

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO.: 11-0519

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SUPREME COURT OF APPEALS
WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

v.

FELONY NO. 07-F-183

BRIAN JOHN STONE, Defendant Below,
Petitioner

REPLY MEMORANDUM ON
BEHALF OF BRIAN JOHN STONE

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I. ARGUMENT OF LAW

A. The Circuit Court Violated the Petitioner's Fifth Amendment Rights When It Imposed Multiple Punishments Upon Him for a Single Criminal Offense.

In his Petition for Appeal, the Petitioner, Brian J. Stone asserted that his right against double jeopardy as guaranteed by the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution was violated by the Circuit Court of Monongalia County. Particularly, he argued that his state and federal constitutional rights were violated when the circuit court imposed 12 separate punishments upon him pursuant to West Virginia Code §§ 17C-4-1(a) and (b) for leaving the scene of a single vehicular accident. In addressing this issue, the Petitioner: (1) reasserts the constitutional standards relating to double jeopardy; (2) examines the legislative intent and purpose regarding West Virginia Code § 17C-4-1, as well as the requirements of the rule of lenity; and (3) addresses and refutes the arguments advanced by the State of West Virginia.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits the federal government and state governments from placing a defendant "in jeopardy of life or limb" for the same offense twice. It has been consistently recognized that the Double Jeopardy Clause of the Fifth Amendment provides the following safeguards: "[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S. Ct. 2536, 2540 (1984) (quoting *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977), quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969)). The Fifth Amendment's

protection against double jeopardy is made applicable to the states by virtue of the Fourteenth Amendment of the United States Constitution. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056 (1969).

As this Court has observed: "if there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529, 530 (1977) quoting *Ex parte Lange*, 18 Wall. 163, 168, 85 U.S. 163, 168 (1874). The proscription against duplicative or multiple punishments serves to protect criminal defendants from unjust sentences, it promotes consistency in sentencing, and it properly confines a trial court's sentencing authority to what is established by the legislature. As the United States Supreme Court has explained, the latter of these is constitutionally mandated, because "the substantive power to prescribe crimes and determine punishments is vested with the legislature." *Ohio v. Johnson*, 467 U.S. at 499, 104 S. Ct. at 2540-41.

In the present case, the offense in issue is leaving the scene of a vehicular accident. See W. Va. Code § 17C-4-1. The West Virginia Legislature has determined that any driver involved in an accident has a duty to remain at the scene and fulfill certain statutory requirements. See W. Va. Code § 17C-4-3. It is the act of leaving the scene of an accident that constitutes a criminal offense.¹ Thus, it is logical to assume that an individual who leaves the scene of a single accident can only be convicted and sentenced on one count of leaving the scene of an accident. The Petitioner was

¹ As discussed herein, West Virginia Code § 17C-4-1 is not intended to punish a driver for causing the death of another through some intentional or reckless act. For example, a person could be charged under this statute if he is driving lawfully and hits a pedestrian who unexpectedly enters the highway if he does not stop at the scene and fulfill the requirements of the statute.

convicted of and sentenced on 12 separate counts of leaving the scene of an accident. This result is not only illogical, it is unconstitutional.

This Court has not had the opportunity to address the precise issue presented here -- whether the circuit court violated the Petitioner's constitutional rights when it imposed multiple punishments on him for a single violation of West Virginia Code § 17C-4-1(a)² arising out of a single vehicular accident. As stated in the Petition for Appeal, this is not a typical *Blockburger*³ question, because the issue presented is not whether the Petitioner can be charged and sentenced under two separate criminal statutes for a single act or transaction. Rather, the issue is whether multiple charges and punishments under West Virginia Code § 17C-4-1 are contemplated for a single act or transaction committed by a defendant. The Petitioner contends that the statute does not allow a circuit court to impose multiple punishments on a defendant who leaves the scene of one accident, regardless of the number of people injured or killed.

The *Myers* Court found that a double jeopardy challenge regarding multiple punishments requires the reviewing court to examine the intent of the Legislature. *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982). "[A] court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes." Syl. Pt. 8, in part, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992).

² The Petitioner is mindful that five counts were brought pursuant to West Virginia Code § 17C-4-1(a) and seven were brought pursuant to West Virginia Code § 17C-4-1(b). It is his position that, assuming the State proved its case, he can only be sentenced on one count pursuant to subsection (a).

³ This refers to *Blockburger v. U.S.*, 284 U.S. 299, 52 S. Ct. 180 (1932). Under the often cited *Blockburger* opinion: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.

