

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA

Respondent,

v.

Supreme Court No.: 24-81
Circuit Court No.: 20-F-72
Circuit Court of Logan County, WV

PAUL ANTHONY CONLEY

Petitioner.

PETITIONER'S REPLY BRIEF

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner

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REPLY BRIEF

W.Va. Code § 17C-5-8(a) and (g) provide that the results of blood draws are only admissible in DUI cases to prove blood alcohol levels if they are taken within two hours from arrest. Petitioner entered a conditional plea of guilty to DUI causing death and serious bodily injury because the circuit court ruled it would admit the results of two blood draws that occurred outside that time window.

In its response the State of West Virginia makes two general arguments. First, that for various reasons the statute in question does not mean what it plainly says, or that its words should be ignored. Second, that the statute is void because it usurps the constitutional authority of this Court to promulgate rules of evidence. These arguments are without merit and are addressed separately below.

I. The State Wrongly Maintains The Statute Does Not Mean What It Says Or Should Be Ignored

The State begins section I. of its response by asserting that W.Va. Code § 17C-5-8(g) “does not create a limitation on admissibility, but rather a presumption of admissibility.” Resp. at 6. The State’s argument is unintelligible. The State meanders through the history of DUI law, science and evidence in a way that makes no sense. Resp. at 6-8.

The argument that § 17C-5-8(a) and (g) do not create a limitation on admissibility is plainly wrong. Subsection (a) says that “evidence of the amount of alcohol in the person’s blood ... is admissible, *if* the sample or specimen was taken within the time period provided in subsection (g).” [Emphasis added]. Subsection (g) expressly provides that “For the *purposes of admissibility* of a chemical test under subsection (a): (1) A sample or specimen taken to determine the alcohol concentration of a person’s blood, *must be taken* within two hours from the time of the person’s arrest;” [Emphasis added]. Subsection (a) says the test result is

admissible “if” the requirements of subsection (g) are met. And subsection (g) says, it “*must be taken*” within two hours from arrest for “*purposes of admissibility*.” It could not be clearer.

A. The State Incorrectly Claims Both Blood Draws Were Taken Within The Time Required

In section I. A. of the response the State claims that by strictly construing the plain text of § 17C-5-8 both blood samples were taken within the time period required by that statute. Resp. at 8-9. The response asserts that the word “within” in subsection (g) means “not later than” two hours after the time of arrest. Resp. at 9. “In this sense ‘within’ fixes the end but not the beginning of the period of time.” Resp. at 9.

There are several problems with this interpretation of subsection (g). First, subsection (g) reads that the sample “must be taken within two hours *from* the time of the person’s arrest.” [Emphasis added]. It does not say within two hours “of” arrest. As the State argues the time period does end two hours after a person’s arrest. But the use of the word “from” makes it clear that the time period starts with the arrest itself. So, the State is correct that the word “within” can be understood to be the later time limit of blood testing, but the word “from” makes it equally clear that the beginning of that time period is the moment of arrest. In this case, that is on November 8, 2019. A.R. 100-04.

Second, the accident took place on September 12, 2019, but if the State’s strained construction of subsection (g) is accepted it would mean that blood samples drawn from the beginning of time up to two hours after Petitioner’s arrest on November 8, 2019 would be admissible. A.R. 7, 100-04. The time period would end two hours after arrest on November 8, 2019, but it would not have a beginning date or time. Test results from a month *before* the accident on September 12, 2019, a week after the accident, or up to two hours after Petitioner’s arrest on November 8, 2019 would all be admissible. That makes no sense. The only

understanding that is reasonable is that the statute means that the time period starts with the arrest of a person and ends two hours later.

