

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAMELA JEAN GAMES-NEELY,
Prosecuting Attorney,

Petitioner,

v.

No.: 11-1648

HONORABLE JOANN OVERINGTON,
Magistrate, Berkeley County, West Virginia,

Respondent.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR.

A. WHETHER THE CIRCUIT COURT ERRED IN DENYING THE WRIT OF PROHIBITION WHEN THE RESPONDENT MAGISTRATE EXCEEDED HER LEGAL AUTHORITY BY ORDERING AS DISCOVERY INFORMATION NOT AUTHORIZED BY W.V.R.CR.P.MAG.CT. 29?

B. WHETHER THE CIRCUIT COURT ERRED IN DENYING THE WRIT OF PROHIBITION WHEN THE RESPONDENT MAGISTRATE EXCEEDED HER LEGAL AUTHORITY IN A MISDEMEANOR DUI CASE BY ORDERING SPECIFIC DISCOVERY REQUESTED BY THE DEFENDANT WITHOUT A SHOWING OF MATERIALITY TO THE DEFENSE'S CASE?

1. The Defendant failed to show the materiality to his defense of all of the downloaded data for all of the records for all of the files from the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after.

2. The Defendant failed to show the materiality to his defense of all of the maintenance and certification records for the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after.

3. The Defendant failed to show the materiality to his defense of all of the maintenance and certification records for any and all simulators used in the calibration or verification of the Intoximeter EC/IR II used on the Defendant.

4. The Defendant failed to show the materiality to his defense of all of the assays for any and all simulator solutions used in the calibration or verification of accuracy of the Intoximeter EC/IR II used on the Defendant.

5. The Defendant failed to show the materiality to his defense of all of the identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy of the Intoximeter EC/IR II used on the Defendant.

6. The Defendant failed to show the materiality to his defense of copies of any and all training materials received by the Department [of Public Safety] from Intoximeters, Inc., for the training of breath test operators and maintenance technicians when such documents are protected by federal copyright laws.

II. STATEMENT OF THE CASE.

1. On January 6, 2011, Christopher Thomas Seidell (“Defendant”) was charged in the Berkeley County Magistrate Court with the misdemeanor of Driving Under the Influence, in violation of **W. Va. Code § 17C-5-2(d)**, and a minor traffic offense. [*State v. Christopher T. Seidell*, Berkeley County Case No.: 11-M-98/99.]

2. The arrest was based on the following allegations. The arresting officer observed the Defendant almost hitting another vehicle at an intersection and then not signaling lane changes and weaving. The Defendant exhibited signs of intoxication and admitted drinking beers. The Defendant failed each of the non-scientific field sobriety tests and blew a .114 on the Preliminary Breath test. After being arrested, the Defendant registered a .149 blood alcohol content on the designated secondary chemical test, the Intoximeter EC/IR-II. [*Criminal Complaint*, Case No.: 11-M-98/99.]

3. The Defendant filed a Motion for Breath Test Discovery, demanding the following:

1. The downloaded data for the Intoximeter EC/IR II breath machine used in this case. Specifically all of the data for all the records for all of the files downloaded for EC/IR II serial number 008084 for the time period of January 1, 2010 through March 1, 2011. It is requested that this data be in both digital and hard copy format with the first row showing headers. Regardless how the data is provided, it is important that all the files, including the blow data and fuel cell data be provided.

2. All the maintenance and certification records for EC/IR II serial number 008084 for the time period of January 1, 2010 to March 1, 2011.

3. All the maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for EC/IR II serial number 008084. This particular request includes documentation for any NIST thermometers that are used in the verification of simulator calibration.

4. All assays for any and all simulator solutions used in the calibration or verification of accuracy for EC/IR II serial number 008084.

5. Identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy for EC/IR II serial number 008084.

6. Copies of any and all training materials received by the department from Intoximeters, Inc. for the training of breath test operators and maintenance technicians.

Further, any personal information from individuals other than the named defendant, Christopher Seidell, may be excluded from any and all information provided. However, it is expressly understood that any "fields" omitted by the West Virginia State police prior to providing said information be identified in some recognizable manner such as a citation number or some similar consistent form thereof.

[*Motion for Breath Test Discovery*, App. R., 21-23.]

4. The Respondent Magistrate granted the Motion over the State's objection in a conclusory order prepared by the Defendant's counsel. [*EC/IR II Discovery Order*, 5/10/11, App. R. 24-25.] No other record from Magistrate Court exists that demonstrates the Respondent Magistrate's reasoning or basis for granting the motion.

5. The Petitioner argued to the Circuit Court that the Respondent Magistrate's Discovery Order is outside the scope of discovery permitted in magistrate court criminal cases, pursuant to *W.V.R.Cr.P. Mag. Ct. 29*, because the State is not intending on using such information. The Petitioner further argued that, notwithstanding the requirements of *W.V.R.Cr.P. Mag. Ct. 29*, the Defendant failed to demonstrate any relevancy of the requested information to this proceeding or any relevancy of the time frame for which such information is requested. The Petitioner also represented that the State Police represent that the material provided to them by Intoximeter, Inc., is copyrighted, such that they lack legal authority to provide a copy. [*Petition for Writ of Prohibition*, Case No.: 11-C-403, App.R. 17-20; Tr. 7/8/11, App.R. 90-126.]

