

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHAD R. CLOWER,

Appellee/Petitioner Below,

v.

Case No.: 34329

WEST VIRGINIA DEPARTMENT OF MOTOR  
VEHICLES, JOSEPH CICCHIRILLO, COMMISSIONER,

Appellant/Respondent Below.

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FROM THE CIRCUIT COURT OF HAMPSHIRE COUNTY, WEST VIRGINIA

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APPELLEE'S RESPONSE TO BRIEF OF APPELLANT

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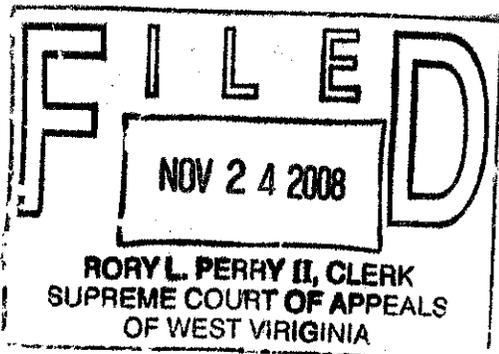


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## I. STATEMENT OF THE CASE

Appellant's statement of the case is accurate as far as it goes and is adopted herein and incorporated by reference. The omissions will be addressed in Appellee's argument.

## II. APPELLANT ERRORS

A. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT REASONABLE SUSPICION FOR A STOP IS A REQUISITE TO DETERMINATION THAT APPELLEE WAS DRIVING UNDER THE INFLUENCE, AS THE LEGISLATURE, BY THE USE OF "LAWFUL ARREST," "LAWFULLY TAKEN INTO CUSTODY," AND "REASONABLE GROUNDS" CLEARLY INTENDED THE SEARCH AND SEIZURE PROTECTION OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS TO APPLY TO DUI LICENSE REVOCATION HEARINGS.

IN ADDITION, REGARDLESS OF LEGISLATIVE INTENT, DUE PROCESS AND OTHER CONSTITUTION PROVISIONS REQUIRES SUCH PROTECTION.

B. THE CIRCUIT COURT REASONABLY CONCLUDED THAT THERE WAS NO REASONABLE SUSPICION FOR THE STOP AS THE RECORD CLEARLY SHOWS THAT NO TRAFFIC WAS AFFECTED BY THE FAILURE OF THE APPELLEE TO USE HIS TURN SIGNAL IN MAKING A TURN.

### III. POINTS AND AUTHORITIES

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## V. ARGUMENT

### A. APPLICATION OF THE SEARCH AND SEIZURE PROTECTIONS OF THE WEST VIRGINIA AND UNITED STATES CONSTITUTION TO ADMINISTRATIVE LICENSE REVOCATION HEARINGS IS REQUIRED UNDER WEST VIRGINIA LAW.

One of the key issues in this case is whether the legislature intended the search and seizure protections of the West Virginia and United States Constitutions to apply to license registration proceedings. It did! Indeed, throughout the statute the legislative intent to apply the Fourth Amendment to license revocations hearings is clear. Before the Commissioner can revoke a driver's license, *West Virginia Code* §17C-5A-2(e) (2004) requires him to "make specific findings" as to:

"(1) Whether the arresting 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 alcoholic concentration in the person's blood of ten 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 weight, but less than ten 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; and (3) 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."

(Emphasis supplied).

In addition, with respect to breath tests, in pertinent part, *West Virginia Code* §17C-5-4 (2001) states,

"A preliminary breath analysis may be administered in accordance with the provisions of section five [§17C-5-5] of this article whenever a law-enforcement officer has reasonable cause to

believe a person to have committed an offense prohibited by section two [§17C-5-2] of this article or by an ordinance of a municipality of this state which has the same elements as an offense described in said section two of this article. A secondary test of blood, breath or urine shall be incidental to a lawful arrest and shall be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person to have 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 said section two of this article.”

(Emphasis supplied).

Also, in pertinent part, *West Virginia Code* §17C-5-5 (1983) states,

“When a law-enforcement officer has reason to believe a person has committed an offense prohibited by section two [§17C-5-2] of this article or by an ordinance of a municipality of this State which has the same elements as an offense described in said section two of this article, the law-enforcement officer may require such person to submit to a preliminary breath analysis for purpose of determining such person’s blood alcohol content. Such breath analysis must be administered as soon as possible after the law-enforcement officer has a reasonable belief that the person has been driving while under the influence of alcohol, controlled substances or drugs.”

