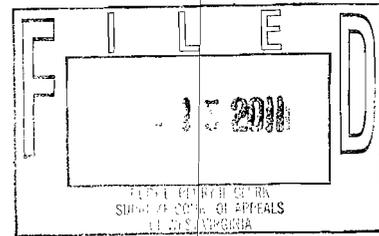

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0519



STATE OF WEST VIRGINIA,

Respondent,

v.

BRIAN JOHN STONE,

Petitioner.

STATE OF WEST VIRGINIA'S RESPONSE TO PETITION OF APPEAL

MARCIA ASHDOWN
MONONGALIA COUNTY PROSECUTING ATTORNEY
243 High Street, Room 323
Morgantown, West Virginia 26505
State Bar No.: 174
Email: ashdown@court.state.wv.us

PERRI DeCHRISTOPHER
ASSISTANT PROSECUTING ATTORNEY
State Bar No.: 6572
Telephone: (304) 291-7250
Email: pjdechr@court.state.wv.us

Counsel for Respondent

TABLE OF CONTENTS

	Page
I. STATEMENT OF FACTS	1
II. PROCEDURAL HISTORY	2
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	2
IV. RESPONSE TO PETITIONER’S ASSIGNMENTS OF ERROR	3
V. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW	3
1. THE CIRCUIT COURT OF MONONGALIA COUNTY WAS CORRECT IN IMPOSING A SEPARATE PUNISHMENT FOR EACH OFFENSE RELATING TO THE PETITIONER’S CHOICE TO FLEE THE SCENE OF THE CRIME RATHER THAN REMAIN ON SCENE TO PROVIDE INFORMATION AND TO OFFER AID TO EACH AND EVERY VICTIM THAT HE EITHER INJURED OR KILLED	3
2. THE BLOOD TEST PROVING THAT THE PETITIONER’S BLOOD ALCOHOL CONTENT WAS .23 WAS OBTAINED PURSUANT TO A VALID AND LAWFUL SEARCH WARRANT UTILIZED BY LAW ENFORCEMENT TO GATHER EVIDENCE AS PART OF A CRIMINAL INVESTIGATION	7
a. Application of <i>McClead</i> to West Virginia Code	8
b. Decisions of West Virginia County Circuit Courts and the West Virginia Supreme Court Subsequent to <i>McClead</i>	10
c. <i>Schmerber v. California</i>	12
3. THE EVIDENCE PRESENTED BY THE STATE WAS OVERWHELMING IN SUPPORTING EACH AND EVERY CONVICTION, INCLUDING AN EYEWITNESS WHO WAS DRIVING BEHIND THE PETITIONER AND WITNESSED THE PETITIONER’S RECKLESS DISREGARD OF THE SAFETY OF OTHERS THAT CAUSED THE CRASH	13
VI. CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Blockburger v. United States</i> , 284 U.S. 299 (1932)	4
<i>Cox v. State</i> , 533 S.E.2d 435 (Ga. 2000)	5
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	10, 12, 13
<i>State v. Gill</i> , 187 W. Va. 136, 416 S.E.2d 253 (1992)	3, 4
<i>State v. McClead</i> , 211 W. Va. 515, 566 S.E.2d 652 (2002)	8, 10, 11, 12, 13
<i>State v. Myers</i> , 171 W. Va. 277, 298 S.E.2d 813 (1982)	5
CONSTITUTIONAL PROVISIONS:	
W. Va. Const. art. 3, § 6	9
STATUTES:	
W. Va. Code § 17C-4-1	5, 6
W. Va. Code § 17C-4-3	6
W. Va. Code § 17C-5-4(d)	8, 9
W. Va. Code § 17C-5-7	10
W. Va. Code § 17C-5-7(a)	8, 9
W. Va. Code § 17C-5-8	10
W. Va. Code § 17C-5-8(d)	10
W. Va. Code § 61-3-12	9
W. Va. Code §§ 61-8B-1 <i>et seq.</i>	9
W. Va. Code § 62-1A-2	9

OTHER:

W. Va. R. Crim. P. 41(b) 9

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0519

STATE OF WEST VIRGINIA,

Respondent,

v.

BRIAN JOHN STONE,

Petitioner.

STATE OF WEST VIRGINIA'S RESPONSE TO PETITION OF APPEAL

The State of West Virginia hereby responds to the petition filed on behalf of the Petitioner to appeal his conviction for the numerous guilty verdicts handed down relating to his drunk driving that resulted in the death of two adults and three children and the injury of two additional adults and five children on Interstate Highway 68 in Monongalia County in July 2007.