6. The Petitioner also objected to the Court's consideration of the documents Mr. Wagner attached to the Defendant's Motion to Deny State's Petition for Writ of Prohibition. Specifically, the Petitioner objected as follows:

Att. 1: March 16, 2011, Order from State v. Ruffner (Morgan County Circuit Court). This Order is not *res judicata* or collateral estoppel to this proceeding, and appears to order information for an *in camera* review. [Tr. 7/8/11, App.R. 92.]

Att. 2: Affidavit of Elizabeth MacMurray from State v. Ruffner (Morgan County Circuit Court). This affidavit is hearsay. [Id., App.R. 96.]

Att. 3: September 21, 2010, Order from State v. McKinney (Berkeley County Circuit Court). This Order is not *res judicata* or collateral estoppel to this proceeding, and

was agreed upon the State's belief that defendant therein was undertaking a *Daubert* challenge to the EC/IR II. [Id., App.R. 92-95.]

Att. 4: March 1, 2011, Order from State v. Gain (Berkeley County Magistrate Court). There is a State's Motion to Rescind Order currently pending based on the Defendant's misrepresentation to the court that this *ex parte* order was agreed with the State. [Id., App.R. 95-96.]

Att. 5: February 3, 2011, Order from State v. Ethredge (Morgan County Magistrate Court). This Order is not *res judicata* or collateral estoppel to this proceeding. [Id., App.R. 95-96.]

Att. 6: April 27, 2011, Order from City of Martinsburg v. Hummer (Martinsburg Municipal Court). This Order is not *res judicata* or collateral estoppel to this proceeding, and it is asserted that the City Prosecutor was led by defense counsel to believe that this was a *pro forma* order. [Id., App.R. 95-96.]

Att. 7: April 27, 2011, Order from City of Martinsburg v. Atlee (Martinsburg Municipal Court). This Order is not *res judicata* or collateral estoppel to this proceeding, and it is asserted that the City Prosecutor was led to believe that this was a *pro forma* order. [Id., App.R. 95-96.]

Att. 8: November 18, 2010, Order from North Carolina v. Marino (N.C. Superior Court, Moore County). This Order is not *res judicata* or collateral estoppel to this proceeding. [Id., App.R. 97.]

Att. 9: November 3, 2010, transcript from hearing for out-of-state subpoena in North Carolina v. Marino (N.C. Superior Court, Moore County). This transcript is not *res judicata* or collateral estoppel to this proceeding, and it is hearsay. Additionally, it was not provided by Mr. Wagner to counsel. [Id., App.R. 97-99.]

Att. 10: June 14, 2011, Order from Wyoming v. Espinoza (Wyoming Circuit Court, Albany County). This Order is not *res judicata* or collateral estoppel to this proceeding. [Id., App.R. 97.]

Att. 11: March 6, 2011, letter from Bryan Brown to Mr. Wagner. It is hearsay. [Id., App.R. 96-97.]

[App. R. 92-97.]

7. The Defendant argued that the information requested is relevant because the device is designed to produce the data, and the data will provide a meaningful opportunity to review the machine. [Id., App.R. 104-109; *Motion to Deny State's Petition for Writ of Prohibition*, 7/6/11, App.R. 28-64.]

8. The Circuit Court directed the parties to submit proposed orders, which proposed orders were submitted. [App. R. 65-77, 78-83.]

9. The Circuit Court prepared and entered its own Order denying the Petition. [*Order Denying Petition for Writ of Prohibition*, 10/5/11, App. R. 1-14.]

10. Due to the Circuit Clerk's not transmitting a copy of the Order to the Petitioner, the Circuit Court granted an extension of time within which to file a Notice of Appeal. [*Order Granting Extension of Time to File Notice of Appeal and Granting Stay*, 11/2/11, App.R. 15-16.]

11. The Notice of Appeal was timely filed and this Court entered a scheduling order. [*Scheduling Order*, 11/28/11, Docket No.: 11-1648.]

III. SUMMARY OF THE ARGUMENT.

The Circuit Court erred by denying the Petition for Writ of Prohibition because the information demanded as discovery in the underlying Magistrate Court misdemeanor DUI case is plainly outside the scope of discovery permitted by *W.V.R.Cr.P.Mag.Ct. 29* [2010].

The Circuit Court also erred by denying the Petition for Writ of Prohibition because, *W.V.R.Cr.P.Mag.Ct. 29* [2010] notwithstanding, the Defendant in the underlying Magistrate Court misdemeanor DUI case failed to show the materiality to his defense of the overly broad scope of information he demanded as discovery relating to the designated secondary breath examination device, the Intoximeter EC/IR II.

The Circuit Court erroneously based its factual findings solely on inadmissible hearsay that was objected to by the Petitioner. That hearsay was an affidavit that had been prepared in an entirely different case from another county which concerned a different breath alcohol analysis device than was used on the Defendant. The Circuit Court based its entire decision on factual representations that were made about that other device rather than the device used on the Defendant.

The Petitioner respectfully requests this Court to reverse the ruling of the Circuit Court.

IV. STATEMENT REGARDING ORAL ARGUMENT.

If this Court were to accept this case for argument, Rule 20 argument is appropriate since this case appears to present an issue of first impression for this Court. The Petitioner found no reported cases of this Court interpreting *W.V.R.Cr.P.Mag.Ct. 29* or discussing the materiality in a DUI case of the specific discovery requests made by this Defendant pertaining to the Intoximeter EC/IR II used as the State's designated secondary chemical test.

