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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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STATE OF WEST VIRGINIA, :

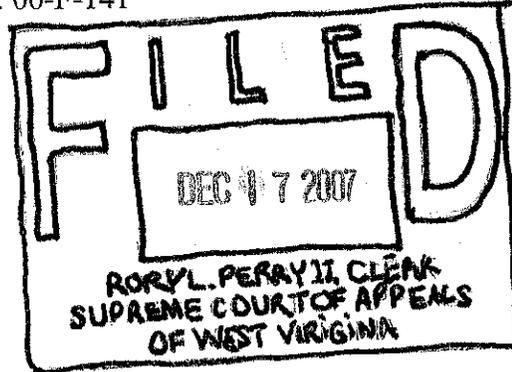
v. :

JOSHUA LEE SLATER, :

Petitioner. :

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No. _____
Circuit Court of Kanawha County
No. 06-F-141



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APPELLANT'S BRIEF
-----X
-----X

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PROCEEDINGS AND RULINGS BELOW

On July 26, 2006, a jury found Joshua Slater guilty of one count of kidnaping, one count of wanton endangerment, one count of domestic battery and one count of burglary. T.436.¹ The jury recommended mercy. Mr. Slater was sentenced to life in prison on the kidnaping count, one year for the domestic battery count, five years for the wanton endangerment count, and one to ten years for the burglary count. All sentences were to run consecutive to each other. T.460.

A timely Petition for Appeal was filed, and on October 23, 2007, the Supreme Court of Appeals heard an oral presentation on the Petition. The Court then granted the Petition by a vote of 4-1.

¹ Pages in the trial transcript will be noted as T.#.

INTRODUCTION

Joshua Slater, a 23 year old man with no prior criminal record, lived with his 22 year old long-time girlfriend Angela Walls and their two children, Keira, age two, and Joshua, age one. Joshua and Angela had a domestic dispute during which he struck her, and threatened to kill her with his gun. She then left the house through a bedroom window with their children. Everyone agrees that Joshua's offense caused no physical injury worse than a minor bruise, and no property damage greater than a broken pane of door glass. T.312-313. The victims of Joshua's acts spoke on his behalf at sentence and urged the judge to be lenient. They were disregarded. He was sentenced to life plus sixteen years in prison.

The errors committed by the court during Mr. Slater's trial were frequent, diffuse, and highly prejudicial. Individually and cumulatively they require reversal of his conviction. These errors include:

I. The Evidence Of Daytime Burglary Was Legally Insufficient. All Parties Agree That Mr. Slater Had Permission To Enter the House

Joshua Slater was convicted of burglary under the statutory provision that criminalizes an unauthorized breaking and entering. Unlike some other provisions of the burglary law, this statute requires that the entry be unauthorized. The supposed victim of the burglary, Lori Walls, Angela's mother, testified unequivocally that Josh Slater had a key to her house and complete permission to enter the house. There was absolutely no evidence offered suggesting that his entry was unauthorized. The evidence was therefore insufficient to support the burglary conviction.

II. The Evidence Of Kidnaping Was Legally Insufficient Because The Court Made A Finding Of Fact That The Only Concession Intended Was That Angela Walls Was Confined

Joshua Slater was convicted of kidnaping for the act of confining his girlfriend in the bedroom of their trailer. The statute under which he was convicted requires not only that he confined her, but that he did so with the purpose of receiving some “concession” or benefit. The trial judge made a finding of fact that the only concession was that he “gained control over her and prevented her from leaving.” This was insufficient to sustain the kidnaping conviction because the statute requires that the “concession” be something in addition to and beyond the act of confining. Were it sufficient to simply confine the alleged victim, the “concession” requirement of the statute would be surplusage – a vestigial phrase that is automatically satisfied every time someone performs an act of confining or abducting. This is against the plain meaning of the statute, and is not what the legislature intended.

III. Joshua Slater’s Sentence Was Unconstitutionally Disproportionate, Cruel And Unusual

Everyone agrees that the only physical harm Joshua Slater caused was minor bruising that required no medical treatment. Everyone also agrees that the only property damage he caused was a small broken pane of glass. Yet Joshua Slater was sentenced to an aggregate term of imprisonment of life plus sixteen years. The West Virginia Constitution requires that sentences be proportionate to the seriousness of the defendant’s acts as well as to the sentences imposed on other defendants for similar crimes. Mr. Slater’s sentence is so grossly disproportionate to the terms imposed on other, similarly situated defendants that it offends both the West Virginia and

United States Constitutions. It is also so excessive in itself and so disproportionate to the harm caused as to violate the Cruel and Unusual Punishment provisions of the West Virginia and United States Constitutions.

