

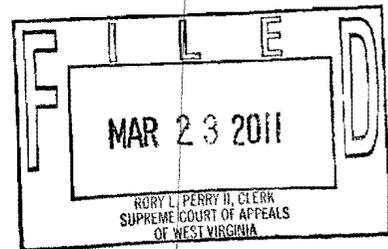
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO.: _____

STATE OF WEST VIRGINIA,

v.

BRIAN JOHN STONE,
Defendant

FELONY NO. 07-F-183



PETITION FOR APPEAL ON
BEHALF OF BRIAN JOHN STONE

FILED

MAR 16 2011

JEAN FRIEND
CIRCUIT CLERK

Prepared By:

Stephanie J. Shepherd
(WV Bar ID 9176)
Hedges Lyons & Shepherd, PLLC
141 Walnut Street
Morgantown, WV 26505
304-296-0123

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	1
III.	PROCEDURAL HISTORY	3
IV.	STANDARD OF REVIEW	12
V.	ASSIGNMENTS OF ERROR	13
VI.	ARGUMENT OF LAW	13
	A. The Circuit Court Violated the Defendant's Right Against Double Jeopardy as Guaranteed by the Fifth Amendment of the United States Constitution and Article III, § 5 of the West Virginia Constitution When It Sentenced Him to Multiple Punishments for the Same Offense.	13
	B. The Circuit Court Erred When It Allowed the Results of Blood Tests Completed on the Defendant to be Admitted at Trial.	24
	C. The Circuit Court Erred When It Denied the Defendant's Motion for Post-Verdict Judgment of Acquittal, or in the Alternative a New Trial.	26
VII.	CONCLUSION	29

TABLE OF AUTHORIES

A. CASES

<i>Benton v. Maryland</i> , 395 U.S. 784, 89 S. Ct. 2056 (1969)	15
<i>Blockburger v. U.S.</i> , 284 U.S. 299, 52 S. Ct. 180 (1932)	16
<i>Chrystal R. M. v. Charlie A. L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995)	12
<i>Dake v. State</i> , 675 So.2d 1365 (Ala. Crim. App. 1995)	21
<i>Firestone v. State of Nevada</i> , 120 Nev. 13, 83 P.3d 279 (2004)	21
<i>Hardy v. State</i> , 705 So.2d 979 (Fla. App. 1998)	21
<i>Nield v. State</i> , 677 N.E.2d 79 (Ind. App. Ct. 1997)	21
<i>Ohio v. Johnson</i> , 467 U.S. 493, 104 S. Ct. 2536 (1984)	14
<i>People v. Sleboda</i> , 166 Ill. App. 3d 42, 519 N.E.2d 512 (1988)	21
<i>State v. Gill</i> , 187 W. Va. 136, 416 S.E.2d 253 (1992)	15
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	13
<i>State v. McClead</i> , 211 W. Va. 515, 566 S.E.2d 652 (2002)	4
<i>State v. Myers</i> , 171 W. Va. 277, 298 S.E.2d 813 (1982)	23
<i>State v. Powers</i> , 200 Ariz. 123, 23 P.3d 668 (2001)	18
<i>State v. Sears</i> , 196 W. Va. 71, 468 S.E.2d 324 (1996)	12
<i>State v. Ustimenko</i> , 137 Wash. App. 109, 151 P.3d 256 (2007)	21
<i>State ex rel. Morgan v. Trent</i> , 195 W. Va. 257, 465 S.E.2d 257 (1995)	17
<i>United States v. Lemons</i> , 941 F.2d 309 (5th Cir. 1991)	16
<i>West Virginia Div. of Env'tl. Prot. v. Kingwood Coal Co.</i> , 200 W. Va. 734, 490 S.E.2d 823 (1997)	12

B. CONSTITUTIONS, STATUTES AND RULES

Fifth Amendment of the United States Constitution	13
Fourteenth Amendment of the United States Constitution	15
Article III, § 5 of the West Virginia Constitution	13
A.R.S. § 28-661	18
A.R.S. § 28-663A., 1-3	20
RCW 46.52.020	22
West Virginia Code § 17B-4-3(b)	4
West Virginia Code § 17C-4-1	1
West Virginia Code § 17C-4-1(a)	4
West Virginia Code § 17C-4-1(c)	4
West Virginia Code § 17C-4-3	18
West Virginia Code § 17C-4-3(b)	6
West Virginia Code § 17C-5-2(a)	4
West Virginia Code § 17C-5-2(c)	4
West Virginia Code § 17C-5-2(k)	4

I. INTRODUCTION

The federal and state constitutions guarantee a defendant a right against double jeopardy. It is well-settled that a primary tenet of this broadly stated right is that a defendant may not be subjected to multiple punishments for the same offense, unless the legislature has made a clear expression to the contrary. In the instant matter, the Defendant was charged, convicted and sentenced on 12 separate counts of Leaving the Scene of an Accident (W. Va. Code § 17C-4-1), even though there was only a single car accident from which he allegedly fled. All of this was done in a clear violation of the Defendant's constitutional rights, and he now seeks to have these sentences reversed.

Further, the Defendant seeks a reversal of, or in the alternative, a new trial on the other offenses for which he stands convicted. The results of blood tests completed on him were erroneously admitted at trial. Moreover, the State failed to prove the Defendant's guilt beyond a reasonable doubt.

II. STATEMENT OF FACTS

On July 7, 2007, the Defendant was traveling east on Interstate 68 in Monongalia County when he was involved in a tragic multi-vehicle accident. The EMS and law enforcement quickly responded to the scene; however, five people lost their lives that night and another seven were injured.

The State alleged that the Defendant was driving his car while he was intoxicated with alcohol, and while doing so struck the passenger side of a Ford Taurus driven by Courtney Evans. Mr. Evans was also traveling east on the interstate with his wife, and two sons. According to the State, the impact of the Defendant's 2007 Ford F-150 truck caused the Evans' vehicle to shoot across the median, into one of the west bound traffic

lanes, striking a 2005 Chevrolet Trailblazer. (Test. of Daniel Greathouse, Tr. Trans., pp. 307-308). The Trailblazer was being driven by Donnell Perry. Mr. Perry was traveling west on Interstate 68 with his wife, his three daughters, his two granddaughters, and his grandson. (Test. of Marcia Perry, Tr. Trans., pp. 387).