V. ARGUMENT.

Standard of review.

The standards of review, applicable to each of the arguments herein, used by this Court when reviewing the denial of a petition for writ of prohibition are:

1. The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*.
2. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors

are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Syl. Pts. 1 and 2, *State ex rel. Callahan v. Santucci*, 210 W.Va. 483, 557 S.E.2d 890 (2001).

The Petitioner satisfies all five of the factors listed in Syllabus Point 2, *State ex rel. Callahan v. Santucci*, *id.* The first two factors are satisfied because the State has no other means to seek relief and is damaged or prejudiced in a way that is not correctable on appeal because the State has no right of appeal in a criminal case.

As to factor four, the Defendant’s counsel has filed identical or similar motions for discovery in other DUI prosecutions pending before in other courts in this and other counties. If the Circuit Court’s, and the Respondent Magistrate’s, erroneous orders are allowed to stand the error will repeat and persist in disregard for either procedural or substantive law.

Since the Respondent Magistrate’s Order represents the first time that a Magistrate in Berkeley County has had this particular Motion before them, the order raises a new and important problems or issues of law of first impression, thereby fulfilling the fifth factor for the granting of a writ of prohibition.

The arguments provided below, therefore, will focus on the third factor, the one to be given substantial weight, that the Respondent Magistrate's order is clearly erroneous as a matter of law.

A. THE CIRCUIT COURT ERRED IN DENYING THE WRIT OF PROHIBITION WHEN THE RESPONDENT MAGISTRATE EXCEEDED HER LEGAL AUTHORITY BY ORDERING AS DISCOVERY INFORMATION NOT AUTHORIZED BY W.V.R.CR.P.MAG.CT. 29.

The rule governing discovery in criminal cases in magistrate court provides:

RULE 29. Discovery in Misdemeanor Actions.

(a) The state and the defendant shall make every reasonable effort to informally exchange reciprocal discovery prior to trial. In the event that the parties are unable to reach an agreement on discovery, the following provisions shall apply:

(b) Disclosure of evidence by the state.

(1) The following must be disclosed by the state, if the state intends to use such evidence during any stage of the court proceedings:

- (A) Statement of defendant
- (B) Defendant's prior criminal record
- (C) Documents and tangible objects
- (D) Reports of examination and tests
- (E) Expert witnesses: names, addresses and summary of expected testimony
- (F) State witnesses: names and addresses

(c) Disclosure of evidence by the defendant.

(1) The following must be disclosed by the defendant, if the defendant intends to use such evidence during any stage of the court proceedings:

- (A) Documents and tangible objects
- (B) Reports of examinations and tests
- (C) Expert witnesses: names, addresses and summary of

expected testimony

(D) Defense witnesses: names and addresses

(d) Timing of discovery from the state. If discovery is requested by the defendant, the relevant discovery material shall be provided at least 21 days in advance of the date of trial, provided that the request has been made at least 14 days in advance of the date the response is due.

(e) Timing of discovery from the defendant. If reciprocal discovery is requested by the state, the relevant discovery material shall be provided at least 14 days before the date of trial, provided that the request is made at least 7 days in advance of the date the response is due.

(f) Continuance. If discovery that has been timely requested is not, for good reason shown, available to be produced in a timely manner, either the state or the defense may request, and be granted, a continuance to facilitate production of the requested material.

(g) Failure to comply with discovery request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to promptly provide the discovery or to promptly arrange for inspection of the discovery. In addition, the court may grant a continuance or prohibit the offending party from introducing any evidence that was not disclosed.

W.V.R.Cr.P.Mag.Ct. 29 [2010].

Focusing on Rule 29(b), the Respondent Magistrate clearly exceeded her lawful authority by ordering the State to produce the information demanded by the Defendant. That information is not included among the specific items listed by Rule 29(b) to be provided by the State. The Circuit Court erred by denying the requested writ

that would have prohibited the Respondent Magistrate from enforcing her erroneous discovery order.

The Circuit Court erred by not applying the plain language of Rule 29. Instead, the Circuit Court relied on an opinion of this Court that preceded the promulgation of Rule 29, State v. Doonan, 220 W. Va. 8, 640 S.E.2d 71 (2006).

Doonan applied general discovery principles of *W.V.R.Cr.P. 16* to criminal cases in the Magistrate Courts *because there was at that time no procedural rule governing discovery in the Magistrate Courts*. This Court officially corrected the discovery rule omission by promulgating Rule 29, which became effective in May 2007, and which negated Doonan's application of *W.V.R.Cr.P. 16* to Magistrate Court:

“Until an appropriate rule is adopted in the Rules of Criminal Procedure for Magistrate Courts, the provisions of Rule 16 of the West Virginia Rules of Criminal Procedure shall govern the procedures and requirements for discovery in criminal cases which are to be heard on their merits in magistrate courts.

Syl. Pt. 5, State v. Doonan, *supra*. See also *W.V.R.Cr.P. 1*.

