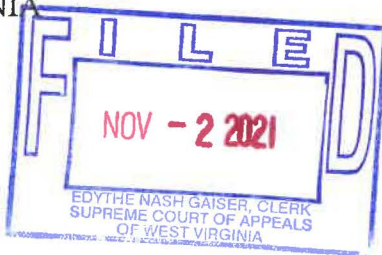


IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 2

STATE OF WEST VIRGINIA

vs.

MICAH A. MCCLAIN,
Defendant.



CASE NO: 21-F-76

AMENDED ORDER OF CERTIFICATION
Correcting Filing Date of Motion to Certify Question

EVAN JENKINS, Chief Justice:

The Honorable Cindy S. Scott, Division No. 2 of the 17th Judicial Circuit of the State of West Virginia, pursuant to WEST VIRGINIA CODE §58-5-2, respectfully requests that the Supreme Court of Appeals of West Virginia (“this Court”) exercise its discretion to answer the following questions:

1. Does the Legislature’s 2010 amendment of West Virginia Code § 17C-4-1, replacing the word “accident” with “crash” create ambiguity in the interpretation of the statute?

Answer: No.

2. In applying the rule of lenity, does the operative phrase “vehicle **involved** in a crash” in West Virginia Code § 17C-4-1(a) and (d) [2018], mean that a vehicle must make direct physical contact with or collide with a person or vehicle being driven or occupied by a person resulting in his or her injury or death?

Answer: No.

3. Does the phrase “involved in a crash” as contemplated in West Virginia Code § 17C-4-1(a)&(d), include a driver who makes contact with a single vehicle and that vehicle makes contact with other vehicles in an unbroken chain resulting in injury or death to persons in other vehicles?

Answer: Yes.

4. If ambiguity does not exist, should the Court allow the word “crash” as used in West Virginia Code § 17C-4-1, to be given its common, ordinary and accepted meaning? Further, is it a question of fact as to whether or not the driver of any vehicle was involved in a “crash” as contemplated in West Virginia Code § 17C-4-1(a)&(d)?

Answer: Yes.

It is this Court’s opinion that there is no controlling appellate decision, constitutional provision, or statute delineated in the WEST VIRGINIA CODE that answers these questions. Accordingly, this Court concludes that these questions are appropriate for certification under WEST VIRGINIA CODE §58-5-2.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 26, 2021, the Grand Jurors of the State of West Virginia, in and for the citizens of Monongalia County, upon their oaths, charged Micah Aron McClain (“Mr. McClain” or “Defendant”) with Leaving the Scene of an Accident Resulting in Death pursuant to WEST VIRGINIA CODE §17C-4-1(a) and (d).

The case arises out of actions that occurred on September 5, 2019, in Morgantown, Monongalia County, West Virginia. On or about July 19, 2021, Defendant by and through his counsel filed his Motion to Certify Question. On or about August 9, 2021, the Defendant by and through his counsel filed Notice of Filing of Motion for Judgment on the Pleadings, or, Alternatively, Motion to Certify Questions. The Court conducted a hearing on August 31, 2021.

This matter is currently set for a substantive pretrial motion hearing on November 29, 2021, and a jury trial on December 7, 2021.

ANALYSIS

In 2010, the Legislature made significant modification to 17C-4-1, in response to the Erin Keener case in Marion County, West Virginia, and amended the provision by renaming it

to “Erin’s Law,” increasing the penalty and, by replacing the word “accident” with the word “crash” throughout the entire statute. The 2010 version reads, in pertinent parts, as follows:

- (a) The driver of any vehicle **involved in a crash** resulting in injury to or death of any person shall immediately stop the vehicle at the **scene of the crash** or as close to the scene as possible and return to and remain at the **scene of the crash** until he or she has complied with the requirements of section three of this article: *Provided*, That the driver may leave the **scene of the crash** as may reasonably be necessary for the purpose of rendering assistance to an injured person as required by said section three. Every such stop shall be made without obstructing traffic more than is necessary. (Emphasis added.)
- (b) Any person knowingly violating the provisions of subsection (a) of this section after being **involved in a crash** resulting in the death of any person is guilty of a felony and, upon conviction thereof, shall be fined by not more than \$5,000 or imprisoned in a correctional facility for not less than one year nor more than five years, or both, fined and confined. (Emphasis added.)

