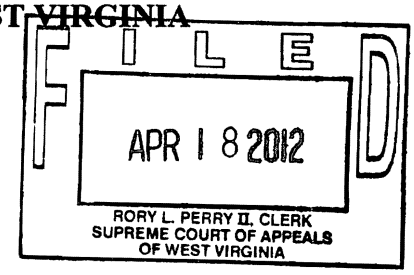
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA




**DOCKET NO. 11-1648**

**PAMELA JEAN GAMES-NEELY,**
**Prosecuting Attorney**
Petitioner,

v.

**HONORABLE JOANN OVERINGTON,**
**Magistrate, Berkeley County, West Virginia**
Respondent.

# Respondent's Brief

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
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Petitioner,

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**HONORABLE JOANN OVERINGTON,**
**Magistrate, Berkeley County, West Virginia**
Respondent.

## RESPONDENT'S BRIEF

## QUESTION PRESENTED

1. Under *State v. Lewis* and *State ex rel. Hoover v. Berger*, did the circuit court err when it denied petitioner's Petition for Writ of Prohibition when petitioner failed to show that the lower court's actions were so flagrant that it was deprived of the opportunity to prosecute the case?

2. Under *Brady v. Maryland* and *State v. Hatfield*, did the circuit court err when it denied petitioner's Petition for Writ of Prohibition when Seidell provided ample evidence to show that information sought was material to his case and subsequently found that the lower court did not err in granting the original discovery motion?

## STATEMENT OF THE CASE

On January 6, 2011, Christopher Seidell (hereinafter "Seidell") was charged with Driving Under the Influence (DUI) in the Magistrate Court of Berkeley County, West Virginia. A.R. at 1. After being arrested by the officer that night, a secondary chemical test of the breath was administered to Seidell, which returned a result of 0.149%. A.R. at 2. On March 18, 2011,

Seidell filed a motion in the Magistrate Court of Berkeley County for breath test discovery. A.R. at 23. As part of said discovery request, Seidell requested that he be provided with the following:

1. The download data for the Intoximeter EC/IR II breath machine used in this case. Specifically all 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.

A.R. at 21-22. On May 10, 2011, Magistrate JoAnn Overington granted Seidell's motion over the objections of petitioner. A.R. at 24-25.

On May 16, 2011, petitioner filed a Petition For Writ of Prohibition in the Circuit Court of Berkeley County, West Virginia, alleging that Magistrate Overington's granting of said motion was clearly erroneous because all of the items sought in said motion fell outside the scope of Rule 29 of the West Virginia Rules for Criminal Procedure in Magistrate Courts. A.R. at 19. On July 6, 2011, Seidell filed a Motion To Deny State's Petition For Writ of Prohibition and attached thereto several exhibits in support of said motion. A.R. at 28-64. Among the exhibits was an expert affidavit by Mary C. McMurray, which was filed in a discovery

proceeding on the same Motion For Breath Test Discovery in Morgan County, West Virginia, as well as several Orders Granting Breath Test Discovery from other local courts, some of which were agreed to by petitioner, and the transcript replete with expert testimony from a case in North Carolina seeking similar evidence on its breath testing machine. *Id.*

On July 8, 2011, a Rule to Show Cause hearing was held in the Circuit Court of Berkeley County, West Virginia, before the Honorable Gina Groh. A.R. at 90. At said hearing, petitioner argued that the items being sought in the Breath Test Discovery Motion were not relevant and outside the scope of Rule 29 of the West Virginia Rules for Criminal Procedure for Magistrate Courts. A.R. at 92. Counsel for Seidell argued that the information being sought is relevant and material under the due process clause. A.R. 106-110. A.R. at 106. On October 5, 2011, Judge Groh entered an Order denying petitioner's Petition for Writ of Prohibition. A.R. at 1-14. Petitioner now seeks review in this Court of said Order.

