

IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON
NO. 33662

STATE OF WEST VIRGINIA,

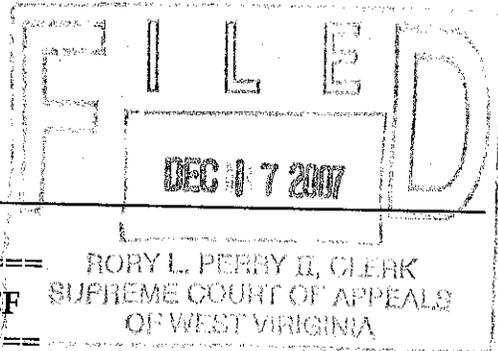
Respondent,

vs.

MONONGALIA COUNTY CIRCUIT COURT
CASE NO. 05-F-69

JAMES LEE BROOKS,

Petitioner.



APPELLANT'S BRIEF

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OF WEST VIRGINIA

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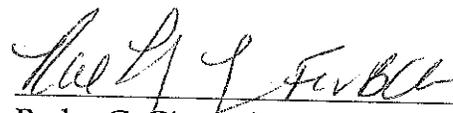

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I.

PROCEEDINGS AND OPINIONS BELOW

On February 12, 2005, a juvenile petition was filed against the Appellant, James Lee Brooks, which alleged that he had committed the offense, if charged as an adult, of robbery in the first degree in the Circuit Court on Monongalia County. Record at Envelope V, Juvenile file, 05-JD-8, H.T., 2/14/05, p. 2. As a result of the detention and preliminary hearing held on February 14, 2005, before the Honorable Russell M. Clawges, Jr. of the Circuit Court of Monongalia County, probable cause was found to have existed, and the juvenile was ordered detained until adjudication. Record at Envelope V, Juvenile file, 05-JD-8, H.T., 2/14/05, pp. 32-34. On March 4, 2005, the juvenile received a motion by the State to transfer him to adult jurisdiction, citing as the offense committed, first degree robbery. Record at Envelope V, Juvenile file, 05-JD-8. A

hearing on the motion was held before the Honorable Judge Robert B. Stone of the Circuit Court of Monongalia County on May 5, 2005, wherein by Order dated May 10, 2005, the Court granted the State's motion for transfer and ordered that the juvenile be transferred to the adult criminal jurisdiction of the Circuit Court of Monongalia County. Record at Envelope V, Juvenile file, 05-JD-8, H.T., 5/5/05, p. 74. This hearing was originally scheduled for March 11, 2005, but was continued as to allow the juvenile and his counsel to obtain additional information for the preparation of said transfer hearing. Record at Envelope V, Juvenile file, 05-JD-8, H.T., 5/5/2005, pp. 3-4.

During the May 2005 term of the Monongalia County Grand Jury, the defendant was named in a four-count indictment asserting robbery in the first degree, pursuant to West Virginia Code § 61-2-12(a), conspiracy to commit first degree robbery, pursuant to West Virginia Code § 61-10-31, malicious assault, pursuant to West Virginia Code § 61-2-9(a), and conspiracy to commit malicious assault, pursuant to West Virginia Code § 61-10-31. Record at 1.

On June 17, 2005, the defendant filed a Motion to Dismiss Counts Two, Three, and Four of the Indictment. Record at p. 14. A hearing was held on June 27, 2005, on defendant's motion and the trial court in its Order entered on September 9, 2005, asked the defendant to further brief the issue or inform the trial court on the motion. Record at Volume III and pgs. 27-28. Subsequently, the defendant filed a Memorandum in Support of Defendant's Motion to Dismiss Counts Two, Three, and Four of the Indictment, on October 7, 2005. Record at pgs. 40-50. On October 21, 2005, State's

Response to Defendant's Motion to Dismiss Counts Two, Three, and Four of the Indictment was filed. Record at pgs. 56-71. On October 24, 2005, the trial court held a denied the Defendant's Motion to Dismiss Counts Two, Three, and Four of the Indictment. H.T. 10/24/2005.

