

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MELVIN MESSER,

Appellant,

v.

Supreme Court No. _____
Circuit Court No. 06-F-76 (Mingo)

STATE OF WEST VIRGINIA,

Appellee.

PETITION FOR APPEAL

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OF WEST VIRGINIA

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APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PROCEEDINGS AND RULINGS BELOW 1

STATEMENT OF FACTS 3

ASSIGNMENTS OF ERROR 5

DISCUSSION OF LAW 7

RELIEF REQUESTED 29

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

CASES:

<u>Brady v. Maryland</u> , 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963)	18
<u>Mooney v. Holohan</u> , 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935)	18
<u>Napue v. Illinois</u> , 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)	18
<u>State ex rel. Pinson v. Maynard</u> , 181 W.Va. 662, 383 S.E.2d 844 (1989)	19, 20
<u>State v. Beard</u> , 203 W.Va. 305, 507 S.E.2d 688 (1998)	20
<u>State v. Cook</u> , 204 W.Va. 591, 515 S.E.2d 127 (1999)	13, 26
<u>State v. Critzer</u> , 167 W.Va. 655, 280 S.E.2d 288 (1981)	7
<u>State v. Goff</u> , 169 W.Va. 778, 784, 289 S.E.2d 473 (1982)	27
<u>State v. Guthrie</u> , 194 W.Va. 657, 461 S.E.2d 163 (1995)	25
<u>State v. Hottinger</u> , 194 W.Va. 716, 461 S.E.2d 462 (1995)	7
<u>State v. Kirtley</u> , 162 W.Va. 249, 252 S.E.2d 574 (1978)	13, 26
<u>State v. Mills</u> , 219 W.Va. 28, 631 S.E.2d 586 (2005)	15
<u>State v. Moose</u> , 110 W.Va. 476, 158 S.E. 715 (1931)	7
<u>State v. Moss</u> , 180 W.Va. at 368, 376 S.E.2d at 574)	15
<u>State v. Randolph</u> , 179 W.Va. 546, 548, 370 S.E.2d 741, 743 (1988)	27
<u>State v. Sugg</u> , 193 W.Va 388, 456 S.E.2d 469 (1995)	9, 12, 14, 15, 16
<u>Thompson v. Calderon</u> , 120 F.3d 1045 (9 th Cir., <i>en banc</i> , 1997) (<i>overruled on other grounds</i>)	17, 18
<u>U.S. v. Lawson</u> , 502 F.Supp. 158 (D.Md. 1980)	19, 20
<u>U.S. v. Wilson</u> , 135 F.3d 291 (4 th Cir., 1998)	15, 16

CONSTITUTIONAL PROVISIONS:

Article III, §10 of the *Constitution of West Virginia* 5, 6, 7, 17, 19, 27, 28, 29
V Amendment to the *Constitution of the United States* 5, 6, 7, 17, 19, 27, 28, 29
Article III, §5 of the *Constitution of West Virginia* 5, 27

RULES:

Rule 42.04(b) of the West Virginia Trial Court Rules 7, 16
Rule 3.3 of the Rules of Professional Conduct 7, 16

STATUTES:

West Virginia Code §61-2-1 1, 3, 4

PROCEEDINGS AND RULINGS BELOW

The petitioner, Melvin Messer, was convicted on January 11, 2007, in the Circuit Court of Mingo County, West Virginia, of two (2) counts of "Murder in the First Degree" in violation of West Virginia Code §61-2-1 for the alleged "willful, deliberate and premeditated" killing of Christopher Chapman and Walter Gauze. West Virginia Code §61-2-1.

The petitioner filed various pretrial and post-trial motions regarding the charges against him. Specifically, the petitioner filed a Motion to Dismiss and a Motion to Suppress which were denied by the Court by Order entered on December 6, 2006. *See*, Defendant's Motion to Dismiss and Motion to Suppress; *see*, Court's Order Denying Defendant's Motion to Dismiss Indictment and Denying Defendant's *Ore Tenus* Motion to Suppress Statement; *see also*, TR Vol. 2, pp. 11-46, generally).

At the close of evidence, the defendant moved the Court for judgment of acquittal, said motion being denied. TR Vol. 3, pp. 203-206.

Then, the defendant proceeded to present his defense.

Upon submission of the case to the jury, the defendant again moved the Court for judgment of acquittal, said motion being denied. TR Vol. 4, pp. 15-19.

The jury deliberated and returned a verdict of guilty of two (2) counts of Murder in the First Degree with a recommendation of Mercy. *See*, Jury Trial Order entered January 19, 2007; TR Vol. 4, pp. 119-128.

On January 30, 2007, the defendant moved the Court for a new trial in accordance with Rule 33 of the West Virginia Rules of Criminal Procedure, said Motion being denied.

On February 20, 2007, the defendant moved the Court to amend the record in the matter

to add the grand jury transcript of Tommy Banig for the purpose of appellate argument.

Although the transcript has not been added to the record, the relevant portions were read into the record during this argument. TR Vol. 4, pp. 131-155.

Additionally, on February 20, 2007, the defendant was sentenced by the Circuit Court of Mingo County, West Virginia, to two (2) consecutive life sentences, with mercy. See, Sentencing Order entered February 23, 2007.

STATEMENT OF FACTS

The Petitioner, Melvin Messer, was convicted on January 11, 2007, in the Circuit Court of Mingo County, West Virginia, of Murder in the First Degree, with a recommendation of mercy, in violation of West Virginia Code §61-2-1.

The conviction arose from the shooting deaths of Christopher Chapman and Walter Gauze on April 3, 2006.

The defendant contended that the shootings resulted from self-defense or the defense of others.

In pretrial proceedings, the State acknowledged that there appeared to be mitigating circumstances and or possible justification for the shootings.

At trial, the State presented the following evidence:

1. The statement of the defendant.
2. The testimony of Robert Brewer and Angela Dawn Spence who testified that the day prior to the shooting the defendant and Tommy Banig were at their house attempting to sell the gun that ultimately was used in the killings.
3. A girl friend of one of the victim's who testified that the decedents entered the house before her and that while they went down the hall to a bedroom, she sat on the couch with some other persons and could not see down the hallway.
4. The testimony of medical examiner who testified to the cause and manner of death.
5. A forensic scientist who testified that the bullets retrieved from the victims were fired from the gun acknowledged by the defendant to have fired the shots.

