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

**STATE OF WEST VIRGINIA,  
Plaintiff,**

vs.

**CASE NO: 02-F-158**

**ERNEST J. JOHNSON,  
Defendant,**

**PETITION FOR APPEAL**

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CASES.....4-6

FACTUAL AND PROCEDURAL HISTORY.....7

STANDARD OF REVIEW.....9,

ANALYSIS.....

POINT ONE: THE APPEAL SHOULD BE GRANTED BECAUSE THE INDICTMENT WAS INSUFFICIENT AND THUS VIOLATES THE FIFTH AMENDMENT AND THE DUE PROCESS CLAUSE OF SIXTH AMENDMENTS TO THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.....9

A.

THE APPEAL SHOULD BE GRANTED BECAUSE, EVEN THOUGH RULE 34 OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEDURE MANDATES THE MOTION BE FILED WITHIN TEN DAYS OF THE VERDICT OR FINDING OF GUILTY, THE DEFENSE BROUGHT THE FATAL INSUFFICIENCY TO THE COURT'S ATTENTION BEFORE JURY DELIBERATIONS.....9

B.

THE APPEAL SHOULD BE GRANTED BECAUSE THE COURT DID NOT HAVE JURISDICTION OVER THE CHARGE BECAUSE THE STATUTE HAD BEEN AMENDED AND THE CRIME CHARGED IN THE INDICTMENT NO LONGER EXISTED AS FIRST-DEGREE ROBBERY.....18

C.

THE APPEAL SHOULD BE GRANTED BECAUSE THE PROSECUTOR MISTAKENLY PROVIDED THE GRAND JURY WITH IMPROPER STATUTORY LANGUAGE FOR ARMED ROBBERY, AND NEITHER AMENDMENT OF THE CHARGE THROUGH INSTRUCTION NOR A GOOD FAITH BELIEF THE LANGUAGE IN THE AMENDED STATUTE MEANS ESSENTIALLY THE SAME AS THE PREVIOUS STATUTORY FORM CURES THE DEFECT.....21

POINT TWO: THE STATEMENT TAKEN BY POLICE ON THE DAY OF MR. JOHNSON'S ARREST SHOULD NOT HAVE BEEN ADMITTED BECAUSE THE DETECTIVE DID NOT PROMPTLY PRESENT MR. JOHNSON BEFORE A MAGISTRATE AND THE DELAY WAS ONLY FOR THE PURPOSE OF OBTAINING AN INCRIMINATING STATEMENT.....32

POINT THREE: THE APPELLANT'S RECIDIVIST LIFE-SENTENCE SHOULD BE VACATED BECAUSE IT WAS UNCONSTITUTIONALLY DISPROPORTIONATE, BASED ON ERRONEOUS FACTS, PREJUDICIAL EVIDENCE AND INCOMPETENT WITNESSES...35

A.

MR. JOHNSON'S RECIDIVIST LIFE-SENTENCE SHOULD BE VACATED BECAUSE THE UNDERLYING FELONIES ARE NOT OF A VIOLENT NATURE AND ONLY ONE POSED THREAT OF VIOLENCE AND THEREFORE THE SENTENCE VIOLATES THE PROPORTIONALITY CLAUSES OF BOTH THE WEST VIRGINIA AND THE UNITED STATES CONSTITUTIONS.....35

B.

MR. JOHNSON'S RECIDIVIST LIFE SENTENCE SHOULD BE VACATED BECAUSE THE JUDGE ADMITTED A PICTURE OF THE DEFENDANT, WHILE CLEARLY UNDER ARREST, WHICH HAD NO PROBATIVE VALUE AND WHICH CONTAINED THE WORDS SEXUAL ASSAULT ON THE BACK WHICH, WHILE REDACTED, WERE LATER ADMITTED THROUGH ANOTHER DOCUMENT...42

C.

MR. JOHNSON'S RECIDIVIST LIFE SENTENCE SHOULD BE REVERSED BECAUSE NEITHER DETECTIVE JAMES GROODY NOR DETECTIVE MARK JONES WERE ACTUALLY PRESENT WHEN MR. JOHNSON PLED GUILTY TO EITHER CHARGE AND AS SUCH THEY HAD NO DIRECT KNOWLEDGE TO QUALIFY THEM AS COMPETENT WITNESSES TO GIVE TESTIMONY.....47

CONCLUSION.....50

## CASES

### UNITED STATES

Albrecht v. United States, 273 U.S. 1, 8 (1927).

Ex Parte Bain, 121 U.S. 1, 12-13, 7 S Ct. 781, 30 L. Ed. 849 (1887).

Henderson v. Morgan, 426 U.S. 637, 644-45 (1976).

Russell v. United States, 369 U.S. 749, 82 S Ct. 1038, 8 L Ed. 2d 240 (1962).

Stirone v. United States, 361 U.S. 212, 80 S Ct. 270, 4 L Ed. 2d 252 (1960).

United States v. Miller, 471 U.S. 130, 105 S Ct. 1811, 85 L Ed. 2d 99 (1985).

Vasquez v. Hillery, 474 U.S. 254, 263, 106 S Ct. 617, 88 L Ed.2d. (1986).

### FOURTH CIRCUIT

United States v. Coward, 669 F.2d 180 (4<sup>th</sup> Cir. Cert denied, 456 U.S. 946, 1982).

United States v. Floresca 38 F.3d 706 (4<sup>th</sup> Cir. 1994).

Halley v. Dorsey, 580 F.2d 112, 115 (4<sup>th</sup> Cir. 1978).

United States v. Hooker, 841 F.2d 1225 (4<sup>th</sup> Cir. 1988).

United States v. Price, 857 F.2d 235, (4<sup>th</sup> Cir. 1988).

United States v. Promise, 255 F.3d 150, (4<sup>th</sup> Cir. 2001).

United States v. Pupo, 841 F.2d 1235 (4<sup>th</sup> Cir. 1988).

### W.VA

Arbogast v. Mohn, 260 S.E.2d 820, (W.Va. 1979).

Scott v. Harshbarger, 180 S.E. 187 (W.Va. 1935)

State ex. rel. Carson v. Wood, 175 S.E.2d 482 (W.Va. 1970).

State v. Childers, 415 S.E.2d 460, 464 (W.Va.1992).

State ex rel Combs v. Boles, 151 S.E.2d 115 (W.Va. 1966).

State v. DeWeese, 582 S.E.2d 786 (W.Va. 2003).

State v. Fisher, 370 S.E.2d 480 (W.Va.1988).

State v. Grimmer, 251 S.E.2d 780, (W.Va. 1979).

State v. Jones, 239 S.E.2d 763 (W.Va. 1977).

State v. Hulbert, 544 S.E.2d 919 (W.Va. 2001).

State v. Knight, 285 S.E. 2d 401 (W.Va. 1981).

State v. Marrs, 379 S.E.2d 497 (W.Va. 1989).

State v. McGraw, 85 S.E.2d 849 (W.Va.1955).

State v. Milburn, 511 S.E.2d 828 (W.Va. 1998).

State v. Miller, 400 S.E.2d 897 (W.Va.1990).

State v. Parkersburg Brewing Co., 45 S.E. 924 (W.Va.1903).

Accord, State ex rel. Payne v. Mitchell, 164 S.E.2d 201 (W.Va. 1968).

State ex rel. Pinson v. Maynard,383 S.E.2d 844 (W.Va.1989).

State ex.rel. Underwood v. Silverstein, 278 S.E.2d 886 (W.Va.1981).

State v. Stone, 33 S.E.2d 144 (W.Va. 1945).

State v. Stone, 268 S.E.2d 50 (W.Va. 1980).

State v. Zain, 528 S.E.2d 748 (W.Va.1999).

#### **OTHER STATES**

Herron v. State, 118 Miss. 420, 79 So. 289

## **RULES AND STATUTES**

West Virginia Rule of Criminal Procedure 5.

West Virginia Rule of Criminal Procedure 7.

West Virginia Rule of Criminal Procedure 34.

West Virginia Rule of Criminal Procedure 52.

Federal Rule of Criminal Procedure 12.

West Virginia Code § 62-1-5(a)(1)

West Virginia Code § 61-2-12.

West Virginia Code § 62-2-11.

## FACTUAL AND PROCEDURAL HISTORY

Ernest Johnson was arrested and charged with first-degree robbery on June 21, 2002. He, along with his alleged accomplice, Allen Myers, was charged of robbing the Marathon Gas Station on Norway Avenue at the corner of Edison Drive in Huntington, West Virginia.

Mr. Johnson was later indicted for first-degree robbery on September 13, 2002. That indictment stated: "On or about June 21, 2002, in the County of Cabell, State of West Virginia, Ernest J. Johnson and Allen Myers jointly committed the offense of first-degree robbery by unlawfully and feloniously robbing Charles Adams, **by using the threat of deadly force by threatening the presentment and use of a firearm**, and did steal money belonging to Marathon Gas Station, lawfully in the care, custody and control of Charles Adams by virtue of his employment with Marathon Gas Station, against his will and against the peace and dignity of the State.

The Cabell County Grand Jury returned a true bill against the Defendant for the crime of armed robbery based upon the aforementioned language. However, West Virginia Code § 61-2-12 (a) sets forth the elements the State must prove in order to establish a first-degree robbery charge and defines that charge as: (a) Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon.