IV. The Trial Court Refused To Answer The Deliberating Jury's Reasonable Questions Of Law

During their deliberations, the jurors became confused about the elements of wanton endangerment, and they sent a written note to the court asking for clarification:

“Under wanton endangerment does it matter if the gun is loaded? Does wanton endangerment lie on the one with the gun or the perception of the person it is pointed at?” T.433.

These are reasonable and intelligent questions that went to the heart of the case. They are exactly the kind of questions we want jurors to ask when they are not sure how to apply a complex legal principle. In fact, the reason we permit jurors to ask questions is to make sure they do not have to guess at the law governing the case.

The trial court could have easily cleared up the confusion. Instead, the judge refused to answer the jurors' questions and ordered them to continue deliberating. T.433-434. They convicted less than an hour later. T.435.

Since trial courts are required to answer reasonable questions when the jury is confused or ignorant about essential elements of the crime charged, it was reversible error for the court in Mr. Slater's case to refuse to answer the jury's questions.

V. The Trial Court Violated Sandstrom v. Montana, United States v. Morrissette, And State v. O'Connell By Instructing The Jury That It Would Be Reasonable To Infer That Mr. Slater Intended His Acts As Well As The Natural And Probable Consequences Of Those Acts

It is certainly permissible for a trial judge to instruct a jury that they may, if they wish, infer that a person intends the natural and probable consequences of his acts. There are three major limitations on this inference:

- ◆ The court cannot place the burden on the defense to rebut this inference.
- ◆ The court cannot express an opinion to the jury about whether it should adopt the inference.
- ◆ The court cannot tell the jurors – either explicitly or implicitly – that they must adopt the inference.

The court in Mr. Slater's trial violated all three of these principles, and gave a blatantly unconstitutional variation of the instruction.

The court prefaced its instruction by charging the jury that it would be reasonable for them to adopt the inference of intent. T.401. This was improper because it told the jurors that the judge had an opinion about whether they should make the inference – that if they were reasonable people they would accept it. It also had the effect of shifting the burden of proof to the defense on the issue of intent – the defense would have to overcome the judge's statement that it would be reasonable to accept the inference, and show the jury that it would be unreasonable to adopt the inference in this case. Finally, it gave the jury the incorrect impression that the inference of intent was not really permissive, but was mandatory if the jury believed itself to be reasonable.

STATEMENT OF FACTS

Joshua Slater was 23 years old and Angela Walls was 22. T.156. They had been together since their early teens. T.156. Because as a teenager Joshua and his parents did not get along, Angela's mom and dad took him in when he was fifteen, and he lived with them for several years. T. 242-243. Joshua had the keys to their home and their cars, was permitted to come and go as he pleased, and was considered a family member. T.240, 243-244.

By November of 2005, Joshua and Angela had two small children of their own, Keira, age two, and Joshua, age one. T.156. They moved out of Angela's parents' house, and lived together in a trailer in Sissonville.

On the evening of November 28, 2005, Angela left the trailer and went out to illegally buy ten xanax pills. T.197-199. When she returned, she and Joshua shared three pills and went to sleep. In the morning, Joshua got up and found that the remaining seven pills were missing. He thought Angela had taken them during the night. She denied it. They argued, and the argument escalated. T.159-160. At some point, he hit her on the side of the head and threw a hammer, hitting her in the leg. T. 163, 166. Angela had minor bruises from these blows. These were the only injuries she suffered from the entire incident. T.312-313. She did not need or seek medical treatment.

When the argument continued, Angela announced that she was taking the children and going to her mother's house. T.161-163. As she was leaving, Joshua, who was cleaning his gun in preparation to go hunting, pointed the gun at her and ordered her to stay. T.163. As the argument got more heated, Joshua threatened Angela and her family. T.188. He told her to put

on camouflage clothing, and spend the day in their bedroom, after which he said he would take her in the woods and kill her. T.168, 176-179. Soon after that, Angela and the children left through the bedroom window of the trailer and drove to her mother's house. T.180-181.

When Joshua realized Angela had taken their car, he assumed she had gone to her mother's house. He went on foot to the Walls' home, tried to open the door with his key, but it did not work. T.356. No one was home. He then broke a window pane in the rear door and entered. T.356. By that time the police had been notified, and Deputy Anna Kessell had arrived at the Walls' house. T.253. Joshua saw her and ran away. T.257. He was arrested without resistance a short time later. T.307.