I.

STATEMENT OF FACTS

The Petitioner was driving his 2007 Ford F-150 truck east on Interstate 68 in Monongalia County on July 7, 2007, when he recklessly, and in violation of law, caused a crash that involved both the east and west lanes of Interstate 68 and caused the death of *five* innocent victims and the injury of *seven* additional victims. The Petitioner fled the scene on foot and when apprehended by police, his appearance and behavior indicated that he was impaired due to intoxication. His failure of several field sobriety tests confirmed the officers' opinion and he was arrested for Driving Under

the Influence, Third or Subsequent Offense. Officers also learned through a criminal records check that the Petitioner did not have a valid driver's license because it had been revoked due to his multiple prior convictions for driving under the influence of alcohol.

During his processing, the Petitioner was given every opportunity to take the designated secondary chemical test, the Intoximeter breath test, to determine his blood alcohol concentration. The Petitioner, not surprisingly in light of his extensive experience with this process, refused to take this test. In order to gather this evidence to further this investigation, officers obtained a search warrant for the Petitioner's blood, transported him to Ruby Memorial Hospital, and obtained a blood sample. The sample was later analyzed and it was determined that the Petitioner's blood alcohol concentration was .23, the legal limit at the time being .08.

II.

PROCEDURAL HISTORY

The Petitioner was indicted by the September 2007 Term of the Grand Jury of Monongalia County for 26 offenses: Five counts of DUI Causing Death; seven counts of DUI Causing Injury; five counts of Leaving the Scene of an Accident Causing Death; seven counts of Leaving the Scene of an Accident Causing Injury; Driving Under the Influence, Third or Subsequent Offense; and Driving on a License Revoked For Driving Under the Influence, Third or Subsequent Offense.

The Petitioner, Brian Stone, was convicted of all charges by jury verdict on March 21, 2008.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not believe that oral argument is necessary in the instant case.

IV.

RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

1. The Circuit Court of Monongalia County was correct in imposing a separate punishment for each offense relating to the Petitioner's choice to flee the scene of the crime rather than remain on scene to provide information and to offer aid to each and every victim that he either injured or killed.

2. The blood test proving that the Petitioner's blood alcohol content was .23 was obtained pursuant to a valid and lawful search warrant utilized by law enforcement to gather evidence as part of a criminal investigation.

3. The evidence presented by the State was overwhelming in supporting each and every conviction, including an eyewitness who was driving behind the Petitioner and witnessed the Petitioner's reckless disregard of the safety of others that caused the crash.

V.

POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

1. **THE CIRCUIT COURT OF MONONGALIA COUNTY WAS CORRECT IN IMPOSING A SEPARATE PUNISHMENT FOR EACH OFFENSE RELATING TO THE PETITIONER'S CHOICE TO FLEE THE SCENE OF THE CRIME RATHER THAN REMAIN ON SCENE TO PROVIDE INFORMATION AND TO OFFER AID TO EACH AND EVERY VICTIM THAT HE EITHER INJURED OR KILLED.**

Through the Double Jeopardy Clauses of our State and Federal Constitutions, citizens are protected against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). Like this case, the issue presented

in *Gill* was the third component of the Double Jeopardy Clause; i.e., the protection against multiple punishments for the same offense.

Under the test first announced in *Blockburger v. United States*, 284 U.S. 299 (1932), violations of double jeopardy were initially based solely upon a determination of whether there were two offenses or only one and that issue was arrived at by examining “whether each provision require[d] proof of a fact which the other does not.” *Id.* at 304.

However, the West Virginia Supreme Court recognized that the *Blockburger* test is not determinative in all instances because a legislative body has the prerogative to impose cumulative punishments for the same conduct. *Gill* at 142, 416 S.E.2d at 259. Therefore, the *Gill* Court further explained that, in view of this clear sentencing prerogative, we evaluate punishments for double jeopardy purposes by the following standard:

In ascertaining legislative 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. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.

Syl. Pt. 8, *State v. Gill*.

In this case, no clear legislative intent is spelled out in the West Virginia Code relating to punishment for multiple offenses. Therefore, we must refer back to the simple *Blockburger* test to determine whether each offense requires an element of proof the other does not.

