

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

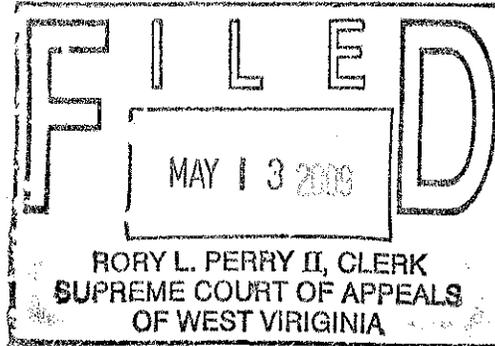
Plaintiff below/Appellee,

v.

DOCKET NO.: 34735
(Berkeley County Case No.: 06-F-21)

EDWARD C. GRIMES,
aka E.C. Grimes aka Turk,

Defendant below/Appellant.



APPELLEE STATE OF WEST VIRGINIA'S BRIEF

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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is a murder case where two little boys were present when their dad was shot in the head and killed by the Appellant, a boyfriend of the boys' mother. The Appellant was indicted for First Degree Murder. The Appellant withdrew from a plea agreement to the lesser-included offense of Second Degree Murder when the victim's family objected to the agreed-upon sentence of twelve years. This Court refused a Petition for Writ of Prohibition brought by the Appellant before trial on a pre-trial issue (which is raised again here on appeal). At the jury trial, the Appellant argued self-defense but the jury disbelieved that defense and convicted the Appellant of Second Degree Murder. The Appellant was then sentenced to the statutory determinate sentence of forty years.

Although the burden is on the Appellant to prove that there was error in the trial below, the Appellant's brief makes scant reference to the actual record below, choosing instead to color his argument with broad brushstrokes. The Appellant fails to prove that there was any error in the trial record below necessitating a reversal of his conviction or sentence. The State of West Virginia respectfully requests this Honorable Court to affirm the judgments of the jury and trial court below and deny the Appeal.

II. STATEMENT OF THE FACTS

It is undisputed that the Appellant shot and killed Ronald Kidrick with a single gunshot wound to the head in the parking lot of the Relax Inn, Martinsburg, West Virginia, before dawn on July 30, 2005. It is undisputed that both the Appellant and Ronald Kidrick were romantically involved with the same woman—Mary Davis. The Appellant was then seeing Ms. Davis; Mr. Kidrick was the father of Ms. Davis' son Trejan ("Trey") and "father to" Ms. Davis' son Christopher Davis. Both boys were living with their mother at the Relax Inn on the day the Appellant killed Mr. Kidrick. It is undisputed that both boys were witnesses to the events leading up to the shooting. It is undisputed that both boys were present when the shooting took place.

A. The Preliminary Hearing.

1. Berkeley County Sheriff's Captain K.C. Bohrer testified at the Appellant's September 22, 2005, Preliminary Hearing that Ronald Kidrick's 11 year-old son, Chris, who was present at

the scene on July 30, 2005, told him the following:

- a. Chris was staying at the Relax Inn with his mother and little brother, Trey;
- b. The Appellant would occasionally stay with them;
- c. On the night in question, the Appellant arrived in the middle of the night and found another man, a Mr. Money Penny, in the room and beat Mr. Money Penny with a pistol and threw him out;
- d. Chris described the pistol and said that he had seen the Appellant with that pistol before;
- e. A telephone conversation was had between Chris and Mr. Kidrick about Kidrick picking up Chris and his brother Trey;
- f. Mr. Kidrick did not want to come to the motel room while the Appellant was there because of previous problems;
- g. The Appellant got on the phone and had words with Mr. Kidrick, including words to the effect of "you want some of this, come and get it."
- h. Chris was later outside and heard a gunshot and saw the Appellant with a gun out, holding it sideways, standing over Mr. Kidrick;
- i. The Appellant then left with another man;
- j. Chris went over to Mr. Kidrick and saw a firearm laying there and then called 911.

[Tr., Preliminary Hearing, 9/22/05, 9-12.]

2. Captain Bohrer also testified that the brother Trey was interviewed by a different officer. [Id., 12.]

3. Captain Bohrer further testified that when the Appellant was arrested out-of-state some 30 days later, he and another officer transported him back to West Virginia during which the Appellant stated that "he did what he had to do," which Captain Bohrer took to mean that the Appellant fired the weapon. [Id., 14-15.]