Joshua Slater was charged with kidnaping, for ordering Angela to stay in their bedroom; daytime burglary, for breaking and entering the Walls' house; wanton endangerment, for threatening Angela with the gun; and domestic battery for hitting her.

During the trial, Lori Walls, Angela's mother, testified that Joshua Slater was like a son to her. He had keys to her house and car. And he had authorization to enter the house. At the end of the State's case, defense counsel moved to dismiss the burglary charge on this ground. T.330. The trial court denied the motion without even addressing the issue of whether Mr. Slater was authorized to enter. T.341.

At the conclusion of the case, in response to counsel's sentencing motions, the trial judge made a finding of fact that the "concession" element of the kidnaping charge had been satisfied by the mere fact that Joshua prevented Angela from leaving. "I find that there was concession in that he was able to gain control over her and kept her from leaving." T.447. This, of course, was the same act of confining that the State asserted to prove the *actus reus* element of the kidnaping.

T.410.

Prior to closing arguments, the judge instructed the jury it would be reasonable for them to infer that Joshua Slater intended to commit his acts and to infer he intended the natural and probable consequences of his acts:

It is reasonable to infer that a person ordinarily intends to do that which he does or which is the natural or probable consequences of his knowing acts. The jury may draw the inference that a person intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any conscious act or omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the State has proved beyond a reasonable doubt the required criminal intent. T.401-402.

During the jury's deliberations, the jurors sent a written question to the judge, asking for clarification of confusion they were having about the elements of the wanton endangerment charge:

[1] Under wanton endangerment does it matter if the gun is loaded?

[2] Does wanton endangerment lie on the one with the gun or the perception of [the] person it is pointed at? T.433.

The trial court refused to answer either question and ordered the jury to resume its deliberations. T.433-434. They returned a guilty verdict less than an hour later.

ASSIGNMENTS OF ERROR

1. The evidence was legally insufficient to sustain the burglary conviction because Mr. Slater was charged with breaking and entering a dwelling in the daytime – a crime which requires that his entry be unauthorized. It was undisputed that Mr. Slater had permission to enter the house.
2. The kidnaping statute requires that in addition to confining a victim, a defendant intend to obtain from the victim a “concession,” beyond the simple act of confining. The evidence was legally insufficient to sustain Mr. Slater’s kidnaping conviction because the trial judge found as a matter of both fact and law that the only “concession” Mr. Slater sought or obtained by confining his live-in girlfriend to their trailer was to prevent her from leaving.
3. Mr. Slater, who is 23 years old and has no prior criminal record was sentenced to life plus sixteen years for a crime in which everyone agrees there was no physical injury worse than a minor bruise, and no property damage greater than a broken window. This sentence is so disproportionate and excessive that it violates Article 3, Section 5 of the West Virginia Constitution and the Cruel and Unusual Punishment clauses of the Eighth and Fourteenth Amendments to the United States Constitution.
4. The deliberating jurors sent the judge a note asking two proper questions reflecting that they did not understand the legal elements of wanton endangerment. The judge improperly refused to answer either of the questions, and ordered the jury to continue deliberating without any further explanation of the law.

5. The trial judge violated the federal and state constitutional principles enunciated in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975), In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), Morissette v. United States 342 U.S. 246 (1952), and State v. O'Connell, 163 W.Va. 366, 256 S.E.2d 429 (1979). by suggesting to the jury that it would be reasonable for them to adopt an inference that the defendant intended his acts as well as the natural and probable consequences of those acts.

ARGUMENT

POINT ONE: THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN THE BURGLARY CONVICTION BECAUSE MR. SLATER WAS CHARGED WITH “BREAKING AND ENTERING” A DWELLING IN THE DAYTIME — A CRIME THAT REQUIRES HIS ENTRY TO BE UNAUTHORIZED. IT WAS UNDISPUTED THAT MR. SLATER HAD PERMISSION TO ENTER THE HOUSE.

Lori Walls was the owner of the house Joshua Slater was charged with burglarizing. She testified that Josh had lived in her home for many years, was considered a member of the family, and had full access to her house:

A: I took care of Josh just as if Josh was one of my own. . . .
. . . and I still feel that way today. . . . Josh had a key to my
home, plus a key to every one of my vehicles. T.243. . . .

