No. 21-0873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,
Plaintiff below,
Respondent,

vs.

MICAH A. McCLAIN,
Defendant below,
Petitioner.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Micah A. McClain ("Petitioner McClain") hereby submits this brief in reply to *Respondent's Brief* and the questions it raises in opposition to the relevant factual information and legal arguments presented by Petitioner McClain in his opening brief. The questions and further discussion they stimulate will be addressed in *seriatim* below.

INTRODUCTION

A vast majority of states, at varying times in the past, adopted and enacted the draft "hit-and-run" legislation found in the *Uniform Vehicle Code* published by the National Committee on Uniform Traffic Laws and Ordinances. West Virginia is among that majority and did so in 1951, but, at present, is in the minority of those states who have adopted the model legislation which amended the statute by replacing the unambiguous term "accident" with the more narrow and limited term "crash." Of those few states which have chosen to replace the

term "accident" with "crash," only one state defined the term "crash" by statute.[1] That State, North Carolina, specifically informed its citizens by statute that any event attributable directly to the motion of a motor vehicle or its load resulting in injury was within the scope and meaning of "crash" and that term was synonymous with "accident" and "collision," thereby eliminating any ambiguity and providing drivers of vehicles fair notice of the broad scope of North Carolina's "hit-and-run" statute.

Of the remaining states requiring a crash to have occurred before the "hit-and-run" statute becomes operative, Florida is the only to have clearly articulated, by judicial decree, and defined "crash" to say, '"any vehicle involved in a crash" means that a vehicle must collide with another vehicle, person, or object."[2] However, the Florida Supreme Court did not answer the dispositive question as to whether a vehicle, albeit a commercial motor 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 to be within the scope and command of the "hit-and-run" statute. Without a clear expression of legislative intent, does the phrase, "any vehicle involved in a crash," impose criminal liability upon Petitioner McClain, whose conduct, arguably, caused an initial physical contact with Ali's vehicle, but such physical contact was attenuated by Ali's superseding and intervening acts which actually caused his vehicle to make direct physical contact with and collide into Ms. Eddy's vehicle, resulting in her death? In other words, how does a person of common experience and reason know he can be charged with the

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[1] See, *State v. Bridges*, 232 N.C.App. 184, 754 S.E.2d 260 (2014), (holding that physical contact was not required because of the statutory definition of "crash" in N.C. Gen.Stat. § 20-4.01(4b), which states unequivocally that "crash" is defined as "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. These terms collision, accident, and crash and their cognates are synonymous.")

[2] *Gaulden v. State of Florida*, 195 So.3d 1123, 1128 (Fla. 2016).

crime of "hit-and-run," when his vehicle did not make physical contact with or collide into the victim or her vehicle?

The West Virginia Legislature has not defined "crash" in any statute or legislative rule, nor has this Court articulated the scope of criminal liability under the phrase, "any vehicle involved in a crash," now set forth in § 17C-4-1(a) [2018], in any of its opinions. Therefore, West Virginia has done neither to clear the obvious ambiguity nor give fair notice and guiderails for compliance. The question presented is one of great importance to all citizens who drive "vehicles" in this State, to the law enforcement communities and county prosecutors who are tasked with understanding the commands and prohibitions of § 17C-4-1 and to make charging decisions thereon, and, especially, to those many persons who regularly drive and operate extremely large, complex, diesel-powered commercial motor vehicles transporting "oversized loads" on our roadway and highway system within our State, with all of its unique physical characteristics and features.[3]

Moreover, the initial wording of the enactment in 1951, allowing alternative times and places (immediately—at the scene or sometime later and as close to the scene as possible) where a driver must "stop" his vehicle, and the additional amendments made to § 17C-4-1 by the Legislature since then, removing the time-limiting term "forthwith" in mandating when the driver must return to the scene and by removing the wording "[e]very stop shall be made without obstructing traffic more than is necessary," create conflict among other related statutes governing the operation, stopping, and parking of commercial motor vehicles, and all aggregate to create ambiguity, doubtfulness of meaning, and uncertainty as to the expressed prohibitions mandated by the statute. Thus, now understanding the full scope of Petitioner McClain's concerns as to the

[3] West Virginia's roads and highways are narrow; curvy; without an abundance of "parking areas" and wide and stable berms; and, in many instances, like Route 7, with less-than-well-maintained roadway surfaces, free of potholes.

ambiguity of the statute and the lack of fair notice it provides, this Court may consider it a better course to reformulate the certified questions framed by the Circuit Court, consistent with all applicable rules of construction, within the power expressed in Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