(Emphasis supplied).

The above statutory language emphasizes the legislature’s intent to apply Fourth Amendment protection to administrative hearings. What else can “lawful arrest,” “lawfully taken into custody,” or “reasonable grounds” mean other than a legislative intent to apply the Fourth Amendment to DUI license revocation hearings? Indeed, based on the language in *West Virginia Code* §17C-5A-4 (1983), quoted above, it is not even a matter of applying the exclusionary rule but a jurisdictional prerequisite to revocation. In *Illinois v. Krueger*, 208 Ill, App. 3d 897; 567 N. E. 2d 717 (1991), the court ruled that the requirement that a person be “under arrest” was

sufficient to warrant the application of Fourth Amendment protection.

The court also noted that:

“Although the state characterizes the issue in this case as to whether to apply the exclusionary rule to a civil suspension proceeding, we believe that the real question before us is whether the statute affirmatively authorizes the Secretary of State to suspend a motorist’s license on the basis of a search which is the product of an unauthorized arrest. The Secretary’s power to impose a summary license suspension is derived from the statute and we decline to read the statute as, in effect, authorization, unconstitutional arrest, searches, and the imposition of new deprivations on those unconstitutional arrest or searches.”

*Krueger*, at 904-905.

Likewise, the Supreme Court of Oregon in *Pooler v. Motor Vehicles Division*, 306 Ore. 47; 755 P. 2d 701 (1988) ruled that the legislature intended a valid arrest when it required a person be “under arrest” prior to the administration of a secondary chemical test, and thus, applied the search and seizure protection to license revocation hearings. See also *Gallagher v. Secretary of State*, Mich. App. 269; 229 N. W. 2d 410; 1975 Mich. App. LEXIS 1343 (1975) affirmed, *Michigan v. Borchard*, 460 Mich. 278; 597 N. W. 2011; 1999 Mich. LEXIS 1866 (1999).

Ohio courts also apply search and seizure protection to administrative hearings based on the following statutory language. “Whether law enforcement had reasonable grounds to believe the arrested person was operating a vehicle. . . and whether he was placed under arrest.” See *Williams v. Ohio Bureau of Motor Vehicles*, 62 Ohio Misc. 2d 741; 610 N. E. 2d 1229 (1992); *Watford v. Bureau of Motor Vehicles*, 110 Ohio App. 3d 499; 674 N. E. 2d 776 (1996).

Note that the statutes in the above cases did not even require a *lawful* arrest. Noteworthy,

in *Holland v. Parker*, 354 F. Supp. 196; 1973 U. S. Dist. LEXIS 14903 (D. S. D. 1973), the court held that South Dakota implied consent law was invalid because it did not require a lawful arrest. Many states with only the arrest or reasonable grounds language still apply search and seizure protection to license revocation hearings.<sup>1</sup> (See Appendix 1).

As far as we can determine, there isn't *any* state with a statute like West Virginia's that doesn't apply search and seizure protection to license revocation hearings. For instance, the Alabama statutes requires a lawful arrest. The courts in that state repeatedly hold that search and seizure protections apply to license revocation hearings. See: *Ex parte Love*, 513 So. 2d 24; 1987 Ala. LEXIS 4343 (Ala. 1987); *Director of Dept. of Public Safety v. Goodwin*, 587 So. 2d 404; 1991 Ala. Civ. App. LEXIS 469 (Ala. 1991); *Parks v. Director*, 592 So. 2d 1066; 1992 Ala. Civ. App. LEXIS 5 (Ala. 1992). The Idaho DUI statute requires "legal cause" for the stop, and the exclusionary rule applies. See *In re Kane*, 139 Idaho 586; 83 P. 3d 130 (Ct. App. 2003); *In re Deen*, 131 Idaho 435; 958 P. 2d 592 (1998). The lawful arrest language is so self evident that the issue is usually not litigated. Here, the Commissioner has adopted a rogue position. It's also an untenable one.

