearing was sufficient to affirm the revocation of Respondent's driving privileges. The D.U.I. Information Sheet and the criminal complaint were admitted pursuant to W. Va. Code § 29A-5-2 and 91 C.S.R. 1, § 3.9.4.b at the administrative hearing, and was authenticated by Tpr. Glende. *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W.Va. 70, 7631 S.E.2d 628 (2006); *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008); *Groves v. Cicchirillo*, 225 W.Va. 474, 694 S.E.2d 639 (2010). In addition to the documentary evidence, Tpr. Glende appeared and provided testimony. The totality of the evidence shows that the Respondent was driving under the influence of alcohol, and that he failed the secondary chemical test of the breath.

The circuit court noted in its findings of fact the testimony of Tpr. Glende showing that Respondent was intoxicated. A. R. At 3-4. Respondent did not appear at the administrative hearing

and never denied driving.

The fact that Tpr. Glende did not see Respondent driving does not vitiate the revocation. Tpr. Glende appropriately used the information from Officer Anderson and proceeded to perform his own investigation. He properly formulated probable cause for the arrest, and developed sufficient evidence to support the revocation order.

Tpr. Glende had reasonable grounds to believe that Respondent had driven under the influence of alcohol, and the evidence shows that Respondent committed the offense of driving under the influence of alcohol. W. Va. Code §17C-5A-2(f).

In DUI administrative hearings, W. Va. Code § 17C-5A-2(f)(2010) charges the OAH to make specific findings as to

- (1) Whether the investigating law-enforcement officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol, controlled substances or drugs, or while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight, or to have been driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by eight but less than eight hundredths of one percent, by weight;
- (2) whether the person was lawfully placed under arrest for an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary test: Provided, That this element shall be waived in cases where no arrest occurred due to driver incapacitation;
- (3) whether the person committed an offense involving driving under the influence of alcohol, controlled substances or drugs, or was lawfully taken into custody for the purpose of administering a secondary chemical test; and
- (4) whether the tests, if any, were administered in accordance with the provisions of this article and article five [§§ 17C-5-1 et seq.] of this chapter.

The language in § 17C-5A-2(f)(2) above is wholly unrelated to the stop; and is gleaned from W. Va. Code § 17C-5-4(c), which states:

A secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

W. Va. Code § 17C-5-4(c) gives the investigating officer direction regarding administration of the secondary chemical test, while, in comparison, W. Va. Code § 17C-5-4(b) gives the officer direction regarding the administration of the preliminary breath test:

A preliminary breath analysis may be administered in accordance with the provisions of section five of this article whenever a law-enforcement officer has reasonable cause to believe a person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

The lawful arrest language in W. Va. Code § 17C-5-4(c) relates only to the admissibility of the secondary chemical test. Secondary breath test results cannot be considered if the test was administered when the driver was not lawfully arrested, meaning that the officer had not gathered enough evidence to have a reasonable suspicion to believe that the driver had been driving while under the influence of alcohol, drugs or controlled substances. Any definition of lawful arrest contained in W. Va. Code § 17C-5A-2 that disregards its limited use in W. Va. Code § 17C-5-4 is overreaching.

The phrase “[a] secondary test of blood, breath or urine shall be incidental to a lawful arrest” means that the results of a chemical test are not admissible unless it was done in connection with, or “incidental” to, a lawful arrest. This is the construction we placed on

this statutory language in *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), where we found a blood test to be inadmissible because it was not taken incident to a lawful arrest.

Albrecht v. State, 173 W. Va. 268, 272, 314 S.E.2d 859, 863 (1984).

Therefore, even though the circuit court determined that Respondent was not lawfully arrested, only the secondary chemical test results could be ignored. Of course, a secondary chemical test was not required for the OAH to determine that Respondent was DUI because where there was more than adequate evidence reflecting that Respondent, who was operating a motor vehicle in this state, exhibited symptoms of intoxication and had consumed alcohol. *Albrecht v. State*, 173 W. Va. 268, 273, 314 S.E.2d 859, 864-865 (1984).

Simply put, the Commissioner submits that “lawful arrest” is limited to the arrest itself while the circuit court below determined that “...without a finding that the legitimacy for the initial traffic stop existed [sic], there was insufficient evidence to find Trooper Glende’s arrest of Mr. Doyle was lawful as required by W. Va. Code 17C-5A-2(f).” A. R. at 13. However, the stop and the arrest are two separate and distinct functions of the investigating officer.

