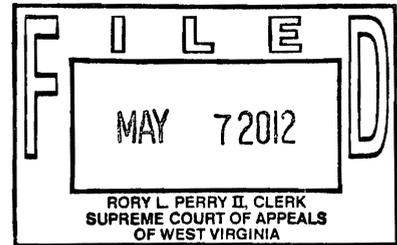


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



PAMELA JEAN GAMES-NEELY,  
Prosecuting Attorney,

Petitioner,

v.

No.: 11-1648

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

Respondent.

**PETITIONER'S REPLY BRIEF**

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**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.**

The Respondent's Brief fails to demonstrate where in the record he showed by reliable evidence either to the Respondent Magistrate or to the Circuit Court the materiality of any of the Defendant Seidell's six discovery requests in the DUI case below. The courts and the State are not required to presume materiality simply because a defendant has made a discovery request.

In State ex rel. Rusen v. Hill, 193 W. Va. 133, 454 S.E.2d 427 (1995), this Court holds: "we find that *complete and reasonable discovery* is normally in the best interest of the public." *Id.*, 454 S.E.2d 427, 433. The Petitioner agrees with this holding and posits that reasonable discovery in a criminal case is that which is material to the preparation of the defense or intended for use by the state as evidence in chief at trial. *W.V.R.Cr.P.* 16(a)(1)(B), (C), (D). "[E]vidence is material 'if there is a reasonably 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 (2010).

The requirement of the materiality of discovery in a criminal proceeding is a much narrower standard than that permitted for discovery in civil cases. In civil cases in West Virginia discovery is open generally "if the information sought appears

reasonably calculated to lead to the discovery of admissible evidence.” *W.V.R.C.P.*

26(b)(1).

A similar distinction was drawn in a New Jersey case relied upon by the Respondent. In State v. Maricic, 417 N.J. Super. 280, 9 A.3d 1026 (N.J. Super. A.D. 2010), that Court holds “unlike discovery in civil cases, information cannot be demanded [by a criminal defendant] which merely leads to other information which is ‘relevant.’” *Id.*, 9 A.3d 1026, 1029 [citations omitted]. The Maricic Court further holds “Allowing a defendant to forage for evidence without a reasonable basis is not an ingredient of either due process or fundamental fairness in the administration of the criminal laws.” *Id.* [citations omitted].

Applying this sound logic from Maricic to the current case, the cloak of due process and fundamental fairness with which the Defendant Seidell seeks to cover himself falls off when he fails to show the materiality of his discovery request. Demonstration of materiality is required in other cases relied upon in the Respondent’s Brief: State v. Underdahl, 767 N.W.2d 677 (Mn. 2009) (source code discovery request denied for defendant Underdahl’s failure to show materiality; but source code discovery request granted on defendant Brunner’s showing of materiality); and People v. Robinson, 53 A.D.3d 63, 860 N.Y.S.2d 159 (N.Y.App.Div. 2008) (source code discovery request denied).

The Respondent's Brief brushes away the import of *W.V.R.Cr.P.Mag.Ct. 29* on an assertion that his discovery request is required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and this Court's opinion in State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007). That reliance on Brady and Youngblood wholly ignores the important third component of that analysis, that the evidence "must have been material":

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 willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. Pt. 2, State v. Youngblood, *id.*; Syl. Pt. 16, State v. White, 227 W.Va. 231, 707 S.E.2d 841 (2011).

Without a showing of materiality by the defense, the Respondent Magistrate's order permitting foraging for evidence was clearly erroneous as a matter of law. *See* Syl. Pt. 2, State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001). The Circuit Court erred in refusing to grant the writ of prohibition when the Defendant Seidell failed to show that materiality before that court. Syl. Pt. 1, *id.*

As the Petitioner explained in the initial brief, 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).

The Petitioner does not dispute that a DUI defendant has the right to challenge the State's evidence that would lay this foundation. The Petitioner only asks that the Defendant Seidell should properly demonstrate why each item requested and the time frame for which it is requested is material to that challenge.

The EC/IR II is approved by the United States Department of Transportation's National Highway Traffic Safety Administration (NHTSA) as conforming to the Model Specifications for Evidential Breath Alcohol Measurement Devices. *Federal Register*, Vol. 75, No. 47, p. 11624-11627, March 11, 2010. The United States Supreme Court referenced this same type of approval by the NHTSA as providing a basis for the accuracy of the Intoxilyzer device reviewed in California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984), at 489 n. 9.