I. CONCISE SUMMARY OF FACTS AND RELEVANT WORDS AND TERMS

These facts, words, and terms are relevant, and generally not in dispute, and have previously undergone limited judicial evaluation and treatment by this Court, as noted here:

1. At the time of the September 5, 2019, occurrence on the Route 7 "laned roadway" [§ 17C-1-39][4], in Monongalia County, West Virginia, Petitioner McClain was the "driver" [§ 17C-1-31] of a "commercial motor vehicle," as defined by § 17E-1-3(7) [2011]. His "vehicle" [§ 17C-1-2] also met the definitions of "motor vehicle" [§ 17C-1-3, § 17E-1-3(29)], "truck" [§ 17C-1-12], and "semitrailer" [§ 17C-1-16].

2. At that time, Ms. Lippert and Ms. Eddy were each driving a "noncommercial motor vehicle" [§ 17E-1-3(30)] and their "vehicles" [§ 17C-1-2] also met the definition of "motor vehicle" [§ 17C-1-3].

3. Also at that time, Mr. Ali was driving the triaxle dump truck loaded with hot asphalt,[5] which met the definition of "commercial motor vehicle" [§ 17E-1-3(7)], and, likewise, his vehicle also could be classified as a "vehicle" [§ 17C-1-2], a "motor vehicle" [§ 17C-1-3, § 17E-1-3(29)], and "truck" [§ 17C-1-12].

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[4] The location of the occurrence could also meet the definitions of "roadway" [17C-1-37] and "highway" [17C-1-35].

[5] For purposes of understanding the legal status of those involved, Ali could also meet the definition of "operator" set forth in § 17C-17A-2(f).

4. At no time did Petitioner McClain's commercial motor vehicle collide with, crash into, or make physical contact with either of the noncommercial vehicles trailing at some distance behind him that were being driven by Ms. Lippert and Ms. Eddy.

5. The only physical contact between Petitioner McClain's commercial motor vehicle and the D6 bulldozer it was transporting and any other vehicle was when the tip of the blade of the bulldozer was struck by the front left tire of the commercial motor vehicle being driven by Ali, proceeding in the westbound lane of Route 7, as it passed Petitioner McClain.

6. After the physical contact was made between the two commercial vehicles, Ali proceeded in the westbound lane for some distance, failed to maintain control of his vehicle, crossed the centerline, sideswiped Ms. Lippert's vehicle, continued on for some additional distance into the right-hand curve, and then rolled his vehicle over in the roadway, thereby dumping its load of hot asphalt, crushing Ms. Eddy's vehicle, and entrapping her therein.

7. Neither Petitioner McClain's vehicle nor the D6 bulldozer it was transporting sustained any damage as a result of the tire of the Ali vehicle's striking the blade of the bulldozer as the two commercial motor vehicles passed on the narrow-laned roadway, a distance before the beginning of the right-hand curve where the Ali vehicle eventually collided into the Lippert and Eddy vehicles.

8. The sequential collisions between the Ali vehicle and the Lippert and Eddy vehicles occurred in a narrow, sharp curve, well to the rear of Petitioner McClain as he proceeded ahead in the eastbound lane of Route 7.

9. The record clearly establishes that Petitioner McClain did travel a relatively short distance, to Pedlar Run Road, after the physical contact with the tire of Ali's vehicle occurred, where he brought his large tractor trailer rig transporting the "oversized load"

to a "stop," as defined by § 17C-1-52. JA pp. 111-134. According to the statement given to the investigating officer after returning to the scene, Petitioner McClain believed that was the closest possible place for him to stop and "park" [§ 17C-1-54] his commercial vehicle in relationship to where contact with the tire of Ali's vehicle occurred and where it could have been "halted in a location where the vehicle can safely remain stationary."[6] JA pp. 16-17. *See*, § 17E-1-14a(c). The record also shows that there was no available "parking area" [§ 17C-1-60] or other lawful location[7] along Route 7 from the scene to Pedlar Run Road which was clear and available for Petitioner McClain to pull off, stop, and park to the side of or off of this narrow, laned roadway. JA pp. 16, 17, 91-134.

10. Neither "crash," "accident," nor "involved in a crash" have been defined by the Legislature in any known enactment. However, this Court has held that the word "accident" is not ambiguous and, in giving it, "[t]he common and everyday meaning of 'accident' is a chance event arising from unknown causes." *American Modern Home Ins. Co. v. Corra*, 222 W.Va. 797, 671 S.E.2d 802 (2008).