In the year 2000, prior to the alleged robbery herein, the West Virginia Legislature amended West Virginia Code Section 61-2-12 (a)(2) to provide that the threatening of the presentment and use of a firearm was no longer satisfactory to establish a charge of first-degree robbery, and instead, the State was required to prove presentment of a firearm or other deadly weapon.

Even though the Cabell County Prosecutor, Chris Chiles, presented the wrong language to the grand jury and defense counsel, Tim Rosinsky, brought the mistake to Judge Ferguson's attention before jury deliberations, the Defendant, Ernest J. Johnson was found guilty of the "lesser included" offense of second-degree robbery on May 5, 2003, after a three-day trial.

Trial counsel, Tim Rosinsky, ultimately filed a Motion in Arrest of Judgement on August 4, 2004. Mr. Rosinsky never argued that Motion because, unfortunately, irreconcilable differences arose between counsel and client. Mr. Rosinsky withdrew on August 6, 2003.

Present counsel, A. Courtenay Craig, was appointed on September 4, 2003. On October 31, 2003, Mr. Craig filed a memorandum in support of the Motion in Arrest of Judgement. After a hearing on the memorandum on November 17, 2003, Judge Ferguson took the Motion under advisement. Ultimately, Judge Ferguson denied the Motion on January 13, 2004.

On April 26, 2004, the State proceeded with a recidivist trial whereby Mr. Johnson was convicted of being an habitual offender. Mr. Johnson received a life sentence with mercy making him eligible for parole after serving a minimum sentence of fifteen years. Mr. Johnson's counsel filed a Motion to Dismiss the recidivist sentence on May 15, 2004. Judge Ferguson took that Motion under advisement after oral arguments on June 3, 2004. That Motion was denied on October 18, 2004. Johnson was re-sentenced on September 12, 2005 for purposes of appeal.

The Appellant is currently serving a life sentence with mercy at the Mount Olive Correctional Center in Mount Olive, West Virginia. The Appellant is appealing his conviction for the charge of first-degree robbery and his sentence as an habitual offender.

## **POINT ONE**

**THE APPEAL SHOULD BE GRANTED BECAUSE THE INDICTMENT WAS INSUFFICIENT AND THUS VIOLATES THE FIFTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.**

### **STANDARD OF REVIEW**

Generally, the sufficiency of an indictment is reviewed de novo on appeal. State v. Zain 528 S.E.2d 748 (W.Va. 1999). It is clear that a de novo review of the evidence presented to the grand jury as well as the grand jury charge itself show the indictment was insufficient because: a primary defect was alleged; there was no evidence of presentment of a firearm; the statute had been amended to require actual presentment; the officer gave an inaccurate definition of the law and; the prosecutor gave the grand jury the unamended law in the grand jury charge which resulted in a true bill. The evidence submitted to the grand jury was, therefore, insufficient to support a true bill. In reviewing evidence for sufficiency to support indictment, the court must be certain that there was significant and material evidence presented to grand jury to support all elements of alleged criminal offense. State ex rel. Pinson v. Maynard, 383 S.E.2d 844 (W.Va.,1989). The Cabell County conviction cannot stand because the indictment was insufficient.

## **POINT ONE**

A.

**THE APPEAL SHOULD BE GRANTED BECAUSE, EVEN THOUGH RULE 34 OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEDURE MANDATES THE MOTION BE FILED WITHIN TEN DAYS OF THE VERDICT OR FINDING OF GUILTY, THE DEFENSE BROUGHT THE FATAL INSUFFICIENCY TO THE COURT'S ATTENTION WELL BEFORE JURY DELIBERATIONS.**

Mr. Johnson's appeal should be granted because, even though Rule 34 of the West Virginia Rules of Criminal Procedure mandates that a Motion in Arrest of Judgment be filed within ten days of the verdict or finding of guilty, the defense brought the fatal insufficiency to the court's attention well before the verdict by the jury. Rule 34 of the West Virginia Rules of Criminal Procedure states in pertinent part:

"[t]he court on motion of a defendant shall arrest judgement if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgement shall be made within ten days after verdict or finding of guilty."

In this instance, while the Appellant was found guilty on May 5, 2003, and his Motion in Arrest of Judgment was not filed until August 4, 2003, the Defendant's Counsel, Timothy Rosinsky, clearly established to the court, during trial, there was a fatal insufficiency in the indictment, not once, but twice.

The first notice of the fatal insufficiency given to the court came on May 2, 2003. On that particular day, Defense Counsel, Timothy Rosinsky, stated to the court:

**"[f]irst of all, the First Degree robbery charge has to go because there is no proof by the state of use or presentment of a firearm. The statute was changed in the year 2000 and everyone has testified that there was no gun. So, that charge has to go. So, that's my first motion."** Trial Transcript, Vol. II, Pg. 316, Lines 9-14

Mr. Joseph Martorella, assistant prosecuting attorney replied:

**"Yes, as to the charge of the - - that it is not First Degree Robbery, there is - - and this is very quick research. So you have got to understand that this next statement is having looked at all of the law very, very quickly and using the best talents of the elected Prosecutor on this matter.**

**"There is no case on the new statute. It is the consensus of a lot of people that that has not changed - - the statute, and the phrasing "when presented with a deadly weapon" is - -makes - - the threat of presenting of deadly weapon makes as much sense as it ever did before."** Id. At Pg. 317, Lines 8-18.

The Court:

**"It doesn't say by threat of a presentment of - -" Id.**

Mr. Martorella:

**"No, your honor, but it - -" Id.**

The Court:

**" It says, the presentment." Id.**

Mr. Martorella:

**"It says deadly." Id.**

The Court:

**"I am going to take - - I am going to overrule at this, but I am leaning towards - - you know, I don't care what everybody else says. It's my decision, and they changed the statute; and a plain reading of it like to me right now - - although I won't do it at this - - is that I will have to do it when we get ready for instructions." Id at Pg. 317-318**

Mr. Martorella:

**"Well, your honor, -**

The Court:

**"But if you have got any cases, you better find them for me because -**

Mr. Martorella:

**"There aren't any. There aren't any cases in West Virginia that we could find very - we looked very quickly. You know, and we are pretty sure of that, that there aren't any cases under this statute that we could find in terms of the-**

The Court:

**"I think you would have been perfectly all right under the old law."**

Mr. Martorella:

**"Yes, Judge, can we - - in considering this I wish you would consider while you are considering what you are going to do on this matter is if you trust me in this area as I trust the Prosecuting Attorney's Office that there is no law in this matter."**

The Court:

**"I am not disputing that."**

Mr. Martorella:

**"Okay. No, but what I am saying is that, Judge, could you - -would you let the jury decide this issue? And they always have the right of appeal and instructions - - if you give this instruction, that's the - -the Court will automatically docket that up there and they are not really"**

The Court:

**"I know, but I can't in good faith let a possible verdict go to the jury - -"**

Mr. Martorella:

**"No, I am not telling you"**

The Court:

**"That I don't think is proper."**

Mr. Martorella:

**"I am not telling you to violate your conscience. I am not telling you that."**

Mr. Martorella:

**"If you violate your conscience, that's not what this argument is saying. What this argument is saying is I don't think you know - - pardon me, your Honor, but I don't think you know or that you are not convinced. I know I am not convinced, and I can tell you that our office isn't; and we have searched around at other offices to find out how they are interpreting it and even up to the Attorney General's Office to try to find out if there is any spin that they are giving it. So, there is some confusion in this area, and I would hope that."**

The Court:

**“Well, but you know criminal statutes are strictly construed against the state; and the statute is really very clear, as I am looking at it right now.”**

Mr. Martorella;

**“Your honor, we”**

The Court:

**“You know, there could have been other language to that statute and make it very clear that what you are saying it would have applied. But I am not going to throw out at this time, but when we get down to all of the evidence and I could rule on the.”**

Mr. Martorella:

**“Could we revisit this argument?”**

The Court:

**“I will, but, yes. I am telling you I think there is a problem.”**

In this instance, it is incredibly clear Mr. Rosinsky brought attention to the insufficiency of the charge contained in the indictment as it pertained to the statute and the elements of proof as provided by the State. Not only did Mr. Rosinsky bring it to the attention of the court, the court recognized there was an insufficiency. Although, the court did not recognize it as the fatal insufficiency it was, the court still conceded it believed there was error. It is the Appellant's contention that the court and the State were constructively put on notice of the fatal defect in the indictment prior to the verdict and, therefore, the statute of limitations becomes a moot and specious argument because the State and the court were constructively noticed prior to the tolling of the statute.