The Appellant cites numerous out of state cases in support of its position. However, none require the person to be "lawfully taken into custody" or "lawfully arrested." (See Appendix 2). The critical inquiry in states that disfavor application of search and seizure protection to administrative cases is whether the legislature intended that doctrine to apply. In each of the cases relied upon by the Appellee, the Supreme Court of each state analyzed the specific statute

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<sup>1</sup>Note, in a number of states the criminal courts have jurisdiction over DUI license revocations. All of these states, of course, apply the exclusionary rule.

which provides the applicable DMV jurisdiction. Because those states do *not* have the requirement that the custody or arrest be lawful, each court cited by Appellee that support its position ultimately concluded that the legislature did not intend to extend such protection to license revocation hearings.

For example, Appellant relies heavily on the Supreme Court of Arizona's decision in *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 203 Ariz. 326; 54 P.3d 355 (Ariz App. Div. 2 2002) in its analysis. The Arizona Supreme Court expressly noted in that case that "... the legislature apparently intended such hearings to narrowly focus, inter alia, on whether the law enforcement officer 'had reasonable grounds to believe' that the motorist had been driving while under the influence of alcohol or drugs, regardless of the circumstances of the underlying stop." *Id.* at 333. The Court also noted the importance of the statutory language in stating, "[a]s MVD points out, this court stated in *Owen*: 'There is no requirement under the implied consent statute that the arrest be a valid arrest or that [the arrestee] be convicted for the offense.'" *Id.* at 333 citing *Owen v. Creedon*, 170 Ariz. 511, 826 P2d. 808 (App.1992).

Thus, contrary to what Appellant claims, the statutory framework in *Tornabene* is not substantially similar to West Virginia. West Virginia, unlike Arizona and *all* states cited by Appellant for that matter, requires that the individual be "*lawfully* taken into custody," or "*lawfully* arrested."<sup>2</sup> The statute in the other case upon which the Commissioner principally relies, i.e., *Nevers v. State Dept. of Admin.*, 123 P. 3d 958; 2005 Alas. LEXIS 149 (2005), doesn't

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<sup>2</sup>As the Commissioner has established in his brief, f. n. 5, the Arizona statute only requires the person to be "placed under arrest."

even require an arrest, lawful or otherwise.<sup>3</sup>

Appellant also improperly cites Nebraska, Iowa and Minnesota in support of its case. In fact, Nebraska and Iowa *support* the application of search and seizure protection to administrative hearings, despite the absence of statutory language requiring each state to do so.

For instance, Nebraska's legislature elected to apply the exclusionary rule indirectly to administrative hearings by making an administrative sanction for DUI contingent upon successful criminal prosecution for DUI. See Neb. Rev. Stat. §60-6, 206(4) (Reissue 1998). So, if a person successfully defends their criminal sanction for DUI in Nebraska, the Commissioner "shall have all proceedings dismissed or his or her operator's license immediately reinstated . . . upon receipt of suitable evidence by the director that . . . b) the charge was dismissed, or c) the defendant, at trial, was found not guilty of violating such law." *Id.* Although the Commissioner does not directly apply the exclusionary rule in Nebraska in administrative hearings, illegally obtained evidence will be completely barred via the statutory framework cited above. "Ultimately, the risk of erroneous deprivation is minimized by the fact that any legitimately dispositive Fourth Amendment argument will ultimately be validated in the criminal proceeding

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<sup>3</sup>In pertinent part, the Alaska statute states:

"(g) The hearing for review of action by the department under AS 28.15.165 shall be *limited* to the issues of whether the law enforcement officer had probable cause to believe that the person was operating a motor vehicle or commercial motor vehicle that was involved in an accident causing death or serious physical injury to another, or that the person was operating a motor vehicle, commercial motor vehicle, or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance in violation of AS 28.33.030 or AS 28.35.030 . . ."

(Emphasis supplied).

and result in the dismissal of the ALR proceeding or reinstatement of the driver's license." *Hass v. Neth*, 265 Neb. 321; 657 N.W.2d 11 (2003).

Likewise, Iowa maintains a similar statute which requires the DOT to reinstate a driver's privileges to operate a motor vehicle upon a finding by a criminal court that the arrest was unlawful. The Iowa Supreme Court in *Brownsberger v. DOT*, 460 N.W.2d 449; 1990 Iowa Sup. LEXIS 208 (1990) held that Iowa Code section 321J13(4) (1989), which requires reinstatement under certain circumstances, effectively operates as a statutory exclusionary rule. Appellee cites *Manders v. Iowa DOT*, 454 N.W.2d 364; 1988 Iowa App. LEXIS 144 (1990) in its support, claiming that the exclusionary rule is not an issue to be considered by the DOT. However, in *Manders*, no criminal adjudication had yet occurred, and the safeguard statute cited above which bars evidence illegally seized was never triggered!