Trial was held before the Honorable Robert B. Stone, Circuit Court of Monongalia County, West Virginia, on November 1, 2, and 3, of 2005. On November 3, 2005, the jury reached its verdict and concluded that the defendant was guilty upon all counts contained in the indictment. T.T., Vol. VIII, pp. 97-100. On July 10, 2006, the defendant was sentenced to serve a term of two to ten years for the offense of malicious assault, to a term of one to five years for the offense of conspiracy to commit malicious assault, with the sentences for malicious assault and conspiracy to commit malicious assault to run concurrently with each other. The defendant was also sentenced to a term of forty-five years for the offense of robbery in the first degree, to run consecutive with the previous sentences of malicious assault and conspiracy to commit malicious assault, and to one to five years for the offense of conspiracy to commit robbery in the first degree, with the sentence for conspiracy to commit robbery in the first degree to run concurrent with the sentence of first degree robbery. H.T., Vol. X, Record at 314-317. Said Order was entered by the Honorable Robert B. Stone and filed with the Circuit Clerk of Monongalia County on July 12, 2006. Record at 314-317.

A Notice of Intent to file this Petition for Appeal was timely filed by the defendant on December 1, 2005. Record at 289. By Order dated November 2, 2006, the

trial court granted the defendant's motion for extension of two months for the filing of the Petition for Appeal, thereby making the Petition due January 11, 2007. Record at 322. The Petition is timely filed pursuant to Rule 45 of the West Virginia Rules of Criminal Procedure.

II.

STATEMENT OF THE CASE

In the early morning hours of February 12, 2005, at approximately 1:08 a.m., the Morgantown Police were dispatched to the intersection of Forest Avenue and Dallas Street after they had received calls from 911, which were placed by Kenneth Kiser and Carolyn Humston, that a man, who was later identified as Earnest Serenella, had been severely beaten. T.T., Vol. VI, pp. 151, 186. Sometime after midnight on February 12, 2005, Kenneth Kiser had arrived at his home which was located at 455 Dallas Street, in Monongalia County, West Virginia, after he had left a local bar. T.T., Vol. VI, pp. 117-119. While Mr. Kiser, who admitted to being somewhat intoxicated, was standing on his porch at 455 Dallas Street, he observed four people walking down Forest Avenue. T.T., Vol. VI, pp. 121, 138. One of the four men, Ernest Serenella, was pushed down to the ground, though Mr. Kiser was uncertain as to how Mr. Serenella was pushed to the ground or which one of the three men did the pushing. T.T., Vol., VI, p. 155.

During the brief five seconds which Mr. Kiser witnessed, he alleged that three men began kicking and stomping the man on the ground. T.T., Vol. VI, pp. 123, 141. Given the darkness and the distance Mr. Kiser was away from the incident, he was

unable to make out the heights of or the clothing worn by the individuals involved. T.T., Vol. VI, p. 127. Mr. Kiser alerted an individual who was staying in his home (by the name of Carolyn Humston), to the situation outside and asked her to call 911. T.T., Vol. VI, p. 128. Those individuals who had participated in the beating of Mr. Serenella, according to Mr. Kiser, looked through his pockets and then they began to leave the scene. During prior testimony, Mr. Kiser did not know if was in fact three individuals who went through Mr. Serenella's pockets immediately after the incident. T.T., Vol., VI, p. 143-144, Record at Envelope V, Juvenile file, 05-JD-8, H.T., 5/5/05, p. 41. After the attack, two of the individuals came back to where Mr. Serenella was laying and again went through his pockets and belongings, while a third individual stood away from the scene. T.T., Vol. VI, p. 129.

When the officers from the Morgantown Police Department arrived on the scene, officers were able to follow tracks left by the suspects, as a recent snowfall made their footprints visible. T.T., Vol. VII, p. 41. The police followed the footprints to the residence of Matthew Reynolds, located at 829 Richwood Avenue. T.T., Vol. VI, p. 204. Mr. Reynolds stated that three individuals, Caleb Wiley, Mike Smith, and the defendant, James Brooks, came into his home in the early morning hours of February 12, 2004. T.T., Vol. VI, p. 211. While at Mr. Reynolds home, Mike Smith discussed the fact that Mr. Serenella had been beaten; "we messed somebody up real bad" and "there was a lot of blood." T.T., Vol. VI, pp. 217-218. Additionally, Caleb Wiley made a statement to Mr. Reynolds that they had "really F'ed that guy up." T.T., Vol. VI, p. 218.