Finally, the most obvious argument against the position of the State is that if the Legislature meant the time window for admissible blood testing to be any time up to two hours after the arrest of a person that is what the statute would say. It does not. “Courts are obligated to ‘presume that a legislature says in a statute what it means and means what it says there.’” *Freeland v. Marshall*, 249 W.Va. 151, ___, 895 S.E.2d 6, 14 (2023); quoting *State ex rel. Biafore v. Tomblin*, 236 W.Va. 528, 533, 782 S.E.2d 223, 228 (2016); quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

B. The Plain Words Of The Statute Do Not Lead To An Absurd Result

The State in section I.B. of its response makes a broad policy argument for why §17C-5-8 would be a better law if this Court ignored its plain language and pretended that it required blood tests to be conducted within two hours from an *accident* rather than within two hours from *arrest*. Resp. at 10-12. The State cites case authority for the proposition that where a particular *construction* of a statute would result in an absurdity the Court should adopt some other reasonable *construction*. Resp. at 10-11. The response claims that Petitioner’s *interpretation* of the statute leads to an absurd result. Resp. at 11. The State seeks to have this Court *construe* and *interpret* the statute to mean something different than what it says. And apparently the State concedes that the plain words of the statute say what the Petitioner maintains they say. When the words of a statute are plain, the plain meaning of the statute is applied.

“When interpreting a statute, we first consider whether the language of the statute is plain.” *State v. Finley*, __ W.Va. __, __ S.E.2d __, 2023 WL 6804936 *5 (2023); see also *State v. General Daniel Morgan Post No. 548, VFW*, Syl. Pt. 5, 144 W.Va. 137, 107 S.E.2d 353 (1959). “In determining how a specific statute should be applied, ‘[w]e look first to the statute’s

language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” *Ancient Energy Ltd. v. Ferguson*, 239 W.Va. 723, 726, 806 S.E.2d 154, 157 (2017); quoting *Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). Also see *State v. Folse*, 249 W.Va. 523, ___, 896 S.E.2d 689, 694 (2023) and *Freeland v. Marshall*, 249 W.Va. 151, ___, 895 S.E.2d 6, 13 (2023). “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” *State v. McClain*, Syl. Pt. 4, 247 W.Va. 423, 880 S.E.2d 889 (2022); quoting *State v. Elder*, Syl. Pt. 2, 152 W.Va. 571, 165 S.E.2d 108 (1968). Also see *Freeland v. Marshall*, 895 S.E.2d at 13, *State v. Finley*, at *5, and *Edward S. v. Raleigh County Housing Authority*, Syl. Pt. 5, 248 W.Va. 458, 889 S.E.2d 31 (2023). “The Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.” *Edward S. v. Raleigh County Housing Authority*, 248 W.Va. at 469, 889 S.E.2d at 42, quoting *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582, 251 S.E.2d 505, 508 (1979). “Courts are obligated to ‘presume that a legislature says in a statute what it means and means what it says there.’” *Freeland v. Marshall*, 895 S.E.2d at 14; quoting *State ex rel. Biafore v. Tomblin*, 236 W.Va. 528, 533, 782 S.E.2d 223, 228 (2016); quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The cases cited in the preceding paragraph stand for the straightforward and simple proposition that if the language of a statute is plain and clear the Court is not to *construe* or *interpret* it but is to apply it as written. The State seeks to have this Court act as a Super Legislature and substitute its judgment, as to what the law should be, for that of the people’s representatives in the Legislature.

Furthermore, the time window provided by § 17C-5-8(g) does not lead to absurd results. This statute is functionally a direction to police to arrest suspects shortly after auto accidents if they wish for blood draw results to be admissible. That is reasonable. While the circumstances of this case may justify the police not arresting the Petitioner immediately after the accident, that

does not make a statute excluding those results absurd. The fact that a statute does not take into account every possible circumstance and scenario does not make it absurd. Furthermore, there is no reason the police could not formally place a person under arrest and that person thereafter go immediately to the hospital for treatment. People that have been arrested go to the hospital routinely if they are injured.

It should also be pointed out § 17C-5-8 has read in its present form since 2013 and this is the first case that has come before this Court on this issue since then. Obviously, the application of this statute's plain language, which the State claims is absurd, to DUI cases hasn't generated any controversy or dispute that has been sufficient to result in an appeal until now. That is because it is not absurd. It has worked perfectly well all these years.