The Petitioner respectfully requests this Court to find that the plain language of *W.V.R.Cr.P.Mag.Ct. 29* does not require the State to provide the specific information demanded by the Defendant in the underlying misdemeanor DUI case. The Petitioner respectfully requests this Court to hold that the Respondent Magistrate exceeded her lawful authority when it ordered the discovery in direct contravention of *W.V.R.Cr.P.Mag.Ct. 29*. The Petitioner respectfully requests this Court to find that the

language of Doonan applying *W.V.R.Cr.P. 16* to discovery in criminal cases in Magistrate Court is overruled by this Court's subsequent adoption of *W.V.R.Cr.P.Mag.Ct. 29*.

Since the Circuit Court erred in denying the writ of prohibition, the Petitioner respectfully requests this Court to reverse the erroneous ruling of the Circuit Court.

State ex rel. Callahan v. Santucci, *supra*.

B. THE CIRCUIT COURT ERRED IN DENYING THE WRIT OF PROHIBITION WHEN THE RESPONDENT MAGISTRATE EXCEEDED HER LEGAL AUTHORITY IN A MISDEMEANOR DUI CASE BY ORDERING SPECIFIC DISCOVERY REQUESTED BY THE DEFENDANT WITHOUT A SHOWING OF MATERIALITY TO THE DEFENSE'S CASE.

Additional Standards of Review.

The Circuit Court's order denying the writ of prohibition ruled that, regardless of the effect of *W.V.R.Cr.P.Mag.Ct. 29*, the Defendant had a due process right, pursuant to *United States Constitution*, Am. 5, and *West Virginia Constitution*, Art. III, § 10, to all of the information he requested in discovery in Magistrate Court. The Circuit Court cited to this Court's holding that "evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[.]'" State v. Morris, 227 W. Va. 76, 705 S.E.2d 583, 592 (2010).

To give a broader picture of that standard, this Court also provides standards for the analysis of a circuit court's ruling on an allegation of the State's failure to disclose evidence and for assessing the materiality of such evidence. While these standards are

usually applicable in post-conviction allegations of non-disclosed evidence, the analysis is germane to the case *sub judice*. Those standards are:

“A claim of a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), presents mixed questions of law and fact. Consequently, the circuit court's factual findings should be reviewed under a clearly erroneous standard, and questions of law are subject to a *de novo* review.” Syllabus point 7, *State v. Black*, 227 W.Va. 297, 708 S.E.2d 491, 2010 WL 761061 (2010).

“There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either wilfully or inadvertently; and (3) the evidence must have been material, *i.e.*, it must have prejudiced the defense at trial.” Syllabus point 2, *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007).

Syl. Pts. 15 and 16, *State v. White*, 227 W.Va. 231, 707 S.E.2d 841 (2011).

In its analysis of an alleged violation of the discovery provisions of *W.V.R.Cr.P.*

16 by a criminal defendant in a felony case, this Court also focuses on the materiality of the evidence sought:

The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case.

Syl. Pt. 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

Bearing these principles in mind, it is apparent that the Circuit Court's factual findings are clearly erroneous and arbitrary and that the Circuit Court erred in ruling that the discovery as requested was material to the defense's case.

1. *The Defendant failed to show the materiality to his defense of all of the downloaded data for all of the records for all of the files from the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after.*

The Intoximeter EC/IR II is an alcohol breath analysis device manufactured by Intoximeters, Inc., a corporation based in St. Louis, Missouri. The Intoximeter EC/IR II is the designated alcohol breath analysis device to be used for secondary chemical tests of persons arrested for driving under the influence offenses for all law enforcement agencies in West Virginia, including the Berkeley County Sheriff's Department (the arresting agency in the underlying case). *See: W. Va. Code § 17C-5-4(d) and 64 C.S.R. 10 § 6.*

Intoximeters, Inc., describes its EC/IR II as a: "transportable, bench-top instrument featuring fuel cell integration analysis combined with real-time analytical advantages of infrared technology." <http://www.intox.com/p-562-intox-ecir-ii.aspx>.

Approved by the National Highway Traffic Safety Administration of the United States Department of Transportation, the unique features of the EC/IR II are described as including:

The sampling system in the Intox EC/IR II utilizes advantages of both electrochemical sensor (EC) and infrared sensor (IR) technology. The Infrared system is capable of measuring both alcohol and carbon dioxide concentrations

in the breath. Software settings and test database are monitored to insure their integrity. The instrument also contains advanced radio frequency interference immunity and detection, automatic accuracy checks and calibrations using internal gas tank or external simulator (recirculation for wet bath use), self-diagnostic capabilities, an easy to read 256 x 32 pixel graphic vacuum fluorescent display and is capable of remote diagnostics along with centralized data collection using optional IntoxNet software.

Id.

The Respondent Magistrate's May 10, 2011, *EC/IR II Discovery Order* is completely devoid of any factual basis or legal application that shows that the Defendant demonstrated a materiality to his defense that would warrant compelling the State to provide all of the downloaded data for all of the records for all of the files from the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after. [App. R. 24-25.] Since the Defendant's discovery motion is just a bald request for the information, no other record from the Magistrate Court exists, or was produced, that shows the Respondent Magistrate's reasoning for granting the motion.

