COMMONWEALTH OF KENTUCKY
SUPREME COURT
Room 209 State Capitol
700 Capital Avenue
Frankfort, Kentucky 40601-3488
Case No. 2013 –SC-000742-D

COMMONWEALTH OF KENTUCKY — APPELLANT

VS

RESPONSIVE BRIEF OF APPELLEE DUNCAN
Webster Circuit Court Appeal 09-XX-0001
COURT OF APPEALS Case No. 2011-CA-000636-DG

CHRISTOPHER DUNCAN — APPELLEE

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that this Brief was served by mailing the original and NINE copies of same to the Supreme Court by Registered mail pursuant to CR 76.40.(2) and to the following by first class mail, postage prepaid to: Hon. Jeffrey A. Cross, Assistant Attorney General, Office of Legal Counsel, 118 State Capitol, 700 Capitol Avenue, Frankfort, Ky. 40601, Judge C. Rene Williams, P. O. Box 126, Dixon, Ky. 42409, and Hon. Zac Greenwell, P. O. Box 341, Marion, Ky 42064, all on this the 1st day of December, 2014. Further this Appellee has not withdrawn the Record on Appeal.

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STATEMENT CONCERNING ORAL ARGUMENT

This case is one which requires specific interpretation of the law and application specifically of a statute. Oral argument would most likely not be helpful.

STATEMENT OF POINTS & AUTHORITIES

	Page #
I)**Will this court void sections (5) of both KRS 189A.005 and 189A.103(5)**	2
KRS 189A.005(5)	2-4
KRS 189A.103(5)	2-4
Beach v. Commonwealth Ky., 927 S.W.2d 826 (1996)	5-9
II) **Beach is Distinguishable, is dicta or advisory and/or should simply be overeruled.**	5
Beach v. Commonwealth Ky., 927 S.W.2d 826 (1996)	5-9
Missouri v. McNeely, 133 S.Ct. 1552 (2013)	6-9
Combs v. Commonwealth, Ky., 965 S.W.2d. 161 (1998)	7
Barker v. Commonwealth, Ky.App. 32 S.w. 3d 515 (2000)	9
III)**MISSOURI V. MCNEELY 133 s.Ct. 1552 (2013)**	9
Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 Led2d 908 (1966)	10
IV)**THERE WAS NO REFUSAL AND EXCULPATORY EVIDENCE WAS NOT PRESERVED.**	11
Krs 189A.005(5)	12
Estep v. Commonwealth, Ky., 64 S.W. 3d 805 (2002)	12

STATEMENT OF THE CASE.

There are no factual matters in issue in this action as all matters were stipulated and agreed to in the trial Court. Interpretation of the decisions herein are addressed in the body of this Brief.

ARGUMENT ON APPEAL TO SUPREME COURT

Comes the now Appellee Duncan who for his responsive Brief on Discretion, states as follows:

This case involves the undisputed facts that this was an alcohol suspected only DUI stop where the Defendant was denied a breathalyzer (which he requested), and was told he had to give blood. There was no one present to take the blood and the Defendant refused to allow the officer to do so. The Officer would have called the paramedics but he did not so inform the Defendant. There is no dispute in these facts of this case. The Officer was very truthful about refusing to allow a breathalyzer. He admitted that the breathalyzer was available but explained that it took too long to travel to the machine (which was in the next city) and administer the test. The officers had been directed to just draw blood every time they had a dui and such was the practice of the City Police.

There continues to be various attempts to confuse the court about the real issue at hand, which it the interpretation of KRS 189A.103(5).

Despite the Commonwealth's protestations to the contrary, Duncan is not challenging that statute but rather asking that this court require the statute to be enforced. The Statute should be enforced, according to its plain language, common sense, the Constitutions of this Commonwealth, and the United States of America. Both

constitutions require that any infringement upon personal rights by the state, shall be kept to the minimal necessary to enforce its governmental purpose. Duncan agrees that the government has a right to enforce its DUI laws both by driving statutes and licensing statutes which would include an implied consent statute.