4. The County Coroner, Fire Department Captain David Brining, testified that Mr. Kidrick was observed with a gunshot wound to the head. [Id., 37.]

5. Berkeley County Sheriff's Sergeant Gary Harmison testified that he interviewed Trejan ("Trey") Kidrick, the victim's son, who was present at the scene on July 30, 2005, and that Trejan told him the following:

- a. His father pulled up in a vehicle and was walking toward Trey, who was outside the motel room;
- b. The Appellant pulled a gun from his waistband with his left hand, stuck it straight out and shot [Mr. Kidrick] in the head;
- c. The Appellant left with another person.

[Id., 39-41.]

6. Sergeant Harmison also testified that Trejan did not tell him anything else about the shooting. [Id., 41.]

B. The Grand Jury.

1. At the February 2006 Term Grand Jury, Captain Bohrer testified. Among other things, Captain Bohrer was asked by the Prosecuting Attorney, "In this particular instance, is there any evidence that Mr. Kidrick's firearm was going to be used (inaudible)?" Captain Bohrer responded, "No. We know that it 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 the fact that he had it with him." [Tr., Grand Jurors, 2/21/06, 7.] Captain Bohrer also testified that when transporting the Appellant back from Baltimore the Appellant "admitted to me that he had shot Kidrick." Upon a juror's question whether that admission can be used, Captain Bohrer replied, "That's up to the Court to determine if it can or not. That would be subject to a suppression hearing at trial." [Id., 8.]

2. The Grand Jury returned an Indictment upon the Appellant on one count of First Degree Murder for the July 30, 2005, shooting death of Ronald Kidrick. [Indictment, 2/21/06, State of West Virginia v. Edward Charles Grimes, Case No.: 06-F-21.]

C. Pre-trial proceedings.

1. The Appellant withdrew from a plea agreement.

The Appellant withdrew from a plea agreement to the lesser-included offense of Second

Degree Murder when the victim's family objected to the agreed-upon sentence of twelve years. [Tr. 7/19/06, 4-5.]

2. The Appellant's Motion to Dismiss Indictment.

a. A month after indictment, and eight months after the shooting death of Mr. Kidrick, Captain Bohrer conducted a March 2006 videotaped interview with seven year-old Trejan Kidrick, who stated that Turk (the Appellant) pulled his gun first and then his dad pulled his.

b. Trejan Kidrick was subsequently interviewed in July 2006 by the Prosecuting Attorney and the Assistant Prosecuting Attorney who tried this case. This interview was nearly one year after the killing of Mr. Kidrick. Trejan for the first time stated, "My dad pulled a gun first and Turk pulled his and shot my dad. That's all I remember." Trejan also told the Prosecuting Attorney at that time that he told the police at the hospital the truth and that he did not tell the police that his dad pulled the gun first. This information was promptly provided by the State to the defense as possible exculpatory evidence. [Tr., Trejan Kidrick, 7/6/06, 6-7.]

c. Upon the State providing to the Appellant this information from Trejan, the Appellant moved to dismiss the indictment. The Motion alleged two things: 1) that Captain Bohrer's Grand Jury testimony was fraudulent; and 2) that because Captain Bohrer adheres to a customary practice of destroying field notes upon their inclusion in his written report the indictment should be dismissed. [Motion to Dismiss, 7/18/06.]

d. Addressing the Motion to Dismiss, the circuit court heard testimony from County Coroner Brining. Brining testified that he prepared a report on Mr. Kidrick's July 30, 2005, shooting death and, based on information he said was received by telephone from Captain Bohrer, included in his report the following: "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 that he witnessed the shooting." [Tr., 7/19/06.]

e. The circuit court also heard testimony from Captain Bohrer:

i. Captain Bohrer testified consistently with his September 22, 2005, Preliminary Hearing testimony that he did not interview Trejan immediately after the shooting but that Sergeant Harmison did. [Tr.,

7/31/06, 33.]

ii. Captain Bohrer testified that he spoke the morning of the shooting with Coroner Brining but “I do not recall ever telling him who pulled which gun first because I don’t know who pulled which gun first. I certainly did not know at that point in time because that was very early on investigation before I had the benefit of Trejan’s information and before I had the benefit of other folks information.” [Id., 36.]

iii. Captain Bohrer also testified that he customarily takes shorthand notes during an investigation, types from those notes into his report and does not keep the notes. [Id., 34-35, 46.]

