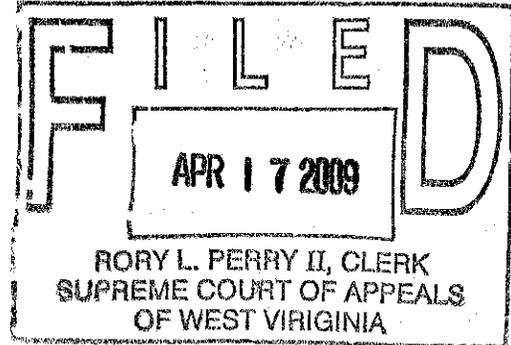


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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS,
CHARLESTON



STATE OF WEST VIRGINIA
Respondent

v.

Case No. 34735

EDWARD C. GRIMES, Petitioner

APPELLANT'S BRIEF ON APPEAL

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NATURE OF THIS PROCEEDING

STATEMENT OF FACTS

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STATEMENT OF FACTS

This is a case where the Appellant was charged with murder and asserted self-defense at trial. The case arose from a confrontation between the two men around 4:30 a.m. to 5:00 a.m. in the parking lot of the Relax Inn located in Martinsburg, WV. Both men were armed with pistols. Both of the eyewitnesses testified that the victim approached the Appellant with a drawn weapon, and that the Appellant drew his weapon and fired one shot, mortally wounding the victim.

. Inexplicably, and despite the fact the state introduced no evidence of premeditation, the case was sent to the jury on 1st Degree Murder. The jury subsequently found the Appellant guilty of 2nd Degree Murder and he was given the maximum sentence of 40 years.

The decedent, Mr. Kidrick had previously told his son, Trejon Kidrick, age seven, and his stepbrother, Christopher Davis, age 12, that he would pick them up that night and take them to Shepherdstown, WV, to stay with him and visit relatives. The boys were living with their mother, Mary Davis, in a room at the Relax Inn in Martinsburg, WV. They had been there for an extended period of time because their mother was unable to afford appropriate housing for her family. Mr. Kidrick had an intermittent romantic relationship with Mary Davis which spanned a period of years. He

was not currently involved romantically with Ms. Davis. The Appellant, Edward Grimes, was currently romantically involved with Ms. Davis and was a frequent visitor to the motel. These plans were made prior to the arrival of Mr. Grimes at the motel.

Mr. Kidrick apparently decided to visit adult night clubs with his friends while drinking and using cocaine instead of picking up the boys. The boys made several calls to him during the course of the evening to remind him that he was supposed to pick them up, both before and after the arrival of Mr. Grimes. Mr. Kidrick eventually left the adult nightclubs in Jefferson County and came to the motel in Martinsburg sometime between 4:30 a.m. and 5:00 a.m. on the night in question. He was carrying a pistol which was found at the scene and toxicology reports indicated that he had a BAC of 0.23% and had used cocaine within two hours prior to death.

Trejon and Christopher had called Mr. Kidrick multiple times after midnight because Kidrick had told them he would bring them to Shepherdstown. Kidrick was aware that Grimes was at the motel. Some words were apparently exchanged between the men either directly or through the children during one of the calls. Kidrick had one of his friends drive him to Martinsburg and arrived there between 4:30 a.m. and 5:00 a.m.

The Appellant was currently romantically involved with Mary Davis, and frequently stayed with her and the children at the motel. On the night in question, Appellant was also carrying a pistol. When Appellant learned that Kidrick was coming to the motel, he called a friend, Mr. McGuire, to find him a ride so he could leave. The friend arrived at the motel but the original ride left, and his friend called for another ride. The second ride got to the motel area shortly before the arrival of Mr. Kidrick, but parked in the lot of an adjacent motel. Mr. Kidrick and Mr. McGuire were outside in the motel

parking lot trying to locate the second ride when Kidrick arrived.

Trejon Kidrick testified that upon Kidrick's arrival, Grimes was facing away from Kidrick, and Kidrick "snuck up on him." He also testified that he saw his father (Kidrick) with a gun in his hand. When asked on direct examination by the State Trejon said he could not tell who had their gun in their hand first. On cross-examination Trejon affirmed a previous taped statement he had made to the Prosecuting Attorney that his father had drawn his gun first.¹ Mr. McGuire, testified that Kidrick approached Grimes while Grimes was turned away, and that Kidrick had a gun in his hand.² Both Trejon and McGuire testified that after seeing Kidrick approach him with a gun, Grimes pulled his pistol and fired on shot. That shot hit Kidrick in the head and caused a mortal wound. Grimes left the scene before the police arrived.

¹ Trial Transcript, November 15, 2006 at 1:45.

² Id at 221-23.

AUTHORITIES RELIED UPON

United States Constitution, 5th Amend.

United States Constitution, 14th Amend.

West Virginia Constitution, Article III, Section 4.

West Virginia Constitution, Article III, Section 10 .

West Virginia Constitution, Article III, Section 14

West Virginia Constitution Article III, Section 20.