The State ends its argument by asking the Court to decide what this statute means by abandoning the plain *text* and instead trying to read the Legislature's mind and discern its true *purpose* in enacting this statute. Resp. at 11-12. This is a dangerous precipice from which there is no return once courts go over the edge and ignore the actual words of a statute and instead decide what they think the law should be. If the plain meaning of subsection (g) of § 17C-5-8 is to be changed it is a job for the Legislature, not this Court.

C. The State Claims That § 17C-5-8 Is Remedial And Wrongly Wants It Construed To Accomplish What The State Sees As Its True Purpose

In section I.C. of the response the State openly seeks to have this Court totally abandon "textualism" and adopt an untethered "purposivism" in applying statutes. Resp. at 12-14. The State argues that the Court should apply the statute based upon what the State sees as the "spirit, purpose and intent of the lawmakers." Resp. at 13. What the State does not explain is how it, or this Court, can glean the intent of the Legislature except by reading the plain language of the law in question. Statutes are drafted and enacted by the Legislature. Statutes are composed of words. Words have meaning. The words of this statute mean that for blood draws to be

admissible they must be taken within two hours from arrest. It is that simple. It is not a matter of whether the State or this Court think it is a good law or a bad law.

The analysis might be different if § 17C-5-8 were part of a single comprehensive Act of the Legislature on some subject matter enacted at one time and it was somehow inconsistent with other statutes in that enactment. But § 17C-5-8 is not inconsistent with any other statute and it was not part of a single new remedial comprehensive act of the Legislature dealing with some subject matter. Bluntly put, § 17C-5-8(g) says what it means and means what it says. *Freeland v. Marshall*, 895 S.E.2d at 14; quoting *State ex rel. Biafore v. Tomblin*, 236 W.Va. 528, 533, 782 S.E.2d 223, 228 (2016); quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Even if this Court were to agree that the “two hours from the time of the person’s arrest” language in Subsection (g) somehow really means two hours from the time of the auto accident, it would not solve the State’s problem with the second blood draw that everyone agrees was taken outside the two-hour window of both the arrest and the accident. A.R. 16, 240. Resp. at 3. Pet. Br. at 1. In order for the second blood draw taken many hours after the accident to be admitted this Court would have to completely disregard the two-hour window as to both arrest and time of accident. A.R. 12-13, 16, 240, 70-71. Pet. Br. at 1. Resp. at 3.

D. The Circuit Court Improperly Attempted To Interpret The Intent Of The Legislature

Section I.D. of the response is a rehash of the arguments previously made. Resp. at 14-16. The State repeatedly refers to what it claims to be the “intent,” “purpose,” “spirit,” and “object” of the statute. Resp. at 14-15. The response continues to urge this Court to take up the role of Super Legislature and declare that § 17C-5-8(g) is not a good law and should be either ignored or rewritten to mean something completely different. It is not the proper role of the

courts to interpret a statute to make it what, in some judge's opinion, is a better law by ignoring what the statute actually says. Numerous cases cited above support this proposition.

E. The State Wrongly Claims The Second Blood Sample Is Admissible Even Though The State's Previous Arguments Do Not Apply To It

The State in section I.E. of its response argues that even if the second blood draw is not admissible under § 17C-5-8 since it was taken more than two hours after the accident and weeks before the arrest, it should still be admitted. Resp. at 16-17. The State relies upon *State v. Dyer*, 177 W.Va. 567, 573, 355 S.E.2d 356, 362 (1987) for the proposition that even though a blood sample taken outside the two hour window is not admissible as evidence of the statutory presumptions regarding intoxication or as direct evidence that the driver was under the influence of alcohol at the time of the alleged offense, it is still admissible to show that the driver consumed a substantial amount of alcohol prior to the crash. Resp. at 16-17.