Law enforcement officers who responded to the scene of the accident determined that the Defendant's truck continued traveling east for a short time after the impact with the Evans' vehicle. It finally came to a stop approximately 200 yards from the main crash site in a wooded area off the right side of the road. (Test. of Lt. Mansell Jones, Tr. Trans, p. 396). The truck apparently rolled one to two times before coming to a final rest. It was alleged that upon coming to a stop, the Defendant exited his vehicle and set off on foot. Deputies found the Defendant walking east, approximately a half-mile from the crash site. (Test. of Dep. David Wilfong, Tr. Trans., p. 478).

The deputies who found the Defendant testified that they surmised the Defendant had been drinking due to the smell of alcohol emanating from him, as well as the Defendant's unsteady gait and his slurred speech. (Test. of Dep. Wilfong, Tr. Trans., p. 480). According to the deputies, a series of field sobriety tests were administered and these tests confirmed their suspicions that the Defendant was intoxicated. (Test. of Dep. Wilfong, Tr. Trans., pp. 481-490). The Defendant was placed under arrest at about 10:45 p.m.

Thereafter, the Defendant was transported to the Monongalia County Sheriff's Department (hereinafter "MCSD") for processing. After arriving at the MCSD, at around 11:07 p.m., deputies asked the Defendant to take a breath test (Intoximeter) and he refused. About thirty minutes later at 11:29 p.m., deputies again asked the Defendant

to take a breath test, and he refused. Upon his second refusal, deputies swore out a search warrant to secure a sample of the Defendant's blood. The warrant was reviewed and signed by the on-call magistrate. With warrant in hand, deputies transported the Defendant to Ruby Memorial Hospital in Morgantown, West Virginia, and registered nurse Kim Slavensky took a sample of the Defendant's blood. Tests completed on the blood sample showed the Defendant had a blood alcohol concentration (BAC) of .23. (State's Exhibit Nos. 60 and 61).

In September 2007, the Defendant was indicted by the Monongalia County Grand Jury and charged with 26 criminal offenses relating to the July 7, 2007, multi-vehicle car accident. The nature of these charges, as well as, the pre-trial procedure, the trial, and the post-trial procedure of this case are set forth in Section III of this Petition.

III. PROCEDURAL HISTORY

On July 7, 2007, the Defendant was arrested and charged with 26 criminal offenses relating to a traffic accident he was involved in that occurred on Interstate 68 in Monongalia County, West Virginia. The Defendant made his initial appearance in front of a magistrate on July 8, 2007. The total bond set in this matter was for 1.35 million dollars. The Defendant was unable to post this bond, and he has been incarcerated since July 8, 2007.

In September 2007, the Grand Jury of Monongalia County returned a 26-count indictment against the Defendant.¹ The charges handed down in this indictment

¹ In September 2007, in a separate matter, the Grand Jury of Monongalia County returned a two-count indictment against the Defendant. This separate case is styled *State v. Stone*, Case No. 07-F-184, and the charges in that matter were one count of DUI, 3rd or subsequent offense, and one count of

included: one felony count of DUI, 3rd or subsequent offense (W. Va. Code § 17C-5-2(k));² one felony count of Driving When License Suspended or Revoked for Driving Under the Influence of Alcohol (SRO), 3rd or subsequent offense (W. Va. Code § 17B-4-3(b)); five felony counts of DUI Causing Death (W. Va. Code § 17C-5-2(a)); seven misdemeanor counts of DUI Causing Injury (W. Va. Code § 17C-5-2(c)); five felony counts of Leaving the Scene of an Accident Causing Death (W. Va. Code § 17C-4-1(a) and (b)); and seven misdemeanor counts of Leaving the Scene of an Accident Causing Injury (W. Va. Code § 17C-4-1(a) and (c)).

On September 13, 2007, the Defendant was arraigned by the circuit court on all 26 charges, and he entered a plea of not guilty to each. A trial was set for the week of December 11, 2007. The record reveals that on or about October 12, 2007, several pre-trial motions were filed on behalf of the Defendant by his trial counsel, including: (1) a motion for bond reduction; (2) a motion for leave to hire an accident reconstructionist; (3) a motion for leave to hire a survey research firm; and (4) a motion to suppress the results of a blood test completed on the Defendant. By order dated November 13, 2007, the circuit court granted the Defendant's motions to hire an accident reconstructionist, and a survey research firm to help determine whether the proper venue was in Monongalia County. The circuit court denied the Defendant's request for a bond reduction, and denied the Defendant's request to suppress the results of the blood test completed on him. With regard to the latter, the circuit court found that *State v. McClead*, 211 W. Va. 515, 566 S.E.2d 652 (2002) was inapplicable and that a search

Driving SRO, 3rd or subsequent offense. The Defendant entered a plea of guilty to these offenses on August 7, 2008. This case is not the subject of this appeal.

² The Defendant was charged and convicted under the 2007 version of West Virginia Code § 17C-5-2. It is this version of the statute that is cited in this brief.

warrant was properly obtained for the Defendant's blood. Shortly thereafter, on November 19, 2007, the Defendant filed a motion to continue the trial, and this motion was granted by the circuit court. The trial was set for the week of March 18, 2008.

In February 2008, the Defendant filed several additional pre-trial motions, including: (1) a motion to bifurcate Counts 1 and 2 of the indictment from the other 24 counts;³ (2) a motion to suppress the results of field sobriety tests conducted on the Defendant;⁴ (3) a motion to change venue; (4) a motion to dismiss Count 1 and Counts 16 to 26 of the indictment; and (5) a supplemental motion to suppress the results of the blood test administered on the Defendant. The circuit court granted the Defendant's motion to bifurcate; however, the other motions filed by the Defendant in February 2008, were denied by the circuit court. With regard to the Defendant's motion to change venue, the circuit court acknowledged that the Defendant presented statistical evidence that demonstrated a large number of people knew about the case from the media, and that a majority of people who knew about the case had a negative reaction to the story. However, the circuit court found that this problem could be remedied by calling a larger than typical number of potential jurors to be present at *voir dire*.

On March 18, 2008, the Defendant's trial on Counts 1 and 3 to 26 of the indictment began. The State called a total of 20 witnesses. The Defendant testified on his own behalf, but he called no other witnesses.