At trial, the defendant presented several witnesses who testified that they knew Walter

Gauze to have a reputation for violence in the community; though all seemed to indicate that they personally had not had any trouble with Mr. Gauze.

On January 11, 2007, following a jury trial, the defendant, Melvin Randall Messer, was convicted of two (2) counts of Murder in the First Degree, with mercy, in violation of West Virginia Code §61-2-1.

ASSIGNMENTS OF ERROR

- I. The defendant was denied Due Process protection, under Article 3 section 10 of the Constitution West Virginia and the Fifth Amendment of the Constitution of the United States, by the prosecuting attorney's repeated misstatement of facts not in evidence during his closing argument.
- II. The defendant was denied Due Process protection, under Article 3 section 10 of the Constitution West Virginia and the Fifth Amendment of the Constitution of the United States, by the inconsistent factual positions taken by the State of West Virginia in the defendant's prosecution and the indictment of Tommy Banig.
- III. The defendant was denied Due Process protection, under Article 3 section 10 of the Constitution West Virginia and the Fifth Amendment of the Constitution of the United States, by the State's failure to present exculpatory evidence to the grand jury.
- IV. The evidence presented does not support a conviction of first-degree murder.
- V. The Circuit Court erred in not suppressing the Defendant's statement as he was not informed of the magnitude of the crime and potential penalty prior to waiving his Miranda Rights in violation of Article 3 section 5 and Article 3 Section 10 of the Constitution West Virginia and the Fifth Amendment of the Constitution of the United States.

VI. The circuit court erred in requiring defendant's counsel to call off the names of prospective witnesses when trial strategy changes and the witnesses are not called; thus causing the jury to speculate on the reasoning for not calling the witnesses resulting in prejudice to the defendant and denial of Due Process protection, under Article 3 section 10 of the Constitution West Virginia and the Fifth Amendment of the Constitution of the United States.

DISCUSSION OF LAW

I. THE DEFENDANT WAS DENIED DUE PROCESS PROTECTION, UNDER ARTICLE 3 SECTION 10 OF THE CONSTITUTION OF WEST VIRGINIA AND THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BY THE PROSECUTING ATTORNEY'S REPEATED MISSTATEMENT OF FACTS NOT IN EVIDENCE DURING HIS CLOSING ARGUMENT.

In his closing argument, the prosecuting attorney continually repeated statements regarding facts that were not in evidence thus denying the defendant due process.

Article 3 section 10 of the Constitution of West Virginia provides, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Likewise, the Fifth Amendment of the Constitution of the United States provides that no person shall be "deprived of life, liberty, or property, without due process of law."

Additionally, Rule 42.04(b) of the West Virginia Trial Court Rules states, "Counsel may not comment upon any evidence ruled out, nor misquote the evidence, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled."

Also, Rule 3.3 of the Rules of Professional Conduct states that a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal."

Furthermore, this Honorable Court previously has held, "An attorney for the State may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deductible therefrom."

State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995)(Syl. Pt. 2)(*citing*, State v. Moose, 110 W.Va. 476, 158 S.E. 715 (1931)(State v. Critzer, 167 W.Va. 655, 280 S.E.2d 288 (1981)(Syl. Pt.

2)).

Additionally, this Court has set forth a test to determine whether a prosecuting attorney's comments prejudice a defendant. In State v. Sugg, this Honorable Court stated that:

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

State v. Sugg, 193 W.Va 388, 456 S.E.2d 469 (1995)(Syl. Pt. 6).

During the course of the defendant's trial, the State's lead investigator, Sergeant Randy Hatfield, read a statement given by the defendant to the jury. In his statement, the defendant stated the following:

About two or three months ago me and Tommy and Walter was involved in a burglary. After that me and Tommy went to Cleveland. I don't know where Walter went to. He called me up in Cleveland and threatened to kill me. Ever since I came back from Cleveland, he'd drive by the house real slow. They never stopped and did anything until tonight. ... The other night, I don't know who did the shooting, but the white van went by the house and 'Patch' was with them. They drove by and shot at the house. I guess the reason he was mad at me and Tommy was because he found out we were going to testify against him in court. Anyways, I was at Tommy's house tonight. I saw them pull up. I went back to use the bathroom. Tommy was in the bedroom, in bed with his wife. I told Tommy that Walter and 'Buck' was here. **Then I went and used the bathroom. When I came out of the bathroom, I heard them fighting in the hallway, ... so I didn't get to use the bathroom. I came out. They were fighting over the guns. 'Buck' had a pistol in his hand. Tommy had a .22 rifle. ... They were trying to take it away. While they were fighting the pistol was going off. I jumped in and started**

fighting with them. I ended up with the pistol. They were still trying to get the rifle. After I got the pistol, I shot him in the chest and then I shot him, 'Buck' again. ... Then I shot Walter. I'm not real sure where I shot him at. We left them laying there. We went and got the kids and everybody out of the house. When I came out of the house I saw Sonia and another girl outside. We all went over to Henry Brewer's house and called 911. I took the pistol over there. It had all kinds of blood and stuff on it so I wiped it off and put it on top of the T.V. We all just set there until the police came. Tommy had been shot in the leg so I helped take care of him until the police and ambulance showed up.

(TR Vol. 4, p. 51, ¶22 – p. 58, ¶3.) (Emphasis added).¹

Throughout the remainder of the trial, the defendant's statement was uncontroverted; the State called no witness to refute this testimony. Nonetheless, the prosecuting attorney argued to the jury that the defendant went into the bathroom with the weapon and came out shooting.

The prosecuting attorney's first misstatement was when he stated, "This was an ambush, folks. Messer comes out, simply starts shooting." (TR Vol. 4, p. 74 ¶¶18-19). Next, the prosecuting attorney tells the jury, "He said he went to the bathroom. Well, he said he didn't use the bathroom and he took a 45 high caliber High Point to" – "That he had that gun" – "Now, unless there was a wildcat back there, I typically don't take a High Point black 45 back to the bathroom to do my business." "[A]nd we know that Messer, the Defendant, had the pistol, the murder weapon." (TR Vol. 4, p. 81 ¶¶2-4; 17-19; 22 and TR Vol. 4, p. 82 ¶¶1-3; 10-12).²

The prosecuting attorney clearly misstated facts that were not in evidence. He indicated to the jury that the defendant went to the bathroom armed and came out shooting. The facts,

¹Ellipsis marks have been inserted to indicate omissions of questions from the Prosecuting Attorney of the witness during the reading of the statement.