First, it must be understood that *Dyer* was decided in 1987, when § 17C-5-8 permitted blood draw test results to be admitted if taken within two hours of the alleged offense *or* the arrest. *Dyer*, 177 W.Va. at 572-73, 355 S.E.2d at 361-62. Therefore, the statute read differently than it has since 2013 when its present language was enacted. The State is correct that *Dyer* holds the admission of blood draw evidence taken outside the designated time window to not be a *reversible* error in the "peculiar circumstances" of that case. *Id.* But *Dyer* is a harmless error case. It is best to let the *Dyer* opinion speak for itself:

We do not believe the admission of the blood test results in this case amounted to *reversible* error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert, Dr. Sopher, was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at that time. Rather, the evidence was relied upon at trial to show that the appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. *Similar evidence had been offered by other of the State's witnesses and had been contained in the appellant's own statements.* Accordingly,

in view of the *peculiar circumstances of this case*, including the structure of the State's examination of its expert and the nature of his expert testimony, we find no error in the admission of the results of the blood test *which would warrant reversal* of the appellant's conviction. [Emphasis added].

Dyer, 177 W.Va. at 573, 355 S.E.2d at 362.

From the above quote it is first evident that in *Dyer* the test results were admitted only to show that the accused had “consumed alcoholic beverages in substantial amounts on the day in question” and “not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that appellant was under the influence of alcohol at the time of the alleged offense.” *Id.* That is not true in the case below. The Judge below ruled that both the first and the second blood test results were admissible for all purposes and without restriction. A.R. 10-11, 20-21, 240-41.

Second, the expert witness called by the State in *Dyer* did not offer an opinion as to the accused’s “probable blood alcohol level at the time of the alleged offense” or that he was “intoxicated at that time.” *Dyer*, 177 W.Va. at 572-73, 355 S.E.2d at 361-62. While there was of course no trial below because of the Petitioner’s conditional guilty plea, had there been a trial the State would certainly have argued to the jury that the blood test results proved the Petitioner was drunk at the time of the accident and that his blood alcohol concentration was well above the legal limit.

Third, in *Dyer* “[s]imilar evidence had been offered by other of the State’s witnesses and had been contained in the appellant’s own statements.” *Id.* In the present case there were no such witnesses or statements of the Petitioner.

Based upon all the above the *Dyer* Court found there was “no error in the admission of the results of the blood test which would warrant reversal of the appellant’s conviction” in light of the “peculiar circumstances” of the case. *Id.* The *Dyer* Court did not say it was not error, only that it was harmless and limited to the peculiar facts of that case. Accordingly, the State’s reliance on *Dyer* is unfounded.

In the present case the second blood draw was outside of both the time of arrest and time of accident two-hour windows. The circuit court erred in ruling that it would be admitted. The Petitioner would note that the judge below in ruling the second blood test result could be admitted indicated that “the time frame between the incident and the draw of the blood goes to the weight and not the admissibility of the evidence.” A.R. 20. This distinction makes no sense. All evidence admitted in all trials is subject to the weight the finder of fact, normally a jury, gives to it. The circuit court below could not think of a good reason for admitting the second blood draw so it simply made one up that is nonsensical and was not even argued by the prosecutor below. A.R. 20. This was error.

II. The State Wrongly Claims W.Va. Code § 17C-5-8(a) And (g) Are Unconstitutional

The State argues in section II. of its response that the Petitioner’s *construction* (that is, the plain words) of the statute violates the separation of powers between the Legislature and Judiciary and is therefore unconstitutional. Resp. 17-20. Of course, if the States construction were adopted it would be equally unconstitutional. The State cites a number of cases accurately setting forth the relationship between the Judiciary, the Legislature and the Rules of Evidence. Resp. at 17-18. The State further correctly points out that this Court has been granted by Section 3, Article VIII of the W.Va. Constitution rule making authority in judicial proceedings, which includes the power to promulgate rules for all cases and proceedings, civil and criminal. Resp. at 18.