Q: So . . . if he had used one of those keys would that have
been against your will and wishes?

A: No, sir, because Josh had access to our home. T.244.

In State v. Plumley, 181 W.Va. 685, 688-689, 384 S.E.2d 130, 133-134 (1989), this Court held that when the legislature removed the requirement of “breaking” from the nighttime burglary statute, West Virginia Code, 61-3-11(a)(1993)(2005 Rep. Vol.), it also removed the requirement that the entering be unauthorized – *but this only refers to the nighttime burglary provision. Plumley, Id.*

Mr. Slater was convicted of burglary under the daytime burglary provision for which the legislature still requires the State to prove a “breaking,” and still requires that the entry be

unauthorized. This was reflected in State v. Louk, 169 W.Va. 24, 26, 285 S.E.2d 432, 434 (1981), a pre-Plumley case in which this Court noted that before the burglary statute was amended, both nighttime and daytime “burglary is complete once there has been an *unauthorized* entry.” (Emphasis added).

In Mr. Slater’s case, this means the State had to prove Mr. Slater did not have permission to enter the Walls’ house. The evidence, however, conclusively proved the opposite – that Mr. Slater had authority to enter the house whenever he wished. Unlike Plumley, he did not trick or coerce the owners into admitting him. The Walls family considered him to be kin, and gave him a key. Mrs. Walls explicitly testified that they permitted him access to the home.

It is irrelevant that Mr. Slater’s key did not work, and he instead entered the Walls’ home by breaking a window in the back door. The statutory requirement of “breaking” is a term of art that mandates not just an entry, but an unauthorized entry. The method of entry – breaking a window – does not transform his authorized entry into an unauthorized one. So long as the owner maintains that Mr. Slater had permission to enter the house, and that permission was not obtained by trickery or coercion, there has been no daytime burglary.

Because the State’s own witness testified that Mr. Slater was authorized to enter the home, the evidence at trial was legally insufficient to sustain the conviction for burglary. Therefore, Mr. Slater’s conviction violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10 of the West Virginia Constitution.

POINT TWO: THE KIDNAPING STATUTE REQUIRES THAT IN ADDITION TO CONFINING A VICTIM, A DEFENDANT INTEND TO OBTAIN FROM THE VICTIM A "CONCESSION," BEYOND THE SIMPLE ACT OF CONFINING. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN MR. SLATER'S KIDNAPING CONVICTION BECAUSE THE TRIAL JUDGE FOUND AS A MATTER OF BOTH FACT AND LAW THAT THE ONLY "CONCESSION" MR. SLATER SOUGHT BY CONFINING HIS GIRLFRIEND IN THEIR TRAILER WAS TO PREVENT HER FROM LEAVING.

The kidnaping statute under which Joshua Slater was charged requires two separate elements to establish the crime: the act of confining the victim, and the purpose or intent to use that confinement to demand or obtain some concession from the victim:

[1] Any person who by force . . . confine[s] . . . any other person . . .

[2] [F]or the purpose or with the intent of taking, receiving, demanding or extorting . . . any concession or advantage of any sort . . . shall be guilty of [kidnaping].

See West Virginia Code, 61-2-14(a)(1999)(2005 Repl. Vol.).

A unique feature of Mr. Slater's trial was that the judge made an explicit factual finding as to how the "concession" requirement had been satisfied. The court held that the only concession was that Mr. Slater confined his girlfriend in their trailer and prevented her from leaving:

I find that there was concession in that he was able to gain control over her and kept her from leaving. T.447 (emphasis added).

This finding was inadequate to sustain the kidnaping conviction because the intended "concession" must be something different from, and in addition to, the act of confinement. Were this not true, the statutory "concession" requirement would be surplusage. If the act of confining

the victim were enough to also constitute the “concession,” all confinements would be completed kidnappings, and the rest of the statute would be meaningless. This is not what the legislature intended or enacted in §61-2-14(a).

Caselaw has established that there are many things that can fulfill the “concession requirement of the kidnaping statute. Confining someone for the purpose of sexual assault is one common example. State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989); State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986); State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985). Abducting or confining someone to get them to drive somewhere is another sufficient “concession” that will satisfy the kidnaping statute. People v. Swanson, 638 P.2d 45 (Colo. 1981). Confining someone for the purpose of extorting ransom would also fit the definition of a “concession.” But there is no authority that supports the trial judge’s position that the confinement itself is enough to satisfy the “concession” requirement. Such a finding would be contrary to the plain meaning of the statute, and has no support in law.