The second time counsel noticed the court of the error was on May 5, 2003. On the final day of trial the following conversation ensued:

The Court:

**“Yes. Do you want to renew your motion?”**

(Trial Transcript, Vol. III, Pgs. 494-495, Lines 15-24 and 1-24)

Mr. Rosinsky:

**“I do your Honor. The statute is clear. There is no use or presentment. The amendment was made in the year 2000, and in this case there has been absolutely no allegation of use or presentment. You just heard it from this guy right here.”**

The Court:

**“Do you want to –**

Mr. Rosinsky:

**“Since there is no evidence of that fact, we believe it would be clearly error to instruct the jury per the plain reading of the statute. That’s our position, your Honor.”**

The Court:

**“Do you want to reply?”**

Mr. Martorella:

**“Your Honor, only that the – it’s the judgement of our office, and many Prosecuting Attorney’s Offices throughout the state, that while the statute had changed it never altered the fact that it -- you could put somebody in fear and -- of deadly force or the fear that they are going to get hurt because they believe there is a weapon there.”**

**The argument that the – you have to present the weapon itself defeats the purpose in practically every case of armed robbery that I know of, and I think that the – I wish I could cite you a case under this new statute and I tried, and I am sure Mr. Rosinsky tried; but there isn’t any. All I can cite you is the fact that courts have said in this state that the fact that they had fear of a weapon or that there was some evidence in the record – and, your Honor, I want**

**to remind you in the examination of Mr. Lane today in showing Exhibits Nos. 12 and 13, I mean, you don't have to –**

The Court:

**“It's possible he could have had a weapon. There is no question in my mind.”**

Mr. Martorella:

**“Yes.”**

Mr. Rosinsky makes his point even clearer later in the transcript when he attacks the sufficiency of the evidence.

**“Okay. And I am going to renew my other motion on the sufficiency of the evidence as well just to cover myself on appeal.”** (Trial Transcript, Vol. III, Pg. 500-501, Lines 7-24 and 1-3)

The Court:

**“He could have had – he could have had a firearm. Now, whether or not he presented it or not is another question.”**

Mr. Rosinsky:

**“Okay. They are speculating that one was involved.”**

The Court:

**“Well, you can look at the video and you can argue to the jury on the video that he had one you don't have to see one to have one.”**

Mr. Rosinsky:

**“Use and presentment.”**

The Court:

**“That's what I'm saying, though.”**

Mr. Rosinsky:

**“The whole reason they changed the statute was to get rid of the finger in the pocket in the first place.”**

The Court:

**“I don’t know if they did that or not. That’s what I was thinking at first, but I am going to let this go to the jury this way and see what they do. And if they come back ‘no’, then your problem is taken care of. It’s second degree.”**

In this case the statute is not ambiguous, as will be shown in Section C., but, even if it were, it should be construed in favor of the Appellant. The "rule of lenity" applies where a criminal statute contains ambiguous language and requires that penal statutes be strictly construed against the state and in favor of the defendant. State v. Hulbert, 544 S.E.2d 919 (W.Va. 2001). Despite this clear rule of law, despite the judge being acutely aware of the failure of the statutory language in the indictment, the Appellant’s case still was allowed to proceed to the jury for a verdict.

There is even an argument this could be considered a Motion to Quash, or a Demurrer to the indictment for failure to meet the essential-elements or the notice tests. The Motion was made twice orally before the verdict. And, if this Motion is converted to a Motion to Quash, it gives the Appellant the opportunity to employ a stricter form of analysis. When sufficiency of an indictment or information is first challenged by a Motion in Arrest of Judgment, the sufficiency of the allegations will be construed with less strictness than when raised by demurrer. Code, 62-2-11. State v. Stone, 33 S.E.2d 144 (W.Va. 1945) Either way, it does not matter because, jurisdictional defects are primary defects and not subject to waiver.

Rule 12 of the Federal Rules of Criminal Procedure makes explicit the application of the

“harmless error” rule to indictments by providing that objections to technical defects in the institution of a prosecution, including those in the indictment, are waived unless asserted by motion to dismiss before trial. Rule 52(a) restates the traditional American Practice that harmless error, that which has not prejudiced the substantial rights of the defendant, is not a permissible basis of appeal, whether the error be in the pleading stage or at some later point in criminal litigation. However, both West Virginia and the Federal Rules provide that jurisdictional defects are not subject to the “harmless error rule.” Rule 12 does expressly preserve for presentation “*at any time* during the pendency of the proceeding” an objection that the indictment fails to show jurisdiction in the court, or fails to charge an offense. In this case, both situations apply.

Rule 34 reinforces the reservation of these two defenses by providing a specific method, motion in arrest of judgment, by which defendant may raise them after the verdict. Since both of these defenses are jurisdictional in nature, the provisions in Rules 12 and 34, permitting them to be made at any time, are probably constitutionally impelled by the due process clause. State ex rel Combs v. Boles, 151 S.E. 2d 115 (W.Va. 1966).

In a more recent case, State v. Jones, 239 S.E. 2d 763 (W.Va 1977), the court stated: [w]here the defects in an indictment are substantial, they may be raised after verdict on motion for new trial, more technically denominated motion in arrest of judgment.” In this case, the Appellant requested he be able to have the indictment or charge withdrawn for lack of specificity. His request was denied. In this case, not only was the error in the indictment jurisdictional, it substantially prejudiced the Appellant’s defense because he was forced to defend himself against a charge whose elements were not sufficiently set out in the indictment and much broader than the actual terms of first-degree robbery.

The Appellant's request is reasonable because it is supported by West Virginia case law and precedent in other states as well. "A failure to object at trial, before, or after does not cure a jurisdictional defect of the indictment. By failure to demur to or move to quash an indictment, an accused waives any benefit he might have taken of secondary defects therein, but he does not waive primary defects." Herron v. State, 118 Miss. 420, 79 So. 289. The Appellant claims jurisdictional issues are primary and are, therefore, not waived by failure to demur or quash. Along those same lines, in State v. Knight, 285 S.E.2d 401 (W.Va 1981), the court observed that failure to raise objections to the indictment "does not thereby waive primary defects therein." Knight was for failure to state facts that constitute an offense, but the jurisdictional issue is still a primary defect. One need only view its treatment under Rules 12 and 34 of the W.Va. Rules of Criminal Procedure. So, therefore, even the Appellant's failure to demur, quash and or object is not enough to cure the primary defect of jurisdictional insufficiency in the indictment.. The Appellant accurately objected to the form of the indictment prior to the verdict, therefore, the Motion in Arrest of Judgement, as filed, should have been granted and therefore, his appeal should be granted.

**B.**

**THE APPEAL SHOULD BE GRANTED BECAUSE THE COURT DID NOT HAVE JURISDICTION OVER THE CHARGE BECAUSE THE STATUTE HAD BEEN AMENDED AND THE CRIME CHARGED IN THE INDICTMENT NO LONGER EXISTED AS FIRST-DEGREE ROBBERY.**

The court did not have jurisdiction over the charge. It does not matter when the Motion in Arrest of Judgement is brought because the court can neither conduct a trial nor legally impose the effect of the verdict in a Judgement Order. Before a state or federal court can properly exercise criminal jurisdiction, it must have jurisdiction over both the person and the offense. The West

Virginia Supreme Court of Appeals held that jurisdiction requires control over the person, the place and the subject matter of the litigation. State ex rel. Payne v. Mitchell, 164 S.E.2d 201 (1968). The court cannot impose a judgement predicated on a statutory crime that no longer exists in the language provided for in the indictment. It isn't the same crime. The court has no authority to impose either verdict or sentence. In this instance, the crime charged in the indictment no longer existed as first-degree robbery as defined in the indictment. The first-degree robbery statute was amended five years ago.

In the year 2000, prior to the alleged robbery herein, the West Virginia Legislature amended West Virginia Code Section 61-2-12 (a)(2) to provide that the threatening of the presentment and use of a firearm was no longer satisfactory to establish a charge of armed robbery, and instead, the State was required to prove presentment of a firearm or other deadly weapon. Therefore, the Appellant asserts, the charge for which he was indicted, did not exist as armed robbery, because the language presented to the grand jury no longer accurately described first-degree robbery, rather it misstated second-degree robbery, consequently the court had no jurisdiction over the charge. "A court generally does not have jurisdiction to adjudge a defendant guilty of an uncharged offense, for such would violate that defendant's due process rights." Albrecht v. United States, 273 U.S. 1, 8 (1927); cf. Henderson v. Morgan, 426 U.S. 637, 644-45 (1976).

The indictment in this case accuses Ernest Johnson of: unlawfully and feloniously robbing Charles Adams, **by using the threat of deadly force by threatening the presentment and use of a firearm**, and did steal money belonging to Marathon Gas Station, lawfully in the care, custody and control of Charles Adams by virtue of his employment with Marathon Gas Station, against his will and against the peace and dignity of the State. This language clearly does not comport with the

statutory language of § 61-2-12 as amended in 2000.

West Virginia Code § 61-2-12 (2000) states in pertinent part: (a) Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) **uses the threat of deadly force by the presenting of a firearm or other deadly weapon.** This is substantially different language. As a result, the indictment has no effect because it does not follow the requisite statutory language. "Generally, an indictment written in statutory language is given effect only if the language actually used charged all the essential elements of the offense." State v. Childers, 415 S.E.2d 460, (W.Va. 1992).