Statutes that are clear or unambiguous should be construed in accordance with their common meaning, and a court should not interpret or apply a statute in a manner that defies the intent of the legislature. On the other hand, if the statute is ambiguous or the legislature's intention is not clear, then courts are required to apply the rule of lenity. *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995). The rule of lenity requires penal statutes to be "strictly construed against the State and in favor of the defendant." Syl. Pt. 5, in part, *State ex rel. Morgan v. Trent, supra*. In this case, under either analysis, the Petitioner is entitled to have eleven of the twelve sentences imposed on him for leaving the scene of an accident vacated.

In the present case, if the statute is afforded its plain meaning, it is clear that the Petitioner could only lawfully be convicted and sentenced on one count under West Virginia Code § 17C-4-1(a). West Virginia Code § 17C-4-1(a) states:

The driver of any vehicle involved in a crash resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the crash or as close to the scene as possible and return to and remain at the scene of the crash until he or she has complied with the requirements of section three of this article: *Provided*, That the driver may leave the scene of the crash as may reasonably be necessary for the purpose of rendering assistance to an injured person as required by said section three. Every such stop shall be made without obstructing traffic more than is necessary.

First, it is important to determine the act or acts the Legislature has declared to be unlawful, because that determines how the crime may be charged and ultimately how the defendant may be sentenced. It is quite obvious that the purpose of this statute is to define the act or acts of leaving the scene of an automobile accident without fulfilling certain statutory requirements as a criminal offense. Unlike West Virginia Code § 17C-

5-2(a)⁴ (DUI causing death), West Virginia Code § 17C-5-2(c)⁵ (DUI causing injury), and West Virginia Code § 17C-5-1(a)⁶ (negligent homicide), the purpose of the statute is not to punish the defendant for causing injury to or the death of another person as a result of faulty driving. Indeed, the statute, on its face, imposes the obligation to remain at the scene on all of the drivers involved in the accident, not simply the driver who may be at fault. Moreover, the duty arises before the driver who is at fault in the accident may even be established, and to obtain a conviction the State is not required to prove that

⁴ West Virginia Code § 17C-5-2(a) states: Any person who:

- (1) Drives a vehicle in this state while he or she:
 - (A) Is under the influence of alcohol;
 - (B) Is under the influence of any controlled substance;
 - (C) Is under the influence of any other drug;
 - (D) Is under the combined influence of alcohol and any controlled substance or any other drug; or
 - (E) Has an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight; and
- (2) While driving does any act forbidden by law or fails to perform any duty imposed by law in the driving of the vehicle, which act or failure proximately causes the death of any person within one year next following the act or failure; and
- (3) Commits the act or failure in reckless disregard of the safety of others and when the influence of alcohol, controlled substances or drugs is shown to be a contributing cause to the death, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than two years nor more than ten years and shall be fined not less than one thousand dollars nor more than three thousand dollars.

⁵ West Virginia Code § 17C-5-2(c) states: Any person who:

- (1) Drives a vehicle in this state while he or she:
 - (A) Is under the influence of alcohol;
 - (B) Is under the influence of any controlled substance;
 - (C) Is under the influence of any other drug;
 - (D) Is under the combined influence of alcohol and any controlled substance or any other drug; or
 - (E) Has an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight; and
- (2) While driving does any act forbidden by law or fails to perform any duty imposed by law in the driving of the vehicle, which act or failure proximately causes bodily injury to any person other than himself or herself, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than one day nor more than one year, which jail term is to include actual confinement of not less than twenty-four hours, and shall be fined not less than two hundred dollars nor more than one thousand dollars.

⁶ West Virginia Code § 17C-5-1(a) states: When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle anywhere in this state in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.

the defendant was under the influence, driving recklessly or even violated a traffic regulation. Finally, it is telling that a defendant can be convicted and sentenced for this offense and an offense intended to address the death of a person such as negligent homicide, DUI causing death, or involuntary manslaughter, because this strongly indicates that West Virginia Code § 17C-4-1 was not intended to address crimes against the person like the aforementioned provisions. In summary, when the wording of the statute itself, and these factors are considered, it is clear that this statute was intended to punish a person who leaves the scene of an accident without fulfilling certain statutory requirements, that this act can only be completed one time, and therefore, a defendant can only lawfully have one sentence imposed for committing this offense. If, on the other hand, the illegal act or unit of prosecution is not clear, the rule of lenity must be applied.⁷