Rule 16, West Virginia Rules of Criminal Procedure

Rule 29, West Virginia Rules of Criminal Procedure

Brady v. Maryland 387 U.S. 83 (1963)

Oregon v. Elstad, 470 U.S. 298 (1985)

Arizona V. Youngblood, 488 U.S. 51 (1988)

Bank of Nova Scotia v. U.S. 487 U.S. 250 (1988)

Kyles v. Whitley, 514 U.S. 419 (1995)

Strickler v. Greene, 527 U.S. 263 (1999)

Illinois v. Fisher, 540 U.S. 544 (2004)

Missouri v. Seibert, 542 U.S. 600 (2004)

Youngblood v. West Virginia, 126 S.Ct. 2188 (2006)

State v. Hatley, Slip Op.(WV No. 33919) (March 13, 2009) (concurring opinion by Justice Ketchum)

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

State v. Bonham, 401 S.E. 2d 901 (W.Va. 1990)

State v. Youngblood, 650 S.E.2d 119 (W.Va. 2007)

State v. Farris 221 S.E.2d 676 (W.Va. 2007)

State v. Foster, 656 S.E.2d 74, 90 (W.Va. 2007)

Illinois v. Newberry, 166 Ill. 2d 310 (1995).

Criminal Investigation, 9th Ed., Charles R. Swanson, et al,

McGraw Hill, 2006

ISSUES PRESENTED ON APPEAL

1. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO DISMISS FOR BRADY VIOLATIONS
2. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO DISMISS FOR MISCONDUCT BEFORE THE GRAND JURY
3. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO PLACE POLICE RECORDS IN EVIDENCE OVER HEARSAY OBJECTION
4. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE RULE 404(B) EVIDENCE AS TO UNRELATED ACTS
5. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MID-TRIAL MOTION FOR ACQUITTAL
6. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF EVIDENCE
7. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE FIRST DEGREE MURDER CHARGE TO GO TO THE JURY WHEN THERE WAS NO EVIDENCE OF PREMEDITATION
8. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL OR MISTRIAL
9. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT TO A DISPROPORTIONATE SENTENCE OF 40 YEARS

ARGUMENT

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO DISMISS FOR BRADY³ VIOLATIONS

THE BRADY VIOLATION

This case was tainted throughout by the intentional destruction of field or investigative notes by the chief investigator in this case, Capt. K.C. Bohrer. These notes concerned initial interviews with witnesses (including eyewitnesses) at the crime scene, communications with the county coroner the day of the shooting, payment of \$20 to a juvenile eyewitness after an interview (the substance of which was subsequently recanted), as well as numerous other matters. The Capt. Bohrer testified that it was his "routine practice" to destroy his field or investigative notes after completing his final report⁴. He also stated that all information contained in those notes was contained in the final report. As was demonstrated during the pre-trial and trial, this was not the case. As will be shown, those notes would have been highly relevant to Capt. Bohrer's testimony before the grand jury, his testimony regarding

³Brady v. Maryland, 387 U.S. 83 (1963)

The Appellant is not aware of any written policy of the Berkeley County Sheriff's Department regarding the retention of materials in investigative files. Capt. Bohrer testified that it was his normal practice to destroy his field notes after his report was written. Presumably, since he was one of the highest ranking officers in the department, there was no policy precluding him from destroying his notes. The lack of a policy forbidding destruction of investigative notes has the same effect as a formal policy permitting discretionary destruction of investigative records.

statements made to the County Coroner, the statement taken from the juvenile eyewitness, as well as the testimony of the investigator at trial and pre-trial.⁵ It is the Appellant's belief that these investigative notes, at least with respect to the specific issues above, would have contained both exculpatory and impeachment evidence, and their disclosure could have significantly affected the outcome of the trial, both by content and their impeachment value on the State's chief witness. Youngblood v. West Virginia, 650 S.E.2d 119 (2007)

How then can a defendant prove a Brady violation when the very item required to make the requisite showings of impeachment or exculpatory value, suppression, and materiality⁶ has been destroyed by the state? Could the defendant in Youngblood have proved a Brady violation if the note had been taken by the police investigator and subsequently discarded or destroyed, instead of being rejected by the police as not important?

This practice raises the spectre of the State being able to routinely take relevant evidence and destroy it and leaving the defendant with no effective legal recourse for the destruction of that evidence. Can Youngblood, Kyles⁷, and Brady possibly be read to require a defendant to prove the content of investigative records created by and then

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The destruction of the investigative records not only precluded the Appellant from using them for whatever exculpatory or impeachment material they contained, but obviously prevented the Court from being able to do any meaningful review. Unfortunately, that will always be the result when the police have unbridled discretion in determining what investigative records should be retained and which should be destroyed or never included in the file.

⁶State v. Youngblood, at _____.

Kyles v. Whitley, 514 U.S. 419 (1995)

destroyed by the state in order to establish a Brady violation? Clearly not. Youngblood, Kyles and Brady mandate a policy that requires the retention of ALL investigative records created by the state.