² To all of which the defendant objected.

however, were contrary to the prosecuting attorney's argument. The facts were, as set forth in the defendant's statement, that the defendant went into the bathroom unarmed and came out to experience a confrontation between Tommy Banig, Chris Chapman and Walter Gauze, involving guns. The defendant joined in the fracas, ended up with the gun, and began shooting. This evidence was uncontroverted.

The only evidence that the prosecutor presented that may reasonably allow a jury to infer that the defendant even had a weapon on the date of the alleged crime was the testimony of Robert Brewer and Angela Dawn Spence. At the time of the alleged crime, Mr. Brewer and Ms. Spence were residing together on Marrowbone Creek, Mingo County, West Virginia, where Mr. Brewer buys and sells guns.

Mr. Brewer testified that the defendant and Tommy Banig came to his house together and attempted to sell him a black High Point .45 caliber pistol – the alleged murder weapon. (TR Vol. 3, p. 143, ¶¶16-18). However, on cross examination Mr. Brewer was unsure who he actually dealt with. (TR Vol. 3, p. 145, ¶¶1-21; p. 146, ¶¶1-12). Again, on redirect, the best that Mr. Brewer could do was to say that both men, the defendant and Tommy Banig, attempted to sell him a pistol. (TR Vol. 3, p. 148, ¶¶1-7).

Ms. Spence testified that a boy named Tommy [Banig] came to their house to try to sell a gun to Robert Brewer. (TR Vol. 3, p. 150, ¶¶15-23). Ms. Spence testified that "he" – Tommy – asked Robert to buy the gun. (TR Vol. 3, p. 151, ¶¶1-11).

Thus, the best the State could do was to put the alleged murder weapon in the hands of either the defendant or Tommy Banig a day prior to the shooting. There was no evidence presented by the State to put the gun into the defendant's hand on the day of the actual shooting,

save the defendant's own statement. And, in the defendant's statement, he did not admit to taking the gun into the bathroom; he admitted to opening the door, unarmed, to a fight involving guns in which he ended up with the gun and fired the fatal shots.

A. Test of Prejudice As Set Forth in State v. Sugg

Now, consider the prosecutors closing argument in relation to the test set forth in State v. Sugg, 193 W.Va 388, 456 S.E.2d 469 (1995)(Syl. Pt. 6).

1. The degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused.

The prosecutor's remarks clearly were wrong and clearly were prejudicial. He led the jury to believe that the defendant took the firearm into the bathroom with him. He led the jury to believe that the defendant came out of the bathroom shooting.

However, the uncontroverted evidence in the case was that the defendant came out unarmed but ended up with the gun and fired the fatal shots. Thus supporting the defendant's claim of self-defense and defense of others.

2. Whether the remarks were isolated or extensive.

The prosecuting attorney's remarks to the jury about the defendant being armed were extensive. The prosecuting attorney argued or suggested, not once; not twice; not thrice; but four times that the defendant went into the bathroom armed. (See, TR Vol. 4, p. 74 ¶¶18-19; p. 81 ¶¶2-4; 17-19; 22 and p. 82 ¶¶1-3; 10-12).

3. Absent the remarks, the strength of competent proof introduced to establish the guilt of the accused.

Absent the prosecuting attorney's remarks, the State presented little or no evidence from which a reasonable jury could even infer that this crime involved deliberation, intent, or malice.

The only evidence that any type of deliberation or intent existed came from the testimony of Robert Brewer and Angela Dawn Spence.

Mr. Brewer testified that the defendant and Tommy Banig indicated that they may have to use the firearm over the weekend. (TR Vol. 3, p. 144 ¶¶7-12). Additionally, Ms. Spence testified that the defendant and Tommy Banig indicated they were going to keep the gun over the weekend and bring it back to Mr. Brewer on Monday to sell. (TR Vol. 3, p. 151 ¶¶5-11).

However, having previously been threatened by the decedents, this evidence only tends to show that the defendant and Tommy Banig may expect trouble from someone. Additionally, once the defendant raised the defense of self-defense or defense of others, the State then must prove, beyond a reasonable doubt, that the defendant was not acting in self-defense. *See, State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 574 (1978)(Syl. Pt. 4); *See also, State v. Cook*, 204 W.Va. 591, 515 S.E.2d 127 (1999)(Syl. Pt. 3 and Syl. Pt. 4).

Furthermore, no inference of malice can be made by the defendant's use of a firearm if defendant was the victim of an unprovoked attack or if he acted in sudden heat of passion. *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 574 (1978)(Syl. Pt. 2).

In the case at hand, the defendant was at a residence wherein he was staying. The decedents came to the house, uninvited. When the defendant exited the bathroom, he witnessed a fight wherein a firearm was brandished. He joined in the fray, came up with the gun, and shot and killed the decedents.

Accordingly, as the defendant argued self-defense or defense of others, the prosecuting attorneys misstatements to the jury likely led the jury to believe that, as the prosecuting attorney said, the defendant was armed and that he preplanned these killings.

4. Whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

It clearly appears that the prosecuting attorney placed these matters before the jury to prove that the defendant evidenced deliberation, intent, and/or malice. The defendant's statement that he came out of the bathroom unarmed and jumped into the fracas was uncontroverted.

Additionally, the only evidence that the defendant had the gun prior to the shooting was the testimony of Robert Brewer and Angela Dawn Spence. This evidence was not overwhelming as it could have placed the gun in either the defendant's hands or Tommy Banig's hands. So, the only point that this evidence proved was that, the day prior to the shooting, either the defendant or Tommy Banig had the gun that ultimately killed the decedents.

The jury reasonably could have inferred that Mr. Banig had the High Point .45 and he, Mr. Banig, and the decedents began wrestling over the gun, as told by the defendant. However, by asserting that the defendant had this gun in his possession when he went into the bathroom, the prosecuting attorney was able to take this inference away from the defendant, thus leading the jury to believe that the defendant had the gun all the while even though there was no proof of this statement.