Given the explicit nature of the trial court’s factual findings, the evidence of kidnaping was legally insufficient to sustain the charge because the element of a “concession” was not satisfied. Therefore, Mr. Slater’s conviction violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10 of the West Virginia Constitution.

POINT THREE: MR. SLATER IS 23 YEARS OLD AND HAS NO PRIOR CRIMINAL RECORD. HE WAS SENTENCED TO LIFE PLUS SIXTEEN YEARS FOR A CRIME IN WHICH HE CAUSED ONLY MINOR BRUISES AND A BROKEN WINDOW. THE SENTENCE IS SO EXCESSIVE AND DISPROPORTIONATE THAT IT VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

Here is the sum total of the injuries caused by Joshua Slater in this case:

- Minor bruises on the face and leg of Angela Walls. She needed no medical treatment.
- A broken window pane in the back door of Lori Walls's house.

Mr. Slater has been sentenced to life plus sixteen years in prison.

Both of the victims, Angela and Lori Walls, spoke on Mr. Slater's behalf at sentencing and begged the court for leniency. Their pleas were rejected by the court.

The Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments to the United States Constitution and Article 3, Section 5 of the West Virginia Constitution, as well as the clear precedents of this Court all require that this sentence must be reduced because it is excessive for the crime committed by Mr. Slater, and grossly disproportionate to the sentences imposed on similarly situated defendants convicted of the same charges in other cases .

The West Virginia Constitution contains a Proportionality Clause, which provides people convicted of crimes a greater right to proportionality analysis than is provided by the U.S. Constitution. State v. Deal, 178 W.Va. 142, 146-147, 358 S.E.2d 226, 230-231 (1987); Smoot v. McKenzie, 166 W.Va. 790, 277 S.E.2d 624 (1981); Wanstreet v. Bordenkircher, 166 W.Va. 523, 537, 276 S.E.2d 205, 213-214 (1981). Because proportionality is such a significant consideration

in West Virginia sentencing, it is important to compare the facts of Mr. Slater's case with the facts in State v. Richardson, 214 W.Va. 410, 589 S.E.2d 552 (2003), a remarkably similar case in which this Court declared an even lighter sentence than that given to Mr. Slater to be unconstitutionally harsh.

In Richardson, the defendant argued with his girlfriend and accused her of cheating on him. He took her home, but returned later, broke in through a window, and beat her badly, raising several bruises and knots on her face. He dragged her naked out of her apartment and forced her to go with him to a building down the street owned by his grandfather. Sometime during the incident, he pulled a gun on her, and when she attempted to leave, he punched her, kicked her and bit her. He then sexually assaulted her and burned her with a cigarette. He poured gasoline on her, and threatened to set her on fire. He urinated on her and spat on her. He did all this while she was three months pregnant. Id. at 412 (majority opinion) and 418 (Justice Maynard, concurring in part and dissenting in part), 589 S.E.2d at 554 (majority opinion) and 559 (Justice Maynard, concurring in part and dissenting in part).

Richardson was charged with kidnaping, malicious wounding, wanton endangerment and domestic battery. He was not even charged with burglary, despite his nighttime entry through the window. Throughout the case Richardson's girlfriend supported him. At sentencing, she told the court that she suffered no lasting injury, and had moved on with her life; that her child was fine, that they visited Richardson in prison, and that there was no need for further imprisonment. The court sentenced Richardson to thirty years on the kidnaping and five on the wanton

endangerment².

On appeal, this Court held the thirty year sentence was “so disproportionate to the crime as to be impermissible under the state constitution,” and reduced Richardson’s sentence to ten years.

By contrast, Joshua Slater’s conduct was far less severe than that of Richardson, while his sentence was far greater than Richardson’s unconstitutionally excessive thirty years.

Mr. Slater also had an argument with his live-in girlfriend. He hit her, but unlike Richardson, only caused minor bruises. He pointed a gun at her and threatened to kill her, but unlike Richardson, did nothing to carry out the threat. He confined her in their bedroom, but unlike Richardson, did not do anything as egregious as dragging her naked out of the house and marching her to another building. He did not torture her, burn her, bite her, sexually assault her, kick her or urinate on her – all of which Richardson did.

Richardson, who entered his girlfriend’s apartment through a window at night while she was sleeping was not even charged with burglary. Mr. Slater, who had a key to his girlfriend’s mother’s house, but entered by breaking a window during the day when no one was home, was charged with burglary and sentenced to one to ten years, despite the fact that the supposed victim testified that he had her permission to enter the house.