It is procedurally plain the indictment should not be given effect because the language in the indictment does not include the actual presenting of a firearm; an essential element of first-degree robbery. Failure to allege all material elements renders the indictment void. Id. For example, in State v. Knight, 285 S.E.2d 401 (W.Va. 1981), the defendant was convicted of indecent exposure. One of the elements of that crime is lack of consent by the victim. Because the indictment failed to allege this element, the Court held in Syllabus Point 2 of Knight,

"[t]he State's failure to provide in the indictment sufficient information, from which the defendant could determine the statute he was being charged with violating and, to state each element involved in the crime, did not give the defendant adequate notice from which he could prepare a defense and, is grounds for reversal of the conviction obtained thereunder."

Furthermore, in Syllabus Point 1 of Scott v. Harshbarger, 180 S.E. 187 (W.Va. 1935), the Court held: "[a]n indictment, based upon a form prescribed by statute, which omits to charge one of the material elements of an offense as defined by statute, is void."

This charge should have never been presented to the jury because it was also fatally-flawed

procedurally. The indictment refers to 61-2-12(a) numerically yet, in content, erroneously describes 61-2-12(b). The West Virginia and Federal Rules of Criminal Procedure require that the statute defining an offense charged be mentioned in the indictment. W.Va. And Fed. R. Crim. P. 7(c). West Virginia Rules of Criminal Procedure, Rule 7(c) states in pertinent part that:

“(1) In general.-----The indictment or information shall be plain, concise, and definite written statement of the essential facts constituting the offense charged. An indictment shall be signed by the foreperson of the grand jury and the attorney for the state. An information shall be signed by the attorney for the state. The indictment or the information need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement, except that it shall conclude against the peace and dignity of the state. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute rule, regulation or other provision of law which the defendant is alleged therein to have violated.”

The Appellant was charged in the indictment with 61-2-12, first-degree robbery. However, the grand jury did not sign a valid indictment for first-degree robbery, because they used the language of 61-2-12 prior to the 2000 amendment. This improper statutory reference and accompanying unamended language violates procedural law and is ground enough to grant the Appeal on its own because, “[s]tate’s failure to comply with procedural requirements of State statute constitutes “fundamental defect which inherently results in a complete miscarriage of justice.” Halley v. Dorsey, 580 F.2d 112, 115 (4<sup>th</sup> Cir. 1978).

C.

**THE APPEAL SHOULD BE GRANTED BECAUSE THE PROSECUTOR MISTAKENLY PROVIDED THE GRAND JURY WITH IMPROPER STATUTORY LANGUAGE FOR FIRST-DEGREE ROBBERY, AND NEITHER AMENDMENT OF THE CHARGE THROUGH INSTRUCTION NOR A GOOD FAITH BELIEF THE LANGUAGE IN THE AMENDED STATUTE MEANS ESSENTIALLY THE SAME AS THE PREVIOUS STATUTORY FORM CURES THE DEFECT.**

In the present case, the error that occurred could have taken place in on of two ways.

Either: (a) the prosecutor was unaware of the amendment to the statute, or; (b) he had old code when preparing or presenting the grand jury charges. It does not matter which mistake it was, the prosecutor mistakenly provided the grand jury with erroneous statutory requisites for the indicted charge. In this case it appears both situations apply. In the September 10, 2002, grand jury proceeding, Cabell County Prosecutor, Chris Chiles, in his own words, offered the wrong statutory language. Mr. Chiles stated in that hearing:

**“The accused is Allen Myers – actually the accused are Ernest J. Johnson and Allen Myers. It is again, a proposed one-count indictment for first-degree robbery against both individuals. The indictment would allege, for your consideration, on or about June 21 2002, in the County of Cabell, State of West Virginia, Ernest J. Johnson and Allen Myers jointly committed the offense of 1<sup>st</sup> degree robbery by unlawfully and feloniously robbing Charles Adams, by using the threat of deadly force by threatening the presentment and use of a firearm, and did steal money belonging to Marathon Gas Station, lawfully in the care, custody and control of Charles Adams by virtue of his employment with Marathon Gas Station, against his will and against the peace and dignity of the State.**

(September 10, 2002, Grand Jury Proceedings, pg. 1, ln. 5-20). Adding insult to injury is, the fact the Prosecutor realized an error in language from the previously considered indictment yet did not realize the fact the statute had been amended to require actual presentment. Mr. Chiles states:

**“Ladies and Gentlemen, in the last case – we just realized there was a typographical error in the last one. On the one with Mr. Hatfield and Mr. Adkins that is a difference in a firearm. So, it would be using the threat of deadly force by the presentment and use of a firearm rather than threatening with presentment and use of a firearm.”**

(Id. at Pg 1-2, ln. 21-24 and 1-3).

While Appellant's counsel is not actually sure the difference Mr. Chiles' explanation attempted to distinguish, it appears he realized the difference between actually presenting a firearm and the mere threat of presenting a firearm. A grand juror even asked if there was a difference in the two situations by asking: **[i]s the wording on that not threatening but –.**" Mr. Chiles again showed a knowledge of the difference in points of proof but not the amendment when he replied:

**"Yes, just the fact that there actually was a weapon shown would be with the presentment. I just caught that mistake when I was reading this indictment, because in this indictment it alleges that they committed this offense by using the threat of deadly force by threatening the presentment and use of a firearm and steal money belonging to Marathon gas station, lawfully in the care custody and control of Charles Adams by virtue of his employment with Marathon gas station, against his will and against the peace and dignity of the State."**

(Id. at Pg. 2, ln. 6-16).

Not only does the Prosecutor not realize the amendment, he allows the testifying officer, Detective Chris Sperry, to make an erroneous statement regarding the status of the law at that time. When a Grand Juror asked: **"Is – well saying they have a gun the same offense as actually having a gun?"** Detective Sperry replied: **"If you think it's somewhat reasonable to believe that, yes, there is a gun involved, it's *the same*."** (Id. at pg. 9, ln, 12-14). While the transcript says the last words are "inaudible" appellant's counsel, after reviewing the tape several times, believes Detective Sperry says "it's the same." Either way, the Detective's answer was wrong and Mr. Chiles did nothing to correct him. In fact, not only was the error not corrected, it was further exacerbated when the Cabell County Prosecutor gave the grand jury the wrong language on the grand jury charge used for the true bill.

If the indictment is otherwise defective, mere citation to an applicable statute does not give

the defendant notice of the nature of the offense. This is so simply because the statutory citation in an indictment does not insure that the grand jury has considered and found all essential elements of the offense charged. United States v. Pupo, 841 F.2d 1235 (4<sup>th</sup> Cir. 1988).

Even though the Appellant was aware these elements did not constitute first-degree robbery before he was convicted, the guilty verdict does not preclude him from attacking an insufficient indictment. Since an essential elements defect cannot be cured by guilty verdict, there is no reason to allow a guilty verdict to cure a defect of specificity. In Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L Ed 2d 240 (1962), the Supreme Court stated:

“To allow the prosecutor, or the court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of the grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.”

In fact, the Russell quote above is exactly what happened to Mr. Johnson. The grand jury could not return an indictment for first-degree robbery because as of 2000, first-degree robbery required the defendant actually present a firearm or other deadly weapon. The trial transcript provided no evidence Mr. Johnson was actually armed or presented a firearm. A Motion in Arrest of Judgment must be based on some matter appearing on the face of the record which would render the judgment erroneous or reversible. Code, 62-2-11. Not only was the indictment fatally-defective, there was no proof of presentment of a firearm at trial, and certainly none to the grand jury.

In State v. Parkersburg Brewing Co., 45 S.E. 924 (W. Va. 1903), the court, using language from another case, stated: “a defendant in a criminal case is entitled under the Constitution to have

the essential and material facts charged against him by the grand jury.” A reviewing court may not speculate about whether a grand jury would or would not have indicted a defendant for a crime he was never charged.” See United States v. Promise, 255 F.3d 150, at 190 (4<sup>th</sup> Cir. 2001). “ A court cannot rely on its own view of what indictment a grand jury could or would not have issued if the grand jury was never presented with a charge, or what verdict a petit jury could or would have reached if the petit jury was never presented with an indictment.” (Motz, J. joined by Widner, Michael, and King, J.J.) To do so would usurp the role of the grand jury, which as the United States Supreme Court has recognized is “not bound to indict in every case where a conviction can be obtained.” Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L Ed.2d. (1986)(quoting United States v. Ciambrone, 601 F.2d 616, 629 (2<sup>nd</sup> Cir. 1979). For that reason, the Fourth Circuit explained in United States v. Floresca 38 F.3d 706 (4<sup>th</sup> Cir. 1994) that “it is utterly meaningless to posit that any rational jury could or would have indicted [the defendant for a different crime], because it is plain that this grand jury did not, and, absent waiver, a constitutional verdict cannot be had on an unindicted offense.” Id. at 712. This primary defect was raised prior to the verdict and is not subject to waiver requirements. Failure to raise objections to the indictment “does not thereby waive primary defects therein.” Knight, Supra.

Again, the Appellant, in this case, did receive notice of the proper elements of first-degree robbery during trial, but that did not cure the insufficiency of an indictment which failed to contain any part of one element of the offense. Once a jurisdictional defect in the indictment has been established, neither instructions to the jury, petit jury verdict, nor absence of prejudice can cure the defect. United States v. Hooker, 841 F.2d 1225 (4<sup>th</sup> Cir. 1988). So the Appellant’s trial and the subsequent guilty verdict should not bar this claim due to the explicit language of Rule 12 of the

W.Va Rules of Criminal Procedure, which states, that failure to raise jurisdictional defects at the trial level is of no consequence to the determination.