This matter is addressed by this Court’s own website. In the West Virginia Judiciary Court Rules -- Requests For Public Comment section it is provided as follows:

Pursuant to Article VIII § 3 of the West Virginia Constitution, the Supreme Court of Appeals of West Virginia "shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law." See also W. Va. Code § 51-1-4. The Court exercises this authority by issuing rules orders at various times throughout the year. Comments from the

public, the bench, and the bar are important to the judicial rule making process. This page lists matters that are currently placed for public comment.

Court Rules – Request for Public Comment/West Virginia Judiciary Website,
<https://www.courtswv.gov/legal-community/court-rules/requests-for-public-comment>.

Section 3 of Article VIII of the West Virginia Constitution reads in pertinent part as follows: “The [supreme] court shall have power to *promulgate* rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.” [Emphasis added].

W.Va. Code § 51-1-4 provides as follows:

The Supreme Court of Appeals may, from time to time, make and *promulgate* general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this state. *All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section.* Such rules and regulations shall be uniform for all courts of the same grade or class; but any court of the state other than the Supreme Court of Appeals may adopt rules of court governing its local practice, but such rules of local practice shall not be inconsistent with any general rule of court then in existence or thereafter promulgated, and shall be effective only after approval by the Supreme Court of Appeals.

The judicial council of West Virginia is hereby designated as advisory committee to make observation and report to the Supreme Court of Appeals, from time to time, such recommendations as may, in its judgment, be proper; and *all rules promulgated by the Supreme Court of Appeals under the authority of this section shall, before taking effect, be referred to the chairman of the judicial council, the president of the West Virginia bar association and to the judge of every court affected thereby.* In the event a hearing is requested, within twenty days after such reference, by any five of the persons so designated, the Supreme Court of Appeals shall thereupon designate a day when a hearing on the matter of the adoption of such rules shall be held. In the event no hearing is requested or, if requested, after such hearing, the Supreme Court of Appeals shall be free to adopt or reject the proposed rules. General rules and regulations governing pleading, practice and procedure, and local rules, shall from time to time be published as an appendix to the official reports of the Supreme Court of Appeals and bound therewith. [Emphasis added].

It is clear from the State Constitution, this Court's own website, and § 51-1-4 that this Court does have ultimate constitutional authority to *promulgate* rules of evidence dealing with the issues raised in this case. And this Court is free to do so. But the enabling legislation contained in W.Va. Code § 51-1-4, which is cited with approval on the Court's website, and the website itself set forth the procedure for doing so. The website says, "The Court exercises this authority by issuing rules orders at various times throughout the year" and invites comments on pending rules by the public, bar, and bench. See website above. Section 3 of Article VIII of the State Constitution also empowers this Court to "promulgate rules." And it is this Court's website and § 51-1-4 that provide the procedure for doing so.

Section 51-1-4 provides that "All *statutes* relating to pleading, practice and procedure shall have force and effect only as rules of the court and *shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section.*" [Emphasis added]. Section 51-1-4 further provides that the promulgation procedure requires "all rules promulgated by the Supreme Court of Appeals under the authority of this section shall, before taking effect, be referred to the chairman of the judicial council, the president of the West Virginia bar association and to the judge of every court affected thereby."

In the present case the State asks this Court to forego, ignore, and abandon all of the promulgation procedures set forth in § 51-1-4 and on its own website and substitute its own judgement for that of the Legislature. This Court should decline to do so.

The Petitioner also would point out that this argument concerning constitutionality was not made by the State below before the circuit court and therefore was waived or forfeited by the State and not preserved for this appeal. A.R. 7-8, 16-18.

Finally, in a last gasp, the State asserts that because Rule 402 WVRE provides all relevant evidence is admissible it trumps § 17C-5-8 and permits that admission of the two blood draw results. This also was not argued below by the prosecution. The State simply asserted that the requirements of the statute were met and/or that the statute should be construed to mean

something other than what is says. A.R. 7-8, 16-18. Accordingly, this argument was also waived or forfeited and not preserved for appeal.