According to Mr. Reynolds, "they told me that not to tell anybody that he was there and that I didn't see them" T.T., Vol. VI, p. 211. Additionally, Mr. Reynolds quoted the defendant as saying "we didn't even get anything." T.T., Vol. VI, p. 218. However, in the handwritten statement which Mr. Reynolds gave to police, he did not attribute these words to the defendant. T.T., Vol. VII, p. 22. Subsequently, the three left Mr. Reynolds' home. At approximately 2:06 a.m., the defendant, along with Caleb Wiley, was arrested by the Morgantown Police Department. H.T. 6/27/2005, Vol. III, p. 8. Mr. Smith was apprehended later that same morning. T.T., Vol. VII, p. 49.

The defendant, who was seventeen years old at the time, was placed under arrest and subsequently mirandized by Detective Mezzanotte of the Morgantown Police Department at approximately 3:00 a.m., without first being taken before a circuit court judge for a detention hearing. H.T. 6/27/2005, Vol. III, p. 11. Subsequently, the defendant gave a statement to Detective Mezzanotte which set forth the events of that evening and the defendant's involvement in the alleged crime. According to the defendant, Mr. Smith and Mr. Wiley had attacked Mr. Serenella and subsequently looked through his pockets to see if he had any valuables. The defendant did not participate in the attack upon Mr. Serenella, and only tried to intervene to prevent Mr. Wiley from continuing the attack on Mr. Serenella, which may have involved the defendant inadvertently touching a part of Mr. Serenella's body in an attempt to stop Mr. Wiley's attack. This evidence is only found in discovery. Record at Envelope V, Juvenile file, 05-JD-8. This action, on the part of the defendant, may have been observed

by Mr. Kiser, when he testified that there were three individuals who participated in the attack. T.T., Vol. VI, p. 125. The defendant along with the two other individuals then began to leave the scene of the incident. Mr. Smith and Mr. Wiley then returned to where Mr. Serenella was lying and began to check Mr. Serenella's pockets. The other witness to the incident, Ms. Humston, who was with Mr. Kiser, stated that she only saw two individuals, who were similar in height standing over Mr. Serenella. T.T., Vol. VI, pp. 187, 196

None of the eye witnesses were able to positively identify any the three people who participated in the attack upon Mr. Serenella, even though Mr. Kiser indicated the area was well lit with a street light in close proximity to the area where the incident took place. T.T., Vol. VI, pp. 124-125. Both of the witnesses, i.e. Mr. Kiser and Ms. Humston, were unable to specifically testify to any defining characteristics of the individuals involved in the attack. The clothing which the individuals were wearing could not be identified by the witnesses, except for a black jacket with white stripes, which belonged to Caleb Wiley. T.T., Vol. VI, p. 187, Vol. VII, p. 69. Though the defendant was wearing a sweatshirt with white stripes along the bottom, Ms. Humston did not recall seeing them that evening. T.T., Vol. VI, p. 201 Vol. VII, p. 124. Additionally, Ms. Humston testified that she did not see the baseball hat with the white New York Yankees emblem which the defendant wore or the white emblem which the defendant had on the front of his sweatshirt that night. T.T., Vol. VI, p. 201, 202, Vol. VII, p. 125.

Additionally, the witnesses were unable to discern the heights of the individuals, Ms. Humston was only able to say that the two individuals who she saw standing over Mr. Serenella were similar in height. T.T., Vol. VI, p. 196. Ms. Humston, in her written, statement described the two individuals who she observed as being around 5'7" to 5'9" in height. T.T., Vol. VI, p. 198-199. The defendant is approximately 6'4", and the two co-defendants, Wiley and Smith, are approximately 6'0" and 5'9" in height, though the Miranda sheets for Wiley and Smith list their heights as 6'1" and 5'7" respectively. T.T., Vol. VII, pp. 101, 103, 130. Further, Mr. Kiser, in testimony given at the transfer hearing, was unable to recognize the defendant as he sat at counsel table. Record at Envelope V, Juvenile file, 05-JD-8, H.T. 5/5/2005, p. 17.