As stated in the Petition, other states have addressed double jeopardy issues such as the one presented here. The majority of these courts, after examining statutes substantially similar to West Virginia Code § 17C-4-1, have concluded that a defendant may only be convicted and sentenced for one count of leaving the scene of an accident. These courts concluded that statutes such as West Virginia Code § 17C-4-1 impose a duty on a driver involved in an accident to remain at the scene and fulfill the requirements of the statute. A failure to fulfill this statutory obligation constitutes one offense regardless of the number of persons involved. For example, in *People v. Sleboda*, 166 Ill. App. 3d 42, 519 N.E.2d 512 (1988) the Illinois appellate court stated:

⁷ Multiple felony convictions under West Virginia Code § 17C-4-1 may also cause a defendant to be faced with consequences under West Virginia's Recidivist statute (W. Va. Code § 61-11-19). This provides another basis to apply the rule of lenity if it is determined that the unit of prosecution in this statute is not clear.

"We find that the statute itself indicates that an individual can only be convicted once for leaving the scene of one accident since the focus is on remaining at the scene of the accident."⁸ Likewise, in *Hoag v. State of Florida*, 511 So.2d 401, 402 (Fla. 5th DCA 1987) the Florida appellate court found: "The failure of Hoag to stop at the scene of his accident constituted but one offense although that accident resulted in injuries to four persons and the death of a fifth."⁹ A like conclusion should be reached in this case. The Petitioner could only lawfully be convicted of and sentenced for one count of leaving the scene of an accident. The multiple sentences imposed upon him by the

⁸ The Illinois statutes at issue in *Sleboda* were 625 ILCS 5/11-401(a) and 625 ILCS 5/11-403. 5/11-401(a) states: (a) The driver of any vehicle involved in a motor vehicle accident resulting in personal injury to or death of any person shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible and shall then forthwith return to, and in every event shall remain at the scene of the accident until the requirements of Section 11-403 have been fulfilled. Every such stop shall be made without obstructing traffic more than is necessary.

5/11-403 states: Duty to give information and render aid. The driver of any vehicle involved in a motor vehicle accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give the driver's name, address, registration number and owner of the vehicle the driver is operating and shall upon request and if available exhibit such driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

If none of the persons entitled to information pursuant to this Section is in condition to receive and understand such information and no police officer is present, such driver after rendering reasonable assistance shall forthwith report such motor vehicle accident at the nearest office of a duly authorized police authority, disclosing the information required by this Section.

Any person failing to comply with this Section shall be guilty of a Class A misdemeanor.

⁹ The Florida statutes at issue in *Hoag* was F.S.A. §§ 316.027(a) and (b). It states: (1)(a) The driver of any vehicle involved in a crash occurring on public or private property that results in injury of any person must immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and must remain at the scene of the crash until he or she has fulfilled the requirements of s. 316.062. Any person who willfully violates this paragraph commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) The driver of any vehicle involved in a crash occurring on public or private property that results in the death of any person must immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and must remain at the scene of the crash until he or she has fulfilled the requirements of s. 316.062. Any person who willfully violates this paragraph commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any person who willfully violates this paragraph while driving under the influence as set forth in s. 316.193(1) shall be sentenced to a mandatory minimum term of imprisonment of 2 years.

circuit court violated his Fifth Amendment right against double jeopardy. This deeply rooted constitutional right cannot be discarded because the act in issue is egregious, because a defendant is particularly distasteful, or because the State or trial court feel the statute in question does not provide an adequate punishment. Therefore, for the reasons stated above, the unconstitutional sentences imposed on the Petitioner should be set aside.

In its Response, the State concludes that the Petitioner's multiple punishments under West Virginia Code § 17C-4-1 are constitutionally sound. To support its conclusion, the State argues that *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982) applies and authorizes it to seek as many convictions under West Virginia Code § 17C-4-1 as there are people injured or killed in the accident. The State stretches the applicability of *Myers* beyond what can be reasonably and logically sustained, and it fails to recognize distinctions that can and should be drawn between the negligent or vehicular homicide statute discussed in *Myers* and the statute requiring a driver to remain at the scene of an automobile accident.