³ Ultimately, only Count 2 of the indictment was bifurcated. With regard to the bifurcation of Count 1, the record reflects that the parties agreed that the State would not refer to any previous DUI convictions, or refer to the current charge against the Defendant as a third or subsequent offense. (See Trans. of February 25, 2008, motions hearing).

⁴ This motion was withdrawn by the Defendant.

The trial concluded on March 21, 2008, and the jury returned a verdict of guilty as to each of the 25 charges tried before them. On May 14, 2008, the Defendant entered a plea of guilty to one felony count of Driving SRO, 3rd or subsequent offense in violation of West Virginia Code § 17B-4-3(b), the charge contained in Count 2 of the indictment.

Thereafter, on June 9, 2008, the circuit court sentenced the Defendant as follows:

1. For the offense of Driving Under the Influence of Alcohol, the felony charged in count one of the indictment, the defendant shall serve a term of one (1) to three (3) years in the West Virginia State Penitentiary and pay a fine of \$5,000.00.
2. For the offense of Driving While License Suspended or Revoked for Driving Under the Influence of Alcohol, Third-Offense, the felony charged in count two of the indictment, the defendant shall serve a term of one (1) to three (3) years in the West Virginia State Penitentiary and pay a fine of \$5,000.00.
3. For the offense of Driving Under the Influence of Alcohol Recklessly Causing Death, the felony charged in count three of the indictment, the defendant shall serve a term of two (2) to ten (10) years in the West Virginia State Penitentiary and pay a fine of \$3,000.00.
4. For the offense of Driving Under the Influence of Alcohol Recklessly Causing Death, the felony charged in count four of the indictment, the defendant shall serve a term of two (2) to ten (10) years in the West Virginia State Penitentiary and pay a fine of \$3,000.00.
5. For the offense of Driving Under the Influence of Alcohol Recklessly Causing Death, the felony charged in count five of the indictment, the defendant shall serve a term of two (2) to ten (10) years in the West Virginia State Penitentiary and pay a fine of \$3,000.00.
6. For the offense of Driving Under the Influence of Alcohol Recklessly Causing Death, the felony charged in count six of the indictment, the defendant shall serve a term of two (2) to ten (10) years in the West Virginia State Penitentiary and pay a fine of \$3,000.00.

7. For the offense of Driving Under the Influence of Alcohol Recklessly Causing Death, the felony charged in count seven of the indictment, the defendant shall serve a term of two (2) to ten (10) years in the West Virginia State Penitentiary and pay a fine of \$3,000.00.

8. For the offense of Driving Under the Influence of Alcohol Causing Injury, the misdemeanor charged in count eight of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

9. For the offense of Driving Under the Influence of Alcohol Causing Injury, the misdemeanor charged in count nine of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

10. For the offense of Driving Under the Influence of Alcohol Causing Injury, the misdemeanor charged in count ten of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

11. For the offense of Driving Under the Influence of Alcohol Causing Injury, the misdemeanor charged in count eleven of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

12. For the offense of Driving Under the Influence of Alcohol Causing Injury, the misdemeanor charged in count twelve of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

13. For the offense of Driving Under the Influence of Alcohol Causing Injury, the misdemeanor charged in count thirteen of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

14. For the offense of Driving Under the Influence of Alcohol Causing Injury, the misdemeanor charged in count fourteen of the indictment, the defendant shall serve a term of one (1)

year in the North Central Regional Jail and pay a fine of \$1,000.00.

15. For the offense of Leaving the Scene of an Accident Resulting in Death, the felony charged in count fifteen of the indictment, the defendant shall serve a term of three (3) years in the West Virginia State Penitentiary and pay a fine of \$5,000.00.

16. For the offense of Leaving the Scene of an Accident Resulting in Death, the felony charged in count sixteen of the indictment, the defendant shall serve a term of three (3) years in the West Virginia State Penitentiary and pay a fine of \$5,000.00.

17. For the offense of Leaving the Scene of an Accident Resulting in Death, the felony charged in count seventeen of the indictment, the defendant shall serve a term of three (3) years in the West Virginia State Penitentiary and pay a fine of \$5,000.00.

18. For the offense of Leaving the Scene of an Accident Resulting in Death, the felony charged in count eighteen of the indictment, the defendant shall serve a term of three (3) years in the West Virginia State Penitentiary and pay a fine of \$5,000.00.

19. For the offense of Leaving the Scene of an Accident Resulting in Death, the felony charged in count nineteen of the indictment, the defendant shall serve a term of three (3) years in the West Virginia State Penitentiary and pay a fine of \$5,000.00.

20. For the offense of Leaving the Scene of an Accident Resulting in Injury, the misdemeanor charged in count twenty of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

21. For the offense of Leaving the Scene of an Accident Resulting in Injury, the misdemeanor charged in count twenty-one of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

22. For the offense of Leaving the Scene of an Accident Resulting in Injury, the misdemeanor charged in count twenty-two of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

23. For the offense of Leaving the Scene of an Accident Resulting in Injury, the misdemeanor charged in count twenty-three of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

24. For the offense of Leaving the Scene of an Accident Resulting in Injury, the misdemeanor charged in count twenty-four of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

25. For the offense of Leaving the Scene of an Accident Resulting in Injury, the misdemeanor charged in count twenty-five of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

26. For the offense of Leaving the Scene of an Accident Resulting in Injury, the misdemeanor charged in count twenty-six of the indictment, the defendant shall serve a term of one (1) year in the North Central Regional Jail and pay a fine of \$1,000.00.

On June 26, 2008, the circuit court permitted the Defendant's trial counsel to withdraw from this case. New counsel was appointed for the Defendant on the same day. On December 29, 2008, the Defendant filed two post-trial motions, a Motion in Arrest of Judgment, and a Motion for Post-Verdict Judgment of Acquittal or New Trial. In the Motion in Arrest of Judgment, the Defendant contended that his right against double jeopardy was violated when he was sentenced for multiple counts of fleeing the scene of an accident in violation of West Virginia Code § 17C-4-1. Further, it was argued that the principles of double jeopardy were violated when the Defendant was

convicted and sentenced for violations of West Virginia Code §§ 17C-5-2(k) and 17C-5-2(a) and (c).