Any other policy inevitably leads to a result proscribed by this Court under Youngblood and Kyles - allowing the police to determine what materials should be included in or retained in investigative files - thereby preventing any judicial review of the contents of those files. In Kyles, the United States Supreme Court held, and this Court adopted, the following proposition:

The State of Louisiana [in this case] would prefer . . . [a] more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, and it suggested . . . that it should not be held accountable under . . . Brady for evidence known only to police investigators and not to the prosecutor. . . . Any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even the courts themselves, as the final arbiter of the government's obligation to ensure fair trials. Youngblood at _____, citing with approval Kyles, 514 U.S. 419 at 437-438. (Emphasis added)

Although the Appellant has been unable to locate any decisions supporting or prohibiting such a bright-line rule of retention, the decision of the United States Supreme Court in Missouri v. Seibert, 542 U.S. 600 (2004) is instructive about police policies that violate Constitutional guarantees.⁸ In that case the Court examined the "question first -

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In Illinois v. Fisher, 540 U.S. 544 (2004) the US Supreme Court refused to overturn a conviction on the grounds that cocaine seized from the defendant had been destroyed prior to trial. The defendant had been a fugitive for 10 years, and when finally apprehended and convicted, made a Brady claim that the cocaine was potentially exculpatory evidence. The Court found that the cocaine had already been tested four times, that the police had acted in good faith by following evidence destruction schedules, and that the cocaine was not Brady material. The Illinois court below had relied on the holding of the Illinois Supreme Court that appropriate sanctions must be applied against the state when evidence is destroyed. Illinois v. Newberry, 166 Ill. 2d 310 (1995).

warn later” interrogation policies of police departments. “Question first - warn later” is the tactic of conducting custodial interrogations without Miranda warnings until a confession is elicited, taking a break, and then giving the formal Miranda warnings and having the suspect repeat the confession. It was done without the police advising the suspect that the previous un-warned confession was inadmissible and that the suspect was not required to repeat it.

The State of Missouri argued that such a practice was permissible under Oregon v. Elstad, 470 U.S. 298 (1985) wherein the Supreme Court had ruled that a statement made by a suspect during his arrest that he was at the crime scene did not invalidate a subsequent fully Mirandized confession obtained at the station house, if the initial failure to Mirandize was inadvertent. The statement by the suspect was made in response to a remark by one of the arresting officers, who stated he believed the suspect was involved in a burglary. The Court found that the officer’s initial failure to warn was an oversight and that there was no indication that the police intended to interrogate the suspect, rather that the remark by the officer was directed towards the suspect’s mother in order to advise her what was going on. Seibert at 616-617

However, the Court found that a policy of systematic use of the “question-first, warn-later” interrogation technique did not fall within the “innocent oversight” of Miranda warnings holding of Elstad which permitted a subsequent admissible interrogation. What the Court found instead was that the “question-first, warn-later” practice “effectively threatens to thwart Miranda’s purpose of reducing the risk that a coerced confession would be admitted.” Seibert at 617

In this case we do not have the systematic policy designed to circumvent

Constitutional right found in Seibert; rather what we have is a laissez-faire policy permitting discretionary destruction of investigative records created by the state at the discretion of the officer. As Seibert required the outright prohibition of the “question first-warn later” style of interrogation, this case mandates the adoption of a strict “no destruction of investigative records” policy. There is clearly no middle ground between giving officers full discretion to determine the ultimate content of investigative files and a strict “no-destruction policy.”

The ultimate determination of the character of matters contained in State files, whether they are exculpatory or provide impeachment materials, or are completely irrelevant, lies with the courts and the attorneys, not the police agencies.⁹ A “half-way” policy which prohibited the police from the destruction of evidence which may be favorable to the defendant is obviously useless on its face since that determination cannot be made by a police agency.

Did the records destroyed by the State contain Brady material?

Because the notes were destroyed¹⁰, it is impossible for the defendant to prove to a certainty that the notes contained Brady material. However, the defendant did establish, through circumstantial evidence exclusively from the testimony of the States’s witnesses, a very high probability that they did.

The three requirements for Brady materials are :1) the evidence must be favorable to

⁹Kyles, 514 U.S. 419 at 437-438.

¹⁰The destruction of field or investigative notes is not an accepted or recommended practice. The creation and retention of field notes are generally regarded a very important in criminal investigations in all standard investigation texts. See, eg. Criminal Investigation, Eighth Ed., Charles R. Swanson, et al, McGraw Hill, 2006, at 183-185

the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the state, either wilfully or inadvertently; and (3) the evidence must have been material, i.e. it must have prejudiced the defense at trial. State v. Youngblood, Syl. Pt. 2.

The investigative records were destroyed by the state, therefore the issue of suppression is undisputed.