In its Response, the State makes three points that will be addressed. First, the State asserts: "Even under the *Blockburger* double jeopardy analysis, although the Petitioner can be said to have left the scene of the wreck only one time, the State would be required to prove that the death of each victim (and in Counts 20 through 26, the injury of each victim) was caused by the accident rather than something else, as pointed out in *Myers*. Therefore, each of those counts involving death or injury to separate individuals does require proof of a fact that each of the other counts does not." (State's Response, p. 5). Of course, the passage the State is referring to in *Myers* is this:

We note that evidence that proves one charge of involuntary manslaughter in this case is not sufficient to prove the second. In any case of homicide there must be proof of the identity of the deceased and the causation of death. In such a case as this, a defendant's proof that one of the victims dies of a heart attack prior to the collision would be a complete defense to the charge of involuntary manslaughter. This difference in proof between the two charges, permits multiple punishment in such a case. *State v. Myers*, 171 W. Va. 277, 280, 298 S.E.2d 813, 817 (1982).

The *Myers* Court was discussing negligent *homicide* and involuntary *manslaughter*, which are offenses, as the names imply, that constitute crimes against the person. The offense of leaving the scene of a vehicular accident is not classified in this manner. The State is not required to prove the Defendant caused the victim's death as it would have to in a prosecution for negligent homicide or involuntary manslaughter. Thus, stating that it must prove the identity of the victim as it would in a homicide prosecution is plainly wrong. The duty to remain at the scene and comply with the statute arises regardless of which driver may ultimately be found at fault for the accident. As the Court of Criminal Appeals of Alabama explained:

Just as a robber cannot be convicted separately for each item taken during a robbery, the appellant here cannot be convicted separately for each person injured and each vehicle damaged as a result of an accident of which he left the scene. The fact that several people were injured presented the state with alternative methods of proving its case, i.e., that the appellant left an accident that involved injuries to a person or damage to a vehicle. *Dake v. State*, 675 So.2d 1365, 1368 (1995).

Next, the State quotes the Wisconsin Supreme Court and asserts: "In *Myers* the West Virginia Supreme Court agreed with the Wisconsin Supreme Court when it discussed homicides resulting from drunk driving. That Wisconsin court stated that one who drives recklessly 'may well' expect to contribute to "awesome carnage" and . . .

when multiple deaths result, may expect multiple consequences." *Id.* at 279, 298 S.E.2d at 815." (State's Response, p. 5). The Petitioner does not necessarily disagree that with the sentiments of the Wisconsin court. However, he hastens to point out that West Virginia Code § 17C-4-1 is not a statute intended to address drunk driving or reckless driving. Rather, it criminalizes the act of leaving the scene of an accident before one has provided the other driver with the appropriate information or called for emergency services, if necessary. This argument by the State is a red herring, because it diverts attention from the issue raised on appeal. The Petitioner does not deny the tragic nature of the car accident that occurred on July 7, 2007; however, he respectfully submits that there is not an exception to the Fifth Amendment's proscription on multiple punishments based on the magnitude or result of the offense. Neither West Virginia Code § 17C-4-1(a) or (b) authorize multiple punishments for a single violation of the statute. Legal precedent should be set so it can be applied in a fair and uniform manner; it should not be set so the State can express its ire toward a particular defendant.

Finally, the State asserts that the Petitioner was properly charged and sentenced on 12 separate counts of West Virginia Code § 17C-4-1(a) and (b), because he "had a duty to stay or return and render aid to **each and every** person who was affected, injured or killed by his unlawful actions." (emphasis in original). The State goes on to ask which of the 12 victims was "not important enough to be considered a separate victim by our Legislature."

Again, the Petitioner has no cause or desire to diminish those who were injured or killed. He simply argues that West Virginia Code § 17C-4-1 is not intended to be

applied in the same manner as the negligent homicide statute or the DUI causing death statute; it is not intended to punish an individual for driving recklessly or under the influence. Other provisions in the Code, such as West Virginia Code § 17C-5-2(a) and (c) address death or injuries inflicted on a person or persons and may be charged according to the number of victims. Further, the State mistakenly asserts that West Virginia Code § 17C-4-3 supports its contention that a driver who leaves the scene of an accident may be charged in accordance with the number of people injured or killed.

This provision states in full:

The driver of any vehicle involved in a crash resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his or her name, address and the registration number of the vehicle he or she is driving and shall upon request and if available exhibit his or her driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such crash reasonable assistance, including the carrying, or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person. W. Va. Code § 17C-4-3.