Further, the defendant believes that this was done deliberately as none of defense counsel's multiple objections curtailed the prosecutor's argument.

In State v. Sugg, 193 W.Va 388, 456 S.E.2d 469 (1995), this Court addressed the issue of misstatements by a prosecuting attorney. In Sugg, the prosecuting attorney, in his closing argument, argued that coins found on the defendant's person came from a cash register during a robbery. Sugg at 405, 486. The defense objected advising that there was no testimony to this

effect. The court advised the jury to remember the evidence and admonished that they could disregard the last observation by the prosecutor if there was no evidence of that point.

This Court held that “the comments in question were not so egregious and prejudicial ‘that manifest injustice resulted from the prosecutor’s remarks in so far as their cumulative effect denied the [defendant] his fundamental right to a fair trial and constituted plain error.’” Sugg at 405, 486 (*citing*, State v. Moss, 180 W.Va. at 368, 376 S.E.2d at 574).

However, in State v. Mills, 219 W.Va. 28, 631 S.E.2d 586 (2005), this Court found a prosecuting attorney’s remarks to be clearly in error where he equated mercy to the defendant’s not receiving the death penalty. Mills at 594. However, this Court went on to find that the remarks were not clearly prejudicial nor did the remarks result in a manifest injustice

Defendant cites U.S. v. Wilson, 135 F.3d 291 (4th Cir., 1998), a case from the Eastern District of North Carolina, to show how a prosecuting attorney’s remarks can be prejudicial. In Wilson, the learned Circuit Judge Blaine Michael, in vacating and remanding the conviction of William Talley, held that a prosecutor’s misleading remarks about an unproved murder during Mr. Talley’s drug distribution trial was improper. Judge Michael held that, during the prosecutor’s closing arguments, wherein he made continued references to a murder and attempted to link the defendant to the murder, “there was no basis from direct fact or reasonable inference for a murder argument.” U.S. v. Wilson, 135 F.3d 291, 298 (4th Cir., 1998).

After initially concluding that “the prosecutor’s murder argument was highly improper because it was not supported by the evidence and it was sprung at the last minute,” the Court then

applied its four-prong test to determine the prejudice.³

In concluding that the prosecutor's argument was prejudicial to the defendant the Court noted that there was "a serious risk that the jury decided to convict [the defendant] simply because it believed he was a murderer, not because it weighed the evidence for proof of drug conspiracy and possession, the crimes actually charged." Wilson at 300.

In the case at hand, the defendant set forth the defense of self-defense and the defense of others. The defendant's statement, which was uncontroverted, indicates that he went to the bathroom unarmed. He exits the bathroom, ends up with the gun, and shoots and kills the decedents. The only evidence that the defendant had the gun prior to the killings was the testimony of Robert Brewer and Angela Dawn Spence. The defendant believes that, as in Wilson, the jury likely convicted the defendant of First Degree Murder because the prosecuting attorney led them to believe that the defendant had the gun all along; rather than relying upon the evidence of record that he came up with the gun in the fight and shot the decedents in self-defense.

Accordingly, the prosecuting attorney's repeated misrepresentation of facts that were not in evidence denied the defendant of his due process rights as guaranteed under the Constitution of West Virginia and the Constitution of the United States. Furthermore, these misrepresentations were violative of Rule 3.3 of the Rules of Professional Conduct and Rule 42.04(b) of the West Virginia Trial Court Rules and these misrepresentations clearly satisfy the test as set forth in State v. Sugg, 193 W.Va 388, 456 S.E.2d 469 (1995)(Syl. Pt. 6).

³ The test applied by the Fourth Circuit in U.S. v. Wilson, 135 F.3d 291 (4th Cir., 1998), is analogous to the test set forth by this Court in State v. Sugg, 193 W.Va 388, 456 S.E.2d 469 (1995)(Syl. Pt. 6).

II. THE DEFENDANT WAS DENIED DUE PROCESS PROTECTION, UNDER ARTICLE 3 SECTION 10 OF THE CONSTITUTION WEST VIRGINIA AND THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BY THE INCONSISTENT FACTUAL POSITIONS TAKEN BY THE STATE OF WEST VIRGINIA IN THE DEFENDANT'S PROSECUTION AND THE INDICTMENT OF TOMMY BANIG

The prosecuting attorney took inconsistent factual positions in the prosecution of the defendant and the indictment of Tommy Banig which violate the defendant's due process rights.

Article 3 section 10 of the Constitution West Virginia provides, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Likewise, the Fifth Amendment to the Constitution of the United States provides that no person shall be "deprived of life, liberty, or property, without due process of law."

Additionally, in Thompson v. Calderon, 120 F.3d 1045 (9th Cir., *en banc*, 1997)(*overruled on other grounds*), the Ninth Circuit Court of Appeals, *en banc*, held that "prosecutor's pursuit of fundamentally inconsistent theories in separate trials of defendants charged with same murder violated due process." Thompson at 1045.

In Thompson, two individuals were charged with felony murder of a young lady. The murder was the result of the rape and subsequent killing of the young lady. This theory was formulated and pursued during the preliminary hearing, during pretrial motions, and again at the first defendant's trial. However, the prosecuting attorney abandoned this theory at the second defendant's trial and pursued an inconsistent theory.

In it's holding, the Ninth Circuit stated that a "prosecutor may not '[become] the architect of a proceeding that does not comport with the standards of justice.'" Thompson v. Calderon,

120 F.3d 1045, 1058 (*citing*, Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963)). The Court went on to state, "The prosecutor, therefore, violates the due process clause he knowingly presents false testimony-whether it goes to the merits of the case or solely to a witness's credibility." Thompson v. Calderon, 120 F.3d 1045, 1058 (*citing*, Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935)).

In the case at hand, the defendant was indicted for and convicted of the murders of Christopher Chapman and Walter Gauze. The prosecution argued that the defendant had the murder weapon, a High Point .45 caliber pistol, the day prior to the shooting. (*See generally*, TR Vol. 3, p. 143, ¶¶16-18; p. 145, ¶¶1-21; p. 146, ¶¶1-12; 148, ¶¶1-7; p. 150, ¶¶15-23; and p. 151, ¶¶1-11). The prosecution also argued that the defendant had the gun when he went into the bathroom. (*See, I., supra*).