The EC/IR II is also the designated alcohol breath analysis device for all law enforcement agencies in West Virginia to be used for the secondary chemical tests of

persons arrested for driving under the influence offenses. *See*: W. Va. Code § 17C-5-4(d) and 64 C.S.R. 10 § 6. Due to advances in the technology of blood alcohol breath analysis devices, the EC/IR II possesses a self-diagnostic testing capability which will abort the process if there is any deviation found beyond the defined values. The device will not give a result if it is not working properly. *See* State v. Tindell, 2010 WL 2516875 (Tenn.Crim.App., 2010, *appeal denied*, November 17, 2010), at pages 4-5.

The Defendant Seidell's discovery request, and identical requests the same counsel is making in the 23<sup>rd</sup> Judicial Circuit, appears to be unprecedented in West Virginia. Aside from the case of State v. Tindell, *supra*, which denied a DUI defendant's discovery demand for the EC/IR II source code, the Petitioner's research finds no cases in any jurisdiction addressing discovery requests such as the Defendant Seidell's as to the EC/IR II.

The Defendant was arrested for DUI on January 6, 2011, and used the EC/IR II, serial number 008084 on that date. The Defendant's Motion for Breath Test Discovery demanded 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.]*

The Defendant Seidell did not provide any evidentiary basis for demonstrating the materiality of any of his discovery demands. The Defendant Seidell did not provide

an evidentiary basis that the time frames for which he was demanding discovery were material.

The McMurray affidavit tendered by the Defendant Seidell, upon which the Circuit Court based the entirety of its ruling, was objected to as hearsay. *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).

The Petitioner was denied the opportunity to cross-examine McMurray as to the reasons she identified in that affidavit for wanting the requested discovery. The Circuit Court relied on that affidavit without ever making any finding that it was admissible.

The Respondent's Brief ignores the Circuit Court's flawed ruling but to suggest that the affidavit could be admissible under the catch-all exception of *W.V.R.E.* 803(24). The record demonstrates that the Circuit Court never made any of the findings necessary to rule that the hearsay exception of *W.V.R.E.* 803(24) applies:

The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying

the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

Syllabus Point 5, State v. Smith, 178 W.Va. 104, 358 S.E.2d 188 (1987).

Neither does the Respondent's Brief's citations to other jurisdictions well support its position that the discovery demanded should be provided.

Those other jurisdiction either turned on a showing of materiality: State v. Maricic, *supra*, 417 N.J. Super. 280, 9 A.3d 1026 (N.J. Super. A.D. 2010); State v. Underdahl, *supra*, 767 N.W.2d 677 (2009); State v. Espinoza, [no citation provided by the Respondent] a trial court order from Wyoming with no precedential value to this Court.

Or addressed source code discovery, which is not at issue herein: Underdahl, *id.*, People v. Robinson, *supra*, 53 A.D.3d 63, 860 N.Y.S.2d 159 (N.Y.App.Div. 2008).

Or limited discovery to narrower time frames: State v. Maricic, *supra* (downloaded data from the date of the last calibration until the defendant's test); State v. Espinoza, *supra* (ninety days prior to the defendant's own test).

Or addressed blood alcohol breath analysis devices different from the EC/IR II currently used in West Virginia: State v. Maricic, *supra* (Alcotest device); State v. Underdahl, *supra* (Intoxilyzer 5000EN); People v. Robinson, *supra* (Intoxilyzer 5000);

State v. Chun, 194 N.J. 54, 943 A.2d 114 (2008) (Alcotest); People v Crandall, 228 A.D.2d 794, 644 N.Y.S.2d 817 (1996) (Breathalyzer); Matter of Constantine v Leto, 157 A.D.2d 376, 557 N.Y.S.2d 611 (N.Y.A.D.,1990) (Breathalyzer); People v Erickson, 156 A.D.2d 760, 549 N.Y.S.2d 182 (N.Y.A.D.,1989) (Breathalyzer); People v Di Lorenzo, 134 Misc.2d 1000, 513 N.Y.S.2d 938 (N.Y.Co.Ct. 1987) (Breathalyzer); People v Alvarez, 70 N.Y.2d 375, 521 N.Y.S.2d 212 (N.Y. 1987) (Breathalyzer); People v. English, 103 A.D.2d 979, 480 N.Y.S.2d 56 (N.Y.A.D. 3 Dept.,1984) (Breathalyzer); State v. Espinoza, *supra* (EC IR). The Defendant Seidell presented no admissible evidence that the discovery permitted by these other jurisdictions, as they relate to other and/or less sophisticated devices, makes the discovery he requested material to his case.