In his motion for a judgment of acquittal or new trial, the Defendant argued that "the State failed to produce sufficient evidence that he drove his vehicle in such a manner that he committed an act forbidden by law or failed to perform any duty imposed by law, which act or failure proximately caused the death or injury of the victims herein; that the act or failure, whatever it may be, was in reckless disregard of the safety of others; and that the influence of alcohol was a contributing cause to the deaths of the victims herein." Further, he argued, "[s]pecifically, the only evidence produced by the state concerning either speeding or reckless driving was that of Daniel Greathouse, who admitted on cross examination that he could not testify that the defendant was speeding. Furthermore, the defendant himself testified that he lost control of the vehicle as a result of being struck from behind or due to tire failure. The state presented no evidence to suggest that the defendant's loss of control of his vehicle was in any way reckless, other than the testimony of Daniel Greathouse as indicated above." (Defendant's Motion for Judgment of Acquittal, p. 2). Finally, the Defendant argued that if the blood tests had been excluded under *McClead*, there would have been insufficient evidence to convict him of DUI. The circuit court denied both of these motions; it summarized its rulings as follows:

1. In the Motion in Arrest of Judgment the defendant argued that it constituted a violation of double jeopardy for him to be convicted on multiple counts of fleeing the scene, arguing that it is impossible to flee the scene more than one time. The Court ruled that the defendant's convictions for five counts of fleeing the scene of an accident resulting in death and seven counts of fleeing the scene of an accident resulting in injury were legal and proper. Each of those

offenses related to a separate victim to whom the defendant owed a duty to stop and render aid or make sure that emergency calls were being made for assistance. The Court also disagreed with the defendant's argument that double jeopardy protections were violated by his conviction for third offense DUI in addition to the convictions for DUI causing death and DUI causing injury. The Court found that each of those charges consist of elements that are separate and independent, and that the defendant's convictions and sentences on each and every one of the charges in the indictment are legal and do not constitute any violation of double jeopardy provisions.

2. In the Motion for Post-Verdict Judgment of Acquittal or New Trial the defendant asserted that the evidence was insufficient to sustain convictions for the offenses of DUI resulting in death and DUI resulting in injury, arguing that the State failed to produce sufficient evidence that the defendant had driven his vehicle in a manner that constituted the commission of an act forbidden by law or the failure to perform a duty imposed by law, and that the act or failure was in reckless disregard of the safety of others. The Court rejected that argument, finding that the jury had been properly instructed on all of the elements for all of the offenses for which he was charged, and that the testimony produced by the State regarding the defendant's acts and/or omissions, including speeding and driving recklessly, was sufficient to allow reasonable jurors to agree on the defendant's guilt.

With regard to the defendant's argument that evidence was insufficient to show that the defendant was aware that a wreck had occurred, and that therefore he could not be guilty of leaving the scene, the Court found that there was sufficient evidence that the defendant was well aware that he had been involved in a collision with another vehicle that caused the other vehicle to leave the roadway and that caused his own vehicle to go out of control. As the State pointed out, the jury had the opportunity to listen to the defendant's version of events and rejected that version.

Prior to trial and during the trial the Court addressed the defendant's motions and arguments regarding the application of *State v. McClead* to his case. The Court reiterated its earlier rulings that *State v. McClead* did not apply to the defendant's case and that the Court's denial of

the defendant's motions to suppress the blood test evidence was well founded, in part because there are distinctions to be drawn between the defendant's case and *State v. McClead*. Additionally, with respect to the defendant's contention that the State's expert, Timothy White, testified incorrectly about milliliters of blood instead of centimeters of blood, the Court took judicial notice of the fact that one milliliter of blood equals 100 cubic centimeters of blood. Therefore, the Court found that the defendant's argument lacked merit. (Order dated June 16, 2009).

The Defendant's case has changed hands two additional times since his post-trial motions were argued on June 9, 2009. Additionally, it is acknowledged that there is an extraordinary amount of time between the Defendant being sentenced and this direct appeal. It appears this delay was caused by two primary factors: several changes in court-appointed counsel, and the way *pro se* pleadings filed by the Defendant were construed.

IV. STANDARD OF REVIEW

This Court has determined that "where the issue on appeal from the circuit court is clearly a question of law or involving the interpretation of a statute," a *de novo* standard of review must be applied. *Chrystal R. M. v. Charlie A. L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Further, and with regard to the first assignment of error raised in this appeal, double jeopardy claims are reviewed *de novo*. *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996). "*De novo* refers to a plenary form of review that affords no deference to the previous decisionmaker." *West Virginia Div. of Env'tl. Prot. v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997) (quoting *Fall River County v. S.D. Dept. of Rev.*, 552 N.W.2d 620, 624 (S.D. 1996)).

With regard to reviewing a defendant's claim that the evidence was insufficient to convict him, this Court has held:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

V. ASSIGNMENTS OF ERROR

1. The Circuit Court of Monongalia County erred when it imposed multiple punishments on the Defendant for fleeing the scene of a single accident, pursuant to West Virginia Code § 17C-4-1.

2. The Circuit Court of Monongalia County erred when it permitted the State to introduce the results of blood tests completed on the Defendant.

3. The Circuit Court of Monongalia County erred when it found that the State presented sufficient evidence to sustain the verdict in this matter, which was contrary to the law and the evidence.

VI. ARGUMENT OF LAW

A. **The Circuit Court Violated the Defendant's Right Against Double Jeopardy as Guaranteed by the Fifth Amendment of the United States Constitution and Article III, § 5 of the West Virginia Constitution When It Sentenced Him to Multiple Punishments for the Same Offense.**

The Fifth Amendment of the United States Constitution States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

It is the Double Jeopardy Clause that is of particular import here. The United States Supreme Court has explained that this Clause affords a criminal defendant three basic protections: "[i]t 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)).

It is the third or final tenet that is at issue in the instant matter. As the United States Supreme Court has explained: "[the] final component of double jeopardy -- protection against cumulative punishments -- is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. at 499, 104 S. Ct. at 2540-41. This limitation on a trial court's sentencing authority is constitutionally mandated, because "the substantive power to prescribe crimes and determine punishments is vested with the legislature." *Id.* (citing *U.S. v. Wiltberger*, 5 Wheat 76, 93, 5 L. Ed. 37 (1820)). Thus, "the question under the Double Jeopardy Clause [of] whether punishments are 'multiple' is essentially one of legislative intent." *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359, 366-68, 103 S. Ct. 673, 678-79 (1983)).