iv. Captain Bohrer testified that after the March 2006 taped statement of Trejan, he gave the boys some money to get something to eat because they said they had not eaten that day. [Id., 52-53.]

f. After careful consideration, the circuit court denied the Motion to Dismiss by a 16-page written Order. The circuit court found that the food money Captain Bohrer gave the boys was a humanitarian gesture and, since the March 2006 statement was given after the Indictment was returned, the money could not have influenced the Grand Jury. The circuit court also found that the next statement given by Trejan to the Prosecuting Attorney in July 2006, which statement was given months after Trejan was provided food money and which statement was immediately turned over to the Appellant, was favorable to the Appellant. [Order Denying Defendant’s Motion to Dismiss Indictment, 10/3/06.]

g. The circuit court compared the testimony of Coroner Brining and Captain Bohrer. The circuit court found that Captain Bohrer’s testimony at the Preliminary Hearing was that he did not interview Trejan but that Sergeant Harmison did, and that Captain Bohrer only interviewed Christopher. The circuit court concluded that “Simply because Mr. Brining believes that Captain Bohrer told him the victim drew first, the Court has no basis to believe that Captain Bohrer has personally obtained such information or reached such a conclusion.” [Id., 9.]

h. The circuit court concluded that there was sufficient other evidence before the Grand Jury for them to return an Indictment for First Degree Murder, and insufficient evidence to conclude that Captain Bohrer committed a willful and intentional fraud upon the Grand Jury or gave knowingly perjured testimony. [Id., 10.]

i. Finally, the circuit court found no bad faith in Captain Bohrer's customary practice of destroying field notes after rendering them in his written report. [Id., 12-16.]

3. The McGinnis Hearing.

a. The State provided a **W.V.R.E.** 404(b) notice and presented pre-trial evidence at the required McGinnis hearing that the Appellant beat another man with his fists and a pistol shortly before, and at the same location where, he shot and killed the victim.

b. Mary Davis testified:

i. She is the mother of the decedent's children. [Tr. 7/19/06, 33.]

ii. She was dating the Appellant in July 2005. [Id., 34.]

iii. She was then staying at a motel with the children. [Id., 34-35.]

iv. She had worked with a Mr. Moneypenny. A friend of hers brought Moneypenny to her motel in the middle of the night on July 30 because Moneypenny was drunk and had been beaten and could not be taken to the friend's house. Moneypenny was lying on a bed and she was cleaning him up when the Appellant came in and hit Moneypenny with his fists and then with a gun. The children were screaming. She and her son took Moneypenny outside. [Id., 35-38.]

v. The children were calling their dad [the decedent] earlier when the Appellant was at the motel room. The Appellant returned and found Moneypenny on the bed, then the beating occurred. Son Christopher asked the Appellant if he could use Appellant's cell phone to call his dad. The Appellant and the decedent then argued through Christopher over the phone. [Id., 38-42.]

c. Christopher Davis testified that he is 13 years old. He called his dad [the decedent] on July 30 to come get he and his little brother. His mother [Mary Davis] said wait until the morning. Mr. Moneypenny came in and laid down. His mom cleaned Moneypenny up. The Appellant came in and punched Moneypenny and hit him with a gun and told him to get out. He and his brother went outside to check on Moneypenny. He asked to use the Appellant's phone to call his dad. His dad said he didn't want to come down because he didn't want any trouble with the Appellant. The Appellant said to his dad, "don't make me your scapegoat." He kept checking on Moneypenny until another friend of his mom's came to get Moneypenny. [Id., 47-49.]

d. Trejan Kidrick testified that he is seven years old. He called his dad that night.

So did Christopher. The Appellant told his dad "You want some come and get some." The Appellant punched Money Penny and hit him with a gun. [Id., 52-55.]

e. The parties argued the matter. [Id., 62-65.] The circuit court ruled that the evidence of the phone calls and the beating of Money Penny were all intrinsic and a part of the whole story of what happened that night. The circuit court allowed the evidence to be admitted at trial. [Id., 65-67.]

D. The Petition for Writ of Prohibition.

Following the pre-trial rulings on the issues of Captain Bohrer's notes and testimony before the grand jury, the Appellant filed an original jurisdiction Petition for Writ of Prohibition with this Court, which was refused. [Order, 11/8/06; Petition 10/23/06.]