With regard to the absolute characterization of the records as exculpatory or impeachment materials, and their materiality, the destruction of the records by the state has rendered that impossible for either the Appellant or the Court. Nonetheless, this important Constitutional and Due Process issue must be resolved because otherwise the State will be free to discretionarily destroy investigative records in the future, because their content cannot be proved.¹¹

In resolving these two issues the Appellant respectfully asks the Court to view the record in the light most favorable to the defendant, because the defendant did not destroy the records and substantial Constitutional issues are involved. Appellant also respectfully asks the Court to be mindful of the fact that he is currently serving a 40 year sentence as the result of his conviction.

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It is axiomatic under Brady, Kyles, and Youngblood that the defendant in a criminal proceeding has a right, under both the Federal and West Virginia Constitutions, to such materials, and that it is a violation of Due Process under both constitutions to deny such records..United States Constitution, 5" Amend, United States Constitution, 14th Amend. West Virginia Constitution, Article III, Section 4, West Virginia Constitution Article 111, Section 20, West Virginia Constitution, Article III, Section 10, West Virginia Constitution, Article III, Section 14.

This was a first-degree murder case involving an unplanned confrontation between two armed men. The defendant claimed self-defense. There was never any factual issue as to the identity of the victim or the defendant, no dispute that both men were armed, and no dispute as to whether the defendant fired one shot which resulted in the death of the victim. The only real factual dispute in this case was as to which man drew his weapon first. The destroyed records related to the chief investigator's initial interviews at the crime scene and his initial verbal report to the Coroner that it appeared that the victim had drawn his weapon first. The Coroner in turn relied on this information and included it in his preliminary report.

The chief investigator testified at the preliminary hearing that he had interviewed witnesses and taken notes of his initial interviews at the crime scene.¹² Among those interviewed were the only eyewitnesses to the shooting. Several hours after those interviews he advised the Coroner that it initially appeared that the victim had drawn his weapon first, which information was included in the Coroner's initial report. It is utterly inconceivable that a highly experienced investigator in a murder case would have made such a statement without any factual basis.

Capt. Bohrer testified that he had no recollection of his interviews at the crime scene and had no recollection of speaking with Coroner Brining. While it is possible that an experienced investigator such as Capt. Bohrer would have no present recollection of making such statements to the Coroner, nor of any statements made to him by eyewitnesses at the crime scene, there is no mention of these activities in the police report.¹³ The

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¹³ Capt. Bohrer testified that all the material in his investigative notes goes into his final report and then he destroys his investigative notes.

Coroner was able to refer to his investigative notes to confirm his conversation with Capt. Bohrer, and was absolutely clear in his recollection of the conversation. At trial, the State attempted to explain away the contents of Coroner Brining's initial report by asking whether he could have received that information from some other person at the hospital. The Coroner remained clear in his recollection of the events.

The level of detail in the Coroner's initial report clearly indicate that he had spoken to someone in law enforcement who was investigating the case, rather than to a nurse or paramedic at the hospital.

According to the Preliminary report from the Berkeley County Sheriffs Department, the deceased had been partying at Vixen's [Gentlemen's Club] and went home between 0300-0400 hours on Saturday, 30 July 2005. He then had a telephone conversation with one of his two sons. He determined that his two sons were at the Relax Inn with their mother and her boyfriend. The deceased traveled to the Relax Inn and ultimately became involved in an altercation in the parking lot, with the boyfriend of the children's mother

Initial reports indicate the deceased pulled a gun on the boyfriend and the boyfriend then pulled a gun and shot the deceased in the head. One of the sons has stated he witnessed the shooting. The sons are approximately 5 or 6 years of age. It was reported that the deceased pistol-whipped another male in a hotel room prior to the shooting. At the time of this report, Sheriffs Department Investigators are still working on the case and additional information may be forthcoming. Report of Berkeley County Coroner David Brining, Security Seal 0413575, July 30, 2005, at 2. (hereinafter "Brining Report.)(emphasis added)

The investigator was asked by a member of the Grand Jury whether there was any indication that the victim drew his weapon first, and he said no. He was asked by a member of the Grand Jury if there was any indication that it would be deployed. He said no.

The investigator interviewed the 7 year-old son of the victim who was an eyewitness. He obtained a statement from the 7 year-old that the defendant had drawn his weapon

first. At the conclusion of this interview the investigator gave the 7 year-old \$20 to buy food.¹⁴ The 7 year old subsequently recanted and told the prosecutor that his father drew first in a taped interview and affirmed that statement at trial.

It is hard to imagine evidence in a murder case where self-defense is asserted that is more material and exculpatory than information that the victim drew his weapon first.

It is equally obvious that information about the victim drawing his weapon first would have provided substantial impeachment material against Capt. Bohrer, since it was contrary to the evidence provided to the Grand Jury as well as testimony at trial.