Prior to turning to the intent of the West Virginia Legislature in the instant matter, it is important to recognize that these principles of federal law are 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). This Court recognized the same in the following syllabus point: "In *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the United States Supreme Court held that the Fifth Amendment constitutional guarantee against double jeopardy was binding on the states through the Fourteenth Amendment to the United States Constitution." Syl. Pt. 3, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). Further, the *Gill* Court recognized the protections provided by the Fifth Amendment, holding:

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. 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. Syl. Pt. 1, *State v. Gill, supra*.

Finally, the *Gill* Court again recognized that a criminal defendant's state right against double jeopardy is commensurate with his or her federal right, holding: "The Double Jeopardy Clause in Article III, Section 5 of the *West Virginia Constitution*, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense. Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977)." Syl. Pt. 2, *State v. Gill, supra*.

As stated above, the issue in contention in this case concerns the third principle of double jeopardy -- the prohibition against multiple punishments for the same offense. It was alleged that the Defendant fled the scene of one multi-vehicle car accident on July 7, 2007. However, the Defendant was charged with, convicted of, and

subsequently sentenced on five separate counts of Leaving the Scene of an Accident Resulting in Death, W. Va. Code § 17C-4-1(a) and (c) and seven separate counts of Leaving the Scene of an Accident Resulting in Injury, W. Va. Code § 17C-4-1(a) and (c). The circuit court's imposition of multiple sentences for this single offense was in error, and it violated the Defendant's right against double jeopardy as guaranteed by the Fifth Amendment of the United States Constitution and Article III, § 5 of the West Virginia Constitution.

The question presented here is not an archetypal *Blockburger*⁵ question -- whether when the legislative intent is unclear a criminal defendant can be charged with two separate statutory offenses for the same transaction or occurrence. Rather, the issue is the multiple violations filed against the Defendant under West Virginia Code § 17C-4-1, and the multiple punishments that were imposed by the circuit court as a result of this over-reaching by the State, when the statute, on its face, does not contemplate this type of application.

Federal courts have characterized the charging of a single criminal offense in more than one count of an indictment as "multiplicity." *United States v. Lemons*, 941 F.2d 309, 317 (5th Cir. 1991). As the Fifth Circuit explained: "The chief danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense." *Id.* (quoting *U.S. v. Swain*, 757 F.2d 1530, 1537 (5th Cir. 1985), *cert. denied*, 474 U.S. 825, 106 S. Ct. 81 (1985)). The question of "[whether] a continuous transaction results in the commission of but a single or separate offenses . . . is determined by whether separate and distinct prohibited acts, made punishable by

⁵*Blockburger v. U.S.*, 284 U.S. 299, 52 S. Ct. 180 (1932).

law, have been committed." *Id.* (citations omitted). A question that should be answered by examining the legislative intent and legislative history. *Id.*

Similarly, this Court has held: "A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment." Syl. Pt. 7, *State v. Gill, supra.*⁶ With regard to determining the legislature's intent: "[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, supra.* If there is any question regarding the meaning of a criminal statute, circuit courts are required to utilize the rule of lenity. *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995). To that end, this Court has held: "In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and in favor of the defendant." Syl. Pt. 5, *State ex rel. Morgan v. Trent, supra.*

In the present case, there is no indication that the legislature intended to subject defendants to multiple charges or multiple punishments under West Virginia Code § 17C-4-1, when only a single accident is involved. This statute states in relevant part:

(a) 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

⁶ The *Gill* Court was not presented with the same exact issue as the *Lemons* Court, but courts almost universally examine legislative intent when the statute is ambiguous regarding multiple charges and punishments.

required by said section three. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person knowingly violating the provisions of subsection (a) of this section after being involved in a crash resulting in the death of any person is guilty of a felony and, upon conviction thereof, shall be fined by not more than \$5,000 or imprisoned in a correctional facility for not less than one year nor more than five years, or both fined and confined.

(c) Any person knowingly violating the provisions of subsection (a) of this section after being involved in a crash resulting in physical injury to any person is guilty of a misdemeanor and, upon conviction thereof, shall be punished by confinement in jail for not more than one year, or fined not more than \$1,000, or both.

West Virginia Code § 17C-4-3, contains the requirements a driver must fulfill, and it states:

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.

This appears to be a matter of first impression for this Court; however, several other states have confronted this issue. For example, the Court of Appeals of Arizona has addressed the question presented in the present petition for appeal. In *State v. Powers*, 200 Ariz. 123, 23 P.3d 668 (2001), the defendant was convicted of and sentenced on two counts of leaving the scene of an accident pursuant to A.R.S. § 28-

661.⁷ The defendant in *Powers* was traveling on a city street when he drove into the opposite lane of traffic and struck a pedestrian and her infant daughter. The woman died as a result of her injuries and the baby suffered serious injuries. After the accident, the defendant fled the scene.

On appeal, the defendant claimed that the principles of double jeopardy were offended because he was punished two times for the same offense -- leaving the scene of only one accident. The appellate court recognized that when a single offense is charged in multiple counts of an indictment double jeopardy is implicated. *Powers*, 200 Ariz. at 125, 23 P.3d at 670. The court found that to determine whether double jeopardy principles were violated it had to examine the statute and the intent of the legislature.

The Arizona Appellate Court stated:

The plain and ordinary meanings of the terms "accident" and "scene of the accident" do not depend on the number of victims. As commonly understood, only one accident scene exists even though accidents often involve multiple victims and impacts. In the absence of compelling reasons, therefore, we give these terms their plain and ordinary meaning. See *Wagstaff; Leon. Powers*, 200 Ariz. at 126, 23 P.3d at 671 (footnote omitted).

⁷ A.R.S. § 28-661 states: **A.** The driver of a vehicle involved in an accident resulting in injury to or death of a person shall:

1. Immediately stop the vehicle at the scene of the accident or as close to the accident scene as possible but shall immediately return to the accident scene.

2. Remain at the scene of the accident until the driver has fulfilled the requirements of § 28-663.

B. A driver who is involved in an accident resulting in death or serious physical injury as defined in § 13-105 and who fails to stop or to comply with the requirements of § 28-663 is guilty of a class 3 felony, except that if a driver caused the accident the driver is guilty of a class 2 felony.