Additionally, those clothes and shoes which were taken from the three individuals, the defendant, Mike Smith, and Caleb Wiley, were analyzed by the West Virginia State Police Forensic Laboratory, and the results showed that there was no biological evidence, i.e. blood, on the defendant's clothes which would indicate that he participated in the beating. There was no blood on the defendant's shoes, which would have been reasonable to find, if in fact he had participated in kicking and stomping Mr. Serenella. Of the other two individuals involved, Mr. Wiley did have blood on his clothing which matched Mr. Serenella. T.T., Vol. VII, p. 176. Mr. Reynolds testified at trial that he observed red spots on the defendant's shoes, but the evaluation from the crime lab indicated that there was no blood found on the defendant's shoes. T.T., Vol. VII, p. 143.

III.

ASSIGNMENT OF ERROR

The Defendant assigns as error the following:

1. The Trial Court erred in denying the Defendant's Motion to Dismiss Counts Two, Three, and Four of the Indictment. The defendant asserted twelve (12) assignments of error in his Petition for Appeal filed on January 11, 2007. The Supreme Court of Appeals in its Order entered on October 24, 2007, granted the defendant's Petition for Appeal with regard to Assignment of Error No. 1 only.

IV.

ARGUMENT

1. Trial Court's Refusal to Dismiss Counts Two (2), Three (3), and Four (4) of the Indictment

On June 17, 2005, the defendant filed a Motion to Dismiss Counts Two, Three, and Four of the Indictment filed against the defendant, which was heard at a pre-trial motions hearing. Vol. III., H. T., 6/27/2005. The basis for the Motion was that the May 10, 2005, Order Transferring Juvenile to Adult Jurisdiction only transferred Mr. Brooks with respect to first-degree robbery. Record at Envelope V, Juvenile file, 05-JD-8. At the transfer hearing held on May 5, 2005, the State presented testimony from Mr. Kiser and Detective Mezzanotte. Record at Envelope V, Juvenile file, 05-JD-8, H.T. 5/5/2005. As a result of said testimony, the lower court transferred the juvenile to adult criminal jurisdiction. Record at Envelope V, Juvenile file, 05-JD-8, H.T., 5/5/2005, p. 74.

Subsequently, when the true bill was returned against the defendant on May 13, 2005, by the Monongalia County Grand Jury, the defendant was indicted for not only Count 1, involving robbery in the first-degree (for which he was transferred to adult criminal jurisdiction), but also: Count 2, involving conspiracy; Count 3, involving malicious assault; and Count 4, involving conspiracy. Record at p. 1.

The defendant asserts that W.Va. Code § 49-5-10, requires the State to file a motion which states with particularity the grounds requested for transfer. The Motion to Transfer to Adult Jurisdiction, filed by the State, only made reference to the charge of first-degree robbery. Record at 05-JD-8, Envelope V. W.Va. Code § 49-5-10(a) states:

[a]ny motion filed in accordance with this section is to state, with particularity, the grounds for the requested transfer, including the grounds relied upon as set forth subsection (d), (e), (f), or (g) of this section, and the burden is upon the state to establish the grounds by clear and convincing evidence.