Finally, Angela Walls testified at trial and spoke on Mr. Slater’s behalf at sentencing. She told the court that he was a “wonderful” father, T.210, 450, that she frequently took their children to see him, T.170, and that she had repeatedly told the prosecutor that she did not want

²Richardson entered a plea of guilty to kidnaping and wanton endangerment, and in return, the other charges were dismissed.

to pursue charges, but that the prosecutor had ignored her. T.450.

Mr. Slater does not claim that his behavior towards Angela Walls was proper or justifiable. He is guilty of hitting and threatening her, and should be punished appropriately for those acts. But it defies logic to impose a sentence of life plus sixteen years when this Court has declared Richardson's 30 year sentence for much worse crimes to be unconstitutionally harsh.

As Justice Davis mentioned in her concurring opinion in Richardson, there have been many cases in which this Court has set aside a sentence as disproportionate or excessive. State v. David D.W., 214 W.Va. 167, 588 S.E.2d 156 (2003); State v. Deal, 178 W.Va. 142, 146-147, 358 S.E.2d 226, 230-231 (1987); Smoot v. McKenzie, 166 W.Va. 790, 277 S.E.2d 624 (1981); Wanstreet v. Bordenkircher, 166 W.Va. 523, 537, 276 S.E.2d 205, 213-214 (1981) . In many of those cases, this Court did so after comparing the facts and sentence of the case before it with earlier cases with similar facts, but much different sentences. State v. Buck, 173 W.Va. 243, 245-247, 314 S.E.2d 406, 408-410 (1984); State v. Cooper, 172 W.Va.266, 272-273, 304 S.E.2d 851, 857-858 (1983); Smoot v. McKenzie, 166 W.Va. 790, 791-792, 277 S.E.2d 624, 625 (1981). This is precisely the kind of analysis that Mr. Slater asks this Court to undertake now. Few if any of the cases in which this Court previously reduced sentences presented punishment as grossly disproportionate as Mr. Slater's was from Richardson's. It is therefore appropriate for this Court to follow the precedent set in Richardson and the other cited cases, and reduce Mr. Slater's sentence as excessive and grossly disproportionate under the United States and West Virginia Constitutions.

POINT FOUR: THE DELIBERATING JURORS SENT THE JUDGE A NOTE ASKING TWO PROPER QUESTIONS ABOUT THE LEGAL DEFINITION OF WANTON ENDANGERMENT. THE TRIAL JUDGE REFUSED TO ANSWER EITHER QUESTION. THE JURY WAS THEN FORCED TO REACH A VERDICT WITHOUT ANY EXPLANATION OR CLARIFICATION OF THE LAW THEY SAID THEY DID NOT UNDERSTAND.

“Where it clearly and objectively appears in a criminal case that the jury has failed to comprehend an instruction on a critical element of the crime . . . the trial court must, on request of defense counsel, reinstruct the jury.” *Syllabus Point Two, State v. McClure*, 163 W.Va. 33, 253 S.E.2d 555 (1979). Justice Cleckley outlined the correct procedure for a trial judge to follow when a deliberating jury sends a written question of law: “the proper method of responding to a written jury inquiry during the deliberations period . . . is for the judge to reconvene the jury and to give further instructions, if necessary, in the presence of the defendant and counsel in the courtroom.” *Syllabus Point Three, State v. Allen*, 193 W.Va. 172, 455 S.E.2d 541 (1994); *Edgell v. Painter*, 206 W.Va. 168, 175, 522 S.E.2d 636, 643 (1999).

The trial judge in Mr. Slater’s case did none of these things.

While the jury was deliberating they sent a note asking two important questions about the law of wanton endangerment:

- [1] Under wanton endangerment does it matter if the gun is loaded?
- [2] Does wanton endangerment lie on the one with the gun or the perception of [the] person it is pointed at? T.433.

These were reasonable and intelligent questions for laypeople to ask about a confusing statute. Nonetheless, the trial judge refused to answer them. In fact, the court

did not even ask counsel for his opinion about what to do with the questions, and did not give counsel an opportunity to make any kind of request. Instead, the court simply announced, "I'm going to bring them in and tell them that they have all of the legal instructions that I can give them in order to find their verdict." T.433. To which defense counsel acknowledged: "Yes Ma'am." T.433. The trial court then told the jurors it would not provide any additional instructions or clarification. T.434. The jury was ordered to resume deliberating, and returned a guilty verdict less than an hour later.