The State agrees that the five charges of leaving the scene of an accident resulting in death share identical elements of proof as to the Petitioner’s conduct, as do the seven counts of leaving the

scene of an accident resulting in injury share the same elements of proof. However, when a crime is committed against a person rather than against property, the general rule is that there are as many offenses as there are individuals affected. In *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982), the Court held that multiple deaths resulting from a single negligent operation of motor vehicle may be charged and punished as separate offenses.

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.

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. Another case, *Cox v. State*, 533 S.E.2d 435 (Ga. 2000), held that convictions for three counts of vehicular homicide from one DUI wreck could each be punished separately.

The Petitioner asserts that this Court should disregard the findings in *Myers* because the Court was addressing the crimes of negligent homicide and involuntary manslaughter, whose statutory purposes are “to address the loss of human life due to some negligent conduct of the defendant.” (Pet. at 24.) The Petitioner further asserts in his brief that West Virginia Code § 17C-4-1 does not have a like purpose. This assertion is incorrect and the State submits that just the opposite is true.

It cannot be lost in these facts that West Virginia Code § 17C-4-1 does not merely create a statutory requirement “to prevent individuals from fleeing the scene of an accident to avoid civil or criminal liability,” as asserted by the Petitioner in his brief. (Pet. at 24.) It requires the Petitioner to comply with *all* of the requirements in West Virginia Code § 17C-4-3, including:

[S]hall 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.

The Petitioner had a duty to stay or return to render aid to **each and every** person who was affected, injured or killed by his unlawful actions. The purpose of this statute is clearly and undoubtedly to address the loss of human life due to the negligent (criminal) conduct of the Petitioner.

The Petitioner should serve every day of each consecutive sentence imposed by the court¹ for his failure to return to the scene of this crime to render aid to John Evans (injured as a result of the crash), Courtney Evans (killed as a result of the crash), Sawyer Evans (killed as a result of the crash), Sheena Evans (injured as a result of the crash), Marcia Perry (injured as a result of the crash), Donnell Perry (killed as a result of the crash), Jentil Perry (killed as a result of the crash), Jaquesha Perry (killed as a result of the crash), Myiah Perry (injured as a result of the crash), Justine Perry (injured as a result of the crash), Korie Perry (injured as a result of the crash), Ayana Perry (injured as a result of the crash). Which one of these individuals is not important enough to be considered a separate victim by our Legislature?

¹In the four pages utilized by the Petitioner to list each separate sentence received by the defendant, he has failed to name each separate victim as set forth in each count of the Indictment.

The State submits that the Petitioner was properly charged with separate offenses for leaving the scene for each victim, and he was properly sentenced by the court with separate consecutive offenses for leaving the scene for each victim.

2. THE BLOOD TEST PROVING THAT THE PETITIONER'S BLOOD ALCOHOL CONTENT WAS .23 WAS OBTAINED PURSUANT TO A VALID AND LAWFUL SEARCH WARRANT UTILIZED BY LAW ENFORCEMENT TO GATHER EVIDENCE AS PART OF A CRIMINAL INVESTIGATION.

When officers arrived on scene at this horrific crash, they located the Petitioner, on foot, walking away from the crash and from his own vehicle which had steered clear of the carnage on the road, but came to rest over a hill off the right-hand side of the interstate. Officers observed his demeanor and made observations that included the odor of an alcoholic beverage, bloodshot and glassy eyes, unsteadiness on his feet. Numerous empty beer cans were located in and about the Petitioner's truck. He was arrested for driving under the influence, as well as driving on a revoked license for driving under the influence while officers continued their investigation to determine if any other charges were appropriate.

During processing, the Petitioner refused the Intoximeter test. Because the Petitioner had been arrested and processed for numerous offenses of driving under the influence and was well aware of this machine's evidence gathering purpose, his refusal was not unexpected by the officers. However, officers were rightfully not willing to give up on gathering this type of evidence, knowing the severe and fatal consequences of the crash caused by the Petitioner. They applied for and obtained a search warrant for the Petitioner's blood to gather evidence of his level of intoxication. Blood was drawn at Ruby Memorial Hospital and subsequently tested at the State Police Forensic Laboratory. The Petitioner's blood alcohol level was determined to be .23.