However, in its presentment and indictment of Tommy Banig, the prosecution argued that Tommy Banig, not the defendant, was the one who possessed the High Point .45 caliber pistol on the day prior to the shootings. Specifically, counsel for the defendant argued this point in a post-trial proceeding. (*See generally*, TR Vol. 4, p. 132-154). In his argument, counsel noted the inconsistencies that he believed had taken place in the defendant's trial and the subsequent indictment of Tommy Banig (TR Vol. 4, p. 133, ¶¶3-24; p. 134, ¶¶1-4).

Ultimately, the Court reviewed the grand jury transcript of Tommy Banig and noted the following questioning of Sheriff Lonnie Hannah: "You said March 31, 2006, where did this transaction of the .22 rifle take place? It took place at Marrowbone Creek, Mingo County, West Virginia. And, to summarize, **Thomas Banig sold a .22 rifle to Robert Brewer? Yes, he did.**

And he had possession of the .45 automatic? He had possession of the .45 automatic High Point pistol.” (TR Vol. 4, p. 152, ¶¶ 12-18)(Emphasis added).

By arguing to the jury that the defendant had possession of the .45 caliber High Point pistol the day before the shooting, in order to prove deliberation, intent, and malice, and then turn around and indict Tommy Banig for being the person in possession of the .45 caliber High Point pistol the day before the shooting, the prosecuting attorney has violated the defendant's due process protections.

III. THE DEFENDANT WAS DENIED DUE PROCESS PROTECTION, UNDER ARTICLE 3 SECTION 10 OF THE CONSTITUTION WEST VIRGINIA AND THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BY THE STATE'S FAILURE TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY

The prosecuting attorney's failure to present exculpatory evidence to the Mingo County grand jury denied the defendant of his due process rights in violation of Article 3 section 10 of the Constitution West Virginia, and the Fifth Amendment of the Constitution of the United States.

Article 3 section 10 of the Constitution West Virginia provides, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Likewise, the Fifth Amendment of the Constitution of the United States provides that no person shall be "deprived of life, liberty, or property, without due process of law."

This Court's opinion in State ex rel. Pinson v. Maynard, 181 W.Va. 662, 383 S.E.2d 844 (1989), is insightful into the defendant's argument. In Pinson, this Court noted a Maryland District Court case for instruction. This Court noted that, in United States v. Lawson, 502 F.Supp. 158 (D.Md. 1980), "the Maryland District Court found the prosecutor's questioning of a

key witness was 'deliberately misleading and calculated to create a false impression on the grand jury,' and thus denied the defendants their constitutional right to an unbiased grand jury. The Lawson court ruled an indictment obtained in this manner must be dismissed." Pinson at 667, 849 (*citing*, Lawson at 163). The proposed remedy in Lawson was a possible re-indictment wherein the exculpatory evidence would be presented.

Additional guidance is found in State v. Beard, 203 W.Va. 305, 507 S.E.2d 688 (1998). Beard is the infamous case involving the Rainbow Murders in Pocahontas County, West Virginia. In Beard, defense counsel wrote to the prosecuting attorney approximately one week prior to the convening of a grand jury and demanded that exculpatory alibi evidence be presented to the grand jury. In lieu of presenting this evidence, the State chose rather to read the defendant's statement that was given to Florida authorities. The trial court found the reading of the defendant's statement to the grand jury to be sufficient as the statement was, in and of itself, exculpatory in nature. Beard at 331, 694.

The situation in Beard is similar to the situation in the case at hand. Approximately one week prior to the convening of a grand jury in Mingo County, West Virginia, the defendant requested that the prosecuting attorney present all exculpatory evidence that would tend to show that the defendant was not guilty of first-degree murder – namely the defendant's statement. In prior proceedings, the State had acknowledged that there potentially were mitigating factors in the case and possible justification for the killings. (*See*, TR Vol. 1, p. 7, ¶¶14-21; p. 16, ¶¶1-15; p. 23, ¶¶20-24; p. 24 ¶¶1-3). However, the State did not present the exculpatory evidence nor did it read the defendant's statement to the grand jury as requested.

As its only witness, the State of West Virginia called Sheriff Lonnie Hannah.⁴ Sheriff Hannah testified that he had occasion to investigate the defendant. The sheriff testified that his investigation started following the shooting of Christopher Chapman and Walter Gauze. The sheriff went on to testify as follows:

- Q: Okay; okay. There was a shooting. First of all, what happened? Who shot who?
- A: Melvin Randall Messer shot Chris Chapman and Walter Gauze and Tommy Banig, also....

(Grand Jury TR, p. 6, ¶¶19-22).

- Q: Now, according to your investigation did you take statements from Melvin Randall Messer?
- A: Statement was obtained from Melvin Randall Messer.
- Q: And what was the substance of the statement?
- A: Melvin Randall said that he had shot the victims.
- Q: And did he describe what happened?
- A: He said that they had come in the house and there was an argument and he had come out from a closet and began fighting with them and took gun from them and shot them.
- Q: Took a gun from who?
- A: Took a gun from Chapman, Mr. Chapman.
- Q: Was this consistent - did any other witness give a statement consistent with Chapman having the gun and Messer wrestling the gun away?
- A: Initially, there was a statement of Thomas Banig.
- Q: Now based upon your further investigation is this explanation consistent with the other witness statements and the evidence?
- A: No.
- Q: Elaborate.
- A: The other witnesses say that Walter Gauze and Chris Chapman only came up there - they were coming up there to drink. They never had any weapons, never had any guns....

⁴ Although Sheriff Hannah made the presentment to the Mingo County Grand Jury, he did not testify at trial nor was there any evidence adduced that he was the investigating officer.

(Grand Jury TR, p. 9, ¶¶20-24; p. 10, ¶¶1-23).