## SUMMARY OF THE ARGUMENT

"Where the State claims the trial court abused it legitimate powers, the State must demonstrate that it was deprived of its right to prosecute the case . . ." before the State's motion for a writ of prohibition will be granted. Syl. Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992). Petitioner failed to assert at the circuit court level, and in its brief before this Court, that the lower court's ruling deprived it of its right to prosecute the case. Evidence was presented before the circuit court that the evidence sought would not be unduly burdensome for petitioner to produce. And petitioner failed to assert, in any form, that being ordered to produce said evidence would impact its ability to prosecute the case. Due to this, the circuit court did not err in denying petitioner's Petition for Writ of Prohibition.

Furthermore, the circuit court also did not err in ruling that Seidell showed that the

evidence sought was material to his case. Seidell presented to the circuit court several exhibits, including an expert affidavit, which was notarized and admitted into evidence is similar proceedings in a neighboring county, which outlined why the evidence sought was relevant and material to the preparation of Seidell's case. A transcript, replete with expert testimony, of a similar issue from a case in North Carolina was provided to the Court. Seidell's counsel also proffered to the circuit court the reasoning as to why the evidence sought was material to the preparation of the defense. Even though once the state lays a proper foundation for admittance of the breath test pursuant to *State v. Hood*, 155 W. Va. 337, 184 S.E.2d 334 (1971), a *prima facie* case is established, a defendant is still able to rebut the results of the test by showing that the breath machine was either not properly maintained or not properly operating. The evidence sought is extremely material for these purposes. Also, in *State v. Youngblood*, 650 S.E.2d 119 (W. Va. 2007), this court extended the protections of *Brady v. Maryland* and *State v. Hatfield*, to include impeachment evidence as well as evidence material to defendant's case. The evidence sought would certainly fall within either one of these categories outlined in *Youngblood*, and Seidell presented adequate evidence before the circuit court below to find that the evidence was material to his case. Therefore, the circuit court did not err in denying petitioner's Petition for Writ of Prohibition.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, this case, should the Court decide to accept it for argument, would be appropriately argued under Rule 19. While the specific topic of breath test discovery has not been previously addressed by this Court, its precedent concerning pretrial discovery and what is required under the due process clause is well-established and settled. Thus the case would fall under Rule

19(a)(2) of the West Virginia Rules of Appellate Procedure. A memorandum decision affirming the decision of the lower could be appropriate if the Court finds no substantial question of law and does not disagree with the circuit court's decision, or upon consideration of the applicable standard of review and the record presented, the Court finds no prejudicial error. Counsel does not believe a memorandum decision reversing the decision of the circuit court would be appropriate.

## ARGUMENT

### I. Standard of Review

The present case involves a challenge to a circuit court's refusal to grant extraordinary relief by was of a writ of prohibition. In reviewing this type of case, the appropriate standard of review is *de novo* review to determine whether the prerequisites for such relief were satisfied in proceedings below. *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 557 S.E.2d 890, 893 (2001).[1]

In *State ex rel. Callahan*, the Court stated:

> 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.

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[1] See, *State ex rel. Anstey v. Davis,* 203 W. Va. 538, 509 S.E.2d 579 (1998) ("Our standard of appellate review of a circuit court's decision to refuse to grant relief through an extraordinary writ of mandamus is *de novo*."); *Martin v. W.V. Div. of Labor Contractor Licensing Board,* 199 W. Va. 613, 486 S.E.2d 782 (1997)("The standard of appellate review of a circuit court's order granting relief through extraordinary writ of prohibition is *de novo*.").

*Id.* (citing Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)).

However, one must also remember that petitioner is the State seeking a writ of prohibition in a criminal case. In *State v. Lewis*, this Court held:

> 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 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.

Syl. Pt. 5, 188 W. Va. 85.

## II. Petitioner failed to submit any evidence that the respondent magistrate's order was so flagrant that it was deprived of its ability to prosecute the case.