Even if this were denied, the error is likely a plain error. "Under W.V.R.Crim.P. 52, we (the West Virginia Supreme Court) may take notice of plain errors affecting substantial rights. "We have previously pointed out that the plain-error doctrine should be sparingly used and reserved for cases where 'a miscarriage of justice would result if this Court did not consider and correct the error despite the absence of an objection.'" State v. Marrs, 379 S.E.2d 497 at 500 (W.Va 1989) see also State v. Fisher, 370 S.E.2d 480 at 483 (W.Va. 1988). Due process is a substantial right and cannot be overlooked despite the lack of an objection. However, there was objection to this indictment by defense counsel and, the judge even admitted there was likely error. Tim Rosinsky said on May 2, 2002:

**"[f]irst of all, the First Degree robbery charge has to go because there is no proof by the state of use or presentment of a firearm. The statute was changed in the year 2000 and everyone has testified that there was no gun. So, that charge has to go. So, that's my first motion."** (Trial Transcript, Vol. II, Pg. 316, Lines 9-14)

Mr. Martorella:

**"Could we revisit this argument?"**

The Court:

**"I will, but, yes. I am telling you I think there is a problem."**

The defects in the indictment were not cured by the trial court's amendment of instructions by the State or a special interrogatory. A prosecutor may not amend an indictment to add a missing

essential element of an offense. United States v. Price, 857 F.2d 235, (4<sup>th</sup> Cir. 1988). (“such a change would violate the defendant’s right to be tried only for offenses charged by a grand jury”).

An indictment is amended when it is so altered as to charge a different offense from that found by the grand jury. United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811, 85 L Ed. 2d 99 (1985). Furthermore, in United States v. Coward, 669 F.2d 180 (4<sup>th</sup> Cir. Cert denied, 456 U.S. 946, 1982), the Fourth Circuit noted that the general rule forbids amendment of an indictment by the court or the prosecutor.” The Supreme Court, however, has indicated that the Fifth Amendment’s grand jury guarantee is not violated by an amendment that “drop[s] from an indictment those allegations that are unnecessary to an offense that is clearly contained within it.” United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811, 85 L Ed. 2d 99 (1985).

Conversely, the Fourth Circuit has stated that we prohibit “any amendment that transforms an indictment from one that does not state an offense into one that does” and “any change that tends to increase the defendant’s burden at trial.” United States v. Coward, 669 F.2d 180 (1982). Here, the change in the indictment changed the charge contained in the indictment to a new charge altogether. This was unconstitutional and undoubtedly raised the Appellant’s burden at trial. He had to defend himself before a jury on an erroneously defined crime, one which no longer existed as defined in the indictment. And, he was subjected to that unconstitutional charge being before the jury as a potential verdict because the court and prosecutor did not realize the magnitude of the error.

This violates State v. Grimmer, 251 S.E. 2d 780, (W.Va 1979), which states “the defendant must be brought before the court on an indictment which fully and plainly informs him of the

character and cause of the accusation.” He was not fully and plainly informed about first-degree robbery as statutorily amended in 2000 and, the indictment is, therefore, defective and insufficient.

Not even the amendment through instruction cures the fatal insufficiency. An unconstitutional amendment of an indictment occurs when the charging terms are altered, either literally or constructively. Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L Ed 2d 252 (1960).

In the present case, the prosecutor attempted to constructively amend the indictment by differentiating the necessary elements, through instruction, found in first-degree robbery. This was an improper and unconstitutional amendment of the indictment since indictments are only valid if returned and endorsed by the grand jury, and amendments are generally prohibited. State v. McGraw, 85 S.E.2d 849 (W.Va. 1955). Additionally, no one can adequately assess the effect this error had on the impressions of the jury. It may well have affected their verdict. Furthermore, Double Jeopardy has attached to the first-degree Robbery, even if the entire verdict is thrown out. He can't be tried for that particular charge a second time because proof at trial was insufficient. The defendant gets the benefit of the record in that respect. A Motion in Arrest of Judgment must be based on some matter appearing on the face of the record which would render the judgment erroneous or reversible. Code, 62-2-11. The most the state could re-indict for is 2<sup>nd</sup> Degree Robbery, if at all, because the Appellant was indicted for first-degree robbery and the evidence was insufficient to maintain that charge at the close of the State's evidence.

Furthermore, while assistant prosecutor Joe Martorella argued that it was the belief of both he and his office, that even though the statute had been amended, there was essentially no

difference in the elements of proof between 61-2-12(a) then and prior to the 2000 amendment. This “good-faith” argument is fallacious.

West Virginia Code § 61-2-12 (a) sets forth the elements the State must prove in order to establish a first-degree robbery charge and defines that charge as: (a) Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon.

In the year 2000, prior to the alleged robbery herein, the West Virginia Legislature amended West Virginia Code Section 62-2-12 (a)(2) to provide that the threatening of the presentment and use of a firearm was no longer satisfactory to establish a charge of first-degree robbery, and instead, the State was required to prove presentment of a firearm or other deadly weapon.

At trial on May 2, 2003, Mr. Joseph Martorella, assistant prosecuting attorney stated:

**“Yes, as to the charge of the - - that it is not First Degree Robbery, there is - - and this is very quick research. So you have got to understand that this next statement is having looked at all of the law very, very quickly and using the best talents of the elected Prosecutor on this matter.**

**“There is no case on the new statute. It is the consensus of a lot of people that that has not changed - - the statute, and the phrasing “when presented with a deadly weapon” is - -makes - - the threat of presenting of deadly weapon makes as much sense as it ever did before.”** Id. At Pg. 317, Lines 8-18.

The Court:

**“I am going to take - - I am going to overrule at this, but I am leaning towards - - you know, I don’t care what everybody else says. It’s my decision, and they changed the statute; and a plain reading of it like to me right now - - although I won’t do it at this - - is that I will**

**have to do it when we get ready for instructions.” Id at Pg. 317-318**

Mr. Martorella:

**“Well, your honor, –**

The Court:

**“But if you have got any cases, you better find them for me because –**

Mr. Martorella:

**“There aren’t any. There aren’t any cases in West Virginia that we could find very – we looked very quickly. You know, and we are pretty sure of that that there aren’t any cases under this statute that we could find in terms of the–**

The Court:

**“I think you would have been perfectly all right under the old law.”**

The judge was exactly correct. The plain meaning of the words of the statute are to be applied barring any ambiguities. "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 ex.rel. Underwood v. Silverstein, 278 S.E.2d 886 (W.Va. 1981). There is nothing ambiguous about the term presenting or its application within the plain meaning of the statute.

“Present,” a verb, as defined by Webster’s New College Dictionary, copyright 1959, means: (6) to aim, point, or direct as a weapon. Clearly, the legislature, when it amended W.Va. Code § 61-2-12, had a specific definition for the verb presenting: meaning to show or; point. If the statute before amendment only required one of the two: the threat of use or; actual presentment of, then

clearly the legislature was more narrowly construing the elements by requiring the actual sight of the weapon not merely possible possession by the perpetrator.

Even a review of the word presentment comports with this interpretation. "Presentment," a noun, as defined by Webster's New College Dictionary, copyright 1959, means: (1) presentation; (2) a setting forth to view; that which is presented or exhibited." Undoubtedly, through logical analysis, "presentment" has been amended to mean "presenting" otherwise the amendment was superfluous. It is illogical to assume this stance because, amending the terms of a statute without amending its meaning necessarily results in the legislature enacting an ambiguous statute. This is not the case.

The later act supercedes the prior act, to the extent they are contradictory. "It is a general rule of statutory interpretation that those provisions of an earlier act which are irreconcilable with those of an amendatory act are impliedly repealed. 1A J. Sutherland, Statutes and Statutory Construction 23.12 (4th ed. C. D. Sands 1972)." Arbogast v. Mohn, 260 S.E.2d 820, (W.Va. 1979). The new act prevails and the indictment fatally errs because it mis-charged the Appellant from the beginning.

In this case, the Appellant was never informed of the correct statutory language for behavior constituting the charge in the indictment by the grand jury. The Appellant was charged with first-degree robbery under erroneous statutory terms. Clearly, this is a breach of constitutional standards. "The Fifth Amendment to the United States Constitution requires '[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.'" "The Supreme Court has explained that 'an indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime which he was charged.'" Ex Parte Bain, 121 U.S. 1, 12-13, 7 S.Ct. 781, 30 L Ed 849 (1887), The grand jury never considered the correct

statutory language. Consequently, they were incapable of returning a true bill for first-degree robbery as defined by W.Va. Code § 61-2-12(a) (2000) "Penal statutes must be strictly construed against the State and in favor of the Defendant." State ex. rel. Carson v. Wood, 175 S.E.2d 482 (W.Va. 1970). The grand jury returned an erroneous indictment predicated on an outdated and subsequently amended statute, therefore, the indictment was insufficient, the court had no jurisdiction over the charge, amendments are not permitted, and the appeal should be granted.