However the Commonwealth in this matter is asking this Court to void Section (5) of KRS 189A.103 and Section (5) of KRS189A.005, in violation of the separation of powers and further judicially legislate the DUI statutes in contravention of the black letter law.

In this action, Mr. Duncan was believed to have been intoxicated by alcohol only. The state could prove its purpose by a breathalyzer which does not require the jabbing of a needle into the blood vein of the accused. There is no doubt that the lesser of infringement would have been to blow air into a tube. The Defendant Duncan begged for a breathalyzer and was refused his request. If KRS 189A.103(5) and 189A.005(5) were followed, then Mr. Duncan should have been given a breathalyzer.

I) WILL THIS COURT EFFECTIVELY VOID SECTIONS (5) OF BOTH KRS 189A.005 AND 189A.103?

KRS 189A.005 (5) DEFINING "REFUSAL" reads as follows:

> ...**If the breath testing sample and the alcohol concentration cannot be measured by the breath testing instrument, the law enforcement officer shall then request the defendant to take a blood or urine test in lieu of the breath test."...**

KRS 189A.103 (5) reads as follows:

"When the preliminary breath test, breath test, or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both may be required in addition to a breath test, or in lieu of a breath test."

The Appellants Brief and Appellee's Response will discuss many facets of the law, including but not limited to implied consent, improper search, and the practical application currently being used throughout this Commonwealth. Both documents will go on to discuss, Constitutionals Rights and Protections and various Kentucky and United States cases. However, in spite of various "red herrings", it remains that the real issue at hand, is the enforcement of the clear words of the statutes or this Court's decision to void same and legislate.

As stated above, all the facts were stipulated, and the officer forthrightly told the court that he did not have time to do a breathalyzer and only offered to do a blood test. He confirmed that the Defendant requested the breathalyzer many times and was denied same. **A breathalyzer was available; although no testing was available at the site where same were offer and/requested**. The parties were not at any medical facility and no medical personnel were present to draw blood. This Officer confirmed that this is the normal procedure for he and many officers in his situation. They have been advised that they do not have to allow testing by breathalyzers. See tape on appeal.

Given its plain meaning, the language of the statute states that if a substance other than alcohol is suspected in a DUI stop, then officers can seek additional testing. The definition of "refusal" contained in the statute makes it clear that the order of testing is to give a breathalyzer first and only seek blood or urine if breath testing fails for some

reason. Nonetheless, the officers of this Commonwealth have been interpreting the statute to give a choice as to the type of testing under all circumstances, including an alcohol suspected only stop. The Court of Appeals panel herein in its decision of July 19, 2013 ordered the statue followed and supported the statute by pointing out the Constitutional protections at issue. Such protections were pointed out as the reasoning for not allowing the unfettered testing by law enforcement.

The result of that July decision being published seems to scare many of the prosecutorial and law enforcement personnel. The Legislature always meant for its statutes to be followed and to do so would only mean that in an "alcohol" only DUI stop, an officer would be required to have exigent circumstances to require that a person subject himself to being stuck with a needle or be deemed to have "refused" the test, if he is willing to give a breath test. Officers make decisions everyday as to whether they have exigent circumstances to proceed without a warrant. This is not a new position for them, nor a standard that has not been used and approved for years in this Commonwealth. The holding in that July decision to follow the statute did not disturb the implied consent law but simply limited it to its statutory construction. If proper interpretation is not applied, then Sections 5 of both Statutes are meaningless.