- Q: Okay; Now, you had mentioned earlier - you interviewed some witnesses. Did those witnesses corroborate Messer's representation of what happened?
- A: Yes. In somewhat, as far as the shooting part;
- Q: Okay; But what about who had possession of a firearm?
- A: Possession of the firearm, we took an initial statement from Thomas Banig, who said they brought the gun with them and the next statement he recanted his statement and he sent for us and we went back to talk to him and he told us he wanted to tell the truth about what happened and in that statement he said that he had the gun.
- Q: Who had the gun?
- A: Melvin Randall had the gun.
- Q: Did he say that Chapman ever had the firearm?
- A: No.
- Q: Did any other witness then give a statement - before that give a statement consistent with the statement that Chapman never had the gun in his possession?
- A: Yes. Chapman was with a girl that came with him up to their house and they were drinking and partying she was kind of fooling around with him and all that and she said that she had her hands all over him and he never had a gun.
- Q: How many, if any, other witnesses stated that Chapman never had a firearm?
- A: To the best of my knowledge, I think five.
- Q: Was any weapon found on Chapman's person?
- A: No.
- Q: Was there anything - objects found near the body?
- A: Yes. There was a can of beer that was sitting inside of a cooler type thing you hold beer in was there next to his body and I think maybe his car keys.
- Q: With respect to Gauze, did anyone alleged that Gauze ever had a firearm?
- A: No. ...

(Grand Jury TR, p. 12, ¶¶1-24; p. 13, ¶¶1-15).

- Q: What did - You took a second statement from Banig, Tommy Banig. What did he say happened?
- A: Tommy Banig said that he and Melvin Randall had had - made a little bit of problem with these guys, maybe earlier.

One of the men - one of the persons who was - one of the victims that maybe earlier in the week or something and they were kind of, you know, stressed out a little bit about that. He said that when they initially came in the house they came back to where he and his wife were in the bedroom and Melvin Randall had came back to the bedroom where they were and said Buck - is the nickname of Chris, his nickname was Buck, that "Buck and Walter are here," and he told him, "Just go in the bathroom and I'll take care of this," because, you know, "We ain't got no problems," so he comes in and they come back there to the door. ...

(Grand Jury TR, p. 14, ¶¶4-19).

- Q: Okay; Now, you were talking about Banig. Continue what you were saying about the statement.
- A: Banig said that possibly there may have been a little problem with these boys. You know, they'd had had a little rough with each other some time or another or some threats or accusations or something, so Melvin Randall - he tells him to go in the bathroom and he goes in the bathroom and Chris Chapman comes in and Walter Gauze comes in behind him and another girl, Sonya Belt, came in in one of those orders and set down on the couch, which it's a little narrow -
- Q: - Now, who is she?
- A: She was a girlfriend - She was the girl who I talked about earlier and said she was with Chris Chapman. She had been fooling with Chris a little bit there.
- Q: Okay; So they come in and what happens next, according to Tommy Banig?
- A: According to Tommy, they come down the hallway and Tommy - the second statement -
- Q: Yes.
- A: The second statement that Tommy gave they came down the hallway and evidently they'd had some exchange of words or something and possibly Melvin Randall came out of the bathroom with the gun and started cranking off shots.
- Q: Did Tommy Banig say that he was in fear of his life at that point?
- A: No. Tommy told in his statement, said him and Chapman were good friends, were actually real good friends. He said

maybe they'd had a little bit of problem but they always got over it, you know. They associated with each other.

Q: Did Banig say that there was a volatile or dangerous situation there before Messer came out of the bathroom with the gun?

A: No. I asked him if he was in fear of his life to or if he thought that there was a problem or threat to him and he said he didn't.

Q: According to Thomas Banig, was Melvin Messer's life in danger at that time?

A: No.

Q: Who did he say he had a gun?

A: Melvin Randall Messer....

(Grand Jury TR, p. 15, ¶¶15-23; p. 16, ¶¶1-24; p. 17, ¶¶1-14).

By selectively presenting the afore referenced testimony to the grand jury, without reading the defendant's statement to the grand jury, in its entirety, the State selectively has chosen to tell the grand jury that Tommy Banig's version of events is more true than the defendant's version of events. The relevance to the prosecution's selective presentment is this, if the defendant's statement had been read to the grand jury, in its entirety, then the grand jury could have chosen to believe the defendant's statement over that of Tommy Banig.

Thus, had the grand jury chose to believe the defendant over Tommy Banig, then he may have been indicted for a lesser charge – such as, second-degree murder or voluntary manslaughter. Then, the potential penalty at trial would have been capped with a determinate number of years, not life. However, by the state's selective presentment, the defendant was denied due process by not affording the grand jury the opportunity to hear all the evidence and make a rational decision on whether to indict on a lesser charge thus minimizing the defendant's potential exposure at trial.

IV. THE EVIDENCE PRESENTED DOES NOT SUPPORT A CONVICTION OF FIRST-DEGREE MURDER

The evidence presented at trial, when viewed in the light most favorable to the state, does not support a conviction of first-degree murder.

This Honorable Court, in State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), set forth the criteria when considering the sufficiency of evidence for a criminal conviction. In Guthrie, this Court stated,

The function of appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Guthrie at 663 (Syl. Pt. 1).

Additionally, this Court held,

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that a jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Guthrie at 663 (Syl. Pt. 3).

In the case at hand, the State proved that either the defendant or Tommy Banig had possession of the gun that killed the decedents the day prior to the shooting. (*See generally*, TR Vol. 3, p. 143, ¶¶16-18; p. 145, ¶¶1-21; p. 146, ¶¶1-12; 148, ¶¶1-7; p. 150, ¶¶15-23; and p. 151, ¶¶1-11). Additionally, the State proved, through the defendant's own statement that: (1) the defendant went to the bathroom, unarmed; (2) a fight erupted in the hallway, outside of the bathroom; (3) the defendant exited the bathroom to see the fight; (4) the defendant came into possession of a High Point .45 caliber pistol; (5) the defendant admittedly shot the decedents. (TR Vol. 4, p. 51, ¶22 – p. 58, ¶3).

The state failed to prove any deliberation, intent or malice on the part of the defendant, save for the fact that the defendant and Tommy Banig were at Robert Brewer's house the day prior to the shooting attempting to sell the firearm – although Brewer nor his girlfriend, Angela Dawn Spence, were sure of who actually had the High Point firearm.