More importantly this argument is wrong. Section 17C-5-8 was enacted by the Legislature in 2013, many years after the adoption of Rule 402 of the Rules of Evidence. The Legislature knew about Rule 402. Section 17C-5-8 was enacted as a specific law governing the admission of one type of evidence in one type of case. Therefore, it is obvious it was intended to apply to DUI cases notwithstanding Rule 402. It is common for the Legislature to provide for the admission, exclusion or suppression of certain evidence. In fact, there are at least three articles in the West Virginia Code that do so. See Chapter 57, Article 2 (“Evidence and Witnesses”), Article 3 “Competency of Witnesses”), and Article 5 (“Miscellaneous Provisions”). Take for example W.Va. Code § 57-2-3 providing that “In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.” The present version of this statute was enacted in 1965. It is not unconstitutional. But the State would have to say it is unconstitutional if its position is consistent with this argument. In addition to statements by an accused on prior legal examination these Articles cover the admission of handwriting analysis (§ 57-2-1), competency of spouse testimony (§§ 57-3-2, 3, and 4), convicts as witnesses (§ 57-3-5), reporters’ privilege (§ 57-3-10) and several other matters.

This Court has constitutional authority to promulgate rules that overrule and supersede § 17C-5-8 and other statutes dealing with the admission or exclusion of evidence. But unless and until this Court does so by the procedures set forth on its own website and by the enabling statute W.Va. Code § 51-1-4 the rule of admission and exclusion provided by the plain text of § 17C-5-8(a) and (g) remains in effect.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In his petition the Petitioner requested Rule 20 oral argument in this conditional plea case because it presents a question of first impression and of fundamental public importance as to whether the current version of W.Va. Code § 17C-5-8(a) and (g) requires that to be admissible blood draws in DUI cases must be taken within two hours from arrest. Pet. Br. at 4. Since receiving the response of the State, it is apparent to counsel that there is even greater reason for oral argument and a signed and published opinion in this case. The State argues that this Court should ignore the language of the statute and/or that the statute be interpreted to mean something different than what the plain words say. Either way the State is seeking a decision that would represent a change of law. Resp. at 6-17. Furthermore, the State is asking this Court to declare § 17C-5-8 unconstitutional. Resp. at 17-20. Rule 20(a)(3) of the W.Va. Rules of Appellate Procedure specifically lists “cases involving constitutional questions regarding the validity of a statute...” as being of the type of case suitable for Rule 20 oral argument. Accordingly, for the reasons set forth in the “Statement Regarding Oral Argument” section of the petition *and* the State’s response, this Court should grant oral argument in this case and issue a signed and published decision.

CONCLUSION

Statutes are composed of words. Words have meanings. The words of W.Va. Code § 17C-5-8(a) and (g) mean that the result of the tests on the first blood draw in this case cannot be admitted because it was not taken within two hours from the Petitioner’s arrest. The results of the second blood draw cannot be admitted because it was not taken within two hours from *either* the arrest *or* the accident.

The State invites this Court to substitute its own judgment as to what the law should be by either ignoring the plain text of the statute or pretending it says something else. It is an

invitation the Court should not accept. Finally, in desperation, the State asks the Court to ignore its own procedures and the enabling legislation at W.Va. Code § 51-1-4 and retroactively declare the statute in question unconstitutional. This Court should not do so.

Based upon all the above, this Court should reverse the conviction of the Petitioner and remand this case to the circuit court with directions to permit the Petitioner to withdraw his conditional plea of guilty and to suppress and exclude from any future trial BAC evidence from the blood draws in question.

Respectfully Submitted,
Paul Anthony Conley,
By Counsel.

/s/ Gary A. Collias
Gary A. Collias
West Virginia State Bar No. 784
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
304-741-8647
gary.a.collias@wv.gov

Counsel for Petitioner