This Court holds in other contexts affecting criminal prosecutions that good cause will not be presumed from a silent record. *See: State v. Holliday*, 188 W.Va. 321, 424 S.E.2d 248, 250 (1992)(using restraints on a criminal defendant during trial); Syl. Pts. 4 & 5, *State ex rel. Johnson v. Zakaib*, 184 W.Va. 346, 400 S.E.2d 590 (1990)(circuit court speedy trial right); Syl. Pt. 2, *Gibson v. Dale*, 173 W.Va. 681, 319 S.E.2d 806

(1984)(knowing and intelligent waiver of grounds for habeas corpus); Syl. Pt. 1, State ex rel. Miller v. Fury, 172 W.Va. 580, 309 S.E.2d 79 (1983)(magistrate court speedy trial right); Syl. Pts. 2 & 3, State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982)(magistrate court speedy trial right); State v. Dozier, 163 W.Va. 192, 255 S.E.2d 552, 555 (1979)(knowing and intelligent waiver of right to proper jury instruction).

Since the record below was silent, the Circuit Court could make no presumption as to the factual or legal basis for the Respondent Magistrate's Order. The Petitioner therefore met her burden that the Respondent Magistrate had exceeded her lawful authority in ordering the requested discovery. The Defendant then failed to rebut the Petitioner's showing when he failed to provide a factual basis *before the Circuit Court* that the discovery he requested was material to his defense.

This Court holds that a proper foundation must be laid before the results of a breath test may be admitted at a criminal trial for a charge of driving under the influence. Syl., State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971), *cited favorably in* Hanson v. Miller, 211 W.Va. 677, 567 S.E.2d 687, 689 (2002). Hood holds that

the necessary foundation before the admission of the results of any test are: (1) That the testing device or equipment was in proper working order; (2) that the person giving and interpreting the test was properly qualified; (3) that the test was properly conducted; and (4) that there was compliance with any statutory requirements.

Hood, *supra*, 184 S.E.2d 334, 337 (citations omitted).

Consequently, a DUI defendant may choose to question whether the testing device was in proper working order on the day it was used on him. Choosing to challenge the proper working condition of the device does not authorize a defendant to go on a fishing expedition for information however. The defendant must show the materiality of that information to his defense.

The date of incident in this case is January 6, 2011. The Defendant in this case cast off on a fishing expedition by requesting all of the downloaded data for all of the records for all of the files stored in the Intoximeter EC/IR II used in his case (number 008084) from January 1, 2010, through March 1, 2011. Yet, the Defendant failed to demonstrate to the Circuit Court why that information is material to challenging whether the device was working on January 6, 2011.

At the July 8, 2011, hearing before the Circuit Court the Defendant offered no witness to be examined on this question. The Defendant did not call the Respondent Magistrate to explain her rationale for granting the motion. The Defendant did not call any witness to explain to the Circuit Court why this information was material.

Rather than calling witnesses to try to establish the materiality of the requested information, the Defendant chose to rely upon attachments to his *Motion to Deny State's Petition for Writ of Prohibition*. The Petitioner objected to the Circuit Court's consideration of any of those attachments as each was either hearsay or bore no *res judicata* effect on the current case. [App.R. 92-99.]

The Petitioner specifically made a hearsay objection to an affidavit of Elizabeth McMurray. [App.R. 96.] From the face of that affidavit, it was prepared for a different case with a different defendant in a different county. Significantly, the affidavit concerned a different EC/IR II device than was used on the Defendant in this case.

The Petitioner objected to this hearsay evidence being considered by the Circuit Court because hearsay is inadmissible unless it falls within an exception to the Rules of Evidence. *W.V.R.E.* 801 and 802. "Hearsay is presumptively untrustworthy because the out-of-court declarant cannot be cross-examined immediately as to any inaccuracy or ambiguity in his or her statement." State v. Phillips, 194 W.Va. 569, 461 S.E.2d 75, 81 (1995)(citations omitted). Hearsay is inadmissible unless it is not being offered for the truth of the matter asserted, is not hearsay under the rules, or falls within an exception in the rules. *See* Syl. Pt. 3, State v. Woodson, 222 W.Va. 607, 671 S.E.2d 438 (2008). Extraordinary remedy proceedings, like the writ of prohibition, are not excluded from the application of the Rules of Evidence by *W.V.R.E.* 1101.

In the proceeding in the Circuit Court, Ms. McMurray's affidavit was being offered for the truth of the matter asserted, that the information requested by the Defendant was material to his defense. Ms. McMurray's affidavit was hearsay. Ms. McMurray's affidavit did not fall within an exception provided in the rules. The affidavit was plainly inadmissible. Woodson.

In its final order the Circuit Court specifically noted the Petitioner's hearsay objection. The Circuit Court then inexplicably ruled, without citing any legal exception that would allow the admissibility of this hearsay, that "the Court will consider the affidavit as an extension of the argument advanced by the Defendant's counsel at oral argument." [*Order Denying Petition for Writ of Prohibition*, 10/5/11, App. R. 8, n. 3.]

The Circuit Court then specifically relied upon this affidavit in rendering its ruling. [*Id.*, App. R. 8-11.] The Circuit Court plainly erred in its consideration of this inadmissible hearsay. Woodson, *supra*; Phillips, *supra*; W.V.R.E. 801 and 802.

If the affidavit is properly excluded as inadmissible hearsay then the Defendant offered no evidence at all. Without any evidence presented by the Defendant, any findings of fact that the Circuit Court made were, therefore, arbitrary and clearly erroneous. State v. White, *supra*, 707 S.E.2d 841.