Accordingly, the Court must find that the destroyed records contained Brady information and reverse Appellant's conviction.¹⁵

2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANTS MOTION TO DISMISS FOR MISCONDUCT BEFORE THE GRAND JURY

Captain. K.C. Bohrer, Berkeley County Sheriffs Department, the lead investigator in this case, was the only witness who appeared before the Grand Jury. He was asked directly by a Grand Juror

Q. In this instance, is there any evidence that Mr. Kidrick's firearm was going to

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The fact that the investigator gave \$20 to the 7 year old was omitted from the police report. It was, however, promptly disclosed by the prosecuting attorney after she learned of it. The Prosecuting Attorney re-interviewed the boy and he stated that his father had drawn his gun first and affirmed that statement at trial. The trial judge found this was a "humanitarian" gesture.

There is no remedy short of dismissal. This is not a case like State v. Osakalumi 461 S.E.2d 504 ,W.Va.,1995), where physical evidence was destroyed , and the court attempted to give a limiting instruction as to any testimony offered by the State about the destroyed couch. As in Osakalumi, the "trial was" in this case was " so fundamentally unfair that appellant is entitled to a new trial." Id at 514 n. 14.

be used (inaudible)?

A. No. We know that is was present. We know that he took it with him, but no one has been able to identify (inaudible) that it was (inaudible) in any way, shape in this crime other than 'he fact he had it with him'.^{16 17}

However, there was undisputed testimony and evidence before the Court that Captain Bohrer had advised the County Coroner Brining immediately after the shooting that the initial investigation indicated that the victim had drawn his gun first. This information was included in Coroner Brining's initial report.

According to the Preliminary report from the Berkeley County Sheriffs Department, the deceased had been partying at Vixen's [Gentlemen's Club] and went home between 0300-0400 hours on Saturday, 30 July 2005. He then had a telephone conversation with one of his two sons. He determined that his two sons were at the Relax Inn with their mother and her boyfriend. The deceased traveled to the Relax Inn and ultimately became involved in an altercation in the parking lot, with the boyfriend of the children's mother

Initial reports indicate the deceased pulled a gun on the boyfriend and the boyfriend then pulled a gun and shot the deceased in the head. One of the sons has stated he witnessed the shooting. The sons are approximately 5 or 6 years of age. It was reported that the deceased pistol-whipped another male in a hotel room prior to the shooting. At the time of this report, Sheriffs Department Investigators are still working on the case and additional information may be forthcoming. Report of Berkeley County Coroner David Brining, Security Seal 0413575, July 30,2005, at 2. (hereinafter "Brining Report."

Coroner Brining testified before the Circuit Court that he had received that information from Capt. Bohrer. At the July 19,2006 hearing on Defendant's Motions to

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Grand Jury Proceedings, Circuit Court of Berkeley County, February 21, 2006 (hereinafter "Grand Jury") at 7.

As the lead investigator in a homicide, Sgt. Bohrer had, or should have had knowledge of the Coroner's report. He also failed to mention the Coroner's report to the Grand Jury. In fact, the Coroner testified that the information in his report was obtained directly from Capt. Bohrer.

Dismiss, ¹⁸ Coroner Brining testified as follows:

Q. Okay, thank you. Would you look at page 2 of your report, please. The second paragraph begins, "Initial reports indicate that the deceased pulled a gun on the boyfriend and the boyfriend then pulled a gun and shot the victim in the head. One of the sons stated he witnessed the shooting, is that an accurate statement of what is in your report?"

A. Yes, sir.

Q. The initial report that you referred to came from whom?

A. The information came from Captain Borhrer of the Sheriffs Department.

Q. Captain K.C. Borhrer?

A. Yes, sir.

Q. And he told you that his initial reports was that first the boyfriend [sic] pulled the gun?

A. Yeah, he said that they were - he obviously still was doing an investigation and initial reports indicated that.

Q. Did you make any notes of the conversation with him?

A. Yes.

Q. Do you have them with you?

A. Yes.

Q. Would you be willing to share them with us?

A. Certainly.

Q. Was that information given to you on July the 30th?

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The toxicology report done on the victim reported that "Alcohol was present in the blood at a concentration of 0.23%. Cocaine and several of its metabolites were also found in the blood indicating cocaine use within 2 hours of the time of death." State of WV, Office of the Chief Medical Examiner, Toxicology Report on Ronald Kidrick. August 15, 2005. (Copy attached as Attachment C).

A. Yes, sir.

Q. And it was given to you at City Hospital?

A. No, it was in a telephone conversation with Captain Bohrer.

Q. Did Captain Bohrer to your knowledge every give you any other version of events?

A. No, I only spoke to him the one time after my initial notification of the death

Hearing Transcript, Case 06-F-21, Circuit Court of Berkeley County, July 19, 2006 at 4-6

Coroner Brining double checked his notes while testifying in court to verify this information.

Capt. Bohrer testified at the preliminary hearing¹⁹ and before the Circuit Court that he had spoken to two young witnesses to the shooting but had not formally interviewed them or taken statements from them. He testified that it was his normal practice to take field notes regarding informal conversations with witnesses. The only juvenile witness who actually viewed the shooting was interviewed later the same day by another officer. According to that officer's report, the juvenile stated that the Defendant had pulled out his gun and shot his father (the victim) in the head. The report did not provide information as to who drew their weapon first, and it is not known whether that question was asked of the witness.