Finally, in administrative implied consent hearings in Minnesota, Minn. Stat. §169.123, includes in the scope of the hearing whether the peace officer has "reasonable grounds to believe" the person was operating a motor vehicle and whether that person "was lawfully placed under arrest." The Supreme Court of Minnesota has applied the exclusionary rule without exception to traffic stops in administrative license revocation proceedings. See *Ascher v. Commissioner of Public Safety*, 527 N. W. 2d 122; 1995 Minn App. LEXIS 113 (Minn. 1995) and *Olson v. Commissioner of Public Safety*, 371 N. W. 2d 552 (Minn. 1985). Thus, Respondent's reliance on *Ascher, supra* is misplaced. The appellate court decision in *Ascher* limited the application of the exclusionary rule only to drivers on probation where a term of probation is that the individual not consume alcohol.

Finally, apparently recognizing the weakness in his position, the Commissioner

gratuitously cites the statute as amended on June 7, 2008, which of course, is inapplicable herein.<sup>4</sup> Apparently, the Commissioner is trying to entice the court to interpret the new statute as eliminating search and seizure protection from license revocation hearings. As that issue is not properly before the court and has not been briefed by either party, the Appellee requests that the court decline the Commissioner's invitation.

**B. WEST VIRGINIA PRECEDENT FAVORS APPLICATION OF THE EXCLUSIONARY RULE TO ADMINISTRATIVE LICENSE REVOCATION HEARINGS**

This Court in *Muscatell v. Cline*, 196 W. Va. 588; 474 S.E.2d 518 (1996) set precedent and applied the exclusionary rule to a civil administrative license revocation proceedings. In applying the Fourth Amendment and the exclusionary rule to the legality of the traffic stop, the Court emphasized that “[i]t must be determined that the stop is not justified by mere pretext that would mock the constitutional protections to which all citizens are entitled.” *Id.* at 598. The Court went on to apply a “reasonable suspicion” standard and not a “probable cause” standard for determining the legality of the initial traffic stop. In so ruling, the Court affirmed that a traffic stop must comply with Fourth Amendment safeguards in civil license revocation hearings. See also *Carroll v. Stump*, 217 W. Va. 748; 619 S.E.2d 261 (2005) (Court relied upon lower court's finding that the arrest was lawful to address Appellee's Constitutional arguments.)

The Appellee now asks this court to revisit this longstanding rule of law in West Virginia. The Court took special precautions in *Muscatell* to specifically outline and explain the proper standard for the Commissioner to apply in his Constitutional analysis. The Court discussed at

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<sup>4</sup>The fact that this amendment came about as a result of Appellant's lobbying effort is evidence that even Appellant recognized that prior to the amendment the legislature intended to apply Fourth Amendment protection to license revocation hearings.

length the requirement that the Commissioner must find that a law enforcement officer maintain a “reasonable suspicion” that the vehicle is lawfully subject to seizure in order to sustain a drivers license revocation. Appellee’s argument that the court in *Muscatell* never specifically addressed the applicability of the exclusionary rule is unfounded, and consequently, precedential value must be accorded to that decision.

The Respondent implies that West Virginia has found that the exclusionary rule inapplicable to civil cases through its holding in *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155; 451 S.E.2d 721 (1994), a decision delivered by this Court two years prior to *Muscatell*. The holding in *Madden* is limited to circumstances where “once a witness chooses to testify and raises an issue that contradicts the illegally obtained evidence, the illegally obtained evidence may then be admitted for impeachment purposes only.” *Id.* at 163. The court in *Madden* went on to emphasize that “we decline to rule on a general question concerning the applicability of the exclusionary sanction outside the criminal context.” *Id.*

### C. PUBLIC POLICY FAVORS APPLICATION OF THE FOURTH AMENDMENT

Even if the legislative intent had not been so clear, public policy would still favor application of the Fourth Amendment to DMV license revocation hearings.