## POINT TWO

**THE STATEMENT TAKEN BY POLICE ON THE DAY OF MR. JOHNSON'S ARREST SHOULD HAVE BEEN SUPPRESSED BECAUSE THE DETECTIVE DID NOT PROMPTLY PRESENT MR. JOHNSON BEFORE A MAGISTRATE AND THE DELAY WAS SOLELY FOR THE PURPOSE OF OBTAINING AN INCRIMINATING STATEMENT.**

### **FACTUAL AND PROCEDURAL BACKGROUND**

On June 26, 2002, Detective Chris Sperry arrested and questioned Ernest Johnson. (Trial Transcript, Vol. I, Pg. 125, Lines 1-12). The sole purpose of that interview was to obtain an incriminating statement from Mr. Johnson about the robbery at 145 Norway Avenue, Huntington, West Virginia on June 21, 2002.

Detective Sperry was examined at length about the arrest and subsequent interrogation at Mr. Johnson's trial. At trial, when asked when Mr. Johnson was arrested Detective Sperry testified he arrested Mr. Johnson at 17:20 p.m. on June 26, 2002. (Trial Transcript, Vol. I, Pg. 143-144, Lines 21-24 and 1) However, Mr. Johnson's statement was not taken until 18:43 p.m. that evening. (Id. at Pg. 144, Lines 2-9). Not only did Detective Sperry interview Ernest Johnson, he also interviewed the co-defendant, Allen Myers as well. (Id. at Pg. 144, Lines 11-12).

At that time, Mr. Johnson and Mr. Myers were not just detainees for questioning, they were the arrested primary suspects.(Trial Transcript, Vol. I, Pg. 122, Line 13) Both men had already been identified by Mr. Myers girlfriend, Jamie Brookover, based on video surveillance pictures Detective Sperry showed her. (Grand Jury Proceedings, Pgs. 6-7, Lines 7-24 and 1-8). It is interesting to note that Detective Sperry claims in his grand jury testimony he arrested Mr. Myers and Mr. Johnson on June 21, 2002 (*Id.* et al), however, at trial he claims he did not become involved in the investigation until three days later.(Trial Transcript, Vol. II, Pgs.199-200, Lines 5-24 and 1-10). This means Detective Sperry's testimony at the grand jury proceeding was either inaccurate or untruthful regarding this point.

Not only was Mr. Johnson's statement to Detective Sperry laced with profanity, it also alluded to the fact Mr. Johnson had a prior record through his several references to his "jacket." (See tape of statement of Ernest Johnson or Trial Transcript, Vol. I, Pg. 154-162) "Jacket" is a common slang term for a person's criminal record. Generally, a defendant's criminal record is not admissible unless he testifies or places his character in issue. See West Virginia Rule of Evidence 404(b). Despite Mr.Rosinsky's objections based on prompt presentment and voluntariness (Trial Transcript, Vol. I, Pg. 142, Lines 12-15), Judge Ferguson allowed the tape into evidence. This admission undoubtedly tainted Mr. Johnson's right to a fair trial because it was illegally obtained.

### **STANDARD OF REVIEW**

Judge Ferguson's ruling regarding admission of Mr. Johnson's June 26, 2002 statement should be reversed and the appeal granted because while the Judge's ruling on voluntariness regarding Mr. Johnson's intoxication may have been correct, his ruling regarding the admission of said statement was clearly erroneous under a prompt presentment argument because Mr. Johnson

was not promptly presented before a magistrate upon his arrest and the sole purpose of interrogation was to elicit an incriminating statement from Mr. Johnson. On appeal from denial of motion to suppress evidence, circuit court's findings of fact are reviewed under clearly erroneous standard, and questions of law and ultimate conclusion as to the constitutionality of law enforcement action are reviewed de novo. State v. Lilly, 461 S.E.2d 101 (W.Va.1995).

### ARGUMENT

The statement given by Mr. Johnson on June 26, 2002 should have been suppressed because he was not promptly presented to a magistrate and the sole purpose of the interrogation by Detective Sperry was to elicit an incriminating statement from him. An officer making an arrest under a warrant issued upon a complaint ..., shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made. W.Va. Code § 62-1-5(a)(1), See also West Virginia Rule of Criminal Procedure 5(a) ("An officer making an arrest under a warrant issued upon a complaint ... shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made."). Mr. Johnson was not interrogated by the Detective for over an hour and twenty minutes after his arrest. This interrogation was improper and a thus a sanctionable offense because it was for the sole purpose of obtaining an incriminating statement. A sanctionable violation occurs if the purpose for detaining the defendant is to conduct an interrogation to obtain an incriminating statement from the defendant about his or her involvement in the crime for which he or she was arrested. State v. Milburn, 511 S.E.2d 828 (W.Va. 1998).

Mr. Johnson's statement was obtained in violation of West Virginia statute and in violation of the West Virginia Rules of Criminal Procedure. It should have, therefore, been suppressed as "fruit of the poisonous tree." Under the fruits of the poisonous tree doctrine " [e]vidence which is

located by the police as a result of information and leads obtained from illegal [conduct], constitutes 'the fruit of the poisonous tree' and is inadmissible in evidence.' "State v. Stone, 268 S.E.2d 50 (W.Va. 1980). And even though the prompt presentment rule is not of a constitutional magnitude in this State, it is still applicable as a means to suppress illegally obtained evidence.

“Although the prompt presentment rule is not adorned by the constitution, it is designed to protect the constitutional rights of an accused. In view of the significant purpose of the prompt presentment rule, we perceive no legally justifiable reason for not extending the fruits of the poisonous tree doctrine to preclude the use of evidence derived directly from a statement that was obtained as a result of a violation of the prompt presentment rule.”

State v. DeWeese, 582 S.E.2d 786 (W.Va.,2003).

The Judge erred in allowing the statement to be admitted into evidence because not only did it contain statements regarding the Appellant's criminal record, it was illegally obtained because the detective did not promptly present the Appellant before a magistrate and the sole purpose of the delay was to elicit an incriminating statement from the Appellant. The appeal, therefore, should be granted.

### **POINT THREE**

#### **A.**

**MR. JOHNSON'S RECIDIVIST LIFE SENTENCE SHOULD BE VACATED BECAUSE THE UNDERLYING FELONIES ARE NOT OF A VIOLENT NATURE AND ONLY ONE POSED THREAT OF VIOLENCE AND THEREFORE THE SENTENCE VIOLATES THE PROPORTIONALITY CLAUSES OF BOTH THE WEST VIRGINIA AND THE UNITED STATES CONSTITUTIONS.**

The Appellant pled guilty to simple burglary on December 12, 1996 in Ascension Parish, Louisiana. Mr. Johnson was given probation for three years in lieu of the twelve year sentence under R.S. 14.62. No restitution was ordered by the Louisiana Court and nowhere under his plea before that

court was there any evidence of violence or threat of violence to anyone. The Defendant alleged there was no one home at the time he broke open the door to Richard Duval's trailer.

The Appellant pled guilty to Indecent Behavior with a Juvenile on June 16, 1997 in Tangipahoa Parish, Louisiana. The Appellant was given five years probation in lieu of the seven year sentence under R.S. 14.81. Nowhere under his plea before that court was there any evidence of violence or threat of violence to anyone.

While the Appellant was convicted of second-degree Robbery on May 5, 2003, there was no actual violence involved only a mere possibility of violence. The West Virginia Supreme Court of Appeals State v. Miller, 400 S.E.2d 897 (W.Va.1990) stated that:

“[t]he appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: we give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried more serious penalties and therefore justify application of the recidivist statute.”

In that case the Court also stated:

“the final felony which triggered application of the recidivist statute was unquestionably a violent crime. The first underlying felony, the juvenile conviction for breaking and entering, posed only a threat of violence. However, the other two more recent underlying felonies were not crimes of even a potentially violent nature. Certainly, it cannot be said that the appellant had a history of violent felony convictions prior to this shooting incident. As we have noted, we generally require that the nature of the prior felonies be closely examined. While not exclusive, the propensity for violence is an important factor to be considered before applying the recidivist statute. In the case now before us, we recognize that although the appellant's 1986 unlawful assault conviction was for a violent felony, none of his three underlying felonies actually involved violence. Moreover, we note that these

three crimes spanned a period of twenty-five years. It could not be said of the appellant prior to this 1986 conviction that his criminal record exhibited "any discernible trend of violence."

State v. Oxier, 179 W.Va 413, 369 S.E.2d 866, 869 (1989)

Applying that logic to the case at hand, it is clear Mr. Johnson should not be charged as a recidivist.

"A life sentence is the maximum penalty prescribed by law in West Virginia. Because the underlying felonies in this case were all of a non-violent nature, and because the maximum penalty for the triggering felony is itself only ten years, we do not believe that the application of the recidivist statute so as to result in a life sentence is justified in this case. If a life sentence is imposed in this case, what remains in cases involving truly violent underlying felonies?"

State v. Miller, 184 W.Va. 462, 400 S.E.2d 897 (1990).

In Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L. Ed. 637 (1983), the Supreme Court stated that:

"[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." The Supreme Court explained that "a court's analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction and; (iii) the sentences imposed for commission of the same crime in other jurisdictions."