This 7 year old was first formally interviewed by Capt. Bohrer after the

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Transcript of Preliminary Hearing, Case No. 05-F-885, Magistrate Court of Berkeley County, September 22, 2005, at 12,29 (hereinafter "Preliminary Hearing)

Defendant was indicted for murder. In that interview, he stated that the Defendant had drawn his gun first. At the conclusion of this interview Lt. Bohrer gave the 7 year old \$20 to buy food. The Circuit Court found this to be a humanitarian gesture.

However, the 7 year old was subsequently interviewed by the Prosecuting Attorney and the Chief of the Major Crimes Division in 2006 as part of pretrial preparation. At that time he stated unequivocally and repeatedly to them that in fact his father had drawn his gun first. The State immediately notified the defense of this Brady material.

Capt. Bohrer testified at the preliminary hearing that he had interviewed the two juveniles and made notes, and verified that information in testimony before the Circuit Court Captain Bohrer further testified that he had no recollection of advising Coroner Brining that "the deceased pulled a gun on the boyfriend." Id at 35-37.

Clearly, the Defendant has established a prima facie case of willful, intentional fraud in obtaining the indictment, See State ex rel Pinson v. Maynard, 383 S.E. 2d 844 (W. Va. 1989), Syl. Pt. 3, . Bank of Nova Scotia v. U.S. 487 U.S. 250 (1988), and the proper remedy is dismissal. Accordingly, The Circuit Court committed reversible error in failing to dismiss the indictment.

Second, the Defendant also alleged that a material misrepresentation was made to the Grand Jury. Captain. Bohrer advised the Grand Jury that the Defendant had allegedly verbally "admitted" to the murder while being transported from another state. In fact, the Defendant was alleged to have stated "I did what I had to do" which

would have had a significantly different impact on the Grand Jury had Lt. Bohrer been truthful in his answer to the prior question. Grand Jury at 8. ²⁰

Captain Bohrer was specifically asked by a Grand Juror

Q. Can that admission of guilt be used? (Emphasis added)

A. It's up to the Court to determine if it can or not. That would be the subject of a suppression hearing at trial.

Capt. Bohrer was unable to refresh his recollection with his notes because it was his "routine practice" to destroy all field notes

It is not open to discussion whether the Grand Jury was interested in whether there was any evidence the victim had drawn his weapon first and that is was material to their considerations - they asked the question. In a presentment for murder under these facts, the issue of who drew their weapon first is obviously material, nor can there be any dispute that such information would "substantially influence the grand jury's decision to indict." Pinson, at Syl. Pt. 6.

Likewise, Capt. Bohrer's testimony to the Grand Jury that the Defendant had "admitted" to the murder cannot be treated as de minimis. If Capt. Bohrer had told the Grand Jury, as he told Coroner Brining, that the initial evidence showed that the victim pulled his gun first, then he would not have been telling the Grand Jury that the Defendant had "admitted" to the murder. He would have told them that the Defendant admitted firing the fatal shot after the victim pulled his gun. Once more, there is "grave

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As is frequently the case, the Appellant was alleged to have made "spontaneous" statements during transport from Baltimore, Md to Martinsburg, WV. This is a 90 minute ride.

doubt" that the "decision to indict was free from substantial influence of such violations." Id.

The Defendant was denied his right to a fair, impartial, and unbiased grand jury under Bank of Nova Scotia and Pinson and thus denied his right to Due Process under the United States and West Virginia Constitutions. Accordingly, the Circuit Court committed reversible error in denying Defendant's Motions to Dismiss.

3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO PLACE POLICE RECORDS IN EVIDENCE OVER HEARSAY OBJECTION.

At trial, the Circuit Court permitted the State to introduce police records into evidence over the hearsay objection of the Appellant. Rule 803(8) of the West Virginia Rules of Evidence, identical to its federal counterpart, provides that the following are not excluded by the hearsay rule even if the declarant is available: Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Brooks v. Galen of West Virginia, Inc., 649 S.E.2d 272 (W.Va.,2007.) at 280-81. Police records are by their

nature investigative records which contain hearsay.

4. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE RULE 404(B) OR "INTRINSIC" EVIDENCE AS TO UNRELATED ACTS BY THE APPELLANT

In this case the State filed a motion , pursuant to Rule 404(B), WVREv, to permit the State to elicit testimony about an altercation between the Appellant and another individual shortly before the shooting at issue in this case. The Appellant had arrived at his girlfriend's house sometime in the early morning and had found her cleaning blood and pepper spray off an individual named Moneypenny who had apparently been severely beaten and pepper-sprayed by the bouncers at a bar, and had been brought him to Mary's motel room. When the Appellant arrived sometime between 3 and 5 a.m , Moneypenny was in the bed used used by the children and Mary was trying to clean him up. The Appellant may have asked Moneypenny to leave, but the testimony was clear that the Appellant struck Moneypenny at least once with his pistol and more than once with his fists, and eventually forced him to leave. Moneypenny was a stranger to the Appellant, and Moneypenny's presence at the motel was totally unrelated to the shooting. The admission of this evidence was resisted by t he Appellant on the grounds that it could add little probative value, was essentially unrelated to the shooting, and would be highly prejudicial to the Appellant. The only purpose served by the introduction of this evidence would be to inform the jury that the Appellant had allegedly committed an uncharged crime against in individual on the same night in

the same general location, which is precisely why the prohibition in Rule 404(B) was created. Stated simply, he did it before and he's done it again.

The Circuit Court erroneously found that this incident was not 404(B) material, but rather that this incident was intrinsic to the case, which it clearly is not. The Court specifically found that " this evidence was part of the extended transaction that resulted in the death of Mr. Kidrick."²¹

The State recognized it was 404(B) evidence and filed the appropriate motion. The Circuit Court was required to have a McGinnis hearing as to the admissibility of this evidence. State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516(1994).

This Court has repeatedly stressed the importance of a McGinnis hearing. Most recently, in State v. Nelson 655 S.E.2d 73 (W.Va.,2007) this Court reaffirmed

1. "Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Id., Syl. Pt 1.

²¹ Transcript, Pre-Trial Hearing, July 19, 2006, at 67.

2. "In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried." Syl.pt. 16, State v. Thomas, 157 W. Va. 640, 157 W. Va. 640, 203 S.E.2d 445 (1974). Id., Syl pt. 2.

The admission of this evidence was highly prejudicial to the Appellant since it portrayed him as an impulsively violent person, and it would have logically influenced the jury in finding the Appellant guilty of 2nd Degree Murder. If the Court had engaged in the required analysis under Rules 401, 401, and 403 WVREv, it would have been apparent that the evidence should be excluded. First, the evidence bore no relevance to the shooting. Moneypenny was a stranger to the Appellant. The victim in the case was the former paramour of Mary, and the father of one of Mary's children with whom the Appellant resided and supported. The Appellant returned home late at night and found this individual in the bed used by Mary's children.

The only probative value this evidence contained was 1) the presence of the Appellant at the motel room shortly before the shooting and 2) the fact that the Appellant was armed with a pistol.²² However, there were numerous other witnesses who could testify to those facts, so the evidence about the assault on Moneypenny was cumulative with regard to those issues. Moreover, the Appellant had never disputed that he was present and that he fired the fatal shot. The State and the Court had been on notice that the Appellant intended to argue self-defense.

²² Moneypenny did not testify at trial.

The prejudicial value of this evidence was great. It portrayed the Appellant as an impulsively violent person. It was offered by the State for the very purpose proscribed by Rule 404(B) - that the Appellant was a bad person. The only real factual issue in the case was which man drew their weapon first. Had the Court found the evidence relevant, and conducted the required balancing under McGinnis, it would have been apparent that the prejudicial value of this evidence far outweighed any probative value it might have.²³

Accordingly, the Circuit Court committed reversible error and Appellant's conviction must be reversed.

5. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MID-TRIAL MOTION FOR ACQUITTAL

After the presentation of the State's case-in-chief, the Appellant moved to dismiss on the grounds that the state had failed to introduce any evidence on the issue of premeditation. The circuit court denied the motion.

Premeditation is the required, additional element of proof that separates 1st degree murder from all other forms of murder or manslaughter. "It is clear, however, that the intent to kill or malice is a required element of both first and second degree murder but the distinguishing feature for first degree murder is the existence of premeditation and deliberation." State v. Hatfield, 286 S.E.2d 402, 407-08. (1982).

²³

See State v. Hatley, Slip Op.(WV No. 33919) (March 13, 2009) (concurring opinion by Justice Ketchum)

The trial transcript fails show any witness who addressed the issue of premeditation. Rather, the testimony indicated that once the Appellant learned that the victim was enroute to the motel, he immediately took steps to obtain a ride, and was in fact in the process of leaving the motel area when the victim arrived. Since the State had failed to make out a prima facie case, the circuit court should have granted the motion to dismiss.²⁴

When the State fails to make out a prima facie case of 1st degree murder because it cannot show premeditation, the case must be dismissed. The circuit court's refusal to dismiss the case was obviously highly prejudicial to the Appellant, and constitutes reversible error.

Accordingly, the Circuit Court committed reversible error and Appellant's conviction must be reversed

6. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF EVIDENCE

The Appellant again moved for dismissal at the close of evidence and his motion was denied. As previously set forth in Assignment of Error 5, the State had failed to make out a prima facie case, and the case should have been dismissed.