In *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261 (2005), Justice Davis cautioned against exceeding the parameters of W. Va. Code § 17C-5A-2, which provides that if a person was arrested for DUI, and the results of the secondary chemical test show that the person had a blood alcohol content in excess of eight hundredths of one percent, the Commissioner of the DMV shall revoke the license. No more than that should be read into the statute.

Thus, in describing when the commissioner shall order revocation of a driver's license based upon the written statement of the arresting officer, the Legislature has mandated that the commissioner examine the document to determine that “a person was arrested.” W. Va. Code § 17C-5A-1(c) (emphasis added). “In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the

express mention of one thing implies the exclusion of another, applies.’ Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984).” *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 27, 488 S.E.2d 20, 27 (1997). There is nothing in this statute to indicate that the commissioner must confirm that the individual was actually criminally charged with DUI, through a criminal complaint or otherwise, as a prerequisite to revoking a driver’s license.

”[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted.*” ... Moreover, “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”

Perito v. County of Brooke, 215 W. Va. 178, 184, 597 S.E.2d 311, 317 (2004) (additional internal quotations and citations omitted). 217 W. Va. 748, 760, 619 S.E.2d 261, 273 (2005).

Likewise, there is no requirement of a valid stop to support the lawful arrest and subsequent license revocation of a driver who has driven while under the influence of drugs or alcohol. The appropriate grounds for review of the legitimacy of a final order of revocation from the Commissioner were also set forth in *Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010) and *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010). In *Cain*, this Court held:

As set forth in W. Va. Code § 17C-5A-2(f) (2008), the underlying factual predicate required to support an administrative license revocation is whether the arresting officer had reasonable grounds to believe that the accused individual had been driving his or her vehicle while under the influence of alcohol, controlled substances, or drugs.

Syl. Pt. 3, *Cain, supra*.

In *Groves, supra*, this Court held, “[t]he principal determination to be made at a DMV hearing regarding revocation of a driver’s license for DUI is ‘whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs.’ W. Va. Code § 17C-5A-2(e).”

225 W. Va. 478, 694 S.E.2d 643. This Court in *Groves* further reasoned,

What we have consistently held is that

[w]here there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol. Syllabus Point 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). Syllabus Point 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997).

Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008).

225 W. Va. 480, 694 S.E.2d 645.

These holdings reflect the circumscription of W. Va. Code § 17C-5A-2 about which Justice Davis spoke in her concurrence in *Carroll, supra*. Based upon the reasons set forth above, the evidence obtained by the investigating officer supported the lawfulness of Respondent's arrest, and the circuit court's Order denying the Commissioner's *Petition for Appeal* should be reversed.

This Court has always drawn a bright line between the criminal DUI procedures and the civil, administrative license revocation procedures: "It is also well established that a proceeding to revoke a driver's license is a civil not a criminal action." *Shumate v. W. Va. Dept of Motor Vehicles*, 182 W. Va. 810, 813, 392 S.E.2D 701, 704 (1990), cited at FN9 of *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012). The circuit court's inclusion of the nature of the stop in its interpretation of lawful arrest superimposes in this civil, administrative process the state of the law in the criminal process.

Since the Commissioner's sole authority in W. Va. Code § 17C-5A-1(c) is to revoke all drivers who have committed a DUI offense, the circuit court's Order now suggests that the Legislature had intended to create two classes of drunk drivers: those where the officers may not have followed

the criminal procedure exactly regarding the nature of the stop and those where there was either no stop at all or one which the circuit court would deem “lawful.” At the time that the Commissioner must act to revoke, that information is not readily available for the Commissioner’s consideration - nor is it even relevant given the Commissioner’s limited authority to revoke *all* drunk drivers. “The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.” Syl. Pt. 3, *In re petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005). If the Commissioner were required to consider the nature of the stop during its review for revocation, then the purpose of the administrative license revocation procedures would be greatly frustrated.

B. The circuit court erred in applying the exclusionary rule to the instant civil, administrative license revocation proceeding in violation of this Court’s recent decisions in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229W. Va. 302, 729 S.E.2d. 137 (2012).

By excluding all of the evidence of Respondent’s intoxication, the circuit court applied the criminal exclusionary rule meaning that it ignored the statutory requirement in W. Va. Code § 17C-5A-2(e) which states that “the principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol...”