The State's argument is misplaced. If the entire criminal act is characterized as leaving the scene of an accident before providing required identification information and rendering reasonable assistance the conclusion regarding the constitutionality of the Petitioner's multiple sentences does not change. This section of the statute also characterizes the duty as arising out of a single accident. Moreover, the phrase "reasonable assistance" is not defined, and obviously could vary a great deal. For instance, sometimes the most reasonable thing to do may be nothing, less one would risk causing more harm to the injured person. This phrase cannot be interpreted to

mean a person involved in a crash has a duty to administer medical assistance to anyone and everyone who is injured in an accident, or suffer criminal consequences. The concern of the statute is that drivers stay at the scene of the crash, provide the required information, and if there are injuries make an attempt to assess the needs of other people involved. Perhaps it goes without saying, but in most cases, the most reasonable thing to do when an accident occurs is to seek the assistance of EMS and law enforcement, because the majority of drivers would not be qualified to provide medical assistance.

B. The Circuit Court of Monongalia County Erroneously Permitted the State to Admit the Results of Blood Tests Completed on the Petitioner.

In his post-trial motions before the circuit court and in his Petition for Appeal, the Petitioner asserted that he should be granted a new trial because the circuit court erroneously admitted the results of blood tests completed on him in violation of *State v. McClead*, 211 W. Va. 515, 566 S.E.2d 652 (2002). The Petitioner briefed this issue in his petition, and reasserts those arguments now. He seeks a clarification of *McClead* and a new trial for each of the DUI offenses he was convicted of in March 2008.

C. The Circuit Court of Monongalia County Erred When It Denied the Defendant's Motion for Post-Verdict Judgment of Acquittal, or in the Alternative a New Trial.

Before the circuit court and in his Petition for Appeal, the Petitioner asserted that he was entitled to a post-verdict judgment of acquittal or a new trial because the State failed to produce evidence sufficient to convict him of DUI causing death pursuant to West Virginia Code § 17C-5-2(a) and leaving the scene of an accident causing injury or death pursuant to West Virginia Code § 17C-4-1(a) and (c). The Petitioner fully briefed

this issue in his petition and reasserts those arguments now. The weight of the evidence did not support his conviction and he is entitled to the relief he seeks.

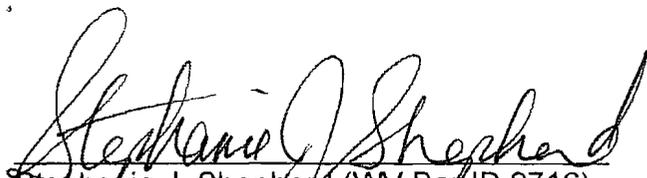
II. CONCLUSION

The Petitioner's right against double jeopardy as guaranteed by the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution was violated when the circuit court imposed 12 punishments upon him for a single violation of leaving the scene of an accident, an act criminalized by West Virginia Code § 17C-4-1. The circuit court erroneously concluded that the punishment was proper because of the number of people injured or killed in the accident, instead of examining the act that the Legislature intended to criminalize -- the act of leaving the scene of an accident without fulfilling certain statutory duties.

The circuit court erred when it permitted the State to introduce blood tests completed on the Petitioner in violation of *State v. McClead*. The Petitioner did not consent to these tests and is entitled to a new trial because of this error. Finally, the State produced evidence that was insufficient to prove his guilt of DUI causing death (W. Va. Code § 17C-5-2(a)) and leaving the scene of an accident (W. Va. Code § 17C-4-1(a) and (b)) beyond a reasonable doubt. He entitled to have these convictions reversed, or in the alternative, he is entitled to a new trial.

BRIAN JOHN STONE
Defendant

By Counsel

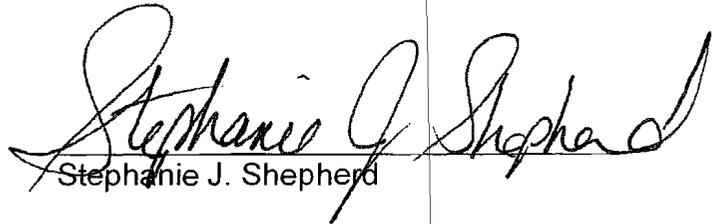


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CERTIFICATE OF SERVICE

I, Stephanie J. Shepherd, do hereby certify that I served a true and correct copy of the foregoing *Reply Memorandum of Behalf of Brian John Stone* upon Marcia Ashdown, Office of the Prosecuting Attorney, 243 High Street, Morgantown, WV, via hand delivery, this 18th day of August 2011.


Stephanie J. Shepherd