The additional charges contained in the Indictment filed against the defendant contain different elements than the charge of first-degree robbery upon which the defendant was originally transferred. Given that the defendant has a due process right to present evidence on his own behalf at such transfer hearing, the defendant was deprived of his due process rights, as he was denied the opportunity to be heard by presenting witnesses and evidence and to confront and cross-examine adverse witnesses, with respect to the additional three charges. By analogy, in The Matter of Stephfon W., 191 W. Va. 20, 442 S.E.2d 717 (1994), the West Virginia Supreme Court of Appeals reversed a Circuit Court where it had made a transfer to adult jurisdiction

based upon evidence presented at a preliminary hearing, as opposed to having a transfer hearing. The Supreme Court made it clear that an independent determination must occur with respect to the charge upon which the juvenile is being transferred. While in the case at bar, the State has not relied solely on evidence from a preliminary hearing, the State nevertheless relied on evidence at a transfer hearing related to first-degree robbery, in order to indict the defendant and charge him with the three other adult crimes under Counts two through four. Arguably, if the State is precluded from utilizing evidence solely from a preliminary hearing to suffice as the necessary proof of probable cause at a transfer hearing, the State should similarly be precluded from solely relying on evidence at a transfer hearing for one charge to suffice as a probable cause basis for three other charges. In Stephfon, the Supreme Court required a transfer hearing. In the present case, due process similarly requires a transfer hearing on the extra charges. The defendant's trial, on Counts two through four, was a violation of his due process rights and protections under Chapter 49, Article 5, of the West Virginia Code.

The juvenile was transferred pursuant to W.Va. Code § 49-5-10(d) and W.Va. Code § 49-5-10(d)(2), provides as follows:

The court shall transfer a juvenile proceeding to criminal jurisdiction if there is probable cause to believe that:

(2) The juvenile is at least fourteen years of age and has committed an offense of violence to the person which would be a felony if the juvenile was an adult: Provided, That the juvenile has been previously adjudged delinquent for the commission of an offense of violence to the person which would be a felony if the juvenile was an adult.

The crime of malicious assault, like the crime of robbery in the first degree, is an offense of violence to the person, as set forth in W.Va. Code § 49-5-10(d)(2) and has different elements from those of robbery in the first degree. Given that malicious assault is a basis for a juvenile to be transferred to adult criminal jurisdiction, the State should have moved to transfer the juvenile on this charge as well, which in turn would require the trial court to make a finding that probable cause existed that the juvenile committed the crime of malicious assault. Certainly, the State, at the time it made its motion to transfer the juvenile to adult status, possessed information, gathered through the State's criminal investigation, regarding malicious assault. As the State was already in possession of the information as it related to the incident, the State should have moved to transfer the juvenile on all charges for which the State intended to charge the juvenile as an adult.

Further, with respect to transfer hearings, this Court has held that "when a statute is interpreted according to the well-established principle that transfer should be the exception and not the rule, ambiguous language should be construed against transfer." State v. D. D., 172 W. Va. 791, 798, 310 S.E.2d 858, 862 (1983). The defendant maintains that the statute does not permit the State to indict on matters for which the defendant has not been transferred. The transfer statute should be construed "against the government and in favor of the individual." Id. However, to the extent that the State has maintained that the statute does permit transfer, the statute should be interpreted in favor of the defendant by precluding transfer on the three extra counts.

As it does not appear that this Court has addressed this specific issue previously, it is necessary to look at other jurisdictions for guidance with respect to this issue of transfer. In 2000, the Tennessee Supreme Court took up a specific issue with respect to whether a circuit court has jurisdiction over criminal charges which were not addressed at a juvenile's transfer hearing. State v. Darden, 12 S.W.3d 455 (Tenn. 2000). At Darden's transfer hearing, the juvenile court found reasonable grounds that the defendant had committed the act of first-degree murder, and Darden was transferred to be tried as an adult. After the transfer, the grand jury indicted him on two counts of first-degree murder and felony murder, as well as civil rights intimidation and attempted aggravated kidnapping charges. Darden filed a motion to dismiss the extra counts, arguing that the circuit court lacked jurisdiction. The Supreme Court of Tennessee found that the circuit court had jurisdiction over the extra counts. However, this holding is not applicable to the case at bar, because Tennessee has a statute which terminates the juvenile jurisdiction "with respect to any and all delinquent acts with which the child may then or thereafter be charged, and the child shall thereafter be dealt with as an adult as to all pending and subsequent criminal charges" after a transfer. Tenn. Code Ann. § 37-1-134(c) (cited in Darden, 12 S.W.3d at 458). Pursuant to statute, criminal courts in Tennessee retain jurisdiction over the juvenile regarding all subsequent charges, and the juvenile has adult status for any and all subsequent proceedings. No such language can be found with respect to West Virginia's Chapter 49, Article 5.