Instead of making a determination that Respondent was or was not DUI based upon the evidence of intoxication, the circuit court below simply ignored all of that evidence and concluded that he was not lawfully arrested. In fact, the closest that the circuit court came to making a finding about whether or not Respondent drove while under the influence of alcohol was its conclusion that “there was insufficient evidence to find Trooper Glende’s arrest of Mr. Doyle was lawful as required by W. Va. Code § 17C-5A-2(f). As more fully stated above, an arrest for the offense of driving under

the influence of alcohol is not lawful without a valid stop of the vehicle.” (A. R. at 13.) Regardless of the circuit court’s denial of the application of the criminal exclusionary rule, its total disregard for the evidence of DUI obtained by the investigating officer while focusing solely on the nature of the stop, is, indeed, the application of the exclusionary rule.

This Court has made quite clear that the exclusionary rule does not apply to civil license revocation proceedings. *See, Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d. 137 (2012). If the exclusionary rule does not apply to the proceedings, then the authority of the Commissioner to consider the nature of a stop is irrelevant because the evidence would be admitted regardless of the validity of the stop. If the exclusionary rule is not applied to the instant matter, then the following evidence of Respondent’s intoxication must be admitted and considered: Respondent had the odor of alcohol on his breath; his eyes were bloodshot; he admitted drinking "five beers"; Respondent failed the horizontal gaze nystagmus test, the walk-and-turn, and the one-leg stand tests; he failed the preliminary breath test with a blood alcohol content of .12 and the Intoximeter result showed that Respondent had a blood alcohol content of .107. Such evidence was not considered by the OAH or the circuit court below.

Even if this Court finds that there was no evidence presented about the stop of Respondent’s vehicle by Patrolman Anderson, such a finding is irrelevant here because Trooper Glende validly arrested Respondent. In *State v. Byers*, 159 W. Va. 596, 224 S.E.2d 726 (1976), this Court, relying on the statutory language pertaining to DUI offenses, determined that an arrest is lawful if the arresting officer has “reasonable grounds” to believe the offense was committed. In *Byers*, this Court concluded that the “evidence reflecting symptoms of intoxication and consumption of an alcoholic beverage was sufficient to justify submission of the case to the jury.” 159 W. Va. 609, 224 S.E.2d

734. More importantly, this Court recognized that it is only the evidence of intoxication and consumption which is truly relevant to the question of whether a person was DUI. *Id.*

Here, both the DUI Information Sheet completed by Trooper Glende and his unrebutted testimony clearly indicated that Respondent had the odor of alcohol on his breath; his eyes were bloodshot; he admitted drinking "five beers"; Respondent failed the horizontal gaze nystagmus test, the walk-and-turn, and the one-leg stand tests; he failed the preliminary breath test with a blood alcohol content of .12 and the Intoximeter result showed that Respondent had a blood alcohol content of .107. A.R.Tr. OAH Hearing at 11-21. Additionally, Trooper Glende's uncontroverted testimony revealed that Respondent was driving the subject vehicle. "He advised me that he was coming from the race track." A.R.Tr. OAH Hearing at 11.

"A police officer may arrest a person if he has probable cause to believe that person committed a crime." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Under Syllabus Point 1 of *State v. Plantz*, 155 W. Va. 24, 180 S.E.2d 614 (1971), *overruled in part on other grounds*, *State ex rel. White v. Mohn*, 168 W. Va. 211, 283 S.E.2d 914 (1981), probable cause to arrest without a warrant exists "when the facts and the circumstances within the knowledge of the arresting officers are sufficient to warrant a prudent man in believing that an offense has been committed or is being committed." Trooper Glende lawfully arrested the Respondent.

C. This Court should reconcile its holding in *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 678 S.E.2d 41 (2009) regarding a valid stop with its holdings in *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d. 800 (2012) and *Miller v. Toler*, —W. Va. —, 729 S.E.2d. 137 (2012) which state that the exclusionary rule does not apply to civil, administrative license revocation proceedings.

The circuit court below found that "In interpreting the previous 2004 version of the statute, which required a lawful arrest finding, the [Supreme] Court has ruled that a lawful arrest for the

offense of driving under the influence requires a valid stop of the vehicle. *See, e.g., Clower...*” (A. R. at 8.) *Clower* simply is inapplicable to the instant matter and necessitates retrospection by this Court.