The Petitioner relies upon *State v. McClead*, 211 W. Va. 515, 566 S.E.2d 652 (2002) (*per curiam*), and West Virginia Code §17C-5-7(a) in his motion to suppress the blood result in this case. However, a close reading of *McClead* and a review of constitutional and statutory law, decisions of circuit courts across the State of West Virginia, and the most recent actions of the West Virginia Supreme Court show that his reliance is misplaced.

a. **Application of *McClead* to West Virginia Code.**

An examination of *McClead* reveals that the facts in that case are not the same as the facts of the arrest of the Petitioner in this case. In order for the *per curiam* opinion in *McClead* to have precedential value for a subsequent case, the fact patterns in both cases must be the same. In *McClead* the defendant was not asked to perform the Intoxilyzer because it was out of operation. He was asked to consent to a blood test which he initially refused. However, when *McClead* heard the officer discussing his intent to apply for a search warrant, he said he would consent to the blood test and a search warrant was not obtained. Therefore, the question that the West Virginia Supreme Court identified *sua sponte*² was: Did the defendant give a valid and voluntary consent? (Although the voluntariness of consent should have been the end of the *sua sponte* analysis, the Court went much further, stating that Chapter 17, Article 5 does not specify the use of search warrants to obtain physical evidence from defendants, and arguably implying that there is no authority for police to utilize search warrants in DUI cases.). The *McClead* opinion focuses on West Virginia Code §§ 17C-5-4(d) and -7(a) stating that those code sections do not prescribe a procedure for search

²The issue of consent was not raised in the lower court, and was neither briefed nor argued by the parties on appeal. The West Virginia Supreme Court of Appeals interjected its own argument into the case without the State having had an opportunity to address the issue or to respond at any stage of the proceedings, including pretrial motions, trial, post-trial motions, or the appellate stage.

warrants to obtain arrestees' blood samples. That is true. However, neither do other parts of the criminal code that describe crimes prescribe procedures and tools, such as search warrants, for investigators to use. For example, although police often obtain search warrants for the DNA of suspects in sexual assault crimes, nowhere in West Virginia Code §§ 61-8B-1 *et. seq.* is there a procedure set forth to be utilized by law enforcement. During a burglary investigation fingerprints may be recovered at the scene of the crime. An officer may obtain a search warrant in order to obtain fingerprints of a suspect for comparison purposes, even though nowhere in West Virginia Code § 61-3-12 is there a provision to authorize fingerprinting.

The legal authority for obtaining blood samples from a suspect in a DUI investigation (or any evidence necessary in any investigation) is governed by the Constitution,³ by West Virginia Code § 62-1A-2,⁴ and by Rule 41(b)⁵ of the West Virginia Rules of Criminal Procedure, all of which approve the issuance of search warrants based upon probable cause for the purpose of searching for and seizing objects or substances of possible evidentiary value.

More importantly, a careful reading of West Virginia Code §§17C-5-4(d) and -7(a) makes it clear that both sections relate to the effect of refusal to consent to breath *or* blood tests upon the administrative process for license suspension/revocation. Subsection 4(d) says that refusal to submit to the designated test if the designated test is a blood test cannot result in *license revocation*. The statute is silent as to the use of a blood test as *evidence* in the *criminal case*.

³“No search warrant will issue except on probable cause.” W. Va. Const. art. 3, § 6.

⁴“A warrant may be issued under this article to search for and seize any property . . . which has been used as means of committing a criminal offense.” W. Va. Code § 62-1A-2.

⁵“A warrant may be issued under this rule to search for and seize any property that constitutes evidence of the commission of a criminal offense.” W. Va. R. Crim. P. 41(b).

Similarly, the title of West Virginia Code § 17C-5-7 is “Refusal to submit to tests; *revocation of license or privilege*; consent not withdrawn if person arrested is incapable of refusal; hearing.” (Emphasis added.) The entire section deals exclusively with the license revocation process, the effect of an arrestee’s refusal to comply with the designated alcohol test, and what constitutes a refusal. Again, there is no language to suggest that police do not have the option to obtain blood alcohol evidence for the *criminal proceedings* through the use of a search warrant or reliance upon exigent circumstances. (*See Schmerber v. California, infra.*)

It is, then, extremely relevant to remember that West Virginia Code § 17C-5-8 contemplates police obtaining evidence of intoxication other than that gathered from the designated secondary chemical test. Specifically, West Virginia Code § 17C-5-8(d) says “[t]he provisions of this article shall not limit the introduction . . . in any judicial proceeding of *any* other competent evidence bearing on the question of whether the person was under the influence” (Emphasis added.)

b. Decisions of West Virginia County Circuit Courts and the West Virginia Supreme Court Subsequent to *McClead*.

Immediately following the decision in *McClead*, several circuit court judges across the State began holding that *McClead* did not apply to the facts of the cases before them, or that *McClead* did not have precedential value because it was an unauthored opinion, or simply that it was wrong. These opinions may have been influenced by a now widely circulated scholarly opinion dated August 22, 2002, by Putnam County Circuit Court Judge O.C. Spaulding. (R. at 87, Ex.1.)