It was reversible error for the trial court to refuse to answer the jury's questions. Both questions were about essential elements of wanton endangerment. Both questions demonstrated the jurors were either confused about the appropriate law to apply, or simply did not know what the relevant law was. Both questions explained with admirable precision exactly what elements the jurors did not understand.

This is just the situation in which this Court has held that the judge must answer the jurors' questions. In State v. Lutz, 183 W.Va. 234, 395 S.E.2d 478 (1988), for example, this Court held it to be reversible error when the court refused to answer a jury's questions about the implications of a verdict of not guilty by reason of insanity. See also, State v. Daggett, 167 W.Va. 411, 416-417, 280 S.E.2d 545, 549 (1981); State v. Nuckolls, 166 W.Va. 259, 263, 273 S.E.2d 87, 90 (1980). Similarly, in State v. McClure, 163 W.Va. 33, 37, 253 S.E.2d 555, 557-558 (1979), this Court reversed a conviction when the trial court refused to answer a jury's question about the defendant's right not to take the witness stand.

In Mr. Slater's case, there was no excuse for the trial judge to refuse to respond to

the jury's question. Indeed, the court's statement to the jurors that "I instruct you that you have the court's instructions. That's the only law I can provide you on which you can base your verdicts," T. 434, seems to suggest that the trial judge mistakenly believed she was not allowed to answer the jury's questions. The trial court's omission violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10 of the West Virginia Constitution, as well as the Jury Trial Provisions of the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution. The conviction must therefore be reversed.

POINT FIVE: THE TRIAL JUDGE VIOLATED SANDSTROM v. MONTANA AND STATE v. O'CONNELL BY INSTRUCTING THE JURORS THAT IT WOULD BE REASONABLE FOR THEM TO INFER THAT MR. SLATER INTENDED HIS ACTS AND THE NATURAL AND PROBABLE CONSEQUENCES OF THOSE ACTS.

The trial judge gave the jury the following instruction:

It is reasonable to infer that a person ordinarily intends to do that which he does or which is the natural or probable consequences of his knowing acts. The jury may draw the inference that a person intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any conscious act or omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the State has proved beyond a reasonable doubt the required criminal intent. T.401-402. (Emphasis added).

This instruction is improper because it shifts the burden to the defense to rebut the inference of intent while simultaneously informing the jury that the judge believes it would be reasonable for the jurors to make such an inference in Mr. Slater's case.

A. The Instruction Shifts The Burden To The Defense To Rebut The Inference Of Intent

In Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), the U.S. Supreme Court held that it was improper for a trial judge to instruct a jury that a person is presumed to intend the natural and probable consequences of his or her acts. The Court acknowledged two related reasons this instruction should not be given: (1) It may be viewed by the jury as a mandatory presumption, conveying to the jurors the impression that they must accept it; and (2) it shifts the burden of proof to the defense on an essential

element of the crime – intent. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970); Morrisette v. United States 342 U.S. 246 (1952). See also State v. O’Connell, 163 W.Va. 366, 256 S.E.2d 429 (1979).

In Sandstrom, the United States Supreme Court held that when deciding if a trial court’s instruction created an improper mandatory inference, an appellate court must determine whether “a reasonable juror” could have viewed the inference as mandatory. Sandstrom v. Montana, 442 U.S. at 515, 99 S.Ct. at 2454 (1979).

In Mr. Slater’s case, there can be no doubt that this “reasonable juror” test was met, because the trial judge explicitly told the jurors that “it would be reasonable” for them to adopt the inference of intent.

Sandstrom also makes clear that the trial court’s instruction was unconstitutional for an additional reason – it shifted the burden of persuasion to the defense, saddling Mr. Slater with the burden of showing that in his case it would be unreasonable to apply the inference of intent. The Sandstrom court noted that the presumption of intent in that case shifted the burden because it did not include any instruction that the jurors could reject the presumption or that it could be rebutted. Id. at 517, 99 S.Ct. at 2455. Similarly, the trial court in Mr. Slater’s case never told the jury that it would be just as reasonable for them to reject the inference of intent, or even that the inference could be rebutted. In fact, the instruction gave the exact opposite impression, that any reasonable jury would follow the trial judge’s lead, and adopt the inference of intent.

Mr. Slater’s conviction therefore violated the Due Process Clauses of the Fifth

and Fourteenth Amendments to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. The conviction should be reversed, and a new trial ordered at which the jury should be given a neutral instruction on the subject of intent and permissible inferences.