First, even though the criminal exclusionary rule was not applied by name, indeed it was applied by this Court in *Clower*. There, the driver and the officer were the only vehicles on the road late at night, and the driver was pulled over solely for not using his turn signal to make a turn. After *Clower* was stopped, the officer noticed that *Clower* had slurred speech, bloodshot and glassy eyes, and the odor of alcohol on his breath; therefore, the officer began an investigation into a possible violation for DUI. After conducting field sobriety tests and gathering other evidence of DUI, the officer arrested *Clower*, and the Commissioner revoked his driver's license which *Clower* appealed. At the administrative hearing, *Clower* argued that under W. Va. Code § 17C-8-8(a), a driver is only required to use a turn signal when “other traffic may be affected by [the turn].” Because the officer was “approximately two city blocks” behind *Clower's* vehicle at the time of the turn, and that there were no other cars on the roadway at the time, *Clower* argued that the officer did not have a reasonable, articulable suspicion to stop *Clower*.

The revocation was upheld at the administrative level, so *Clower* appealed to the circuit court. There, the circuit court reversed the revocation finding, *inter alia*, that under the circumstances of the case, *Clower* was not required by W. Va. Code § 17C-8-8(a) or §17C-8-9 to have used a turn signal because “no traffic whatsoever could be affected by *Clower's* failure to signal” and that the officer did not have the requisite reasonable suspicion to stop *Clower's* vehicle. The Commissioner appealed the decision of the circuit court.

In its opinion, this Court determined that "[t]he circuit court therefore properly concluded that 'no traffic whatsoever could be affected by [Mr. Clower's] failure to signal' and that Trooper Kessel did not have the requisite reasonable suspicion to stop Mr. Clower's vehicle." 223 W. Va. 535, 543, 678 S.E.2d 41, 49 (2009). This Court then went on to discuss whether the circuit court erred in reversing the Commissioner's revocation.

As we have found, *supra*, Trooper Kessel's stopping Mr. Clower's vehicle was not "justified at its inception," *Terry v. Ohio*, 392 U.S. at 20, 88 S.Ct. 1868. Further, that Trooper Kessel did not have grounds upon which to form an articulable reasonable suspicion to believe that Mr. Clower had committed a misdemeanor traffic offense in violation of W. Va. Code, 17C-8-9. Additionally, Trooper Kessel's own testimony excludes any possibility that Trooper Kessel had any reason, prior to stopping Mr. Clower's vehicle, to believe that Mr. Clower was driving under the influence of alcohol.

Based on these facts, the circuit court concluded that Mr. Clower's was not lawfully placed under arrest because Trooper Kessel did not have the requisite articulable reasonable suspicion to initiate a traffic stop of Mr. Clower's vehicle. We agree. The Commissioner's hearing examiner was clearly wrong in concluding that Mr. Clower was lawfully placed under arrest for the reasons we have discussed in this opinion and the circuit court properly followed the Legislative mandate set forth in W. Va. Code, 29A-5-4(g)—a mandate that specifically requires a circuit court to "reverse, vacate or modify" the Commissioner's order where the Commissioner's order was founded upon findings and conclusions that were in violation of constitutional or statutory provisions or made pursuant to unlawful procedure. In Mr. Clower's case, W. Va. Code, § 17C-5A-2(e) (2004) required that Mr. Clower's have been lawfully arrested—he was not.

223 W. Va. 535, 544, 678 S.E.2d 41, 50 (2009).

After discussing the issue of reasonable suspicion for the stop, this Court completely disregarded all evidence of Clower's DUI (odor of alcohol, bloodshot and glassy eyes, slurred speech, failure of three field sobriety tests, failure of the preliminary breath test, and a secondary chemical test resulting in a .182% blood alcohol content). This Court therefore, tacitly applied the exclusionary rule. Even though this Court did not specifically overrule its holding in *Clower* last year in *Miller*

v. Toler, 729 S.E.2d 137 (2012) and *Miller v. Smith*, 229 W. Va. 478, 729 S.E.2d 800 (2012), it did hold that the criminal exclusionary rule is inapplicable in civil, administrative license revocation proceedings. The rationale in *Toler* and *Smith* necessitates that this Court revisit its decision in *Clower* and its application of the exclusionary rule in that matter.

Additionally, this Court in *Clower* did not consider that W. Va. Code § 17C-5A-1(c) does not require the Commissioner to analyze the nature of an arrest before revocation, and it did not consider that previously the Legislature, at the Commissioner's request, specifically removed the arrest language from that section so that an arrest would not be misconstrued as a predicate to revocation.