This court has held that, “A driver’s license is a property interest and such interest is entitled to protection under the Due Process Clause of the WV Constitution.” *Abshire v. Cline*, 103 W. Va. 180; 455 S.E.2d 549 (1995); *Dolin v. Roberts*, 173 W. Va. 443; 317 S. E. 2d 802 (1984). Generally, the Fourth Amendment applies to all governmental action, including civil as well as criminal actions. The “basic purpose of this Amendment. . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” If the

government intrudes on a person's property, the privacy interest suffers, whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall v. Barlow's, Inc.*, 436 U. S. 307; 56 L. Ed. 2d 305; 98 S. Ct. 1816 (1978).

True, if the Appellant's position is adopted, a driver's constitutional rights would be without a remedy.

The exclusionary rule acts as the teeth to the Fourth Amendment, ensuring that evidence gathered as a result of unlawful police conduct cannot be used for any reason where Fourth Amendment protection applies.

Consequently, the rationale for application of search and seizure protection to civil license revocation proceedings is centered around protecting citizens from unlawful police conduct. The concern for official misconduct is tantamount. Removal of the exclusionary rule would permit law enforcement officers to establish illegal checkpoints and roadblocks in hopes of charging driver's with DUI license suspensions. It would also provide incentive to law enforcement officer's to conduct random, arbitrary stops for license revocation purposes. Allowing unlawfully obtained evidence into administrative hearings would encourage disregard for the Constitutional limits of a legal stop.

The Appellee argues that the deterrent effect is sufficiently strong in the criminal context so as to relieve the necessity for application of the exclusionary rule to civil hearings. However, as stated by the Court in *State v. Lussier*, 171 Vt. 19; 57 A.2d 1017 (2000), "in both the civil and criminal cases, license revocation is often the most longstanding and significant sanction imposed on the defendants.

Law enforcement would still have incentive, despite a criminal dismissal, to illegally stop drivers for a variety of reasons.

Racial profiling is one.

DUI overtime grants are another. Under such grants, if officers do not make a sufficient amount of arrests, they are removed from the program. The appearance rate of officers at DMV hearings is also a consideration in awarding grants. Similarly, a law enforcement agency as a whole, must make a sufficient number of DUI stops in order to continue to receive DUI overtime grants. Many sobriety checkpoints are financed through DUI overtime grants.

In other words, both individual officers and law enforcement agencies will have a financial incentive to ignore the Fourth Amendment. Stops based on pretext will increase substantially. Indeed, the undersigned has already had to defend drivers in DMV revocation hearings who have been stopped in ad hoc checkpoints set up by one or two officers.

Consider the fact that law officers routinely stake out local bars. Regardless of whether or not this is a good practice, under the above circumstances, arbitrary or suspicionless stops are almost certain to increase. While most officers are honest professionals, there are those who will seek to have licenses revoked for vindictive or other improper reasons. Some will use it as an opportunity to get back at their spouses in domestic dispute or divorces.<sup>5</sup> In addition, warrantless entry into homes are likely to increase.

Moreover, prestige and promotion in law enforcement agencies are, at least in part, based on the number of DUI stops and license revocations. Thus, there will be an additional incentive for both individual officers and law enforcement agencies to pad their arrest and revocation rates

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<sup>5</sup>The situation involving Lynn Ranson comes to mind.

through suspicionless or arbitrary stops.<sup>6</sup>

Moreover, the exclusionary rule is applicable in such a small amount of cases that its application would allow few, if any, impaired drivers to return to the roads after an arrest. In fact, if law enforcement operates within the minimum boundaries of the Fourth Amendment, the exclusionary rule will have no adverse impact on public safety. Indeed, the Appellant has offered no evidence to suggest that removing the exclusionary rule from administrative hearings would have a deterrent effect on drunk driving; nor has Appellant shown that the application of search and seizure protection to license revocation hearings up to the present time has hampered law enforcement in any way.