E. Trial.

1. At trial, the jury took a view of the crime scene. [Tr. 11/14/06, 159.]
2. Berkeley County Deputy Fleagle testified that: he received a call of gunshot at the Relax Inn about 5 a.m. [Id., 161-163]; the shooter was not then on the scene [Id., 163]; and he prepared a diagram of the crime scene [Id., 166-169].
3. Berkeley County Sheriff's Deputy Captain Bohrer testified that:
 - a. He was called to the scene of the shooting on July 30 about 6 a.m. [Id., 185];
 - b. The shooting suspect was identified as "Turk." [Id., 188];
 - c. He spoke briefly with Ms. Davis, Chris Petrucci (who had driven the victim there), and the children; one child said Turk shot my daddy. [Id., 188-189];
 - d. He was given names "Turk" and "E.C. Grimes" as the suspect. [Id., 200];
 - e. He identified a photo and the Appellant as the person in the photo. [Id., 200-201];
 - f. He was able to match the name Turk with E.C. Grimes, the Appellant. [Id., 204];
 - g. He was later notified that the Appellant was in custody in Maryland. He went to pick the Appellant up. The Appellant said he was present at the shooting and did what he had to do. [Id., 208-211];

4. Berkeley County Sheriff's Deputy Lieutenant Copenhaver testified that: he received a call that shots were fired and a man was down at the Relax Inn [Id., 232]; he identified the scene from the drawing and showed where the body was found and where a gun with no round in the chamber was found. [Id., 234-236].

5. On the second day of trial, Dr. Karl Vargo, M.D., testified that he is a neurologist that treated the victim; the victim's death was due to a gunshot wound to the head and not due to any drugs that were found in his in system. [Tr. 11/15/06, 38-39.]

6. Dr. Zia Sabet, M.D., testified that: he is a Deputy Medical Examiner who examined the victim; the victim had a bullet wound to the head which entered his brain [Id., 72-73]; the victim's blood had alcohol and cocaine metabolites in it [Id., 75]; and the cause of death was a gunshot wound to the head [Id., 78].

7. John Grantham testified that he was with the victim before the killing and that the victim received a phone call and he believed the victim was going to get his son. [Id., 86-93.]

8. Mary Davis testified that:

- a. She has three children: Christopher 13, Jordan 12, Trejan 7.
- b. She knows the Appellant, Turk or E.C. Grimes, as her boyfriend. [Id., 94-95];
- c. Sons Chris and Trey were with her last summer. [Id., 95];
- d. Money Penny was brought over that night, having been beaten up. Turk came in and "thought the worst," so he hit Money Penny. Money Penny went outside. The kids were screaming. [Id., 96-98];
- e. The boys called their father. Turk and the father were arguing through Chris on the phone. [Id., 98-100.]
- f. Turk called a friend and went outside. [Id., 100];
- g. Her son said the father was shot. She ran outside and held him, Turk was gone. [Id., 100-102].

9. Christopher Davis testified that:

- a. He called his father and told him not to come because it was late. Turk then said "don't use me as a scapegoat" and "if you want some, come and get some."

[Id., 116-117, 118];

b. He identified the Appellant as Turk. [Id., 117-118.]

c. Moneypenny came in [that night] and had been beat up. Turk came in and then beat Moneypenny, punching him and pistol-whipping him. He saw Turk's pistol. Turk hit Moneypenny in the head with the pistol. [Id., 120-122];

d. Turk went outside with Ziggy. [Id., 123];

e. He was outside helping Moneypenny when he heard a gunshot. He looked up and saw the victim on the ground and Turk putting his gun away and running to a black truck. [Id., 123];

f. He showed where everyone was located on the diagram. [Id., 124];

g. He saw Turk holding his gun over the victim. [Id., 125];

h. He saw Turk and Ziggy get in a black truck and leave fast. [Id., 125-127];

10. Trejan Kidrick testified that:

a. He is seven years old. [Id., 138];

b. Turk pistol-whipped Moneypenny that night. [Id., 140];

c. He went outside to check on Moneypenny. [Id., 141-142];

d. He heard Turk and his father argue on phone. Turk said if you want some come and get some. [Id., 142];

e. He saw his dad drive up with a friend in a car, get out of the car and walked near Turk. Turk turned around and shot him. [Id., 144-145];

f. He saw Turk with gun in his hand, also his dad. He could not tell who had the gun in their hand first. [Id., 146];

g. On cross-examination he said that he told the prosecutor when he met with him that his dad pulled the gun first. [Id., 150].