Specifically, W. Va. Code § 17C-5A-1(c) states in pertinent part that,

If, upon examination of the written statement of the officer and the test results described in subsection (b) of this section, the commissioner determines that a person committed an offense described in section two, article five of this chapter or an offense described in a municipal ordinance which has the same elements as an offense described in said section and that the results of any secondary test or tests indicate that at the time the test or tests were administered the person had, in his or her blood, an alcohol concentration of eight hundredths of one percent or more, by weight, or at the time the person committed the offense he or she was under the influence of alcohol, controlled substances or drugs, the commissioner shall make and enter an order revoking or suspending the person's license to operate a motor vehicle in this state...

Therefore, as the Legislature plainly said, the Commissioner revokes a driver's license when the DUI Information Sheet is received and, based upon the information contained therein, the Commissioner determines that the driver was either DUI or that the secondary chemical test was .08% or above. There are no other requirements placed upon the Commissioner for administrative revocation - no review of the validity stop, no review of the arrest, no review of any other factors. Neither Respondent, nor the OAH, nor the circuit court can add revocation requirements to that which has already been decided by the Legislature. *Carroll v. Stump, supra*.

Clower is further inapplicable here because *Clower* never considered the language in W. Va.

Code § 17C-5-4(c) which provides:

[a] secondary test of blood, breath or urine is incidental to a lawful arrest and is to be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person has committed an offense prohibited by section two of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in section two of this article.

"Lawful arrest" is only a predicate for secondary chemical testing, and one must consider the grounds the officer relied upon to make the arrest to determine whether it was lawful. If the arrest is not considered lawful (i.e., the officer could not show why he reasonably believed the driver was DUI), then only the evidence of the secondary chemical test can be ignored - not all of the other evidence of DUI because that would be the application of the criminal exclusionary rule.

A stop is not an arrest, and *Clower* conflated the two just as the OAH and the circuit court did in the matter now before this Court. As the DMV outlined above, the stop and the arrest are two separate and distinct functions of the investigating officer. In *Clower*, this Court determined that the officer's stopping *Clower*'s vehicle was not "justified at its inception" and that the officer did not have grounds upon which to form an articulable reasonable suspicion to believe that *Clower* had committed a misdemeanor traffic offense in violation of W. Va. Code § 17C-8-9. *Clower v. West Virginia Div. of Motor Vehicles*, 223 W. Va. 535, 543, 678 S.E.2d 41, 49 (2009).

As the circuit court pointed out in its Order, the "lawful arrest" language which existed in the 2004 statute was amended out in 2008 and back in 2010, the version of the statute applicable to this case. However, the rationale in the *Toler* and *Smith* cases shows that the respective amendments to W. Va. Code § 17C-5A-2 do not change the fact that the application of the exclusionary rule to civil licence revocation cases is improper.

In *Miller v. Toler*, the Supreme Court set forth the rationale for declining to suppress evidence in the civil context.

An understanding of the rationale behind the judicially-created exclusionary rule is necessary for resolution of whether the exclusionary rule should be extended to civil, administrative driver's license revocation or suspension proceedings. As the United States Supreme Court recently stated in *Davis v. United States*, — U.S. —, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), “[t]he Fourth Amendment ^[footnote omitted] protects the ‘rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Amendment says nothing about suppressing evidence obtained in violation of this command.” *Id.* at 2426 (footnote added). Thus, “[e]xclusion is ‘not a personal constitutional right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search.” *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). Consequently, “[t]he rule's sole purpose ... is to deter future Fourth Amendment violations[,] ^[footnote omitted]” and “[w]here suppression fails to yield ‘appreciable deterrence,’ exclusion is ‘clearly ... unwarranted.’ ” 131 S.Ct. at 2426–27 (quoting, in part, *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)).

729 S.E.2d 141.

Citing *Glynn v. State, Taxation and Revenue Dep't, Motor Vehicle Div.*, 149 N.M. 518, 252 P.3d 742, 750 (Ct.App.), *cert. denied*, 150 N.M. 619, 264 P.3d 520 (2011) (emphasis added), this Court made crystal clear that the legitimacy of the stop has nothing to do with suppressing subsequently-obtained evidence:

The exclusionary rule excludes evidence of the illegal stop from the criminal DWI proceeding, thereby preventing the loss of the driver's liberty interest and deterring future police misconduct. The driver nonetheless loses his or her driver's license in order to temporarily remove the driver from the roads of the state if the police officer had reasonable grounds to believe the driver was DWI and if the other elements necessary for revocation are met. *The revocation serves to*

protect the public from a driver who has chosen either to refuse chemical testing or to ingest intoxicating alcohol or drugs before driving, regardless of whether the initial traffic stop was valid or not.