Instead, the Appellant argues that application of the exclusionary rule will unnecessarily complicate and lengthen the proceeding. No evidence has been offered to suggest or establish how application of the exclusionary rule burdens or delays the system.<sup>7</sup> The Supreme Court in

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<sup>6</sup>A front page article in Thursday's, November 20, 2008, Daily Mail underscores this problem. The article quotes a recent survey by the state Legislature Auditor's Office which "found that a number of troopers--23 percent--said they operated under an unofficial quota of 'contacts' with the public." It quotes some troopers saying that, "if they didn't reach that number [100 contacts per month], they were written up and that could jeopardize any future promotion." A Maryland lawyer for the Fraternal Order of Police said that, ". . . quotas can make some officers over zealous to arrest people or issue citations and can cloud their discretion." (A copy of the article is enclosed in Appendix 3 as Exhibit A).

<sup>7</sup>The Division of Motor Vehicles currently conducts administrative hearings in such a fashion that application of the Fourth Amendment in no way complicates or burdens the hearing. Administrative hearings are routinely scheduled to last less than one hour in duration and hearing officers will almost never allow them to exceed that time. Prior to any testimony offered, all documents supporting the officer's case are swiftly admitted into evidence absent any foundation and made part of the record. These documents include the DUI Information Sheet, which contains all of the officer's hearsay observations regarding his investigation, including breath test results and field sobriety test scores. All defense objections are overruled. The testimony of expert witnesses are routinely ignored. The hearing examiner takes judicial notice that the officer was trained to administer the preliminary and secondary breath test and asks the officer if

Vermont noted “[o]f all the issues litigated in civil suspension proceedings, perhaps the easiest and least time consuming is whether the stop was based on reasonable suspicion of unlawful activity.” *Lussier* at 12.

Up until this case, over many years, the Appellant has interpreted the statute to require search and seizure protection to license revocation hearings without any discernable burden on license revocation hearings. Indeed, it applied it in this case. While, as can be seen below, in his final order the Commissioner provided a dubious rationale for his conclusion, he found as a matter of law that there was reasonable suspicion for the stop of Clower’s automobile. It wasn’t until the Circuit Court overturned that finding on appeal, that the Commissioner said, oops, on second thought, search and seizure protection is not applicable to our hearings. Thus, the Commissioner abruptly and arbitrarily reverses a long standing interpretation of its statute.

Even if application of the Fourth Amendment had some minimal impact on the length of the hearing, application of the Fourth Amendment is a small price to pay to protect citizens from unlawful government conduct. As stated in *Lussier*, “we conclude that it is appropriate to apply the exclusionary rule in civil license revocation suspension proceedings to protect the core value

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he has anything to add to all the evidence previously submitted. Hearing examiners are provided a list of twelve questions that they must ask the officer prior to the conclusion of the hearing if not offered either in the documents submitted or through testimony, one of which is whether reasonable grounds existed for the traffic stop. Mirroring the language of the statute, question number three requires the hearing examiner to ask the officer, “[w]hether there was a lawful reason for the officer to stop or otherwise encounter the person.” (See DUI Hearing Information Sheet included in Appendix 3 as Exhibit B). Indeed, the nature of the DMV’s telescoped hearings already raises serious questions of due process and fundamental fairness. In fact, at least one circuit judge has concluded that the policies and procedures implemented by DMV’s legal staff and applied to administrative hearings are fatally flawed and deny respondents due process. See *McCormick v. West Virginia Department of Transportation*, C. A. #08-AA-01 (2008), a copy of which is included in Appendix 3 As Exhibit C.

of privacy embraced in Article 11, to promote the public's trust in the judicial system, and to assure that unlawful police conduct is not encouraged." 171 Vt. 29

In sum, in creating administrative hearings, the legislature never intended to abrogate an individual's Constitutional rights. As outlined above, *West Virginia Code* §17C-5A-2 (2004) specifically requires the Commissioner to make specific findings as to whether the "officer had reasonable grounds to believe the person to have been driving while under the influence of alcohol," whether the person was "lawfully arrested," and whether he was "lawfully taken into custody." Likewise, the admission of secondary chemical test results are contingent on the showing of a "lawful arrest" by an officer "having reasonable grounds to believe the person has committed an offense prohibited by [17C-5-2]" as outlined in *W. Va.* §17C-5-4.

**D. APPLICATION OF THE FOURTH AMENDMENT IS CRITICAL TO PROTECT  
AGAINST POLICE MISCONDUCT.**

Lastly, Appellee urges this court to circumvent the legislature's intent in requiring that an arrest be "lawful" and the person be "lawfully taken into custody" by applying a balancing test to determine the deterrent effect as opposed to cost to public safety. For the reasons set forth above, such a test is not required, nor authorized, by our legislature. Even if a balancing test were utilized, the Appellee has offered no evidence to suggest that precluding the requirement that an arrest be lawful would somehow protect the public.