Judge Spaulding denied a defendant’s motion to suppress a blood test result from a sample taken pursuant to a search warrant during a DUI investigation. The ruling was appealed to the West Virginia Supreme Court on October 29, 2003, asserting a *McClead* violation. The defendant’s petition was refused (3-2). Moreover, the refusal order of the Court stated, “Justice Davis further

states that she would grant as she believes the majority's decision (in which she joined) in *State v. McClead*, 211 W. Va. 515, 556 S.E.2d 652 (2002) is **wrong**." (R. at 87, Ex 2.)

In 2005, Lewis County Circuit Judge Thomas Keadle denied a motion to suppress a blood test result from a sample drawn pursuant to a search warrant in an investigation of a DUI arrest in *State v. Jerry K. Walls, II*, Case No. 04-F-30. The defendant was subsequently convicted and Judge Keadle's ruling was appealed. The petition to the West Virginia Supreme Court, dated July 14, 2005, asserted the single issue of a *McClead* violation. (R. at 87, Ex. 3.) On November 3, 2005, the West Virginia Supreme Court refused to review Judge Keadle's decision on the admissibility of the blood test result and allowed the conviction to stand. (R. at 87, Ex. 4.)

In 2007, Judge Keadle denied another defendant's motion to suppress a blood test result from a sample drawn pursuant to a search warrant in a DUI case in *State v. Charles Stephen Smith*, Case No. 06-F-36. The defendant was subsequently convicted and Judge Keadle's ruling was again appealed on June 8, 2007, with the sole issue being an alleged *McClead* violation. (R. at 87, Ex. 5.) On October 11, 2007, the West Virginia Supreme Court refused the appeal, thereby declining to overrule Judge Keadle's decision admitting the blood test result. (R. at 87, Ex. 6.)

Clearly, the West Virginia Supreme Court is aware that circuit courts in our State have chosen not to apply *McClead* as argued by the Petitioner. At least one justice, in 2003, has officially declared her position that *McClead* was wrongly decided. The Court has chosen inaction to impliedly overrule *McClead* or to convey that *McClead* is being over-interpreted. The Court's inaction on those petitions for appeal amounts to support of the circuit courts' denials of motions relying upon *McClead* to suppress blood test results obtained through search warrants.

c. *Schmerber v. California.*

The precise issue of collecting a blood sample in order to obtain evidence of a crime was addressed 42 years ago by the United States Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966), a DUI case in which the Court held that, if probable cause exists, police may seize a person and withdraw a sample of the person's blood for evidence. The Court held that, in certain circumstances, blood may even be withdrawn from the suspect without the necessity of a search warrant.

In *Schmerber* (a vehicle crash in which the DUI suspect was taken to a hospital) the Court noted the presence of exigent circumstances and found that any delay caused by obtaining a search warrant threatened the destruction of evidence. *Id.* at 770.

In this Petitioner's case, officers went beyond what is authorized by the United States Supreme Court. They obtained the approval of a neutral judicial officer who found probable cause existed to believe the Petitioner's blood would reveal evidence of the Petitioner's commission of crime. No greater protection of a petitioner's rights than that is required.

Because *McClead* involved the issue of a defendant's consent to a secondary blood alcohol test, as consent relates to the DMV *administrative process*, the case should not be interpreted to prohibit the use of traditional investigative tools (including search warrants) for the gathering of evidence for the *prosecution* of DUI charges. Moreover, to the extent that *McClead* is read by some to arguably prohibit search warrants for blood in DUI criminal cases, it is apparent that the West Virginia Supreme Court of Appeals has declined to agree to such an interpretation, as shown by its refusal to overturn contrary rulings by circuit courts in several cases exactly like this case.

Finally, the United States Supreme Court has long approved the collection of a suspect's blood in a DUI case, even absent a search warrant. The West Virginia Supreme Court has never held that the West Virginia State Constitution provides greater protection to West Virginians than those contemplated by the United States Constitution in *Schmerber, supra*. Neither was the *McClead* opinion based upon a divergence from *Schmerber*.

3. THE EVIDENCE PRESENTED BY THE STATE WAS OVERWHELMING IN SUPPORTING EACH AND EVERY CONVICTION, INCLUDING AN EYEWITNESS WHO WAS DRIVING BEHIND THE PETITIONER AND WITNESSED THE PETITIONER'S RECKLESS DISREGARD OF THE SAFETY OF OTHERS THAT CAUSED THE CRASH.