Additionally, once the defendant raised the defense of self-defense or defense of others, the State then must prove, beyond a reasonable doubt, that the defendant was not acting in self-defense. *See, State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 574 (1978)(Syl. Pt. 4); *See also, State v. Cook*, 204 W.Va. 591, 515 S.E.2d 127 (1999)(Syl. Pt. 3 and Syl. Pt. 4).

Furthermore, no inference of malice can be made by the defendant's use of a firearm if defendant was the victim of an unprovoked attack or if he acted in sudden heat of passion. *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 574 (1978)(Syl. Pt. 2).

In the case at hand, the defendant was at a residence wherein he was staying. The decedents came to the house, uninvited. When the defendant exited the bathroom, he witnessed a fight wherein a firearm was brandished. He joined in the fray, came up with the gun, and shot

and killed the decedents.

Accordingly, when the evidence is viewed in the light most favorable to the State, a conviction for first-degree murder is not warranted.

V. THE CIRCUIT COURT ERRED IN NOT SUPPRESSING THE DEFENDANT'S STATEMENT AS HE WAS NOT INFORMED OF THE MAGNITUDE OF THE CRIME AND POTENTIAL PENALTY PRIOR TO WAIVING HIS MIRANDA RIGHTS

The circuit court erred in not suppressing the defendant's statement as he was not properly informed of the magnitude of the crime and the potential penalties prior to waiving his Miranda Rights.

Article 3 section 10 of the Constitution of West Virginia provides, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Likewise, the Fifth Amendment of the Constitution of the United States provides that no person shall be "deprived of life, liberty, or property, without due process of law."

Also, Article 3 Section 5 of the Constitution of West Virginia provides that ... no person shall "in any criminal case, be compelled to be a witness against himself ..." Similarly, the Fifth Amendment of the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself ..."

This Honorable Court has held that "some information should be given to the defendant as to the nature of the charge in order that he can determine whether to intelligently and voluntarily exercise or waive his Miranda rights." State v. Goff, 169 W.Va. 778, 784, 289 S.E.2d 473 (1982)(fn 8)(cited in State v. Randolph, 179 W.Va. 546, 548, 370 S.E.2d 741, 743 (1988)).

The case at hand is distinguished from Goff and Randolph in that the defendant was not

under arrest at the time that he gave his statement. However, this is not to say that the statement was non-custodial. Trooper K. L. Scarbro testified that he and Trooper Harper picked up the defendant up and drove him to the state police office in Williamson, West Virginia. (TR Vol. 2, p. 36, ¶¶8-14).⁵

Once at the state police office, the defendant was asked to give a statement to police. He waved his Miranda rights and executed the state police Miranda rights form. (generally, TR Vol. 2, p. 30). However, the defendant was not advised clearly of why he was being questioned. The state police Miranda rights form was devoid of any reference to any possible crime charge or any possible penalty. (TR Vol. 2, p. 27, ¶¶21-24; p. 37, ¶¶ 6-17; p. 41, ¶¶12-20).

Accordingly, the defendant was denied due process under the State and Federal Constitutions as well as being compelled to be a witness against himself under the State and Federal Constitutions. (TR Vol. 2, p. 43-45)(See Court's Order denying defendant's motion to suppress).

VI. THE CIRCUIT COURT ERRED IN REQUIRING DEFENDANT'S COUNSEL TO CALL OFF THE NAMES OF PROSPECTIVE WITNESSES WHEN TRIAL STRATEGY CHANGES AND THE WITNESSES ARE NOT CALLED; THUS CAUSING THE JURY TO SPECULATE ON THE REASONING FOR NOT CALLING THE WITNESSES RESULTING IN PREJUDICE TO THE DEFENDANT AND DENIAL OF DUE PROCESS PROTECTION, UNDER ARTICLE 3 SECTION 10 OF THE CONSTITUTION WEST VIRGINIA AND THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The circuit court denied the defendant his due process protections by causing defendant's counsel to call off the names of prospective witnesses; as trial strategy changes and witnesses ultimately are not called to testify. This procedure results in speculation by the jury of why the

⁵Although Trooper Scarboro goes on to testify that the defendant was not under arrest and was free to leave at any time.

witnesses were not called resulting in prejudice to the defendant.

Article 3 section 10 of the Constitution of West Virginia provides, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Likewise, the Fifth Amendment of the Constitution of the United States provides that no person shall be "deprived of life, liberty, or property, without due process of law."

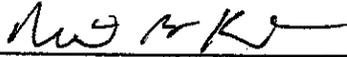
Counsel for the defendant was required to call off the names of potential witnesses to determine any bias or prejudice of any prospective juror. (TR Vol. 2, p. 117, ¶¶1-13). In doing so, the circuit court deprived the defendant of his due process protections. A more reasonable alternative would be to present the names of the potential witnesses to the court allow the court to call off the names collectively. Thus, when witnesses are not called, the jury does not know which side planned to call the witness or which side chose not to call the witness.

Accordingly, the defendant was denied due process protections under the State and Federal Constitutions.

III. RELIEF REQUESTED

For the foregoing reasons, your Petitioner respectfully requests that this Honorable Court set aside the jury verdict in this case, to vacate the defendant's sentence, and to remand the case to the Circuit Court of Mingo County, West Virginia, for further proceedings in this matter.

Respectfully submitted,
Melvin Randall Messer,
By counsel



Robert B. Kuenzel, State Bar No. 8972

Avis, Witten & Wandling, L.C.

111 Stratton Street

Logan, WV 25601

(304) 752-2838

Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MELVIN MESSER,

Appellant,

v.

Supreme Court No. _____
Circuit Court No. 06-F-76 (Mingo)

STATE OF WEST VIRGINIA,

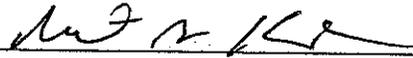
Appellee.