Petitioner sought the writ of prohibition, pretrial, in the Circuit Court of Berkeley County in order to prevent the respondent magistrate from ordering production of several items sought in Seidell's Motion for Breath Test Discovery. The fact that this case arises from a pretrial discovery order is unusual because "usually issues concerning discoverable information arise during trial." *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 139, 454 S.E.2d 427, 433(1995). The Court also noted in *State ex rel. Rusen*, that "the extent and scope of pretrial discovery is within the circuit court's discretion, and we will not disturb a circuit court's ruling unless there is a clear abuse of discretion." *Id.* at 436.[2]

To the best of counsel's knowledge, there are few cases in this State involving an instance where the prosecution seeking a writ of prohibition prior to trial after the trial court orders it to produce evidence. All cases counsel has been able to locate deal with the prosecutor

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[2] See also, *State v. Lassiter*, 177 W. Va. 499, 354 S.E.2d 595 (1987); *State v. Bennett*, 176 W. Va. 1, 339 S.E.2d 213 (1985); *State v. Audia*, 171 W. Va. 568, 301 S.E.2d 199, *cert. denied*, 464 U.S. 934 (1983).

seeking a writ pretrial where the trial court has either suppressed certain evidence or dismissed its case. Perhaps this is due to the fact that a prosecutor would not be damaged by being ordered to produce evidence prior to trial that the trial court found relevant and material. In this situation, there is no way petitioner can claim she was denied of her right to prosecute the case, or deprived of a valid conviction, since there had been no conviction. Petitioner asserted nothing below, or in its brief before this Court, that being ordered to produce the evidence hampered in anyway its ability to prosecute the case. In fact, evidence was put before the circuit court that most of the evidence sought would not be unduly burdensome to produce and simply amount to a couple key-strokes on a computer. The state's case could even potentially be bolstered if it disclosed the evidence and Seidell's expert was then unable to find anything to call into question the accuracy of the specific breath machine.

"'Where the State claims the trial court abused it legitimate powers, the State must demonstrate that it was deprived of its right to prosecute the case . . .' before the State's motion for a writ of prohibition will be granted." *Id.* (quoting Syl. Pt. 5, *State v. Lewis,* 188 W. Va. 85). Petitioner has failed to meet its burden in this case by not demonstrating before the circuit court or this Court that it was deprived of its right to prosecute this case. Therefore, the circuit court did not err in denying petitioner's Petition for Writ of Prohibition.

**III. Seidell submitted ample evidence before the circuit court for it to find that the evidence was material to the preparation of a defense in his case.**

While counsel believes that this case can be resolved on the issue stated supra, it provides the following as further argument. Petitioner seeks to have this Court overturn a pretrial discovery order of the magistrate court below, because it claims that information to be disclosed in the Order was outside the scope of Rule 29 of the West Virginia Rules of Criminal Procedure

for Magistrate Courts. Even though the circuit court below held that the respondent magistrate did not act outside her authority, and counsel agrees with this assertion, that wasn't the overriding basis for its ruling or counsel's argument below. Regardless of whether or not the requested materials are within the scope of Rule 29, they are discoverable, as the circuit court held, pursuant to the Due Process Clause of both the Fourteenth Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution. Discovery is one of the most important tools of a criminal defendant. *State ex rel. Rusen v. Hill*, 193 W. Va. at 139. The purpose of discovery is to protect a defendant's right to a fair trial. *Id.* It is necessary for the State to share its information with the defendant if a fair trial is to result. *Id.* Furthermore, complete and reasonable discovery is in the best interest of the public. *Id.* One consequence of full and frank discovery is that it may very well encourage plea negotiations. *Id.* And as was noted above, the trial court is given broad discretion in dealing with discovery issues prior to trial. *Id.* at 436.

The Due Process Clause of the Fourteenth Amendment requires the state to disclose to criminal defendant favorable evidence that is material either to guilt or to punishment. *United States v. Agurs*, 427 US 97 (1976); *Brady v. Maryland*, 373 US 83 (1963). Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. *California v. Trombetta et. al.*, 467 US 479, at 485 (1984). The United States Supreme Court has interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *Id.* To protect that right, the Court has developed a line of cases which "might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. *California v. Trombetta et. al.*, 467 US at 485 (citing *Brady v. Maryland*, 373 US at 87). This right extends not only to exculpable evidence, but also to impeachment evidence as well. *Thompson v. Cain*, 161 F.3d 802, 806 (5th Cir. 1998). The Supreme Court has expressly held that there is no difference between exculpatory and impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). *See also United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.").