729 S.E.2d 142.

(The emphasis is the Court's).

This Court's long-standing distinction between civil and criminal proceedings stemming from a DUI arrest supports its holding that the *raison d'être* of the exclusionary rule is deterrence of police misconduct. Citing *Tornabene v. Bonine ex rel. Arizona Highway Department*, 203 Ariz. 326, 54 P.3d 355 (Ct.App.2003), this Court observed:

Because use in the license suspension hearing of evidence obtained through an improper stop “ ‘falls outside the offending officer's zone of primary interest,’ ” exclusion of such evidence in that civil context would not significantly affect a police officer's motivation in conducting a vehicle stop. [*Fishbein v. Kozlowski*, 252 Conn. 38, 743 A.2d 1110, 1118-19 (1999)].

Miller v. Toler, 729 S.E.2d 142.

In *Miller v. Smith*, the Mr. Smith's arrest took place following a stop at a safety checkpoint on July 9, 2009. In that case, this Court held:

This Court has been attentive to the concept that the two avenues of inquiry resulting from a DUI incident must remain separate and distinct. The *civil* license revocation is to be carefully differentiated from the determination of *criminal* guilt or innocence. The exclusionary rule is only applicable in the criminal context and “excludes evidence of the illegal stop from the *criminal* DWI proceeding, thereby preventing the loss of the driver's liberty interest and deterring future police misconduct.” *Glynn*, 252 P.3d at 750 (emphasis supplied). Within the separate *civil* context, however, the “driver nonetheless loses his or her driver's license in order to

temporarily remove the driver from the roads of the state if the police officer had reasonable grounds to believe the driver was [DUI] and if the other elements necessary for revocation are met.” *Id.* No inconsistency exists in that dual approach to processing a driver under these circumstances.

229 W. Va. 478, 729 S.E.2d 800.

Citing several cases in which the stop of the vehicle was improper, this Court made clear its holding that the stop is of no consequence in determining whether to apply the exclusionary rule: the rule is not to be applied in civil license revocation cases.

Park v. Valverde, 152 Cal.App.4th 877, 61 Cal.Rptr.3d 895, 902 (2007) (concluding that “the exclusionary rule is inapplicable to the DMV administrative proceedings” where motorist who was driving under the influence was stopped based on outdated police information indicating vehicle he was driving was stolen)...

Fishbein, 743 A.2d at 1117 (concluding that “failure to comply with the requirements for a criminal prosecution as they apply to investigatory stops should not prevent suspension of license of a person arrested upon probable cause to believe that he was operating under the influence of intoxicating liquor”)...

Riche v. Dir. of Revenue, 987 S.W.2d 331, 334–35 (Mo.1999) (declining to apply exclusionary rule to administrative license suspension hearing to exclude evidence of intoxication even though evidence gathered after initial stop that was unsupported by probable cause)...

Miller v. Toler, 729 S.E.2d 144-45.

The *Toler* Court concluded:

Therefore, it logically follows that if the exclusionary rule does not act to prohibit introduction of evidence in a criminal matter when law

enforcement officers are acting in good faith under binding appellate precedent then neither should the exclusionary rule be applied or extended to a civil, administrative driver's license revocation or suspension proceeding where police misconduct is not at issue. Because the exclusionary rule is only meant to deter police misconduct, its application in the instant case would be completely unjustified.

729 S.E.2d 144.

In *Miller v. Smith, supra*, although this Court prudently avoided “elaborat[ing] upon what the lawful arrest language in the 2010 statute would have required under the facts of this particular case,” (fn. 8), its discussion of the exclusionary rule leaves no doubt that its application to civil license revocation cases is inappropriate, regardless of the legitimacy of the stop. Therefore, it applies in the present case.

The lower court applied an exclusionary rule concept to invalidate the civil administrative license revocation based upon the existence of the improper traffic stop. In syllabus point three of *Miller v. Toler*, — W.Va. —, 729 S.E.2d 137 (2012), this Court held that “[t]he judicially-created exclusionary rule is not applicable in a civil, administrative driver's license revocation or suspension proceeding.”^[footnote omitted] Thus, the validity of an underlying traffic stop is relevant to a determination of criminal punishment, rather than to civil administrative license revocation.