11. The State rested. [Id., 152.]

12. The Appellant moved for acquittal. [Id., 154-165.] The circuit court denied the motion, ruling that self-defense is a question for the jury and that the elements were otherwise met in light most favorable to State. [Id., 165-166.]

13. The Appellant then called Berkeley County Sheriff's Deputy Captain Streets who identified a gun from the Grimes case. [Id., 169-171.]

14. The Appellant called Christopher Petrucci, who testified that:

- a. He was with the victim when he was shot. [Id., 173];
- b. That night they had been to clubs, then the victim's house in Shepherdstown, and then went to the Relax Inn in Martinsburg. [Id., 173-174];
- c. He did not use cocaine that night and did not see victim use cocaine that night. [Id., 174];
- d. He and the victim went to Martinsburg to pick up Trey at the Relax Inn. The victim got out of the car. He then heard a gunshot. He believed the victim must have taken the gun for defense purposes. [Id., 175-180];
- e. He could not identify the gun and did not know that night that the victim had a gun. [Id., 185-188.]

15. The Appellant called Martinsburg Fire Department Captain David Brining, who testified that: he is the County Coroner [Id. 191]; reading his initial report he wrote that the deceased pulled a gun and then the boyfriend pulled a gun and shot the deceased in head [Id., 192]; he believed he got that information from Captain Bohrer [Id.]; on cross-examination, from that same report he wrote that the gunshot wound was to the back of head, information he believed he got from a nurse at the hospital [Id., 196].

16. The Appellant recalled Captain Bohrer, who testified that:

- a. he spoke with Brining and does not recall telling him that the victim pulled a gun first since he did not have such information at that time. [Id., 203];
- b. He believed that Brining was mistaken because he did not tell him that. [Id., 206];
- c. He identified the gun found at the scene. [Id., 213];
- d. On cross-examination, he stated that Deputy Harmison interviewed the children. [Id., 215].

17. The Appellant called Gabriel McGuire, who testified that: he is called "Ziggy." [Id.,

217]; he was present at the shooting at the Relax Inn because the Appellant had called him to come [Id., 218]; he called a third person for a ride and that person came and parked at the motel next door [Id., 220]; another car pulled in and a guy got out of car and pulled out a gun and walked toward us and pointed it and then the Appellant reacted and pulled out a gun and shot the guy. [Id., 221-222]. On cross-examination, he testified that the Appellant then fled the scene. [Id., 224.]

18. The defense then rested. [Id., 239.]

19. The Appellant's renewed motions for acquittal were denied. [Id., 242-243.]

20. On the third day of trial, jury instructions were given as to first degree murder, second degree murder, voluntary manslaughter and self-defense. [Tr. 11/16/06, 3-18.]

21. After closings and deliberation, the jury returned a verdict of guilty of Second Degree Murder. [Id., 67-68.]

22. Following a Pre-sentence Report, the Appellant's post-trial motions for acquittal and a new trial were denied and the Appellant was sentenced to the statutory determinate sentence of forty (40) years in the penitentiary. [Sentencing Order, 2/7/07; Tr. 1/29/07.]

23. The Appellant did not then file the required Notice of Intent to Appeal. [Record, *passim*.]

24. The Appellant filed a Motion for Reconsider Sentence, which was denied. [Order, 4/5/07; Motion to Reconsider Sentence, 3/28/07.]

25. Following a long delay by the Appellant's counsel in filing an appeal, the Appellant was re-sentenced by agreed order for appeal purposes. [Agreed Order Reentering Judgment and Sentence for Purpose of Permitting Appeal, 9/24/07.]

26. After the State responded to the Petition for Appeal, noting that no notice of intent to appeal was ever filed, the Appellant submitted an order to the trial court permitting the late filing of a notice of intent to appeal. [Order Nunc Pro Tunc, 3/25/08.]

27. The State of West Virginia respectfully requests this Honorable Court to affirm the judgments of the jury and trial court below and deny the Appeal for failure of the Appellant to prove any error.