The West Virginia Supreme Court has incorporated into West Virginia jurisprudence the principles set forth in *Brady* and *Agurs*. *State v. Salmons*, 203 W. Va. 561, 572, 509 S.E.2d 842, 853 (1998). In *State v. Youngblood*, this Court discussed its adoption and the evolution of its *Brady* standard:

> We initially adopted *Brady* as part of our State constitutional due process in syllabus point 4 of *State v. McArdle*, 156 W. Va. 409, 194 S.E.2d 402 (1973), where it was held that "[a] prosecution that withholds evidence on the demand of an accused, which, if made available would tend to exculpate him violates due process of law." *McArdle* was modified in *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982), in response to *Agurs*, for the purpose of removing the requirement that material exculpatory evidence has to be requested. It was said in syllabus point 4 of *Hatfield* that "[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution."

650 S.E.2d 119 at 127 (W. Va. 2007). This Court has also reversed several convictions on the

basis of the State's failure to disclose favorable impeachment evidence. *Id.*[3] After formally recognizing that failure to disclose impeachment evidence is a constitutional due process violation, the Court in *Youngblood* went on to set forth three components of a constitutional due process violation under *Brady v. Maryland*, 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.

650 S.E.2d at 128.

The petitioner asserts that the State need only provide discovery regarding the foundational requirements for admittance of the results of the Intoximeter EC/IR II at trial put in place by *State v. Hood*, 155 W. Va. 337.[4] Once a proper foundation for admittance is shown, a breath result of 0.08% or greater is admitted as *prima facie* evidence of intoxication. However, this is allowed to be rebutted by a defendant at trial. And one way to rebut the breath result is to challenge the accuracy of the machine being used in the particular case, or the operation of the machine on that particular date. This is why the requested materials are so important, as it provides the only objective data to show whether or not the machine was properly functioning.

To the best of counsel's knowledge, there have been no reported cases dealing with the discovery material being sought in the case below. However, several other jurisdictions have had a chance to rule on similar issues. In *State of New Jersey v. Maricic*, the defendant, being

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[3] See *State v. Kearns*, 210 W. Va. 167, 556 S.E.2d 812 (2001); *State ex rel. Yeager v. Trent*, 203 W. Va. 716, 510 S.E.2d 790 (1998); *State v. Hoard*, 180 W. Va. 111, 375 S.E.2d 582 (1988); *State v. Hall*, 174 W. Va. 787, 329 S.E.2d 860 (1985). *See also Salmons*, 203 W. Va. at 573, 509 S.E.2d at 854 ("In a third landmark case, *United States v. Bagley*, 473 U.S. 667 (1985), the United States Supreme Court held that there was no difference between exculpatory and impeachment evidence for *Brady* purposes.").

[4] *State v. Hood*, provides 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. 155 W. Va. at 342.

charged with a DUI, sought discovery of downloaded data from the breath machine from last calibration until his test, and any repair logs or records relating to the machine, among other items. 9 A.3d 1026, 1027, 417 N.J. Super 280, 282 (N.J. Super. Ch., 2010). The Court then took note of a standard similar to *Hood* in place in New Jersey and noted, that breathalyzer test results would generally be admissible in evidence when the breathalyzer was shown to be in proper working order, when the test was shown to have been administered by a qualified operator, and it was used in accordance with accepted procedures. *Id.* at 1029 (citing *Romano v. Kimmelman*, 474 A.2d 1, 96 N.J. 66 (1984)). The Court then went on to state:

> Although the presumption of reliability is irrebuttable once the State establishes certain facts, inquiry regarding these facts is extremely material. Thus information concerning the conditions under which the tests were held, the machine operator's competence, the particular machine's state of repair and identification and documentation of the ampoules used for defendant's tests are all relevant inquiries.