Once the improperly admitted hearsay is removed, all that is left in the record before the Circuit Court to support the Defendant's position are his bare conclusory statements. In an unpublished opinion noteworthy for its discussion of discovery issues surrounding the Intoximeter EC/IR II, the Tennessee Court of Criminal Appeals denied a motion for discovery of the machine's source code, stating that the appellant "must do more than emphatically state that [she] needed certain discovery. [She] must show how the discoverable items were material to the preparation of [her] defense." State v.

Tindell, 2010 WL 2516875, p. 16 (Tenn.Crim.App., 2010, *appeal denied*, November 17, 2010.)

In the case *sub judice*, the record reflects only the Defendant's emphatic statement of need. The Defendant tells the Circuit Court that "the bottom line on how it's relevant is [...] the machine is designed to produce this data." [App. R., 104, lines 20-24.]

Whether a device can collect data unrelated to a particular defendant's use of the device does not automatically make that data material to his defense. The Defendant failed to articulate any reason why the data from each individual that ever blew into the device for a year prior to his blowing into it, and ninety days after, was material to his defense.

The Defendant then tried to analogize his request to a criminal defendant's right to scrutinize a DNA test or a blood test or a ballistics test. [App. R. 106-107.] The Defendant's analogy to a DNA, blood or ballistics test fails to hold. The results of such tests may be subject to review by a criminal defendant. The methodology used to arrive at the results may be subject to review by a criminal defendant. But reviewing such test results and methodology does not automatically require the State to turn over all of the data for every single DNA, blood or ballistics test that was ever performed on a particular analysis device. There must be more, and that "more" is a particularized showing of materiality to the defense of all of those other tests. The Defendant did not make that showing.

The Defendant concluded that “Relevant discovery is always relevant.” [App. R. 108, line 11.] The statement is circular and does not shed any light on the Defendant’s reasoning as to why the information he requested is material.

The Circuit Court’s ruling was also conclusory: “The Court is satisfied, however, that the Defendant in the instant case has made a threshold showing of relevance, because the Defendant is seeking to test the accuracy of the particular machine which the State intends to use as evidence against him.” [*Order Denying Petition for Writ of Prohibition*, 10/5/11, App.R. 10.] Wanting to test the accuracy of the device is an appropriate aim for the defense. But the Defendant was still required to show how being provided with all of the data on every other person who ever used that same device for fifteen months is material to achieving that aim. Emphatically stating that he needs the information is different from the Defendant showing *why he needs it*.

Lacking a showing of materiality for all of the downloaded data for all of the records for all of the files from the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after, the Defendant is not entitled to such discovery. The Circuit Court erred in holding that he was entitled. *State v. White*, *supra*.

The Petitioner respectfully requests this Court to reverse the ruling of the Circuit Court. *State ex rel. Callahan v. Santucci*, *supra*.

2. *The Defendant failed to show the materiality to his defense of all of the maintenance and certification records for the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after.*

The arguments offered above as to how the Defendant failed to show the materiality to his defense of all of the downloaded data for all of the records for all of the files from the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after, are just as applicable to his request for the maintenance and certification records.

The Circuit Court relied on inadmissible hearsay when it considered Ms. MacMurray's affidavit. Woodson, *supra*; Phillips, *supra*; W.V.R.E. 801 and 802.

If the affidavit is properly excluded as inadmissible hearsay then the Defendant offered no evidence at all. Any findings of fact that the Circuit Court made were, therefore, clearly erroneous. State v. White, *supra*, 707 S.E.2d 841.

Not only are the Circuit Court's factual findings erroneous because they were based on inadmissible hearsay, but the Circuit Court based its findings regarding the maintenance and certification records on the affidavit's representations about an *entirely different device than the one used on the Defendant*. The affidavit the Circuit Court relied upon was prepared for a different case in another county with a different Intoximeter EC/IR II device. The affidavit references software and calibration changes for that device (Number 008325), *not the device used on the Defendant* in this case (Number 008084). Perhaps the Circuit Court did not notice this discrepancy. But it was

these changes to software and calibration the device Number 008325 that the Circuit Court found to be relevant and material to *this* Defendant's defense. [*Order Denying Petition for Writ of Prohibition*, 10/5/11, App. R. 10.] The Circuit Court's factual findings were arbitrary and clearly erroneous. State v. White, *supra*.

Lacking a showing of materiality of all of the maintenance and certification records for the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after, the Defendant is not entitled to such discovery. The Circuit Court erred in holding that he was entitled. State v. White, *supra*.

Notwithstanding the Defendant's failure to show materiality and the Circuit Court's error, the Petitioner recognizes that Hood, *supra*, 184 S.E.2d 334, 337, requires the State to prove as a foundation for the admission of the test results that the device was in proper working order. The Petitioner concedes, as it did to the Circuit Court, that, in the absence of the Defendant's showing of materiality, maintenance and calibration records for the device used on the Defendant for a reasonable time frame prior to the incident date of January 6, 2011, could still be material to the defense.

The Circuit Court's Order that all maintenance and calibration records from January 1, 2010, to March 1, 2011, is overly broad, given that is not based on any factual or legal showing of materiality. The Circuit Court erred in holding that he was entitled. State v. White, *supra*.

The Petitioner respectfully requests this Court to reverse the ruling of the Circuit Court. State ex rel. Callahan v. Santucci, *supra*.