As this Court is aware and its goes without citation, Courts are required to give the plain meaning to words and to the Statutes. Courts are likewise required to attempt to preserve the statutes if possible. There is only one meaning which can be given to KRS 189A103(5), which is:

- **in an alcohol only DUI**
- **blood and urine cannot be requested**
- **without exigent circumstances which validate a warrantless search**

Likewise there if only one meaning to be given to KRS 189A005(5):

- **If the breath testing sample and the alcohol concentration cannot be measured by the breath testing instrument,**
- **the law enforcement officer shall <u>then request</u> the defendant to take a blood or urine test in lieu of the breath test."... (emphasis added)**

The Commonwealth in all of its briefing has not argued any other interpretation of the Statute. The Commonwealth has not addressed the wording of the Statute.

The Commonwealth and the trial Court both stated that while the taking of blood is a search and consequently is subject to Fourth Amendment and state constitutions limitations, that the search is allowed under the Fourth Amendment. Then they go on to make a broad and sweeping statement that the implied consent statute is constitutional. There is no logical progression from the implementation of the constitutional protections to a finding that the implied consent statute is therefore constitutional. Specifically, this Defendant is not challenging the constitutionality of the implied consent statute. Such Statutes are constitutional but must be enforced according to the methods written by the legislative body and not indiscriminately by each and every officer enforcing same. The constitutionality of the implied consent statutes is irrelevant to this matter, and once again, it is not being challenged by this Appellee Duncan.

Thereafter the Commonwealth simply holds on to the bad dicta from <u>Beach v. Commonwealth</u>, Ky., 927 S.W.2d 826 (1996), and attempts to direct the Court to other less specific parts of the statutes and ignores both Sections 5. It is in fact the Commonwealth who is attempting to challenge and have set aside sections of two statutes.

II) BEACH IS DISTINGUISABLE, IS DICTA OR ADVISORY AND/OR SHOULD SIMPLY BE OVERRULED.

The Court of Appeals, entered two decisions herein, one in April 2013, saying that it was "bound by the decision in Beach" , and affirmed the trial Court. However, the undersigned believes that after the decision in Missouri v. McNeely, 133 S. Ct. 1552 (2013), when the Court felt no longer "bound" it reversed itself on re-hearing and entered its July 19, 2013 decision, Reversing and Remanding the trial Court. The Appellate Court did not agree with Beach but believed it was required to follow that case law when its decision was first entered in April.

The Beach case, was appealed on the denial of a request to suppress blood test taken with consent.

The protections of search and seizure really do not apply when a proper consent is given. It appears from a reading of Beach, that counsel for Beach tried to backdoor in an improper search by making a similar argument to Defendant Duncan's. While it would seem that the validity of the consent to the blood test would have been the sole issue in that case, it is verily admitted that the Courts addressed the applicability of KRS 189A.103(5). Since the application of KRS 189A103(5) and KRS 189A005(5) was not the issue to be decided in that action, the whole discussion seems to qualify as "dicta". The discussions in Beach if not dicta, were at best advisory opinions. Dissenting in Beach, Justices Stumbo and Stephens both point out that they agree that a breath test is required first by the Statute. Nonetheless, as feared by the dissents in that case, the breadth of that decision, has unleashed these and other arbitrary and punitive testings, which all fly in the face of the plain language of the statute.

The Court is reminded that the parties in this matter, agreed and stipulated the facts. The officer refused a breathalyzer because it took too long. Respondent Duncan begged for a breathalyzer. The Machine was available. The Officer only allowed /offered a blood test. There was no one present to do the blood test but the Officer at the time of the offer. There was no evidence of any substance except alcohol. There was no consent which was later attempted to be rescinded after the testing. Beach and Duncan simply are two different issues. The dissents in Beach saw the potential for problems. Likewise, various court thereafter tried to fix those issues.