*Id.* (citing *State v. Ford*, 572 A.2d 640, 240 N.J. Super. 44 (App.Div. 1990)). The Court also rejected the argument that, to obtain discovery, the defendant had to know of the existence of flawed procedures or equipment. *Id.* Referring again to *State v. Ford,* the Court noted:

> A defendant, for example, need not know flawed procedures were used in giving a breathalyzer test in order to require the State to disclose information about those procedures. That information is relevant because it "(1) concerns an issue involved in the prosecution, and (2) tends, reasonably, to prove a fact material to such an issue." The State's position would require defendant's to discover information favorable to them before discovery could be undertaken. That is not the way our system works.

*Id.* (internal citations omitted). The Court then noted according to the New Jersey Supreme Court the policy concerning pretrial discovery has been to encourage the presentation of all relevant material to the jury as an aid in the establishment of truth through the judicial process. *Id.* at 1030. Given that policy, the Court held that the lower Court misused its discretion when it denied discovery of the Alcotest repair records.

In also finding that the lower Court misused its discretion in denying the requested downloaded Alcotest results. Quoting from the landmark New Jersey breath test case, *State v. Chun*, 943 A.2d 114, 194 N.J. 54 (2008), the Court noted:

> [T]he Special Master recommended, and the parties by and large agree, that the State should create and maintain a centralized database of information regularly uploaded through modem, and that defendants should have access to centrally collected and maintained data on their own cases, as well as to the compiled scientific data on matters involving others that has been redacted to shield the personal information related to those other individuals as appropriate. Our review of the record satisfies us that there is substantial, credible evidence that supports Special Master's recommendation concerning the creation and maintenance of a regularly-updated database, as well as his recommendation relating to providing access to that data to defendants.

*Id.* (quoting *State v. Chun*, 194 N.J. at 90). In conclusion, the Court held that the discovery of the sort defendant seeks is "extremely material." *Id.* at 1032.

In *People v. English*, 480 N.Y.S.2d 56, 103 A.D.2d 979 (N.Y.A.D. 3 Dept., 1984), the Court found that the calibration records were essential to the defense that the breathalyzer machine was not operating properly, and thus are clearly discoverable. In arriving at this decision, the Court noted that the defendant's sole challenge to the breathalyzer result was the accuracy and reliability of the machine itself. *Id.* at 58. Even though the breathalyzer had gained universal acceptance such that proof of its scientific integrity need not be proven each time test results are offered into evidence, the Court found that the defense could attack the test results on the grounds that the proper operating procedures were not followed or that the particular machine was not operating properly. *Id.* (citing *People v. Gower*, 42 N.Y.2d 117, 121, 397 N.Y.S.2d 368 (1977)). The Court stated that an attack on reliability of a particular breathalyzer goes to the admissibility of the test result not the weight to be accorded to the test, and thus the defendant's challenge to the reliability of the machine was completely frustrated by the trial court's denial of discovery of the calibration records for the machine. *Id.*

In another case out of New York, *People v. Robinson*, 53 A.D.3d 63, 860 N.Y.S.2d 159 (N.Y.App.Div. ,2008), the defendant sought, through discovery, the source code for the breath machine used in his case. The Court noted generally, that broader pretrial discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence. *Id.* at 67 (quoting *People v. Copicotto*, 50 N.Y.2d 222, 226 (1980)). In trying to ascertain whether or not the machine's source code would be discoverable, the court noted that case law had already recognized the defendant's right, in DUI prosecutions, to disclosure of other various documents. *Id. See Matter of Constantine v. Leto*, 157 A.D.2d 376, 378 (1990) (records indicating that a machine was not operating properly are discoverable, as are the State Police rules and regulations, the operational checklist, and calibration records.); *People v. Crandall*, 228 A.D.2d 794, 795 (1996) (documents relating to ampoule analysis and simulator solution analysis are subject to disclosure); *People v. Erickson,* 156 A.D.2d 760, 762 (1989) (breathalyzer operator's permit and the weekly test record are subject to disclosure); *People v. Di Lorenzo*, 134 N.Y.Misc.2d 1000, 1002-04 (1987) (several specific documents are subject to disclosure); *People v. Alvarez*, 70 N.Y.2d 375, 380 (1987) (defendant may not be denied discovery which prevents him from challenging the reliability and accuracy of a breathalyzer machine.).