West Virginia's test for proportionality of the recidivist sentencing guideline is identical to that found in Solem. In Wannstreet v. Bordenkircher, 276 S.E.2d 205 (W.Va. 1981), the Court held that the proportionality of a sentence was to be determined by consideration of four factors: "the nature of the offense; the legislative purpose behind punishment; a comparison of the punishment with what would be inflicted in other jurisdictions; and a comparison with other offenses within the

same jurisdiction.” Syllabus point 5, in part. “With respect to a life sentence imposed under the habitual criminal statutes, we discussed the last three of these factors at length in Wannstreet.” The key inquiry here, therefore, is the nature of the offenses. State v. Deal, 358 S.E.2d 226 (W.Va. 1987).

It is undisputed that Mr. Johnson was convicted of second-degree robbery. However, testimony is ambiguous as to whether there was any threat of violence by him. The victim claims Mr. Johnson threatened to kill him. The co-defendant claims the entire robbery was staged and the victim was aware of the plan and was, in fact, an orchestrating participant. Those facts aside, robbery is an offense that could trigger a recidivist offense. So, depending on which version of events the Court chooses to believe, the analysis still lies with the underlying felonies.

Mr. Johnson was convicted in Louisiana of simple burglary and indecent behavior with a juvenile. Both charges are felonies. However, Mr. Johnson was not placed in prison for his crimes rather he was probated in both instances.

The indecent behavior with a juvenile charge came while he was on probation for simple burglary. While there has been very little testimony developed about the nature of either offense, it is unreasonable to believe Mr. Johnson would be probated twice if either crime had actually involved violence particularly in Louisiana when he was on probation when the second crime was committed.

Furthermore, a review of the underlying Louisiana statutes shows neither crime requires violence. R.S. 14.62 “simple burglary” states: [s]imple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery with intent to commit a felony therein.” Mr. Johnson was not required to pay any restitution so, therefore, any danger to property was minimal. (See plea agreement)

R.S. 14.81 "indecent behavior with a juvenile" states: "[i]ndecent behavior with a juvenile is the commission of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference more than two years between the persons, with the intention of arousing the gratifying the sexual desire of either person." Lack of knowledge of the child's age shall not be a defense."

Analyzing other cases in West Virginia, it appears Mr. Johnson is a strong candidate for a reversal of the recidivist sentence. In a majority of cases where the West Virginia Supreme Court of Appeals has reversed recidivist sentences, the underlying felonies were also of a non-violent nature.

In Wannstreet v. Bordenkircher, 276 S.E.2d 205 (W.Va. 1981), the Court focused on the two underlying felonies stating:

"[i]n analyzing the two prior felony convictions, we note that the first conviction was for forgery of an \$18.62 check, a property offense, which if valued by the amount obtained in larceny terms, would be petit larceny. This offense was followed four years later by the arson of a barn. Neither of these felonies carried the threat of potential or actual violence to the person, which would be crucial to the application of the proportionality principle."

In State v. Davis, 427 S.E.2d 754 (1993), where there were two breaking and enterings and a receiving stolen property, the court placed emphasis on not only the amount taken but whether anyone was present in the building.

"The evidence adduced during trial showed that a total of about ten dollars was taken from an office area of the business and from a small change box in the building. No one, other than the defendant, was in the building at the time of the breaking and entering and, there was no use or, threat of use, of violence against any person involved in the commission of the crime."

Again it seems Mr. Johnson meets the Court's criteria. He was not ordered to pay any

restitution and he claims, but the record is silent, the home owner was not present when the burglary took place.

In State v. Miller, 400 S.E.2d. 897 (W.Va. 1990), this Court indicated that while not the exclusive determining factor, the propensity for violence on the part of the defendant is an important factor to be considered before applying the recidivist statute.

“A further analysis of the record in the case presently under consideration suggests that the underlying felonies upon which the defendant’s recidivist conviction was based were neither violent in nature or in actuality. The first underlying felony conviction was for receiving stolen property. There is no indication that the defendant used or threatened to use violence in that case. The second felony, like the final felony, involved breaking and entering of a business which was closed at night. No one other than the defendant was present at the time of the commission of the crime. There is no evidence that any individual was either harmed or threatened with harm. In analyzing the overall circumstances of the present case, this Court concludes the record indicates the defendant was convicted of three crimes but that not one of them was per se a crime of violence. There is no indication that the two breaking and enterings involved violence to any individual and, the record suggests that they actually occurred in buildings which were closed and in which no individual was present. The third crime was a property crime which involved the receipt of stolen property. In two cases previously cited and Wannstreet, the Court indicated that where all the crimes committed were a non-violent and focused on property, life sentences violated the proportionality principle.”

Id.

“Rather clearly, the crimes of which the defendant was convicted were property crimes and crimes which did not involve violence. In line with the thinking in the cases cited above, the Court believes that a life sentence was disproportionate to those crimes and, in essence, violated the proportionality principle contained in the West Virginia and United States Constitutions. For the reasons stated, this Court believes that the defendant’s life sentence must be set aside and he must be remanded to the Circuit Court of Wood County for re-sentencing.” Id.

In State ex. rel. Boso v. Hedrick, 391 S.E.2d 614, the Court states that even a burglary of a dwelling may not be considered violent if the owner is not present.

Mr. Boso’s most recent felony conviction was for night-time burglary. Under W.Va. Code § 61-3-11, any person convicted of burglary “shall be confined in the

penitentiary not less than one nor more than fifteen years." Mr. Boso previously had been convicted of delivery of a controlled substance and breaking and entering, both of which were punishable by confinement in the penitentiary. The felony offense of delivery of a controlled substance, which involved 20 grams of marijuana by Mr. Boso on June 19, 1974, is punishable by confinement in the penitentiary for a period of not less than one nor more than five years. He received a suspended sentence and was placed on probation."

"Mr. Boso's second felony offense involved a breaking and entering into a Super X drug store on February 4, 1981. The crime of breaking and entering is punishable by confinement for a period of not less than one nor more than ten years. For the conviction of breaking and entering, Mr. Boso received an indeterminate sentence of not less than one nor more than fifteen years."

The seriousness of the crimes committed by Mr. Boso must be viewed in terms of their violent or non-violent nature and also whether they were committed against person or property. See State v. Oxier. Neither delivery of a controlled substance nor breaking and entering is per se a crime of violence. Furthermore, the night-time burglary was committed in an occupied dwelling. There is nothing in the record to indicate that any weapons were used in these crimes or that there was threat of violence to any person. We conclude, therefore, that Mr. Boso's life recidivist sentence is disproportionate to the severity of the offense upon which it is based." Id.

Even a violent third felony may not be enough to institute a recidivist sentence if the underlying felonies are non-violent. In State v. Miller, the defendant was convicted of malicious assault as his third felony, however, the Court failed to uphold the recidivist sentence because the two underlying felonies were non-violent.

"In this case, the final felony which triggered application of the recidivist statute was unquestionably a violent crime. The first underlying felony, the juvenile conviction for breaking and entering, posed only a threat of violence. However, the other two underlying felonies were not crimes of even a potentially violent nature. Certainly, it cannot be said that the appellant had a history of violent felony convictions prior to this shooting incident."

Using the proportionality tests of Solem and Wannstreet, Mr. Johnson should not be sentenced to life. He has neither a history of violence nor a propensity for it. Violence is, in a nutshell, the reason for recidivist sentences. If as shown, Mr. Johnson was not violent in the commission

of his prior felonies and his most recent felony only posed threat of violence, in a light most favorable to the prosecution, Mr. Johnson's recidivist life-sentence is not proportional to the nature of his offenses. Therefore, his recidivist life-sentence should be vacated.

**B.**

**MR. JOHNSON'S RECIDIVIST LIFE SENTENCE SHOULD BE VACATED BECAUSE THE JUDGE ADMITTED A PICTURE OF THE DEFENDANT, WHILE CLEARLY UNDER ARREST, WHICH HAD NO CRIMES BEING CONSIDERED AND WHICH CONTAINS THE WORDS SEXUAL ASSAULT ON THE BACK WHICH WERE LATER ADMITTED THROUGH ANOTHER DOCUMENT.**

Mr. Johnson's recidivist life-sentence should be vacated because the jury was given a picture of Mr. Johnson, over counsel's objection, of him in which he was readily identifiable as being under arrest. Where it is necessary to establish the identity of the accused as the person charged with former convictions under the Habitual Criminal Law, W.Va. Code § 61-11-19, as amended, and the same is established by formal court record, personal identification, and by comparison of his fingerprints with those appearing on his prison record, the introduction in evidence, over objection of prison photographs of the accused prominently showing a prison number, overemphasizes the former convictions, is prejudicial and constitutes reversible error. State v. Reedy, 352 S.E.2d. 168 (W.Va. 1990). The picture admitted, over objection, while not a prison photograph with numbers, is clearly a mug shot and contained on the back of its face the words: sexual assault. Those words were covered when the picture was given to the jury but the damage had been done when the assistant prosecutor, while within three feet of the jury, continually showed the words to the jury. While this is not an exact fact pattern, it is highly analogous in that it overemphasized his prior arrest and hence his prior conviction.