III. THE ISSUES PRESENTED

A. WHETHER THE CIRCUIT COURT ACTED WITHIN ITS LAWFUL AUTHORITY, CONSISTENT WITH ARIZONA V. YOUNGBLOOD, 488 U.S. 51 (1988), WHEN IT PROPERLY HELD THAT CAPTAIN BOHRER DID NOT ACT IN BAD FAITH IN CUSTOMARILY DESTROYING HIS FIELD NOTES AFTER RENDERING THEM INTO HIS WRITTEN REPORT AND DENIED THE MOTION TO DISMISS INDICTMENT?

B. WHETHER THE CIRCUIT COURT ACTED WITHIN ITS LAWFUL AUTHORITY, CONSISTENT WITH STATE EX REL. PINSON V. MAYNARD, 181 W.VA. 662, 383 S.E.2d 844 (W. VA. 1989), WHEN IT PROPERLY HELD THAT CAPTAIN BOHRER DID NOT COMMIT A WILLFUL AND INTENTIONAL FRAUD UPON THE GRAND JURY AND DENIED THE MOTION TO DISMISS INDICTMENT?

C. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING RECORDS OVER THE APPELLANT'S OBJECTION?

D. WHETHER THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION AT THE PRE-TRIAL HEARING IN ADMITTING INTRINSIC EVIDENCE OF THE APPELLANT PISTOL-WHIPPING MR. MONEYPENNY AND THE PHONE CALL TO THE VICTIM?

E. WHETHER THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AGAIN AT THE CLOSE OF ALL EVIDENCE?

F. WHETHER THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR MISTRIAL AND FOR NEW TRIAL?

G. WHETHER THE CIRCUIT COURT PROPERLY IMPOSED THE STATUTORY SENTENCE OF FORTY YEARS?

IV. AUTHORITIES RELIED UPON

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988).....14, 16, 17.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963).....15.

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)....15.

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984).....16, 17, 19.

State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007).....14, 15, 17, 19.

State v. Roy, 194 W.Va. 276, 460 S.E.2d 277 (1995).....18.

State ex rel. Pinson v. Maynard, 181 W.Va. 662, 383 S.E.2d 844 (1989).....19, 21, 22, 23, 24, 25.

State ex rel. Whitman v. Fox, 160 W.Va. 633, 236 S.E.2d 565 (1977).....22.

Barker v. Fox, 160 W.Va. 749, 238 S.E.2d 235 (1977).....22.

State v. Bonham, 184 W.Va. 555, 401 S.E.2d 901 (1991).....24.

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996).....26, 27, 28.

State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994).....27, 28.

State v. Taylor, 200 W. Va. 661, 490 S.E.2d 748 (1997).....28-29, 32, 33.

State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998).....29.

State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996).....29.

State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).....29.

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).....29, 30, 31.

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000).....30, 31.

State v. Whittaker, 221 W.Va. 117, 650 S.E.2d 216 (2007).....31.

State v. Shingleton, 222 W.Va. 647, 671 S.E.2d 478 (2008).....31.

State v. Justice, 191 W. Va. 261, 445 S.E.2d 202, 208 (1994).....31.

State v. Shelton, 116 W. Va. 75, 178 S.E. 633 (1935).....32-33.

State ex rel. Massey v. Hun, 197 W. Va. 729, 478 S.E.2d 579 (1996).....33, 34.

W. Va. Code § 62-9-3.....31.

W. Va. Code § 61-2-3.....33.

W. Va. Code § 61-2-13.....33.

W.V.R.E. 404(b).....25, 26, 28.

W.V.R.E. 403.....26, 28.

V. ARGUMENT

A. THE CIRCUIT COURT ACTED WITHIN ITS LAWFUL AUTHORITY, CONSISTENT WITH ARIZONA V. YOUNGBLOOD, 488 U.S. 51 (1988), WHEN IT PROPERLY HELD THAT CAPTAIN BOHRER DID NOT ACT IN BAD FAITH IN CUSTOMARILY DESTROYING HIS FIELD NOTES AFTER RENDERING THEM INTO HIS WRITTEN REPORT AND DENIED THE MOTION TO DISMISS INDICTMENT.

1. Standards of Review.

The United States Supreme Court holds that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333 (1988).

This Court holds:

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, *i.e.*, it must have prejudiced the defense at trial.

Syl. Pt. 2, State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007).