3. *The Defendant failed to show the materiality to his defense of all of the maintenance and certification records for any and all simulators used in the calibration or verification of the Intoximeter EC/IR II used on the Defendant.*

The arguments offered above as to how the Defendant failed to show the materiality to his defense of all of the downloaded data for all of the records for all of the files, and for all of the maintenance and certification records, from the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after, are just as applicable to the request for all of the maintenance and certification records for any and all simulators used in the calibration or verification of that device.

The Circuit Court relied on inadmissible hearsay when it considered Ms. MacMurray's affidavit. Woodson, *supra*; Phillips, *supra*; W.V.R.E. 801 and 802.

If the affidavit is properly excluded as inadmissible hearsay then the Defendant offered no evidence at all. Any findings of fact that the Circuit Court made were, therefore, clearly erroneous. State v. White, *supra*, 707 S.E.2d 841.

Not only are the Circuit Court's factual findings erroneous because they were based on inadmissible hearsay, but the Circuit Court repeated its error of relying on the affidavit's representations about an *entirely different device than the one used on the Defendant*. [Order Denying Petition for Writ of Prohibition, 10/5/11, App. R. 10.] The two

devices are of the same manufacture but are two different devices (Numbers 008325 and 008084). The Circuit Court relied on the affidavit's representations about the different device and then, in the very next paragraph, the Circuit Court concludes:

For the same reasons contained in the preceding paragraph, the Court finds that the Defendant has articulated the materiality of all of the maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for the particular Intoximeter EC/IE II machine in question, that the Defendant has articulated the materiality of all assays for any and all simulator solutions used in the calibration or verification of accuracy for the particular Intoximeter EC/IR II machine used in the Defendant's case, and that the Defendant has articulated the materiality of the identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification for the particular Intoximeter EC/IR II machine in question. Thus the Court concludes that such evidence is relevant and material to the Defendant's defense, and that such information is not unduly burdensome for the petitioner to produce.

[Order Denying Petition for Writ of Prohibition, 10/5/11, App. R. 10-11.]

The Circuit Court's factual findings were clearly erroneous. State v. White, *supra*.

Lacking a showing of materiality for all of the maintenance and certification records for any and all simulators used in the calibration or verification of the Intoximeter EC/IR II used on the Defendant, for a time period a year before the date of the criminal offense and ninety days after, the Defendant is not entitled to such discovery. The Circuit Court erred in holding that he was entitled. State v. White, *supra*.

The Petitioner respectfully requests this Court to reverse the ruling of the Circuit Court. State ex rel. Callahan v. Santucci, *supra*.

4. *The Defendant failed to show the materiality to his defense of all of the assays for any and all simulator solutions used in the calibration or verification of accuracy of the Intoximeter EC/IR II used on the Defendant.*

The argument that the Circuit Court erred because the Defendant failed to show the materiality to his defense of this requested information is just the same as in the preceding argument. The Circuit Court relied on inadmissible hearsay as the sole basis for its decision when it considered Ms. McMurray's affidavit. Woodson, *supra*; Phillips, *supra*; *W.V.R.E.* 801 and 802. The Circuit Court then misconstrued that hearsay affidavit as pertaining to the breath alcohol device used on the Defendant in this case when it did not. The Circuit Court's factual findings are arbitrary and clearly erroneous. State v. White, *supra*.

Lacking a showing of materiality to his defense of all of the assays for any and all simulator solutions used in the calibration or verification of accuracy of the Intoximeter EC/IR II used on the Defendant, the Defendant is not entitled to such discovery. The Circuit Court erred in holding that he was entitled. State v. White, *supra*.

The Petitioner respectfully requests this Court to reverse the ruling of the Circuit Court. State ex rel. Callahan v. Santucci, *supra*.

5. *The Defendant failed to show the materiality to his defense of all of the identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy of the Intoximeter EC/IR II used on the Defendant.*

The argument that the Circuit Court erred because the Defendant failed to show the materiality to his defense of this requested information is just the same as in the preceding arguments. The Circuit Court relied on inadmissible hearsay as the sole basis for its decision when it considered Ms. McMurray's affidavit. Woodson, *supra*; Phillips, *supra*; W.V.R.E. 801 and 802. The Circuit Court then misconstrued that hearsay affidavit as pertaining to the breath alcohol device used on the Defendant in this case when it did not. The Circuit Court's factual findings are arbitrary and clearly erroneous. State v. White, *supra*.

Lacking a showing of materiality to his defense of all of the identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy of the Intoximeter EC/IR II used on the Defendant, the Defendant is not entitled to such discovery. The Circuit Court erred in holding that he was entitled. State v. White, *supra*.

The Petitioner respectfully requests this Court to reverse the ruling of the Circuit Court. State ex rel. Callahan v. Santucci, *supra*.

6. *The Defendant failed to show the materiality to his defense of copies of any and all training materials received by the Department [of Public Safety] from Intoximeters, Inc., for the training of breath test operators and maintenance technicians when such documents are protected by federal copyright laws.*

At the July 8, 2011, hearing the Petitioner represented that the State Police have prepared a training manual which they use to train law enforcement officers on the functioning and use of the Intoximeter EC/IR II. The Petitioner further represented that a copy of that manual was offered to the Defendant's counsel in another case. The Defendant's counsel then represented that it had been accepted in that other case but was not yet received. [Tr. 7/8/11, 36, App. R. 124.] That offer is still open if the Defendant's counsel does not have the State Police training manual.