11. Inexplicably, Ali was never charged with any criminal offense, even though he admittedly was texting while driving his commercial motor vehicle prior to its striking

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[6] While § 17C-4-1(a) requires the driver of any vehicle involved in a crash to "immediately stop the vehicle at the scene of the crash or as close to the scene as possible," such command must be consistent with other statutory enactments regulating traffic on public laned roadways, including § 17C-13-3, which prohibits stopping, standing, and parking a vehicle in certain places and locations, including "[a]t any place on any highway where the safety and convenience of the traveling public is thereby endangered." *See*, §17C-13-3(a)(18). Suffice it to say, texting while driving a commercial motor vehicle (as Ali was doing in this case) is unlawful. However, texting is permitted by a commercial driver in certain locations; thus, an otherwise unlawful act is permitted in relation to a commercial motor vehicle so long as it is performed "when the driver moved the vehicle to the side of or off a highway, as defined in 49 CFR 390.5, and halted in a location where the vehicle can safely remain stationary." § 17E-1-14a(c). This provision is instructive as to where a commercial motor vehicle is reasonably permitted to stop. It was impossible for Petitioner McClain to safely move his vehicle to the side of Route 7 or halt it in a location anywhere near the scene where it could safely remain stationary.

[7] *See* § 17C-13-3 for the numerous enumerated places and locations where a vehicle cannot be stopped or parked. In addition, the applicability and penalty statutes referable to the actions at issue in this case are set forth in §§ 17C-2-1 and 2.

the blade of the bulldozer being transported by Petitioner McClain and thereafter colliding into the Lippert and Eddy vehicles. Additional legal duties imposed upon Ali, especially after passing the highly visible escort vehicle traveling well ahead of Petitioner McClain's vehicle, required him to reduce his speed in order to control his vehicle "as necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highways in compliance with legal requirements and the duty of all persons to use due care," set forth in § 17C-6-1(a). Further, the holding in *Waugh v. Traxler*, 186 W.Va. 355, 412 S.E.2d 756 (1991), identified the duties of a driver to keep a lookout for oncoming traffic and other sources of danger, to drive in one's own lane of traffic, and to keep one's vehicle under control at all times.

II. ORIGINAL "HIT-AND-RUN" ENACTMENT

West Virginia Code §§ 17C-4-1, *et seq.* [2018], is our current hit-and-run statute and was first adopted in 1951. From a review of currently available resources, it appears that by Chapter 129 of the Acts of the 1951 Regular Session of the Fiftieth Legislature, West Virginia first enacted words and phrases and defined them as they related to the regulation of traffic operating on roadways and, for the first time, enacted Chapter 17C-4-1, *et seq.* The relevant sections of the original enactment to the instant action reads:

> Section 1. *Accidents Involving Death or Personal Injuries.*—(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section three of this article. Every such stop shall be made without obstructing traffic more than is necessary.
>
> (b) Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than thirty days nor more than one year or by fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment.

> (c) The commissioner shall revoke the license or permit to drive and any nonresident operating privilege of the person so convicted.

Chapter 129, W.Va., Acts of the 1951 Regular Session of the Fiftieth Legislature.

In *State v. Tennant*, 173 W.Va. 627, 319 S.E.2d 395 (1984), this Court explained that "West Virginia Code, 17C-4-1 and 3, and the "hit-and-run" statutes in a large number of other states, are modeled after § 10-104 of the Uniform Vehicle Code. *See* Traffic Laws Ann. § 10-104, at 80-92 (1972)." The Uniform Vehicle Code drafted by the National Committee on Uniform Traffic Laws and Ordinances, as it existed in 1951, also supplied the definitions which are incorporated into the traffic laws of this State, many of which remain the same to this date and are instructive on the issues presented in this case. As noted, the initial enactment utilized the unambiguous term "accident" and that term remained in use in § 17C-4-1 until 2010.

The original statute also provided greater clarity of understanding in that it required the driver of a vehicle to stop after an "accident" in a place and manner "without obstructing traffic more than is necessary" and that the driver of a vehicle "shall then forthwith return" to the scene of the "accident." These important, descriptive, distinctive provisos were removed by the Legislature and did not appear in the 2018 codification of § 17C-4-1(a).