C. A driver who is involved in an accident resulting in an injury other than death or serious physical injury as defined in § 13-105 and who fails to stop or to comply with the requirements of § 28-663 is guilty of a class 5 felony.

D. The sentence imposed on a person for a conviction under this section shall run consecutively to any sentence imposed on the person for other convictions on any other charge related to the accident.

E. The department shall revoke the license or permit to drive and any nonresident operating privilege of a person convicted pursuant to subsection B of this section for five years.

F. The department shall revoke the license or permit to drive and any nonresident operating privilege of a person convicted pursuant to subsection C of this section for three years.

Further the court concluded:

The statute itself does not express any legislative intent to adopt a different meaning. Section 28-661 imposes an affirmative duty on a driver to remain "at the scene of the accident," not to render aid to victims or provide them with information. Although ¶ 28-661(A)(2) requires the driver to remain at the scene "until the driver has fulfilled the requirements of § 28-663,"⁸ (emphasis added), that clause only establishes when the duty to remain at the scene terminates, it does not impose a duty to fulfill the requirements. Rather, § 28-663 is the statute that imposes an affirmative duty to perform those obligations. And a failure to perform the obligations of § 28-663 is an offense in and of itself. § 28-663(B). Moreover, basing the number of violations of leaving the scene of an accident on the number of violations of § 28-663 would, in effect, increase without legislative directive the penalty for a violation of § 28-663 from a misdemeanor to a felony in leaving-the-accident-scene cases. Compare § 28-661(B), (C) with § 28-663(B). *Id.* (footnote omitted).

In response to the state's argument that the severity of the injury suffered determines the penalty imposed, and that this implies the legislature intended to permit multiple violations, the *Powers* court found:

First, we would hesitate to expand the ordinary and commonsense meaning of terms in a criminal statute based on inferential reasoning from the penalty provisions. See *Bouie*, 378 U.S. at 350-55, 84 S.Ct. at 1701-03, 12 L.Ed.2d at 898-901; *Reinesto*, 182 Ariz. at 193, 894 P.2d at 736. Second, we can interpret the penalty provisions consistently with the plain and ordinary meaning of the terms "accident" and "scene of the accident." See *Wagstaff*, 164 Ariz. at 490,

⁸ A.R.S. § 28-663A., 1-3 states: **A.** The driver of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle that is driven or attended by a person shall:

1. Give the driver's name and address and the registration number of the vehicle the driver is driving.
2. On request, exhibit the person's driver license to the person struck or the driver or occupants of or person attending a vehicle collided with.
3. Render reasonable assistance to a person injured in the accident, including making arrangements for the carrying of the person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the carrying is requested by the injured person.

794 P.2d at 123. Section 28-661(B) provides that a driver who leaves the scene of an accident "resulting in death or serious physical injury ... is guilty of a class 4 felony." In contrast, § 28-661(C) provides that a driver who leaves the scene of an accident "resulting in an injury *other than* death or serious physical injury ... is guilty of a class 6 felony." (Emphasis added.) The two subsections are mutually exclusive. Therefore, under the clear language of § 28-661(B) and (C), a defendant is guilty of a class four felony if the accident involves death or a serious injury to any person, regardless of other injuries suffered by other individuals. The penalty subsections, therefore, do not support the state's argument. *Powers*, 200 Ariz. at 127, 23 P.3d at 672.

Finally, the *Powers* court reasoned:

Furthermore, our interpretation of the statutory language is supported by a principal objective of § 28-661, "prohibit[ing] drivers from seeking to evade civil or criminal liability by escaping before their identity can be established." *State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App.1995). That objective is satisfied by allowing only a single charge for each accident scene regardless of the number of victims. There is no further benefit in allowing fifteen felony counts of leaving the scene of an accident for an accident in which fifteen people are injured.⁹ *Id.*

Next, in *State v. Ustimenko*, 137 Wash. App. 109, 151 P.3d 256 (2007), the Court of Appeals of Washington determined that a defendant may only be convicted and sentenced one time under Washington's fleeing the scene of an accident statute, regardless of the number of people injured or killed, when only one car accident is involved. In *Ustimenko*, the defendant was driving his vehicle under the influence of alcohol when he hit another vehicle. The driver and her infant daughter were injured,

⁹ The *Powers* court also pointed out that its decision was consistent with the holdings of several other states, examining similar statutes, including: *Dake v. State*, 675 So.2d 1365 (Ala. Crim. App. 1995); *Hardy v. State*, 705 So.2d 979 (Fla. App. 1998); and *People v. Sleboda*, 166 Ill. App. 3d 42, 519 N.E.2d 512 (1988). The undersigned notes that in addition, the following cases have made similar holdings to the one now urged on this Court, including: *Firestone v. State of Nevada*, 120 Nev. 13, 83 P.3d 279 (2004); and *Nield v. State*, 677 N.E.2d 79 (Ind. App. Ct. 1997).

and the car was damaged by the crash. Instead of stopping to provide his personal information and render assistance, the defendant sped away in his car. As a result, he was charged with three counts of hit-and-run pursuant to RCW 46.52.020.¹⁰ He was subsequently convicted and sentenced on all three counts.

On appeal, the Court of Appeals found that Washington's statute was "ambiguous regarding the number of counts that be charged for failing to render assistance." *Ustimenko*, 137 Wash. App. at 117, 151 P.3d at 260. The court looked to

¹⁰ RCW 46.52.020 states in relevant part: (1) A driver of any vehicle involved in an accident resulting in the injury to or death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every such stop shall be made without obstructing traffic more than is necessary.

(2)(a) The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person or damage to other property must move the vehicle as soon as possible off the roadway or freeway main lanes, shoulders, medians, and adjacent areas to a location on an exit ramp shoulder, the frontage road, the nearest suitable cross street, or other suitable location. The driver shall remain at the suitable location until he or she has fulfilled the requirements of subsection (3) of this section. Moving the vehicle in no way affects fault for an accident.

(b) A law enforcement officer or representative of the department of transportation may cause a motor vehicle, cargo, or debris to be moved from the roadway; and neither the department of transportation representative, nor anyone acting under the direction of the officer or the department of transportation representative is liable for damage to the motor vehicle, cargo, or debris caused by reasonable efforts of removal.