Two years after Beach, the case of Combs v. Commonwealth, Ky., 965 S.W.2d 161 (1998) made it clear that Beach, id. only applied to CONSENT cases. Beach was not only determined on the consent issue, that case related solely to implied consent for testing in general. The Supreme Court in Combs, supra. contrasted Combs and Beach when it stated in Combs that "**There is no due process violation. The record is silent as to any proof that Combs requested a different type of testing." Page 165.**

In essence, that Court held that had Combs requested a different type of testing and been denied, that there would have been a due process violation. In this case, Mr. Duncan was denied his due process when he was not allowed to have a breathalyzer which he did request. Combs went on to say that while:

> ***"KRS 189A.103* [**6] implies consent in DUI cases generally."**
>
> **"*KRS 189A.105(1)* also provides that no person shall be compelled to submit to any test or tests, as specified in *KRS 189A.103*. This is an explicit and clear prohibition but contains an exception in *KRS 189A.105(2)(b)*, which allows the issuance of a search warrant when a person is killed or suffers physical injury as a result of the incident in which the defendant has been charged."**

Even though there is a presumption of consent, it is consent to the appropriate test; not all of them and not in all circumstances. Even under the most severe circumstances, death or injury, probable cause must exist before a search warrant will be issued. It would be ridiculous for a judge to be required to find probable cause, if every officer is allowed to simply pick and chose his test under his own "predelictions". It would be even more ridiculous to deny the court the right to a search warrant and allow the officer such freedom. See again Combs:

> **"The clear and unambiguous language of *KRS 189A.105(2)(b)* creates an exception to the general rule found in Subsection (1) of that statute. The effect of this exception is to direct all executive branch employees, including police, not to seek a search warrant where injury or death does not result from a drunk driving offense."**
>
> See also Combs v. Commonwealth, Ky., 965 S.W.2d 161 (1998).
>
> **"It is fundamental constitutional law that the Bill of Rights of both the federal and state constitutions imposes certain limitations on the power of government. The *Fourth Amendment to the United States Constitution* and Section 10 of the Kentucky Constitution assure the people that they will be free from all unreasonable search and seizure...."**
>
> ...

That case goes on to explain that when there is a governmental exception allowing for the violation of such rights that there are protections in place:

> **"but rather the constitutional sections place restrictions on when the executive branch of the government can conduct any search or seizure.**
> ...
> **p. 165 A search warrant was obtained before the blood was taken. The issuance of the search warrant was based on probable cause thereby**

providing additional protection against any unlawful search and seizure. The blood was taken by trained personnel in a hospital ...."

Also subsequent to Beach in the case of Barker v. Commonweath, Ky.App., 32 S.W.3d 515 (2000), it was stated in a DUI case that:

That "the legislature is required to provide 'minimal quidelines' to prevent a 'standardless sweep {that} allows policemen, prosecutors, and juries to pursue their personal predilections.'" Commonwealth v. Kash, Ky.App., 967 S.W. 2d 37 (1997) (quoting from Kolender v. Lawson 461 U.S. 352, 103 S.Ct.1855, 75 L.ed. 2d 903 (1983)) (other citations omitted).

The legislature did not intend for law enforcement to pick and choose which test to administer or how or where to administer same without following any guidelines.

Again, even Judges have to have reasonable cause to allow a search.

Since the state had a means of obtaining its evidence without violating the Defendant Duncan's rights under the 4th Amendment, ie. the Breathalyzer, it had no right to violate those rights by requiring a blood test.

Beach to the extent that it is being interpreted otherwise should be overruled.

III) Missouri v. McNeely, 133 S. Ct. 1552 (2013)

If any doubt remained as to the need to enforce procedural due process protection against unreasonable search and seizure, the Missouri case answered those doubts. The U.S. Supreme Court acknowledged the importance of drunk driving protections but also acknowledged that almost fifty years have passed since Schmerber, supra and notes that considerations have changed but protections have not.

"...'motorists' diminished expectation of privacy does not diminish their privacy interest in preventing a government agent from piercing their skin. And though a blood test conducted in a medical setting by trained personnel is less intrusive than other bodily invasions, this Court has never retreated from its recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests. (emphasis added).

The guaranteed constitutional rights have not changed. One cannot be forced to waive his constitutional rights in order to be afforded due process. Duncan was required by the Officer to submit to a blood test in order to get his exculpatory evidence in violation of two different Statutes which require a breathalyzer be offered first.