Specifically, W.Va. Code § 49-5-2 sets forth the following:

If a juvenile commits an act which would be a crime if committed by an adult, and the juvenile is adjudicated delinquent for that act, the jurisdiction of the court which adjudged the juvenile delinquent continues until the juvenile becomes twenty-one years of age. The court has the same power over that person that it had before he or she became an adult, and has the further power to sentence that person to a term of incarceration: Provided, That any such term of incarceration may not exceed six months. This authority does not preclude the court from exercising criminal jurisdiction over that person if he or she violates the law after becoming an adult or if the proceedings have been transferred to the court's criminal jurisdiction pursuant to section ten of this article.

This Code section permits continuing jurisdiction over a juvenile even after the juvenile becomes an adult, through age 21. Further, the authority that a court has over an adult, who has been adjudicated, does not preclude the court from "exercising criminal jurisdiction" over the adult if the adult violates the law "after" becoming an adult or "after" having been transferred to adult status. Clearly, the present defendant committed no crimes after being transferred to adult status, as he had been remanded to a juvenile facility and kept there since his arrest for this robbery.

Like the court in Darden, Rhode Island in State v. Day, when faced with this question as a matter of first impression, determined that its statute regarding juvenile transfer, as well as the legislative intent behind the statute, allowed a juvenile to be charged with offenses different from, or in addition to, those upon which the waiver of jurisdiction was originally based, such that the new charges arise from the same nucleus of operative facts. State v. Day, 911 A.2d 1042 (R.I. 2006).

In Day, the defendant, a juvenile, was waived to adult criminal jurisdiction when

the Family Court granted the Attorney General's motion alleging that the juvenile had committed the acts of (1) breaking and entering, (2) second-degree robbery, (3) kidnapping, and (4) assault with intent to commit robbery and kidnapping. Id. at 1044. The juvenile was then indicted by a grand jury for (1) burglary, (2) first-degree robbery, (3) felony assault, (4) kidnapping, and (5) larceny of goods valued greater than \$500. Id. The defendant moved to dismiss the indictment asserting that probable cause was only found on the four charges of (1) breaking and entering, (2) second-degree robbery, (3) kidnapping, and (4) assault with intent to commit robbery and kidnapping. Id. The court in Day, like this Court was presented with an issue of first impression to determine whether its juvenile transfer statute required that after a waiver has been granted, do the charges presented to the court of adult criminal jurisdiction have to be aligned with the charges on which the transfer was ordered. Id. at 1045.

Section 14-1-7.1(c) of the Rhode Island State specifically states a follows:

A waiver of jurisdiction over a child pursuant to this section shall constitute a waiver of jurisdiction over that child for the offense upon which the motion is based as well as for all pending and subsequent offenses of whatever nature, and the child shall be referred to the court which would have had jurisdiction if the offense had been committed by an adult.

The state in Day, argued that the language of RI § 14-1-7.1(c) "clearly indicates that a prosecutor is free to charge a child as an adult in the Superior Court with any and all crimes arising from the conduct that formed the basis of the waiver." Id. at 1047. The Day court found that once a determination is made that a juvenile should be waived to

adult jurisdiction, "there is no limitation to the charges that may be lodged against the child in the adult court, as long as those charges spring from the nucleus of operative facts upon which the Family Court waiver of jurisdiction was based." *Id.* at 1054.