For the foregoing reasons, the Petitioner requests this Court to reverse the Circuit Court's rulings as to the Defendant Seidell's discovery requests numbers 1-5.

The Respondent's Brief does not address at all the materiality of the copyrighted manual at issue in discovery request number 6, especially in light of the fact that he has been offered a copy of the actual manual prepared by the West Virginia State Police from which officers are trained how to operate the EC/IR II. The Petitioner requests this Court to reverse the Circuit Court's rulings as to the Defendant Seidell's discovery request number 6 as uncontested.

The Respondent's Brief does not challenge that the Petitioner meets the standards for the issuance of a writ of prohibition set by this Court in Syl. pt. 4, State ex

rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996). The Respondent's Brief, however, disputes the Petitioner's right to bring this proceeding, citing to Syl. Pt. 5, State v. Lewis, 188 W.Va. 85, 422 S.E.2d 807 (1992):

The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

The Petitioner does not allege that the Respondent Magistrate exceeded or acted outside of its jurisdiction. The Petitioner alleges that the Respondent Magistrate flagrantly abuse its legitimate power by failing to require the Defendant Seidell to demonstrate the materiality of his discovery request. Neither double jeopardy nor speedy trial rights were affected by the prompt presentation of this prohibition proceeding to the Circuit Court. The Defendant moved to stay all proceedings below pending the outcome of this matter.

The State will be deprived of its right to prosecute this DUI case, and the others that follow, if the Respondent Magistrate is allowed to act outside the law and order whatever discovery a defendant may request without a finding of materiality to the case. A magistrate that will order discovery without a finding of materiality is not likely

to divine the relevance of the immaterial when asked to rule at or before trial on the admissibility of such evidence. The rules are designed to place only relevant evidence before a jury.

If this Court were to strictly apply this Lewis standard to the seeking of a writ of prohibition in circuit court from a ruling in magistrate court, and find that the State is not deprived of its right to prosecute, then the State is wholly without remedy to ever have such erroneous rulings of the magistrate court reviewed since the State has no right of appeal in a criminal case.

Syllabus Point 5 is not a jurisdictional ruling, as the circuit court has original jurisdiction in prohibition over inferior tribunals. See State ex rel. Silver v. Wilkes, 213 W. Va. 692, 584 S.E.2d 548 (2003); Dietz Colliery Co. v. Ott, 99 W. Va. 663, 129 S.E. 708 (1925); W. Va. Code § 51-2-2. Neither the Respondent Magistrate nor the Defendant Seidell objected to the Circuit Court proceeding on the writ of prohibition. It is only on appeal that the question is first raised.

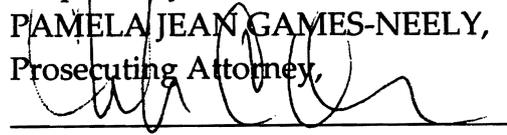
The Petitioner respectfully requests this Court to hear the appeal of this matter as it may have continuing impact on the prosecution of DUI cases throughout the State.

### **CONCLUSION.**

For the foregoing reasons, the Petitioner requests this Court to reverse the Circuit Court's rulings as to the Defendant Seidell's discovery requests numbers 1-5. State ex rel. Callahan v. Santucci, *supra*.

The Respondent's Brief does not address at all the materiality of the copyrighted manual at issue in discovery request number 6, especially in light of the fact that he has been offered a copy of the actual manual prepared by the West Virginia State Police from which officers are trained how to operate the EC/IR II. The Petitioner requests this Court to reverse the Circuit Court's rulings as to the Defendant Seidell's discovery request number 6. State ex rel. Callahan v. Santucci, supra.

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



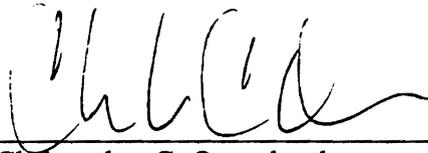
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing PETITIONER'S REPLY BRIEF, on this the 3<sup>RD</sup> day of May, 2012, by \_\_\_ hand-delivery, x first-class mail, postage prepaid, \_\_\_ facsimile to:

Harley O. Wagner, Esq.  
55 Meridian Parkway, Ste. 102  
Martinsburg, West Virginia 25401

A handwritten signature in black ink, appearing to read 'C. Quasebarth', written over a horizontal line.

Christopher C. Quasebarth