However, as also noted above, the potential for government abuse is immense. Law enforcement could set up illegal government checkpoints in poor, rural areas, notoriously populated by minorities, with the goal of revoking the driving privileges of those stopped without sanction. Law enforcement could also legally target social gatherings, restaurants, or bars in an

effort to initiate traffic stops on drivers for no other reason than to harass its patrons with the threat of a loss of license.

If police simply abide by the minimal requirements of the Fourth Amendment, the public will be at no greater threat with the inclusion of the exclusionary rule to administrative hearings. Failure to require a person be lawfully arrested opens the door for grave abuse of government power. As Benjamin Franklin once noted, “those who would give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.”

E. THE CIRCUIT COURT PROPERLY HELD THAT THERE WAS REASONABLE SUSPICION FOR THE STOP OF APPELLEE’S VEHICLE.

In the Commissioner’s final order, he applies the search and seizure protection to this case but in his conclusions of law found that, “[t]he Arresting Officer had reasonable grounds to stop and probable cause to arrest the Respondent.” Final Order (F. O.), at 7 and certified record (C. R.), at 0041.

The Commissioner’s reasoning was as follows:

“The Respondent’s argument is expressly rejected based upon the following discussion. Whether or not traffic was impeded by the Respondent’s failure to use a turn signal is not sufficient, in and of itself, for the Commissioner to determine that probable cause did not exist to initiate a traffic stop of the Respondent’s vehicle. Counsel for the Respondent has taken liberty with his interpretation of the statutory language as it appears in Respondent’s Exhibit 1, whereby he argues that the law does not absolutely require one to give a turn signal every time. *West Virginia Code* §17C-8-8(a) clearly states, in relevant part, ‘. . . No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.’ Therefore, *West Virginia Code* §17C--8-8(a) does not create an exception to *West Virginia*

*Code §17C-8-9*,<sup>8</sup> upon which the Arresting Officer based his statutory authority to make the traffic stop, whereby the Respondent would be excused from using a turn signal simply because traffic was unaffected by his failure to do so. Additionally, whether the Arresting Officer was within two blocks or two car lengths of the Respondent's vehicle when he observed the Respondent's failure to signal his intentions to execute the right turn from U. S. 50 onto Bolton Street or whether he immediately effected the traffic stop after the Respondent's vehicle turn is of no consequence in the matter."

F. O. 6, C. R. 0040.

With all due respect to the Commissioner, his rationale makes no sense. Here, the Commissioner does not even try to claim that it does not make any difference if traffic was affected or not.

Nevertheless arguing that traffic was affected, the Commissioner now selectively quotes the officer's testimony after he had been shown the statute by Clower's counsel with the language requiring traffic to be affected. At that point, the officer tried to back track from his earlier testimony. Indeed, he directly contradicted it. Judge Cookman, as would any objective fact finder, readily discerned that the officer's later testimony was simply not credible. Before being confronted with the statute, in pertinent part, the officer testified as follows:

Tpr. Kessel: I was approximately two city blocks from him when, I was coming through the stop light.  
Mr. Riley: Okay. So, he was two blocks ahead of you?  
Tpr. Kessel: Approximately, yes.

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<sup>8</sup>§17C-8-9. Signals to be given by hand and arm or signal device.

Any stop or turn signal when required herein shall be given either by means of the hand and arm or by a signal lamp or lamps or mechanical signal device, but when a vehicle is so constructed or loaded that hand-and-arm signal would not be visible both to the front and rear of such vehicle then said signals must be given by such a lamp or lamps or signal device. (1951, c. 129.)

Mr. Riley: And then you were just looking forward as you were driving the vehicle and happen to see a vehicle in front of you.

Tpr. Kessel: That's correct.

Mr. Riley: No particular reason to observe it or concentrate on it?

Tpr. Kessel: No, I was just traveling, actually I think I was en route to my office.

Mr. Riley: Okay. And you probably would've turned down Bolton yourself to go to go back to the barracks?

Tpr. Kessel: That's my usual course of travel.