While finding ultimately that the source code was not discoverable in that case, the Court did note that calibration records are essential to the defense to help it determine whether the machine was operating properly, and failure to provide such records to the defendant has been found warrant reversal. *People v. Robinson*, 53 A.D.3d at 70. Even though the scientific reliability of the breathalyzer machine in general was not longer open to question, a defendant

may not be denied discovery which prevents him from challenging the reliability of and accuracy of the machine. *Id.* (citing *People v. Alvarez*, 70 N.Y.2d 375, 380 (1987)).

In *State of Wyoming v. Espinoza*, an unpublished case provided to the Circuit Court below as an attachment to Defendant's Motion To Deny State's Petition For Writ of Prohibition , the defendant sought production of an extensive list of information concerning the Intoximeter EC/IR breath machine used in his case, some of which is also included in Seidell's motion below. A.R. at 55-57. The Court held that a defendant is constitutionally entitled to information that addresses the accuracy and reliability of a breath result that is used in evidence in a criminal case. A.R. at 57.[5] The Court then adopted a "middle-of-the-road" approach to requiring disclosure of information that may be material to the preparation of a defendant's defense but also which requires the defendant to make some showing of materiality before harnessing the prosecution with an unduly burdensome request. A.R. at 59. In sum, a "defendant may not be denied discovery which prevents him from challenging the reliability and accuracy of the machine." *Id.* (quoting *People v. Robinson*, 53 A.D.3d at 70.)

In yet another case in which the defendants sought discovery of the breath machine's source code, this time out of Minnesota, a court goes into a detailed discussion regarding what a defendant must show in order to be granted discovery of the source code. In *State v. Underdahl*, the Court noted that a district judge has "wide discretion to issue discovery orders," and to find an abuse of discretion, an appellate court must conclude that the district court erred by making findings unsupported by the evidence or by improperly applying the law. 767 N.W.2d 677, 684 (Minn., 2009). *Underdahl* involved a consolidation of two separate cases, Underdahl and Brunner, in which the defendants were both seeking discovery of the source code. The Court

[5] See generally *California v. Trombetta*, 467 U.S. at 490 (1984); *Wheeler v. State*, 691 P.2d 599, 603 (Wyo. 1984).

noted that the showing required of the defendant's in order to view the source code was "some plausible showing that the information sought would be both material and favorable to the defense." *Id.* (quoting *State v. Hummel*, 483 N.W.2d 68, 72 (Minn., 1992). The Court then notes that in *Hummel* they overturned the district court's discovery order because the defense offered no theories on how the file could be related to the defense or why the file was reasonably likely to contain information related to the case. *Id.* at 685 (quoting *State v. Hummel,* 483 N.W.2d at 72).

The Court next turned to look at what each of the defendants offered in support of their individual requests for the source code. The Court noted that Underdahl's motion contained no other information or supporting exhibits related to the source code, it was just a bare bones request. *Id.* Underdahl argued at an omnibus hearing that a jury in a DWI case is asked to determine whether a breath test result is valid, and the only way for him to challenge the validity "is to go after the testing method itself." *Id.*

With respect to the other defendant, Brunner, the Court noted that he submitted a memorandum and nine exhibits to support his request for the source code. *Id.* The memorandum gave various definitions of "source code." *Id.* The first exhibit was the written testimony of David Wagner, a computer science professor at the University of California in Berkeley, which explained the source code in voting machines, the source code's importance in finding defects and problems in those machines, and the issues surrounding the source code's disclosure. *Id.* The next exhibits detailed Brunner's attempts to obtain the source code, and the last was a copy of a report prepared on behalf of the defendants in New Jersey litigation about the reliability of New Jersey's breath test machine, the *Chun* case supra. *Id.*

The Court found that district court erred in granting Underdahl's motion because he

failed to make any threshold evidentiary showing whatsoever. *Id.* While he argued that challenging the validity of the Intoxilyzer was the only way for him to dispute the charges against him, he failed to demonstrate how the source code would help him do so. *Id.* Underdahl advanced no theories on how the source code could be related to his defense or why the source code was reasonably likely to contain information related to the case. *Id.*

On the other hand, the Court ruled that Brunner by submitting source code definitions, written testimony of a computer science professor that explained the issues surrounding the source codes and their disclosure, and an example of a breath-test machine analysis and its potential defects, had shown that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and would relate to Brunner's guilt or innocence. *Id.* at 686. The Court ultimately held that the district court did not err in granting Brunner's motion for discovery of the source code.