Conversely, in Gibson v. State, the Supreme Court of Wisconsin held that a "juvenile court can only waive its jurisdiction with respect to charges of delinquency that are actually before it." Gibson v. State, 177 N.W.2d 912, 915 (Wis. 1970). In Gibson, a juvenile was charged with armed robbery in Waukesha county and robbery in Milwaukee county, to which the defendant pled guilty to both charges. *Id.* at 913. The Milwaukee county court entered an order waiving jurisdiction of the defendant; Waukesha county did not enter an order waiving jurisdiction over the defendant, the proceeding in criminal jurisdiction took place in Waukesha county on both charges. *Id.* at 914. The court remanded the matter to "Waukesha county for a hearing to determine the scope and extent of the juvenile court waiver of jurisdiction by the Milwaukee county Children's Court." *Id.* 915. The court provided that should the court determine that juvenile court jurisdiction was not properly waived as to either count, "both judgments of conviction are to be waived." *Id.* at 916. The defendant in the case at hand is requesting the this Court adopt the position of the court in Gibson and require that the juvenile court first must waive jurisdiction of the charges for which he was indicted, prior to the adult criminal court having jurisdiction over those additional charges.

Some jurisdictions have held that a court of adult criminal jurisdiction retains jurisdiction over only lesser-included offenses of the charge for which transfer was

made. In Blythe v. State, juvenile was transferred to adult jurisdiction on the charge of felony-murder, and subsequently entered a plea of guilty to second degree murder. Blythe v. State, 373 N.E.2d 1098, 1099 (Ind. 1978). The defendant appealed on the grounds that the trial judge lacked subject matter jurisdiction to accept the guilty plea and sentence him. Id. 373 N.E.2d 1099 The court in Blythe determined that the trial judge had no jurisdiction to try the defendant upon the charge of second degree murder and the case should have been required to be remanded to the juvenile court for a waiver determination. Id. 373 N.E.2d 1100. The court went on further to state that it would appear "that a court should have jurisdiction to impose sentence upon a verdict of guilt, as to any necessarily lesser included offenses or any lesser degree of the offense for which a defendant was lawfully charged and tried." Id. In Blythe, the court held that second degree murder is not a lesser included offense of felony murder and the court set aside judgment for want of jurisdiction." Id. 373 N.E.2d 1100.

An analogy can be made between the case at hand and Blythe, as in Blythe the court determined that a court of adult criminal jurisdiction could maintain jurisdiction over a juvenile who was not transferred on a charge which was not a lesser-included offense of the charge for which jurisdiction was waived. In the case at hand, the defendant was indicted on three additional charges which are not lesser-included charges of the charge in the juvenile petition for which probable cause was found, that being robbery in the first degree.

The defendant does recognize that other jurisdictions have held adversely,

allowing courts to try related lesser crimes and additional criminal charges arising out of the same set of facts, which were not first brought in. State v. Randolph, 876 P.2d 177 (Kan. 1994), Rocha v. State, 506 S.E.2d 192 (Ga. 1999). In Rocha, the defendant was transferred as the result of delinquency petitions for five counts of aggravated assault. Rocha v. State, 506 S.E.2d at 194. The defendant was then indicted on five counts of aggravated assault, two counts of possession of a firearm during the commission of a felony, and one count of giving a false name to a law enforcement officer. Id. The Court of Appeals of Georgia reiterated a previous holding by stating that "jurisdiction of the superior court over capital felonies committed by juveniles must necessarily extend to related lesser crimes which are part of the same criminal transaction." Id. at 195. The court in Rocha, provides that the basis of its determination is that "to rule otherwise would be to bisect criminal conduct artificially and require the state to follow two procedures with no substantive meaning other than to satisfy procedural requirements." Id. The defendant in the case at hand is not seeking to frustrate the judicial process, simply the defendant is seeking to require that the prosecuting attorney be required to petition for the transfer of a juvenile to adult criminal jurisdiction on the charges for which the state will be indicting, should probable cause be found.

In State v. Randolph, the defendant was transferred to adult criminal jurisdiction on one count of attempted aggravated assault, later the defendant was indicted on two additional charges, aggravated battery and attempted aggravated robbery. State v.