Trial Transcript, Nov 15, 2006 at 242-43. Moreover, since the Appellant had made out a prima facie case of self defense, which was un rebutted by the State, the

²⁴

Although there was some discussion as to lesser-included offenses being offered to the jury, the Appellant clearly did not acquiesce to any other that outright dismissal. Had the Appellant agreed, the Court would have been able to dismiss the 1st Degree count. The circuit court failed to seek such a stipulation and in fact gave the jury the 1st degree murder instruction even though no there was still no evidence of premeditation.

Circuit Court should have directed a verdict of not guilty by reason of self-defense.

7. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE FIRST DEGREE MURDER CHARGE TO GO TO THE JURY WHEN THERE WAS NO EVIDENCE OF PREMEDITATION.

It was clearly reversible error for the Circuit Court to permit the 1st Degree murder charge to go to the jury because State had failed to make out a prima facie case. Trial Transcript Nov.. 16, 2006 at 8 See Assignments of Error 5 and 6 above. Moreover, the fact that the jury ultimately reached a verdict of guilty as to 2nd degree murder does not render this error harmless. Juries frequently agree on compromise verdicts and if this was a compromise verdict and the 1st degree count had been properly dismissed than the jury might have compromised on voluntary manslaughter.

Accordingly, the Circuit Court committed reversible error and Appellant's conviction must be reversed.

8. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL OR MISTRIAL

The Appellant filed post-trial motions. Although the issues raised have not been fully briefed in this Petition, Appellant specifically incorporates all of the claims for relief made therein as ground for appeal.

Appellant moved for a new trial alleging: The verdict of guilty of second degree murder was against the weight of the evidence; The jury did not follow the instructions of the Court; The failure of the State to prove beyond a reasonable doubt the element of

malice; The failure of the State to prove beyond a reasonable doubt that the defendant did not act in self defense; The failure to grant a mistrial when the witness Bohrer repeatedly made reference to "aliases" of the defendant after being warned to not do so.

Appellant also moved for a judgment of acquittal pursuant to Rule 29(c) of the Rules of Criminal Procedure, for the following reasons: The verdict of guilty of second degree murder was against the weight of the evidence; The jury did not follow the instructions of the Court; The failure of the State to prove beyond a reasonable doubt the element of malice; The failure of the State to prove beyond a reasonable doubt that the defendant did not act in self defense; The failure to grant a mistrial when the witness Bohrer repeatedly made reference to "aliases" of the defendant after being warned to not do so; and for such other reason as may appear from the record.

Appellant incorporates his previous arguments with regard to those issues previously briefed in this Petition, and asserts the remaining issues as grounds for appeal.

Accordingly, the Circuit Court committed reversible error and Appellant's conviction must be reversed

9. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT TO A DISPROPORTIONATE SENTENCE OF 40 YEARS

The Appellant was convicted of 2nd degree murder by the jury. The circuit court imposed the maximum sentence of 40 years. This disproportionate to the facts of this case.

As previously set forth, this case involved an early morning confrontation between two armed men in a motel parking lot. The two eyewitnesses who saw the shooting both testified that the victim drew his gun first. It was only after the Appellant saw the victim coming towards him with a drawn gun that he drew his own weapon and fired one shot, mortally wounding the victim.

In cases where this Court has approved such a sentence, the facts have been very different.

While the appellant was sentenced to the maximum penalty for second degree murder permitted under W.Va.Code § 61-2-3 (1994), which is certainly a significant sentence, this Court is unable to find that the sentence shocks the conscience under the circumstances. There was sufficient evidence for the jury to determine that the appellant was present at and aided and abetted the intentional and violent killing of two persons with the use of firearms. In light of the fact that the appellant's crimes resulted in two deaths, we cannot conclude that the appellant's sentences are constitutionally improper.

State v. Foster, 656 S.E.2d 74, 90 (W.Va. 2007)

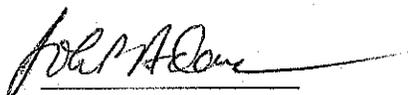
Accordingly, the Circuit Court committed reversible error and Appellant's conviction must be reversed.

CONCLUSION

For the reasons set for above it is clear that numerous errors were made by the Circuit Court. The Appellant respectfully requests that this Court vacate the conviction in his case and remand the case for a new, vacate the conviction in his case and Order that an acquittal be entered on the grounds of self-defense, or grant whatever relief the Court finds appropriate.

Respectfully submitted this 16th day of April 2009.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA

Respondent

VS.

CASE NO: 34735

EDWARD C. GRIMES, Petitioner

CERTIFICATE OF SERVICE

I, John P. Adams, Public Defender do hereby certify that true copy of the attached APPELLANT'S BRIEF ON APPEAL has been delivered to the Supreme Court of Appeal, 1900 Kanawha Blvd., Building E, Charleston, WV 25305, to Prosecuting Attorney Chris Quasebarth, located at 380 W. South St., Martinsburg, West Virginia 25401 and to the Petitioner located at Huttonsville Correctional Center, P.O. Box 1, Huttonsville, WV 26273 on this 16th day of April, 2009.



JOHN P. ADAMS #5867