(3) Unless otherwise provided in subsection (7) of this section the driver of any vehicle involved in an accident resulting in injury to or death of any person, or involving striking the body of a deceased person, or resulting in damage to any vehicle which is driven or attended by any person or damage to other property shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such 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 or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person or on his or her behalf. Under no circumstances shall the rendering of assistance or other compliance with the provisions of this subsection be evidence of the liability of any driver for such accident.

(4)(a) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident resulting in death is guilty of a class B felony and, upon conviction, is punishable according to chapter 9A.20 RCW.

(b) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident resulting in injury is guilty of a class C felony and, upon conviction, is punishable according to chapter 9A.20 RCW.

c) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident involving striking the body of a deceased person is guilty of a gross misdemeanor.

the "unit of prosecution" test and it found that it was not clear whether the statute could be "violated multiple times in the same incident." *Id.* at 118. According to the court, in RCW 46.52.020, "[t]he unit of prosecution is the act of leaving the scene of an accident without giving assistance and required information, not the failure to give assistance and information to a particular individual." As such, the court determined that the rule of lenity must be applied in the defendant's favor.

There is simply no indication that the West Virginia Legislature intended for a criminal defendant to be charged and sentenced multiple times under West Virginia Code § 17C-4-1. When there is one accident caused by a defendant and he leaves the scene without fulfilling the statutory duties imposed by West Virginia Code § 17C-4-3, he can only be charged with and sentenced on one count of leaving the scene of an accident, regardless of the number of people involved. In the present case, the circuit court violated the Defendant's constitutional rights against double jeopardy by imposing 12 separate sentences for a single offense. This blatant error must not be allowed to stand, and the Defendant's unconstitutional sentences should be reversed.

Before the circuit court, the State argued that this Court's holding in *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982) was controlling, and it appears the circuit court adopted this argument. The circuit court's reliance on *Myers* to resolve this issue was misplaced. In *Myers*, this Court determined that a defendant may be subjected to multiple punishments under either the negligent homicide statute (W. Va. Code § 17C-5-1), or the involuntary manslaughter statute (W. Va. Code § 61-2-5) for multiple deaths arising out of one car accident. The Defendant does not quarrel with this holding. Instead, he argues that *Myers* is not controlling on the issue raised.

The *Myers* Court made a general statement that: "When a crime is committed against people rather property, the general rule is that there are as many offenses as there are individuals affected." 171 W. Va. at 279, 298 S.E.2d at 815. At first blush, this statement may appear all encompassing. However, the *Myers* Court was addressing the crimes of negligent homicide and involuntary manslaughter. The purpose of the statutes defining these crimes clearly and undoubtedly is to address the loss of human life due to some negligent conduct of the defendant.

West Virginia Code § 17C-4-1 does not have a like purpose. This statute is intended to prevent individuals from fleeing the scene of an accident to avoid civil or criminal liability.¹¹ Given the purpose of the statute and the legislature's apparent intent regarding multiple violations the Defendant's sentences cannot stand. Moreover, if the statute is said to be ambiguous, the matter must be resolved in the Defendant's favor according to the rule of lenity.

In sum, the circuit court violated the Defendant's right against double jeopardy as guaranteed by the Fifth Amendment of the United States Constitution and Article III § 5 of the West Virginia Constitution. The legislature did not intend for a defendant to be charged with multiple violations of West Virginia Code § 17C-4-1, when there is only one accident scene, regardless of the number of people involved.

B. The Circuit Court Erred When It Allowed the Results of Blood Tests Completed on the Defendant to be Admitted at Trial.

In his post-trial motions filed with the circuit court, the Defendant requested a new trial, because the circuit court erroneously admitted the results of blood tests

¹¹ The Defendant also notes that West Virginia Code § 17C-4-1 was not intended to punish those driving while intoxicated. It appears that this fact may have been lost in the present case, due to the severity of the situation.

completed on him in violation of *State v. McClead*, 211 W. Va. 515, 566 S.E.2d 652 (2002). In *McClead*, this Court stated:

The statute authorizing the use of blood testing for the purposes of a DUI arrest, is W. Va. Code § 17C-5-4 (Supp.2001). W. Va. Code § 17C-5-4(d) specifically provides that if a law enforcement agency has designated blood testing for DUI arrests "and the person arrested refuses to submit to the blood test, then the law-enforcement officer making the arrest shall designate either a breath or urine test to be administered." This provision provides for the use of alternative chemical testing if an arrestee refuses a blood test. The provision *does not* authorize the issuance of a warrant to compel the taking of blood from an arrestee who refuses to voluntarily take a blood test. Moreover, W. Va. Code § 17C-5-7(a) (1986), explicitly provides that "[i]f any person under arrest [for DUI] refuses to submit to any secondary chemical test, the tests shall not be given...." The statute is clear. If an arrestee refuses a chemical test, it "shall not be given." Nothing in W. Va. Code § 17C-5-7(a) authorizes the issuance of a warrant to extract blood from an arrestee. Finally, Justice Miller observed, in *Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978), that "[o]ur [DUI] statute, unlike some, precludes forcibly administering the test against the will of the driver." *Jordan*, 161 W.Va. at 757, 246 S.E.2d at 263. 211 W. Va. at 518, 566 S.E.2d at 655 (footnotes omitted).

At no time, did the Defendant in this matter consent to a blood test. Thus, his trial counsel correctly raised this issue on his behalf, and sought to have the test results excluded.

In its June 16, 2009, order addressing the Defendant's claim that *McClead* was violated, the circuit court held:

Prior to trial and during the trial the Court addressed the defendant's motions and arguments regarding the application of *State v. McClead* to his case. The Court reiterated its earlier rulings that *State v. McClead* did not apply to the defendant's case and that the Court's denial of the defendant's motions to suppress the blood test evidence was well founded, in part because there are distinctions to

be drawn between the defendant's case and *State v. McClead*.

Further, during oral arguments on the Defendant's pre-trial motion to suppress this evidence, the circuit court stated that it believed the *McClead* Court reached erroneous conclusions regarding law enforcement's authority to obtain a search warrant in a DUI case. (See Trans. from February 25, 2008, motions hearing).

The circuit court may or may not be correct in its assessment that the *McClead* decision is wrong. However, this *per curiam* opinion continues to be good law in this State, and a potential source of guidance for lawyers and judicial officers. The Defendant respectfully submits that it is time for this confusion to end, and that his petition should be granted, in part, to resolve this issue. Further, if this Court determines that *McClead* remains a correct interpretation of the law, the Defendant asks that he be granted a new trial for each of the DUI offenses for which he stands convicted.