CERTIFICATE OF SERVICE

The undersigned, Robert B. Kuenzel, counsel for the Petitioner, Melvin Randall Messer, does hereby certify that he has on this the 13th day of July, 2007, served a true copy of the attached Appellant's Brief upon the State of West Virginia by depositing a true copy of same in the United States Mail at Logan, West Virginia, postage prepaid, or via facsimile, or via hand delivery to the person(s) listed below:

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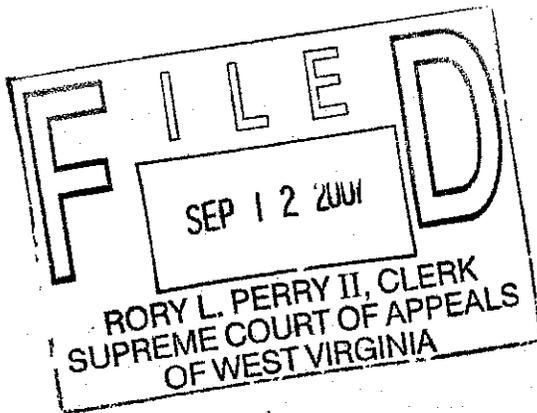
Logan, WV 25601

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Supreme Court of Appeals of West Virginia
DOCKETING STATEMENT

Style of Case (use style from final order)

State of West Virginia
 v.
 Melvin Messer



Type of Action:

Civil
 Criminal

Petitioner(s):

Plaintiff(s)
 Defendant(s)

Circuit Judge: Michael Thornsbury

County: Mingo

Circuit
 Number: 06-F-76

TIMELINESS OF APPEAL

Date of entry of judgment or order appealed from: January 19, 2007

Filing date of any post-judgment motion filed by any party pursuant to R. Civ. P. 50(b), 52(b), or 59:

Date of entry of order deciding post-judgment motion: February 20, 2007

Date of filing of petition for appeal: July 13, 2007

Date of entry of order extending appeal period: 05/14/07

Time extended to: July 13, 2007

FILED
 CIRCUIT COURT
 MINGO COUNTY, WV
 2007 JUL 13 PM 1:29
 RORY L. PERRY II
 CLERK
 SUPREME COURT OF APPEALS
 OF WEST VIRGINIA

FINALITY OF ORDER OR JUDGMENT

Is the order or judgment appealed from a final decision on the merits as to all issues and parties?

YES NO

If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)?

YES NO N/A

Has the defendant been convicted?

YES NO N/A

Has a sentence been imposed?

YES NO N/A

Is the defendant incarcerated? YES NO N/A
Has this case previously been appealed? YES NO

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court?

YES NO

If yes, cite the case and the manner in which it is related on a separate sheet.

CASE INFORMATION

State generally the **nature of the suit**, the **relief sought**, and the **outcome below**. [Attach an additional sheet, if necessary.]

Appeal of conviction of the defendant below of Murder in the First Degree in violation of West Virginia Code Section 61-2-1.

Defendant moves the Honorable Supreme Court of Appeals to vacate the defendant's conviction and remand the the case to the Circuit Court of Mingo County, West Virginia, for further proceedings in this matter.

State the **issues to be raised on appeal**. [Attach an additional sheet, if necessary. Use carriage returns to number the issues in a manner corresponding with the petition for appeal.]

Enter text here. Use carriage returns as necessary. Select and delete this text before continuing. Use "TAB" to move between fields in the form.

I. Whether defendant was denied due process protections under Article 3 Section 10 of the Constitution of West Virginia and the 5th Amendmant of the Constitution of the United States, by the prosecuting attorney's repeated misstatements of facts not in evidence during his closing arguments.

II. Whether defendant was denied due process protections under Article 3 Section 10 of the Constitution of West Virginia and the 5th Amendmant of the Constitution of the United States, by the inconsistent factual positions taken by the State of West Virginia in the defendant's prosecution and the indictment of Tommy Banig.

III. Whether defendant was denied due process protections under Article 3 Section 10 of the Constitution of West Virginia and the 5th Amendmant of the Constitution of the United States, by the State's failure to present exculpatory evidence to the grand jury.

IV. Whether the evidence presented supports a conviction of First Degree Murder

V. Whether the Circuit Court erred in not suppressing the defendant's statement as he was not informed of the magnitude of the crime and the potential penalty prior to waiving his Miranda rights in violation of Article 3 Section 5 and Article 3 Section 10 of the Constitution of West Virginia and the 5th Amendmant of the Constitution of the United States.

Continued: State the **issues to be raised on appeal**. [Attach an additional sheet, if necessary. Use carriage returns to number the issues in a manner corresponding with the petition for appeal.]

Enter text here. Use carriage returns as necessary. Select and delete this text before continuing. Use "TAB" to move between fields in the form.

VI. Whether the Circuit Court erred in requiring defendant's counsel to call off the names of prospective witnesses when trial strategy changes and witnesses are not called; thus causing the jury to speculate on the reasoning for not calling the witnesses resulting in prejudice to the defendant and denial of Due Process rights under Article 3 Section 10 of the Constitution of West Virginia and the 5th Amendment of the Constitution of the United States.

CASE MANAGEMENT INFORMATION

Do you wish to make an oral presentation of the petition? YES NO
Has the entire or only portions of the record been designated? ENTIRE PORTION
If the appeal is granted, do you desire reproduction of the record or that the case be heard on the original record? REPRODUCED
 ORIGINAL

List counsel for each adverse party to the appeal. Include name, firm name, address, and telephone number. If unrepresented by counsel, provide the address and telephone number of the adverse party. Attach an additional sheet if necessary.

Enter text here. Use carriage returns as necessary. Select and delete this text before continuing. Use "TAB" to move between fields in the form.

C. Michael Sparks
Prosecuting Attorney of Mingo County
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WV Attorney General
1900 Kanawha Blvd., East
Room 26E
Charleston, WV 25305-9924
Counsel for State of West Virginia

List the Petitioner(s) name: Enter name here. Delete this text first.

If incarcerated, provide institutional address: Melvin Messer
Southwestern Regional Jail
Holden, WV

Name of attorney or pro se litigant filing Docketing Statement: Enter name here. Delete this text first.

ATTORNEY PRO SE

Will you be handling the appeal? YES NO

If so, provide firm name, address, and telephone number: Robert B. Kuenzel
Avis, Witten & Wandling, L.C.
111 Stratton Street
Logan, WV 25601
(304) 752-2838
Counsel for Appellant

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature: Robert B. Kuenzel

WV Bar No. 8972

Date: 07/13/07

Remember to Attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the order or judgment from which the appeal is taken.
3. A Certificate of Service.