Randolph, 876 P.2d at 179. The Court of Appeals of Kansas determined that the State did not have to return the juvenile and seek a waiver of jurisdiction on the additional charges. Id. at 181. In reaching its determination, the court specifically stated that Kansas law "does not require a strict policy of bringing every charge before the juvenile court for its approval." Id. at 180. W.Va. Code § 49-5-10(a), is distinguishable from Kansas law, as in West Virginia, the legislature specifically provided that the State, in its motion to transfer to adult criminal jurisdiction, "is to state, with particularity, grounds for the requested transfer, including the grounds relied upon as set forth in subsection (d), (e), (f), or (g)." W.Va. Code § 49-5-10(a). Therefore, pursuant to our statute, if the State has grounds for transfer on any other charges, those additional charges must be included in the State's petition to transfer.

Further, the defendant recognizes that the Day, in citing State v. Walton, determined that it was sound logic not to require a strict policy of bring every charge before the juvenile court for approval, in that a juvenile court makes a judicial decision regarding its jurisdiction; the juvenile court does not determine what charges the state can file. Day, 911 A.2d at 1053, citing State v. Walton, 600 N.W.2d at 533 (S.D. 1999). Further, the Day court provides that "the great majority of courts faced with this question have held that prosecutors may charge a child who is waived from juvenile court jurisdiction with any crime that arises from the conduct for which the waiver was sought." Id. at 1051. The fact remains that this question has not been addressed by the State of West Virginia and its statute regarding juvenile transfer does not allow for

additional charges to brought in a indictment against a juvenile subsequent to transfer to adult status.

The West Virginia Legislature has not authorized, by statute, the actions of the trial court. In addition to the Tennessee Legislature specifically setting forth such language in Tenn. Code Ann. § 37-1-134, other states have unambiguous statutory language which allows for the assertion of adult criminal jurisdiction over additional crimes arising out of the same act. For instance, Kentucky provides in KRS § 635.020, titled Criteria for determining how a child is to be tried, specifically § 635.020(8) states: "[a]ll offenses arising out of the same course of conduct shall be tried with the felony arising from that course of conduct" If it were the intent of the West Virginia Legislature to allow the trial court to assert jurisdiction over other offenses arising out of the same factual circumstances for which the defendant had been transferred from juvenile to adult criminal jurisdiction, our Legislature would have specifically provided the language necessary. Given that our Legislature has failed to include the necessary language allowing the circuit court to have jurisdiction over additional offenses arising out of the same factual circumstances, this Court must determine that the Legislature's intention was to prohibit the circuit court actions in the case at hand.

V.

CONCLUSION

The assignment of error was also raised as an issue in the Motion for New Trial, which was denied by the court, and the defendant asserts that this denial

and the denial of the Defendant's Motion to Dismiss Counts Two, Three, and Four of the Indictment amounts to error. The statute regarding transfer of a juvenile to adult criminal jurisdiction in the State of West Virginia is void of any language which would allow the defendant to be transferred to adult criminal jurisdiction on one charge and allow the State to indict on three additional charges for which transfer was not requested. The trial court cannot retain adult criminal jurisdiction on subsequent criminal charges filed against the defendant arising out of the same facts, when the State, which should have moved the defendant's transfer to adult criminal jurisdiction on all charged for which the defendant was indicted failed to do so.

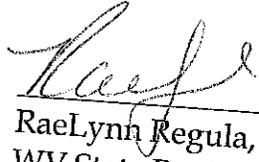
VI.

PRAYER FOR RELIEF

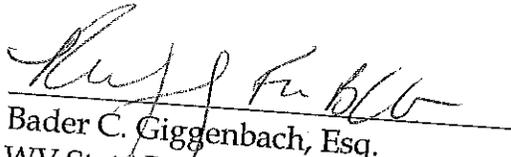
WHEREFORE, for these and other errors which are apparent upon a fair reading of the transcript and the record and for cumulative errors, your Appellant, James Lee Brooks, respectfully prays that the Honorable Justices of the Supreme Court of Appeals of West Virginia reverse the trial court determination that it maintained adult criminal jurisdiction over the defendant for those charges which the defendant was not properly transferred and as a result of the trial court's error, vacate the defendant's conviction for those crimes for which he was not properly transferred or for any other relief that the Honorable Justices deem appropriate.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within APPELLANT'S BRIEF, via hand delivery, on the 17th day of December, 2007, upon the following named counsel:

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