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

In his post-trial motions, the Defendant moved the circuit court for a judgment of acquittal arguing that the State failed to produce sufficient evidence to convict him of DUI causing death (W. Va. Code § 17C-5-2(a)), and fleeing the scene of an accident causing death or injury (W. Va. Code § 17C-4-1(a) and (c)). The legal authority regarding challenges to the sufficiency of the evidence is well known. This Court has held:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the

prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

In the instant matter, the State failed to prove beyond a reasonable doubt that the Defendant was guilty of five counts of DUI causing death as articulated in West Virginia Code § 17C-5-2(a). This statute states:

- (a) 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.

The element in contention is the last one. The State failed to prove that the Defendant acted in a "reckless disregard of the safety of others" on the night of the fatal accident.

As argued in front of the circuit court during pre-trial motions and in post-trial motions, the State's witness, Daniel Greathouse could not testify that the Defendant was speeding. (Test. of Daniel Greathouse, Tr. Trans., pp. 313-314 and 322-323). Further, the Defendant testified that he believed he was hit or that the right front tire blew on his truck causing him to lose control of the vehicle. A tire failure would be a plausible explanation for the "fishtailing" observed by Mr. Greathouse. While it is true that Mrs. Sheena Evans testified that the Defendant hit the car she was traveling in, from her vantage point she would not have been able to discern whether the Defendant's tire malfunctioned causing him to lose control. The State did not prove that the Defendant drove recklessly beyond a reasonable doubt. Accordingly, the weight of the evidence did not support convictions for DUI causing death, and it was error for the circuit court to deny the Defendant's request for a judgment of acquittal, or alternatively, to grant him a new trial on these charges.

Next, the State failed to produce sufficient evidence to convict the Defendant of fleeing the scene of an accident. To that end, the State failed to show the Defendant had actual knowledge of the crash -- an element of proof that is implicit in West Virginia Code § 17C-4-1(a). This statute 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.

The bulk of the evidence produced at trial demonstrated that the Defendant's truck came to a stop at least 200 yards from the crash site. (Test. of Jeff Bailey, Tr. Trans., p. 439). The Defendant testified that he was not aware of the collision between the Evans' vehicle and the Perry's vehicle. And further, his testimony revealed that the truck landed in a wooded area, and the Defendant's view of the crash site would have been obscured. (Test. of Defendant, Tr. Trans., p. 737). In sum, the weight of the evidence showed the Defendant was not aware of the accident; and therefore, could not have been cognizant of his statutory duty to provide personal information and to render aid. Accordingly, the circuit court erred when it denied the Defendant's motion for a judgment of acquittal, or in the alternative, a new trial.

VII. CONCLUSION

The Greek philosopher Aristotle once observed: "The law is reason free from passion." One logical meaning that can be attributed to this often-cited quote is that the law should be applied in an impartial and unemotional manner to each person. The factual circumstances underlying the present action certainly beg for this type of disinterested application of the law. As the record reflects, the events of July 7, 2007, are nothing short of horrific. Five people from two different families died that night in a car accident on Interstate 68 in Monongalia County, West Virginia. Seven more were injured, and left not only to mend their physical injuries, but to manage their grief, which was most likely incalculable.

The State of West Virginia asserted that the Defendant should be held accountable for any action he took that evening that contributed to this multi-vehicle car accident. The Defendant was charged with a staggering 26 criminal offenses arising

out of the events of July 7, 2007. The State's desire to punish the Defendant, given the aftermath of this accident, is understandable. However, in prosecuting its case, the State was required to remain in the confines of the criminal law as articulated by the legislature. It could not charge the Defendant in such a manner as to violate his federal and state constitutional rights against double jeopardy.

The circuit court had a legal duty to ensure the Defendant's rights were protected. The court was not authorized to sentence the Defendant in a manner that would violate the principles of the Double Jeopardy Clauses of the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution. And yet, this is precisely what happened when the circuit court permitted the Defendant to be tried, convicted and sentenced on multiple counts of fleeing the scene of an accident as codified in West Virginia Code § 17C-4-1.

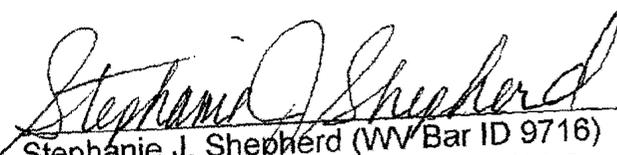
The Defendant raised this issue both before and after trial, asserting that the principles of double jeopardy were being violated. However, the circuit court dismissed the Defendant's claims, and imposed multiple punishments on him in violation of his constitutional rights. He now seeks to have these sentences overturned.

Further, the Defendant contends that the results of the blood tests completed on him were erroneously admitted. Particularly, this Court's holding in *McClead*, which remains a legitimate source of guidance on this issue, appears to support the Defendant's request for exclusion of the results. He seeks a new trial for those offenses for which he stands convicted for which the jury considered the faulty evidence.

Based on the foregoing, the Defendant prays this Court will grant his petition for appeal, reverse his convictions, or grant him a new trial.

BRIAN JOHN STONE
Defendant

By Counsel

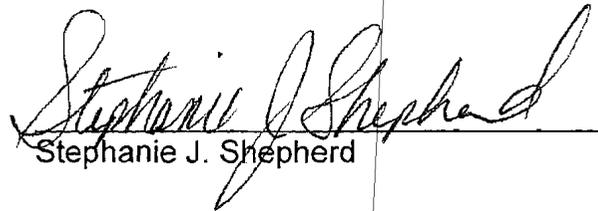

Stephanie J. Shepherd (WV Bar ID 9716)
HEDGES LYONS & SHEPHERD, PLLC
141 Walnut Street
Morgantown, WV 26505
(304) 296-0123

Counsel for Defendant Brian John Stone

CERTIFICATE OF SERVICE

I, Stephanie J. Shepherd, do hereby certify that I served a true and correct copy of the foregoing *Petition for Appeal on Behalf of Brian John Stone* upon the following by U.S. mail, postage prepaid, this 16th day of March 2011:

Marcia Ashdown
Office of the Prosecuting Attorney
243 High Street
Morgantown, WV 26505


Stephanie J. Shepherd