Petitioner cites to a case out of Tennessee, *State v. Tindell*, 2010 WL 2516875 (Tenn. Crim. App., 2010), in which the defendant there was seeking access to the Intoximeter EC/IR II's source code. Petitioner asserts that the case stands for the proposition that a defendant must do more than emphatically state that they needed certain discovery, they must show how the discoverable items were material to preparation of their defense. *Id.* at 20. While this statement is true, the Court looked at much more than that. Prior to getting into their discussion of the source code issue, the Tennessee Court noted that breath tests are not infallible. *Id.* at 18. Because of that, the defense is free to rebut the State's evidence by calling witnesses to challenge the accuracy of the particular machine. *Id.* In order to accomplish this end, the records of the device's procedures are available for examination. *Id.*

In dealing with the ultimate source code issue, the Tennessee Court looked to Minnesota

and *Underdahl*, for guidance on their case. They ultimately concluded that the defendant before them was akin to the Underdahl and not Brunner in Minnesota, in that the record before them was devoid of any evidence indicating the source code would have been material to preparing the defense. *Id.* at 21.

In applying the cases cited supra to the issue at hand, it is clear that the information being sought by Seidell is discoverable under *Brady*. Petitioner doesn't even allege that the information being sought by Seidell is not material, neither in the hearing before the Circuit Court below, nor in his brief before this Court. Petitioner merely alleges that Seidell failed to show that the evidence was material. Petitioner alleges that the Magistrate's EC/IR II Discovery Order is "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. . . ." Petitioner's Brief at 15. Petitioner then claims that since the record is silent that the Circuit Court could not make a presumption as to the factual or legal basis for the Order and that petitioner met its burden. *Id.* at 16. However, in stating that a presumption cannot be drawn from a silent record, petitioner itself makes a presumption that since the record is silent that the evidence is not material. This is not in accord with the line of cases petitioner presents in his brief. In *State v. Holliday*, 188 W. Va. 321, 424 S.E.2d 248 (1992), the Court remanded so that an evidentiary hearing be held to further develop the record. In the other cases cited by petitioner this Court held that it cannot presume a fact is present or not present if the record is silent on the issue.[6] To buy into petitioner's argument means one has to presume that the evidence is not material since the Magistrate Order was silent on the matter.

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[6] *See State ex rel. Johnson v. Zakaib*, 184 W. Va. 346, 400 S.E.2d 590 (1990); *Gibson v. Dale*, 173 W. Va. 681, 319 S.E.2d 806 (1984); *State ex rel. Miller v. Fury*, 172 W. Va. 580, 309 S.E.2d 79 (1983); *State ex rel. Stiltner v.*

Regardless if the Magistrate's Order is silent on the fact of whether or not the evidence is material, the Circuit Court's Order is clearly not silent. The Circuit Court ruled that Seidell clearly showed that the evidence being sought was material. Seidell below did the same exact thing that Brunner did in *Underdahl*, he attached exhibits to his motion in Circuit Court explaining what was being sought, and why it was material. The Minnesota Court in *Underdahl* ruled that in doing so, Brunner showed that the source code was material in his case. Not only did Seidell offer exhibits explaining what was being sought and why it was material, his counsel also proffered as much before the Circuit Court during the Rule to Show Cause Hearing. To claim that counsel merely stated that relevant evidence is always relevant is simply inaccurate as anyone can see from reading the transcript of the hearing below. Counsel argued below that the information being sought provides his expert witness with the chance to conduct a meaningful review of the machine. A.R. at 106. Counsel further proffered to the Court that the only way to conduct a complete evaluation of the scientific accuracy of and reliability of the breath machine is to look at the database collected by the device and downloaded to the State Police Crime Lab. A.R. at 112. Seidell also provided the Court with a six page sworn affidavit from his expert, Mary McMurray, which was admitted into evidence before the same judge in a case in Morgan County, West Virginia. A.R. at 34. In this affidavit, Ms. McMurray provides why each item is being sought in the discovery motion and why it is relevant and material. Petitioner claims that the Court erred in considering this affidavit because it is hearsay. While the Circuit Court states in its Order that it merely is considering the affidavit as an extension of counsel's argument, Seidell also believes that the affidavit could be admitted under Rule 803(24) of the West Virginia Rules of Evidence[7] since it has circumstantial guarantees of trustworthiness, is offered as