729 S.E.2d 806.

This Court’s discussion of *Clower, supra* and the 2004 statute, which included “lawful arrest” language, was necessary because the circuit court in *Smith* had retroactively applied the 2010 statute to a case governed by the 2008 statute.

Reliance upon *Clower* is misplaced; that decision was premised upon a 2004 version of the West Virginia Code § 17C–5A–2 which included language indicating that a lawful arrest was necessary.^[footnote omitted] See also *Cain v. West Virginia Div. of Motor Vehicles*, 225 W.Va. 467,

471 n. 11, 694 S.E.2d 309, 313 n. 11 (2010) (noting the distinction among versions of the statute and explaining that “[t]he current version of this statute [2008 version] no longer requires an arrest. Instead, the second finding that must be established is that a person committed a DUI offense.”).

729 S.E.2d 806 -807.

Although this Court noted the *Clower, supra* and *Cain v. West Virginia Div. Of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010) cases because they noted the distinctions among the 2004, 2008 and 2010 statutes and the ephemeral presence of “lawful arrest” language therein, a careful reading of *Smith* clearly shows that the various amendments are of no moment: the evidence of a person’s intoxication cannot be suppressed in a civil hearing. The aforementioned *Clower/Cain* discussion was immediately followed with a cite from the Court of Appeals of New Mexico, which “explained the distinction”:

The plain language of the statute says nothing about the preliminary traffic stop: Thus, even assuming that an officer did not have reasonable suspicion to stop the driver's vehicle, the statute states that revocation of a driver's license will be upheld as long as the officer had reasonable grounds to believe the driver was DWI and the other three elements are satisfied [arrest, timely hearing, and refusal of blood alcohol testing or a specified blood alcohol concentration].

Glynn v. New Mexico, 149 N.M. 518, 252 P.3d 742, 747 (App.2011).

729 S.E.2d 807.

The *Smith* Court held:

The New Mexico court in *Glynn*, like this Court in *Toler*, found that the exclusionary rule does not apply to civil license revocation proceedings and explained that “[i]f the exclusionary rule does not apply to the proceedings, then the authority of the [Motor Vehicle Division] to consider the legality of a stop is irrelevant because the evidence would be admitted regardless of the legality of the stop.” *Id.* Likewise, this Court finds that the issue of whether the initial traffic

stop was legally deficient in some regard is relevant only in the criminal context.

729 S.E.2d 807.

The *Smith* Court concluded:

The exclusionary rule is only applicable in the criminal context and “excludes evidence of the illegal stop from the *criminal* DWI proceeding, thereby preventing the loss of the driver's liberty interest and deterring future police misconduct.” *Glynn*, 252 P.3d at 750 (emphasis supplied). Within the separate *civil* context, however, the “driver nonetheless loses his or her driver's license in order to temporarily remove the driver from the roads of the state if the police officer had reasonable grounds to believe the driver was [DUI] and if the other elements necessary for revocation are met.” *Id.* No inconsistency exists in that dual approach to processing a driver under these circumstances.

In the instant case, the reason that Respondent was *stopped* was because he disregarded a traffic signal. The reason he was *arrested* was that he exhibited indicia of intoxication. The arrest occurred after Respondent ceased driving and only after there were reasonable grounds for the investigating officer to believe that Respondent was DUI. The arrest was lawful not because of the nature of how the investigating officer came to encounter Respondent but because Respondent had the odor of alcohol on his breath; his eyes were bloodshot; he admitted drinking "five beers"; Respondent failed the horizontal gaze nystagmus test, the walk-and-turn, and the one-leg stand tests; he failed the preliminary breath test with a blood alcohol content of .12.

Statutorily, more would be required than the repetition of "lawful arrest" from W. Va. Code § 17C-5-4 in §17C-5A-2 in order to make the exclusionary rule apply here and to prove an escape mechanism from protecting the innocent public from drunk drivers. The rationale in *Smith* and *Toler* makes clear that *Clower* must be overruled.

CONCLUSION

For the above reasons, this Court should reverse the Order of the circuit court.

Respectfully submitted,

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NO. 12-1509

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner Below, Petitioner,

v.

CHAD DOYLE,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Petitioner's Brief* was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 22nd day of March, 2013, addressed as follows:

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