B. The Instruction Informs The Jurors That The Judge Had An Opinion About The Inference – That She Believed It Would Be Reasonable For Them Adopt The Inference Of Intent

This court has often recognized that a trial judge occupies a unique position in the minds of jurors. State v. Wotring, 167 W.Va. 104, 115-116, 279 S.E.2d 182, 190 (1981). When a layperson enters a court of law, one of the first things he or she learns is that the judge has absolute authority on all things, great and small, that transpire within the four walls of the courtroom. If the parties disagree, they bring their dispute to the judge, and they must abide by her decision. The jury sees that even public officials in the courtroom -- sheriffs, bailiffs, police officers and prosecutors, must defer to the judge's rulings.

The jurors' view of judicial omnipotence is particularly strong when it comes to matters of law and decision-making. Jury members are specifically instructed that they must follow the law as the court gives it to them, and obey the judge's rulings and instructions, even if they disagree with them.

Because jurors routinely give such great deference to trial judges, this Court has long held that a judge presiding over a criminal trial "must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his

position, of unduly influencing jurors in the discharge of their duty as triers of the facts.”

Id., at 115-116, 279 S.E.2d at 190 (1981).

Most important, this Court has acknowledged that “[i]n criminal cases we have frequently held that conduct of the trial judge which indicated his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded.” Id.; State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002); State v. Pietranton, 137 W.Va. 477, 72 S.E.2d 617 (1952).

This principle requires reversal not just in the obvious cases where a trial court makes a declarative statement of its opinion about the defendant’s guilt or innocence. It also requires reversal in the more subtle situation where a trial court, with the best of intentions, explains to the jury that she believes it would be reasonable for them to adopt a particular inference about the facts of the case or the elements of the crime.

In State v. Harris, 169 W.Va. 150, 286 S.E.2d 251 (1982), for example, the trial court made a pre-trial ruling that a tape recorded statement obtained by the police from the defendant was voluntary, and therefore admissible. The trial judge later commented in the presence of the jury that the statement had been made voluntarily since there had been no duress and no promises had been made. When defense counsel objected, the court responded by noting that “I am not vouching for the credibility of the statement. I am vouching for the fact the court does not believe . . . that the defendant was mistreated in any way.” Id., at 155, 286 S.E.2d at 255.

Even though the trial court did not mean to comment on the credibility of the evidence and did not intend to infringe upon the province of the jury, this Court held that

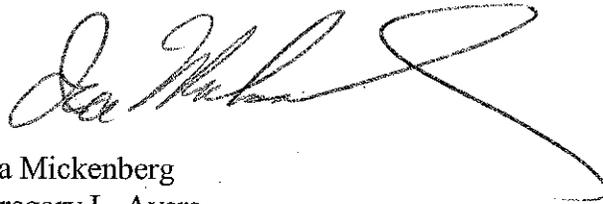
the remarks were improper because it was for the jury to decide if the statements were voluntary and believable. In Harris, however, the voluntariness of the statement was never challenged by the defense, and was therefore not a material issue. It is significant, however, that this Court went out of its way to put all parties on notice that “had there been any contrary evidence from the defendant on this issue [of voluntariness], we would be required to reverse.” Id. at 155, 286 S.E.2d at 255.

In contrast to Harris, the issue of intent was hotly contested in Mr. Slater’s trial, where both the intent to confine and the intent to obtain a concession were key issues in the kidnaping charge, and the requirement of an intent to commit a crime was an essential element of the burglary charge. Although not objected to, the instruction constitutes plain error, in that it amounted to an order that the jury should find a key contested element of the crimes has been met.

RELIEF REQUESTED

Joshua Lee Slater's conviction must be reversed, the kidnaping and burglary charges dismissed, and the case remanded for a new trial on the remaining charges.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ira Mickenberg', with a large, sweeping flourish extending to the right.

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

-----X

STATE OF WEST VIRGINIA, :

v. :

JOSHUA LEE SLATER, :

Petitioner. :

-----X

No. _____
Circuit Court of Kanawha County
No. 06-F-141

CERTIFICATE OF SERVICE

I, Gregory L. Ayers, do hereby certify that on the 17 day of December, 2007, I served a copy of the attached Appellant's Brief, by mail, upon:

Christopher R. Smith
Assistant Attorney General
State Capitol, Room E-26
Charleston, WV 25305


Gregory L. Ayers