Daniel Greathouse was driving home from college that evening. He testified that he was driving at approximately 80 mph in the right lane when he saw a truck (the Petitioner's vehicle) approaching *fast* from behind, estimating the truck's speed at approximately 90 mph. The truck then swerved quickly around him and into the left passing lane and then quickly again into the right-hand lane in front of Mr. Greathouse. An unidentified vehicle was in front of the Petitioner's truck in the right lane at that time. The Evans vehicle was just ahead in the left lane. Witness Jamie Porter testified that the Petitioner was "shimmying through traffic." Suddenly, Petitioner's truck crashed into the side of the Evans car, now beside the Petitioner in the left passing lane.

Sheena Evans, her husband Courtney and two children were returning home to Maryland from a trip. Sheena offered testimony that, as the Petitioner was driving his truck recklessly and as he was attempting to pass their vehicle on the right, he began to push into the left lane and into the Evans vehicle. The vehicles lock. The Evans vehicle was pushed into the median, across the median, and finally into oncoming traffic. They crashed into the Perry family.

The Perry family was also returning home to West Virginia. Marcia and Donnell Perry, their five children and their granddaughter were returning home after a trip that included a Yankee's baseball game and a family picnic. In one moment their lives were unalterably changed, or lost: one father killed, two daughters killed, one mother severely injured, four children severely injured. In the Evans vehicle: one father killed, one son killed, one mother severely injured, one child severely injured.

The Petitioner's truck remained virtually unmarked prior to it running off the left side of the highway, over a hill, unable to be easily seen from the roadway. As the victims' cars burned, as entire families lay dying or suffering from terrible injuries on the road, the Petitioner walked from his truck. He walked away in such a hurry that he left his truck running, the door open and the engine in gear.

The officers on scene were able to gather helpful information from the Petitioner, such as "I wasn't involved in an accident" and "I wasn't driving." Nonetheless, at the end of the day, officers were able to prove he was driving. Their investigation, as detailed above, also proved that his blood alcohol content was .23, and on that date he did not even possess a valid West Virginia driver's license.⁶

The jury charge included instructions on DUI causing death *with* reckless disregard and DUI causing Death *without* reckless disregard. Surely, the evidence of the Petitioner's recklessness, weaving in and out of traffic at a high rate of speed, at a time when his BAC was almost three times the legal limit, was overwhelming. The evidence certainly supports the jury's guilty verdicts.

⁶The operator's license possessed by the Petitioner had been obtained from Pennsylvania by fraud and lies about his driving history and his residency. He has now been convicted in Pennsylvania for that crime

VI.

CONCLUSION

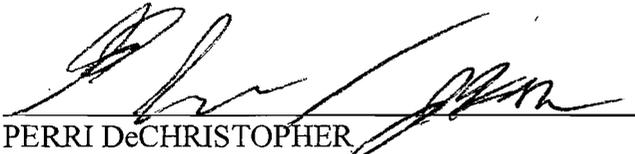
Based upon the facts and legal arguments presented, the State requests that this Court deny the Petition for Appeal and affirm the conviction.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

MARCIA ASHDOWN
MONONGALIA COUNTY PROSECUTING ATTORNEY
State Bar No.: 174
Email: ashdown@court.state.wv.us

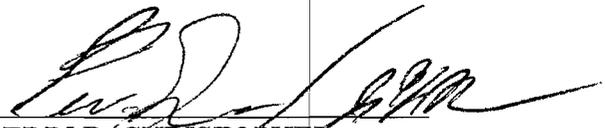


PERRI DeCHRISTOPHER
ASSISTANT PROSECUTING ATTORNEY
Monongalia County Prosecuting Attorney's Office
243 High Street, Room 323
Morgantown, West Virginia 26505
State Bar No.: 6572
Telephone: (304) 291-7250
Email: pjdechr@court.state.wv.us

CERTIFICATE OF SERVICE

I, PERRI DeCHRISTOPHER, Assistant Prosecuting General for Monongalia County and counsel for the Respondent, do hereby verify that I have served a true copy of the "State of West Virginia's Response to Petition of Appeal" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 15th day of July, 2011, addressed as follows:

To: Stephanie J. Shepherd, Esquire
Hedges, Lyons & Shepherd, PLLC
141 Walnut Street
Morgantown, West Virginia 26505


PERRI DeCHRISTOPHER