Mr. Riley: So, you're about *two blocks* behind him and then you see him turn right?

Tpr. Kessel: That's correct.

Mr. Riley: Onto northbound?

Tpr. Kessel: Yes.

Mr. Riley: All right. And was there, was there anything to obstruct your vision between your car and his car?

Tpr. Kessel: Actually no, my vehicle and his vehicle was the only vehicles I noticed in that course of roadway at that time.

Mr. Riley: Okay. Nobody pulling out of Bolton Street?

Tpr. Kessel: Not that I seen, no.

Mr. Riley: Okay. And nobody coming from the west, say from the direction of the Dairy Queen toward the stop light, nobody, no oncoming traffic?

Tpr. Kessel: Not that I can recall, no.

Mr. Riley: Okay. All right. And then you noticed the vehicle turn right onto Bolton?

Tpr. Kessel: That's correct.

Mr. Riley: And you did not observe that vehicle to give a signal light?

Tpr. Kessel: That's correct.

Mr. Riley: Okay. And you had a clear view of it for *two blocks away*?

Tpr. Kessel: That's correct.

Mr. Riley: And you had tail lights on, I assume?

Tpr. Kessel: That's correct, yes.

Mr. Riley: Okay. You just didn't, you can watch the vehicle, you didn't see the, the right light blink as it should for a turn signal?

Tpr. Kessel: Prior to turning, yes.

Mr. Riley: Do you know whether or not that light was

operational?  
Tpr. Kessel: No, I do not.  
Mr. Riley: Okay. In any event, your testimony is you didn't see a signal?  
Tpr. Kessel: That's correct.  
Mr. Riley: Okay. Now, and there's no other cars on the road except yours and his and in that, the whole vicinity?  
Tpr. Kessel: That's correct. That I can recall.

(Tr. 21-23, C. R. 0180-0182).

Obviously, even the hearing examiner did not believe the officer's subsequent testimony, otherwise he would not have used such convoluted reasoning in upholding the stop.

Moreover, under extensive cross examination, the officer backtracked again and admitted he was at least a block away when Clower made his turn. (Tr. 33, C. R. 0192). Simply put, his testimony that he was affected by Clower's failure to use his turn signal was not believable and the Circuit Judge properly found that it was not.

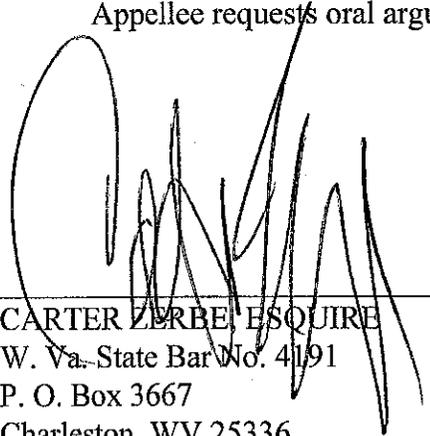
#### VI. CONCLUSION

For the foregoing reasons, the Appellee respectfully requests this honorable court to affirm the decision of the court below.

Appellee requests oral argument in this case.

CHAD CLOWER

By Counsel



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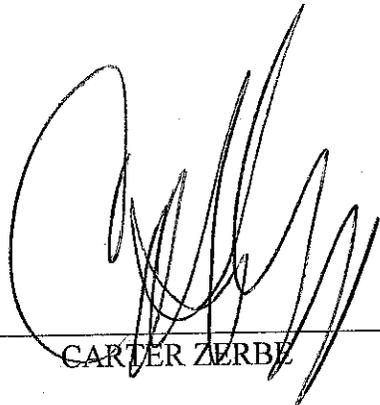
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**CERTIFICATE OF SERVICE**

I, Carter Zerbe, counsel for Appellee, do hereby certify that I have served a true and exact copy of the foregoing APPELLEE'S RESPONSE TO BRIEF OF APPELLANT and APPELLE'S MOTION TO EXCEED FIFTY PAGES by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to:

Janet James, Asst. Attorney General  
Office of the Attorney General  
State Capitol Complex  
Bldg. 1 Room W435  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

on this the 21<sup>st</sup> day of November 2008.



CARTER ZERBE

**EXHIBITS**  
**ON**  
**FILE IN THE**  
**CLERK'S OFFICE**