The Legislature did not define either operative term “accident” or “crash” written into the above-cited statutory amendments. However, it cannot be disputed that, in 2010, the Legislature intended to narrow the scope of criminal liability under § 17C-4-1 by replacing “accident” with “crash.” It is alleged that the 2010 amendment, as carried forward in the 2018 amendment, with the term “crash,” creates ambiguity as to its applicability to the instant case, where the Defendant’s vehicle did not make direct contact with, or collide into, the decedent’s vehicle, as charged in the indictment.

There are no West Virginia case decisions, opinions, or trial court orders which have answered the legal question presented. The only case decision which has been identified which does is *Gaulden v. State*, 195 So.3d 1123 (FL 2016).

In overruling the Florida District Court's decision in *Gaulden I*, the majority and concurring opinions in the *Gaulden* case cited above made clear that Defendant's vehicle must:

The state statute prohibits leaving the scene of a "crash." The plain language of the statute contemplates that a vehicle will "crash" into an object, a person, or an animal. In her dissent in *Gaulden I*, Judge Davis pointed out that the majority's broad construction of the statute was more consistent with the prior iteration of the statute which used the word *accident*, not *crash*. She noted that the legislative staff analysis of the 1999 revision to 316.027(1) explained that the reason for replacing *accident* with *crash* was "'to update and conform terminology and to more accurately describe a collision involving a motor vehicle.'" *Gaulden I*, 134 So.3d at 984 (Davis, J., dissenting). Contrary to Petitioner's claim, *accident* is less specific than *crash*. The latter by definition requires a collision, but *accident* does not.

Gaulden at 1127-1128.

The Florida statute analyzed in *Gaulden* contains the same operative phrase and terms as used by our Legislature in §§ 17C-4-1(a) and (d) and followed a similar course of statutory amendment, whereby the word "accident" was replaced with the word "crash."

This Court acknowledges that the Supreme Court of Appeals of West Virginia may reformulate these questions pursuant to WEST VIRGINIA CODE §58-5-2.

Accordingly, pursuant to WEST VIRGINIA CODE §58-5-2 and Rule 17(a) of the *West Virginia Rules of Appellate Procedure*, it is hereby **ORDERED** that this action is stayed until such questions have been decided and the decisions thereof certified back to this Court. The parties are **DIRECTED** to prepare a joint appendix of the record sufficient to permit review of the certified questions.

Therefore, it is further **ORDERED** (1) that the questions stated above be, and the same hereby are, certified to the Supreme Court of Appeals of West Virginia, and (2) that the Clerk

of this Court forward to the Supreme Court of Appeals of West Virginia, under the official seal of this Court, a copy of this Order.

The names and addresses of counsel of record are the following:

Rob Zak, Assistant Prosecuting Attorney
Monongalia County Prosecuting Attorney's Office
75 High Street, Suite 11
Morgantown, WV 26505
Counsel for the State of West Virginia

J. Michael Benninger, Esquire
Benninger Law
10 Cheat Landing, Suite 100
Morgantown, WV 26508
Counsel for Defendant, Micah A. McClain

The Clerk of this Court shall provide a copy of this Order to all counsel of record.

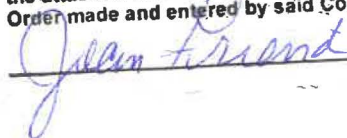
ENTER: October 26, 2021



CINDY S. SCOTT,
CHIEF JUDGE OF THE 17th JUDICIAL
CIRCUIT

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit/Family Court of Monongalia County State aforesaid do hereby certify the attached ORDER is a true copy of the original Order made and entered by said Court.

 Circuit Clerk