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*Harshbarger*, 170 W. Va. 739, 296 S.E.2d 861 (1982); *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979).

[7] Rule 803(24) of the West Virginia Rules of Evidence Provides: Other exceptions- A statement not specifically

evidence of a material fact, is more probative on the point to which it is offered than any other evidence, the general interests of these rules and justice will be met by its admission, and it was provided to petitioner in advance of the hearing date. The affidavit is a sworn affidavit that has been notarized and has been previously admitted into evidence in an evidentiary hearing before the same judge in a neighboring county. It is clearly the type of document that has circumstantial guarantees of trustworthiness. Seidell also provided the circuit court with a transcript of a North Carolina case, replete with expert testimony as to why the information sought is relevant and material to the preparation of a defense. The circuit court had all of this information at its disposal when determining if the evidence sought was material to the preparation of a defense, and found that it was when attacking the reliability and accuracy of the breath machine used in the case.

Taking all of this into consideration, it is clear from the record below, that ample evidence was presented to the Circuit Court to allow it to find that the evidence sought is material and Order that it be produced under the *Brady, Hatfield,* and *Youngblood* line of cases. Therefore, the circuit court did not err in denying petitioner's Petition for Writ of Prohibition.

## CONCLUSION

It is clear from the record below that petitioner presented absolutely nothing to show that the respondent magistrate's ruling was so flagrant that it was deprived of its right to prosecute the case. Furthermore, since the production of the evidence would not be unduly burdensome on petitioner to produce, as the machine is designed to produce much of the breath test discovery

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covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse part sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

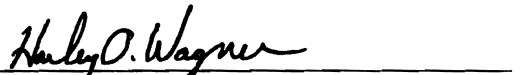
sought by Seidell (i.e. download data), petitioner is not damaged at all by respondent magistrate's order.

Also, Seidell produced ample evidence before the circuit court to show why the evidence was relevant and material to the preparation of a defense in his case, pursuant to the *Brady v. Maryland* and *State v. Hatfield* standards, espoused in *State v. Youngblood.* For these reasons and all those stated supra, the circuit court did not err in denying petitioner's Petition for Writ of Prohibition.

**Respectfully submitted,**

**CHRISTOPHER SEIDELL**

**By Counsel,**



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**DOCKET NO. 11-1648**

**PAMELA JEAN GAMES-NEELY,**
**Prosecuting Attorney**
Petitioner,

v.

**HONORABLE JOANN OVERINGTON,**
**Magistrate, Berkeley County, West Virginia**
Respondent.

## CERTIFICATE OF SERVICE

Harley O. Wagner and Jason M. Glass, counsel for the defendant below, Christopher Seidell, certify that on the 17th day of April, 2012, the forgoing **Respondent's Brief** was served upon counsel for petitioner by depositing true and correct copies thereof in the United States Mail, First Class Postage Prepaid addressed as follows:

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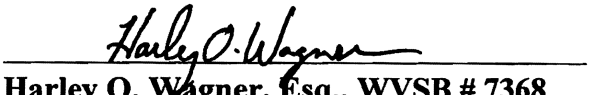

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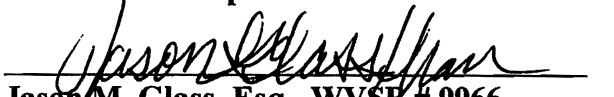

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