Duncan, likewise, does not believe that Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) was overruled by the new holding in Missouri v. McNeely, 133 S. Ct. 1552 (2013), but rather suggests that Schmerber was used improperly to support the Webster Circuit Court's previous ruling in this case.

As McNeely states, Schmerber did exactly what would have been expected. It looked at the totality of the circumstances to see if there was an exigency to allow for a warrantless search. The need for such exigent circumstance is the requirement set forth in McNeely and followed by the ruling of the Court of Appeals in its final decision herein. To the extent that the Commonwealth's Attorney and the Webster Circuit Court ruled that Schmerber somehow required that a person submit to a blood test when no exigent circumstances exist; then either those interpretation of Schmerber were wrong' or McNeely has overruled those interpretations.

The statute is correct. Schmerber is correct, and McNeely is correct. Only the intrepretation placed on the statute and Schmerber by the Commonwealth and the lower court is INCORRECT.

McNeely is certainly the last word on the subject. The U.S. Supreme Court makes it clear that a required blood test will come with constitutional protections.

> **"The [*5] State's rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence supporting probable cause is simple."**
>
> ....
>
> **"...'motorists' diminished expectation of privacy does not diminish their privacy interest in preventing a government agent from piercing their skin. And though a blood test conducted in a medical setting by trained personnel is less intrusive than other bodily invasions, this Court has never retreated from its recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests. (emphasis added).**

NO INTRUSION SHOULD HAVE BEEN FORCED UPON MR. DUNCAN AND HE WAS CORRECT IS NOT AGREEING TO SAME. However, because of his decision and the officers mistaken belief, Mr. Duncan was not allowed the evidence he needed to prove his innocence.

IV) THERE WAS NO REFUSAL AND EXCULPATORY EVIDENCE WAS NOT PRESERVED.

The Defendant did not refuse testing as required by the Statute. He consented to the breathalyzer and was not asked for urine.

The Movant was not properly informed that to refuse to allow the officer to take blood and request a breathalyzer would be considered a total refusal to be tested. Likewise, the Defendant did not refuse to be tested by blood because there was no person authorized by Statute or Regulation to take his blood. See KRS 189A.103(6). He only refused to allow the officer to take his blood. Duncan was not informed that he would be

taken elsewhere to have his blood drawn or that a paramedic would be called. He was simply told by the officer (the only person there) that he needed to allow the officer to do a blood test. Mr. Duncan wanted the breathalyzer testing to prove his innocence, but he was not willing to allow a cop off the street to stick a needle into his veins and get blood to prove it. The breathalyzer would have proven Mr. Duncan was not under the influence of alcohol.

This Court is also again referred to Section 5 of KRS 189A.005 as follows:

> "Refusal" .... **"When the preliminary breath test, breath test, or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both may be required in addition to a breath test, or in lieu of a breath test." ..... he shall then be deemed to have refused if the refusal occurs at the site at which any alcohol concentration or substance test is to be administered;"**

Since the breath test was never offered and he was never taken to a medical technician or facility; there could not have been a refusal under the definition contained in the Statute of "refusal".

This Court is now referred to the Estep v. Commonwealth, 64 S.W.3d 805, (Ky. 2002) as follows:

"..., the Due Process Clause is implicated only when the **failure to preserve** or collect the **missing** evidence was intentional . . . . "

In this action, there is no doubt that the Officer acted intentionally in refusing the breathalyzer. He very truthfully admits same. The Defendant was denied his right to a breathalyzer and thus his further right to independent testing, if needed.

CONCLUSION

Wherefore, Respondent Christopher Duncan requests that the decision of the Court of Appeals be upheld and remain published and that the Beach case be overruled to the extent that it conflicts with this case and the Statute and that his case be remanded for dismissal for failure to preserve exculpatory evidence requested by him.

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