As it stood on September 5, 2019, Petitioner McClain and all others similarly situated would have risked violating § 17C-13-3 by stopping immediately in the middle of Route 7 as there was no place to park his commercial diesel-powered motor vehicle, no place to pull it off to the side of or onto the berm of the roadway, no "parking area" available to him at the scene or close thereto, no cellular phone coverage available to him at that time and location, and no place where the diesel-powered vehicle[8] could have been "halted in a location where the vehicle

[8] Even under § 17C-13A-2, Petitioner McClain would have been prevented from stopping his commercial motor vehicle and allowing "the engine of the vehicle to idle for more than fifteen minutes in any continuous sixty-minute

can safely remain stationary."

III. RELATED STATUTES AND DISCUSSION

As noted in the opening brief, the Legislature enacted the omnibus automobile insurance statute, W.Va. Code § 33-6-31 in 1967. To this day, the Legislature continues to require proof that injury, death, and property damage caused by a "hit-and-run" motor vehicle must arise "out of physical contact of such motor vehicle." W.Va. Code § 33-6-31(e)(3) [2015]. In *State Farm Mut. Auto. Ins. Co. v. Norman*, 191 W.Va. 498, 446 S.E.2d 720 (1994), this Court stated '[t]he physical contact requirement is unquestionably an explicit part of West Virginia's uninsured motorist statute." The *Norman* Court further explained that "[t]his Court must remain cognizant of the fact that the insertion of a physical contact requirement in the uninsured motorist statue was a matter of legislative choice."[9] Id. at 729.

Moreover, the Legislature enacted §§ 17C-13A-1, *et seq.*, §§ 17C-17A-1, *et seq.*, § 17E-1-3, and the multitude of separate statutory definitions collected in § 17C-1-70, which are all relevant to a higher level of discernment of the conduct proscribed and mandated by § 17C-4-1A. Considered together, these statutes provide a constructive view of probable legislative intent which compelled the modifications to § 17C-4-1A since the time of its original enactment. Accordingly, it appears clear and reasonable that the Legislature intended to narrow the scope and reach of this criminal statute to require direct physical contact between the "hit-and-run" vehicle and the victim's vehicle before criminal liability would attach. Likewise, the deletion of the "forthwith" requirement can only mean that a driver can return to the scene within a

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period, except as provided under section three of this article," and, had he done so, he clearly would have obstructed, if not prevented, the first responders and equipment necessary to attempt the extraction of Ms. Eddy from her vehicle and the crushing load of Ali's triaxle dump truck and asphalt entrapping her in her vehicle. A violation of this provision is also a misdemeanor criminal offense.

[9] This Court is certainly aware of the applicable rules of statutory construction set forth in a number of its reported decisions which necessarily guide its analysis of the issues presented in this case, and they will not be restated here.

reasonable period of time after finding a safe location to stop and park his vehicle so that it did not endanger the safety and well-being of other motorists and so that it was free from obstructing emergency first responders who would foreseeably be summoned to the scene.

Petitioner McClain, without knowledge of Ms. Eddy's condition or circumstance, JA 66 (@minute 52:07 of the Morgan bodycam video footage), did these reasonable and logical things commanded by § 17C-4-1(a) in this case and his lawful actions were acknowledged, in real time, by the lead investigating officer at the scene, who made a conscious decision and declared via police radio communication, "[d]isregard that BOLO on that oversize load vehicle. They've returned to scene. They parked down the road here but they didn't flee." JA 67-70. For reasons yet to be fully understood, Petitioner McClain was charged with felony fleeing more than nine (9) months after the occurrence, in spite of the unequivocal declaration made by the lead investigating officer on the scene at the time of Ms. Eddy's death.

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IV. CONCLUSION AND REQUEST FOR RELIEF

The first two certified questions presented are case dispositive and should be answered in the affirmative. In doing so, and upon the undisputed facts of the instant case, it is specifically requested that this Court make instructions directed to the Circuit Court to enter, upon remand, an order dismissing with prejudice the *Indictment* pending against Petitioner McClain and to conduct further proceedings consistent with its opinion.

Respectfully submitted this 13th day of July, 2022.

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CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Petitioner Micah A. McClain, do hereby certify that on July 13, 2022, the foregoing *Petitioner's Reply Brief* was duly served upon counsel of record by depositing true and exact copies thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

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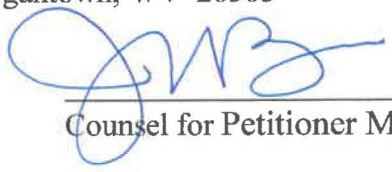

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