The State Police's training manual is the manual actually used to train law enforcement personnel in West Virginia on the use of the Intoximeter EC/IR II. The Defendant did not request this training manual although it is available to him. Instead, the Defendant wants, and the Circuit Court ordered production of, the copyrighted manual produced by the manufacturer, Intoximeters, Inc. This material is copyrighted and is believed to contain proprietary information about the design and construction of the Intoximeter EC/IR II. The State Police have not been granted permission to photocopy any portion of this manual for dissemination.

The Circuit Court relied on inadmissible hearsay as the basis for its decision to order production of the copyrighted manual when it considered Ms. McMurray's affidavit. Woodson, *supra*; Phillips, *supra*; W.V.R.E. 801 and 802. The Defendant

produced no other factual basis that the contents of the copyrighted manual are material to his defense. The Circuit Court's factual findings are arbitrary and clearly erroneous. State v. White, *supra*.

The training manual that the State Police actually use to train law enforcement personnel on the use of the Intoximeter EC/IR II is available to the Defendant if his counsel is not already in possession of that manual. That training manual is not copyrighted and is may be material to whether the officer followed the proper procedures for use of the device. That training manual is not the subject of this appeal.

W.V.R.Cr.P. 16(d)(1) provides authority for a Circuit Court to grant a protective order on discovery matters. *W.V.R.Cr.P.Mag.Ct.* 29 contains no similar authorization for a Magistrate. While the Petitioner has not seen the contents of the copyrighted manual, and despite the Defendant's failure to demonstrate the materiality of the copyrighted manual, it is conceivable that portions of the copyrighted manual address the operation of the Intoximeter EC/IR II. If so, those portions may be material to the defense as to whether the device was operated in accordance with the manufacturer's intent. The Defendant, however, did not demonstrate materiality or provide legal authority to the Circuit Court authorizing production of the copyrighted or proprietary material.

Judge Gray Silver III of the 23rd Judicial Circuit denied the identical request by the Defendant's counsel for the same copyrighted manual in an unrelated felony DUI

Resulting in Death case pending before him. [Order Denying Defendant's Motion to Compel, 7/15/11, State v. McKinney, Case No: 10-F-63, App. R. 136-137.]

The Petitioner asks the Court to note that the Motion to Compel in the unrelated McKinney case (which case is scheduled for jury trial in April 2012), concerned an agreed discovery order entered in that case. The Defendant included that Agreed Order as an attachment to his pleadings before the Circuit Court in the case *sub judice*. [Agreed Order, 9/21/10, State v. McKinney, Case No: 10-F-63, App. R. 84-85.] The Petitioner in the case *sub judice* objected to the Circuit Court considering that Agreed Order from State v. McKinney as either *res judicata* or collateral estoppel, and asserted that the Order was agreed due to the State's belief that McKinney was undertaking a *Daubert* [Daubert v. Merrell Pharmaceuticals, Inc., 507 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)] challenge to the science behind the EC/IR II. [App.R. 94, lines 23-24 to 95, lines 1-7.] The Petitioner further represented that the Defendant's counsel later told Judge Silver in the McKinney case that he is not making a *Daubert* challenge. [App. R. 7, lines 8-14.] The Defendant's counsel did not refute that representation.

There is a conflict between two judges in the same circuit over whether a copy of the copyrighted material must be provided. If this Court were to remand the issue of the discovery of the copyrighted manual from the manufacturer in the case *sub judice* for a determination of its materiality, the Petitioner will need to assure the State Police and the manufacturer that there is no violation of copyright requirements and no

dissemination of the manufacturer's proprietary material. However, there is no mechanism for such assurances since the underlying case is before the Respondent Magistrate, and *W.V.R.Cr.P.Mag.Ct.* 29 does not provide for protective orders. *W.V.R.Cr.P.* 16 does not apply in Magistrate Court. Doonan, *supra*. Any determination of whether information is proprietary may be better suited to the analytical tools available to a Circuit Court Judge.

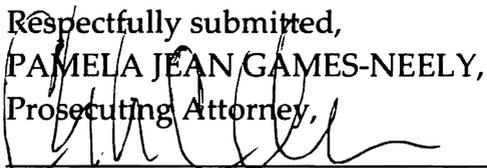
Lacking a showing of materiality to his defense of the manufacturer's copyrighted manual for the Intoximeter EC/IR II, the Defendant is not entitled to such discovery. The Circuit Court erred in holding that he was entitled. State v. White, *supra*.

Since the Circuit Court erred in denying the writ of prohibition, the Petitioner respectfully requests this Court to reverse the erroneous ruling of the Circuit Court. State ex rel. Callahan v. Santucci, *supra*.

VI. CONCLUSION.

For the foregoing reasons, the Petitioner respectfully requests this Court to reverse the ruling of the Circuit Court. State ex rel. Callahan v. Santucci, *supra*.

Respectfully submitted,
PAMELA JEAN GAMES-NEELY,
Prosecuting Attorney,

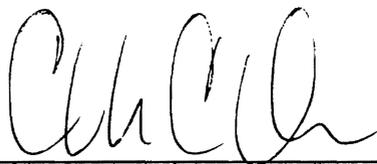


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **PETITIONER'S BRIEF** and **APPENDIX RECORD** on this the 29th day of February, 2012, by ___ hand-delivery, x first-class mail, postage prepaid, ___ facsimile to:

Harley O. Wagner, Esq.
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