Defense counsel, while cross examining Detective James Groody, asked the officer is sure has the same person. Groody replied he had a picture of the Appellant. Counsel asked if they were pictures of from the cases being alleged that day. The officer says "I do not know if I do or not." (4/26/04 Recidivist Trial Transcript, Pg. 56, Lines. 4-12)

Counsel requested the officer keep the pictures down. (Id. at Pg. 57, Lines 3-9) Groody claimed: "it is not a mug shot." (Id. at Lines. 10-12).

Later, Assistant Prosecutor, Joe Martorella, asked Groody if he had a picture for Mr. Johnson. (Id. at Pg. 62, Lines 13-140 Groody replies he does and Mr. Martorella moved for its admission. (Id. at Lines 15-17). Defense counsel immediately objected as there had been no corroboration to the cases at issue. (Id. at Lines 18-21). Later on page 64 of the same transcript the Judge upholds defense counsel's objection and denies its use at trial. (Id. at Pg. 64, Lines 5-6)

Later, Assistant Prosecutor, Joe Martorella, asked Detective Jones if he had a picture of Ernest Johnson from the indecent behavior charge. (Id. at Pg. 65, Lines 11-17). Later when defense counsel realized the court is going to admit the second photo, he objected to the words sexual assault on the back. (Id. at Pg. 67, Lines 6-10). Defense also asked the Prosecution to keep the back of the photo down while the officer is being examined right at the witness box directly in front of the jury. (Id. at Line 23). The objection continued when counsel pointed out the words sexual assault on the back. (Id. at Pg. 68, Line 5-6). However, despite the previously upheld objection, the Judge admitted the photo. (Id. at Pg. 69, Lines 16-17).

The picture was unnecessary and only stood to enhance the Appellant's burden at the recidivist trial because it enhanced his previous convictions. And while ultimately the words "sexual

assault” were redacted from the picture, the picture stood as substantive proof of nothing other than the Appellant had been arrested.

This should constitute reversible error by itself, however, when counsel tried to admit other evidence of differing birth dates the Judge refused to redact the phrase “committed sexual assault” from another document. This hindered the Appellant’s defense in that the jury was allowed to consider an act the Appellant had not actually been convicted of officially. It undoubtedly affected the jury’s deliberations and unfairly painted the Appellant in an unfair light. The following exchange was made at the trial:

Mr. Craig:

**“It’s the one with the alternative birth date, and the only thing I wanted on this was to redact out “committed the offense of sexual battery” because we have done it on the other picture because that’s not what he was convicted of.” (See Recidivist Trial Transcript Pgs. 92-96)**

The Court:

**“Okay. Well, let’s go ahead and mark that as defendant’s Exhibit No. 1.”**

Mr. Craig:

**“And then this, it looks to be a record of the plea and all I would ask is that any reference to Sexual Battery be redacted out of that as well because that’s not what he was convicted of. If they want to put the plea, too, they can take out the part that pertains to –“**

The Court:

**“Doesn’t that – is that not part of the other record?”**

Mr. Martorella:

**"It's part of the – it's a part of the exhibit, Your Honor. That's exactly the way it is, and he can't have it, you know both ways. I mean he can't have the record in there. I want to redact that date that date is obviously a typo error, but you are not going to buy that. So, why should I agree to remove "Sexual Battery" out of there?"**

The Court:

**"Well, let me see -- "**

Mr. Martorella:

**"Everything shows '74."**

The Court:

**"Let me see the other – State's Exhibit."**

Mr. Craig:

**"That shows '75."**

Mr. Martorella:

**"I know it does. That's just a typo error, you know."**

The Court:

**"Well that's what --"**

Mr. Martorella:

**"Because you want to take advantage of an error."**

Mr. Craig;

**“That could be enough to create reasonable doubt in my estimation.”**

Mr. Martorella:

**“Well, yeah, sure. I am sure it can. I am sure it might. But leave Sexual Battery in there. I just may overcome it.”**

The Court:

**“Well, let me see what he’s got there. Are both of these part of his exhibit?”**

Mr. Craig:

**“You know, your Honor. I don’t know because I have gotten various documents from Joe at one time or another.”**

**“Mr. argument would be if he is convicted of one thing and charged with another, that may lead them to an unfair presumption.”**

The Court:

**“Well these are questions. Okay.**

**Well, neither one of these are part of this exhibit. So, let’s mark those Defendant’s Exhibits No. 1 and 2, and then let me see them back again.”**

The Court:

**“Well, this is the – this one Exhibit No.1, that’s the original charge of Sexual Battery.”**

Mr. Craig:

**“Right. But if he wasn’t convicted of it, then I don’t see --“**

The argument ensues for some time but ultimately ends with:

Mr. Craig:

**“What I am saying is, is that if you redact that part, it doesn’t have anything to do with what he was convicted of.”**

The Court:

**“But it has to go to show that he is the same – whether or no this is even the same person or not. It could be totally different charge. I’m just – if you want it in, I’m going to let it in as it is.”**

Mr. Craig:

**“Note my objection for the record.”**

There was no need to include the phrase or charge “Sexual Battery.” The Appellant was not convicted of that charge. The only way to show the different birth date was to admit the document. The error was not made anywhere else. The refusal to redact the phrase “Sexual battery” undoubtedly affected the Appellant’s defense and the jury’s deliberations. It was error and the appeal should be granted on that ground as well.

C.

**MR. JOHNSON’S RECIDIVIST LIFE SENTENCE SHOULD BE REVERSED BECAUSE NEITHER DETECTIVE JAMES GROODY NOR DETECTIVE MARK JONES WERE ACTUALLY PRESENT WHEN MR. JOHNSON PLED GUILTY TO EITHER CHARGE AND AS SUCH THEY HAD NO DIRECT KNOWLEDGE TO QUALIFY THEM**

**AS COMPETENT WITNESSES TO GIVE TESTIMONY.**

Neither Detective James Groody nor Detective Mark Jones had direct knowledge of Mr. Johnson's convictions. They were only brought in to identify Mr. Johnson. James Groody's testimony about Mr. Johnson's convictions should not have been admitted over the objection of counsel. The following statements show counsel properly objected yet the Judge refused to rule.

Mr. Martorella:

**"So are you familiar with a person by name of Ernest Johnson?"** (See Recidivist Trial Transcript Pgs. 41-42)

James Groody:

**"Yes, I am."**

Mr. Martorella:

**"Did you ever get involved in investigating a case in which he was – he was convicted in Louisiana – in your Parish?"**

James Groody:

**"I wasn't specifically involved in that particular case, but I have known Ernest Johnson for a long time, since the early nineties. He is from the Gonzales area and was a regular fixture in the Gonzales area while I was there."**

Mr. Martorella:

**"Do you see Ernest Johnson here today?"**

James Groody:

**“Yes, I do.”**

Mr. Martorella:

**“Could you point him out to the jury?”**

James Groody;

**“Seated at the defense table in the orange with the tatoo under his eye.”**

Mr. Craig;

**“Your Honor, I want to object for a second to his testifying. He has no personal knowledge of this particular case that he is being asked about, and he is –“**

The Court:

**“Well, we will have to wait and see what the evidence is.”**

Nowhere throughout the rest of the record does James Groody testify he has personal of the case or personally attending Mr. Johnson’s trials or plea hearings. For that matter, Detective Mark Jones had no direct knowledge either. Counsel objected to his testimony and the Judge continued to allow him to testify despite his lack of personal knowledge.

It is a basic tenet of law that a witness may not testify about what he has no personal knowledge of. All counsel can do is object. Once is enough. Yet, despite the Detective’s lack of personal knowledge, he was allowed to testify as though he were a competent witness. This appeal should be granted because of the Court’s failure to follow the Rules of Evidence.

## CONCLUSION

The court should grant Mr. Johnson's appeal. The indictment is fatally-flawed because the statutory language used was the pre-2000 unamended version and the essential element of presenting a weapon contained in first degree robbery are missing. No amendment, either literal or constructive, via instruction, was possible because amendments must be secured from the grand jury. The defense's objection to the defect came prior to the verdict regardless of its classification as Motion to Arrest or a Demurrer. Consequently, the court has no jurisdiction over charges in a fatally-flawed indictment regardless if the jury has rendered a verdict or not. And finally, but for the error on the part of the prosecutor providing the outdated and unamended-statutory language to the grand jury, the Appellant would not have been convicted under a fatally-insufficient indictment, therefore, the prosecutor's office should not reap the benefit of this mistake under some guise of judicial economy.

Mr. Johnson's appeal should also be granted because his statement to police was admitted over objection of counsel. The statement was overly prejudicial and gained as the result of a violation of the prompt presentment rule. Mr. Johnson was not taken before a magistrate in a timely fashion and this delay was for the sole purpose of gaining an incriminating statement from him.

And finally, Mr. Johnson's appeal should be granted because his recidivist life sentence violates the proportionality clauses of the West Virginia and the United State's Constitutions. His underlying crimes were not violent and his "triggering" offense only had a possibility of violence, therefore, a life sentence as an habitual offender is disproportionate to the crime. Furthermore, the jury was allowed to see a picture which had no probative value and allowed to consider a document with highly prejudicial wording on it. That wording had no bearing or relevancy to the proceedings and came from incompetent witnesses who were allowed to testify without direct knowledge.