2. Discussion.

The Appellant fails to prove that the circuit court abused its discretion in denying the Appellant’s Motion to Dismiss Indictment. The Appellant fails to establish that the State was in possession of any exculpatory evidence that it did not turn over to the Appellant before trial. This Court refused the Petition for Writ of Prohibition on this issue that the Appellant filed

before trial. This Court is respectfully requested to deny the Petition for Appeal.

The trial record, as referenced above, establishes the following facts. The Appellant shot and killed Ronald Kidrick on July 30, 2005. The Appellant was indicted for that killing in February 2006. A month after the indictment, in March 2006, Captain Bohrer conducted a videotaped interview with seven year-old Trejan Kidrick, who stated that Turk (the Appellant) pulled his gun first and then his dad pulled his. That video was provided by the State to the defense in discovery. County Coroner Fire Department Captain Brining's notes were provided by the State to the defense in discovery.

In July 2006, the Prosecuting Attorney and the Assistant Prosecuting Attorney who tried the case interviewed Trejan Kidrick. Trejan *for the first time* stated, "My dad pulled a gun first and Turk pulled his and shot my dad. That's all I remember." Trejan also said at that time that he told the police at the hospital the truth and that he did *not* tell the police that his dad pulled the gun first. [Tr., Trejan Kidrick, 7/6/06, 6-7.] The Appellant acknowledges that this new information was promptly provided by the State to the defense as possible exculpatory evidence.

At trial four months after that July 2006 interview, seven year old Trejan testified that he saw his dad drive up with a friend in a car, get out of the car and walked near Turk. Turk turned around and shot him. [Tr. 11/15/06, 144-145.] He saw Turk with a gun in his hand, also his dad. He could not tell who had the gun in their hand first. [Id., 146.] On cross-examination by the Appellant, Trejan said that he told the prosecutor when he met with him that his dad pulled the gun first. [Id., 150.] Trejan was asked that question on cross-examination precisely because the State had provided that exculpatory evidence to the defense four months earlier, in July 2006, when Trejan provided that information.

Complying with the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and this Court's recent (but after-decided) decision in State v. Youngblood, *supra*, the exculpatory evidence that the State first received from Trejan at that July 2006 meeting--that his dad pulled a gun first--was turned over and used by the Appellant at trial. There is no dispute as

to this fact.

The circuit court, after hearing the testimony and evidence from Sheriff's Captain Bohrer and Martinsburg Fire Department Captain David Brining, in its pre-trial ruling, found no evidence that there was other exculpatory evidence not turned over by the State to the Appellant. The circuit court, therefore, denied the Appellant's Motion to Dismiss. This Court refused the Appellant's subsequent Petition for Writ of Prohibition on this precise issue.

A police officer engaging in a routine practice of destroying shorthand field notes once those notes are rendered into his official report is not proven by the Appellant to be a due process violation. The Appellant offered no evidence that this routine practice of Captain Bohrer was in bad faith, or was in any way unlawful, or was in any way a violation of applicable police procedures and policies. The Appellant offered no legal basis that, even had he proved his case, the remedy is dismissal of an Indictment, though that is the relief the Appellant requested. The circuit court properly denied the Motion to Dismiss. The Appellant does not now prove that the circuit court erred or that there was exculpatory evidence not provided to him.

In the cases of California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984) and Arizona v. Youngblood, *supra*, 488 U.S. 51, 109 S.Ct. 333 (1988), the United States Supreme Court addressed questions of the State's responsibility toward a criminal defendant's desire to obtain evidence the defendant thinks may be useful to his case. Trombetta dealt with preserving breath samples for Intoxylizer machines in a Driving Under the Influence case; Youngblood with preserving clothing and semen samples in a child sexual assault case. In each case, the United States Supreme Court ruled that due process did *not* require the preservation of the sought evidence. The Youngblood Court specifically requires a showing of *bad faith* in not preserving the evidence before there is a due process violation.

In the case of State v. Youngblood, *supra*, this Court evaluated the consequences for the State where the investigating officer had in his possession a note that included exculpatory information but had not revealed the same to the Prosecuting Attorney. The facts of State v. Youngblood are entirely different from the facts presented herein.

Here, the Appellant did not demonstrate that there would be anything in Captain Bohrer's notes that could be exculpatory. The evidence on the record shows that Trejan was not interviewed by Captain Bohrer until eight months after the shooting. The record shows that Trejan's earlier interview by Sgt. Harmison contained no reference to Trejan's dad pulling a gun first. The record shows that Trejan told the Prosecuting Attorney in her interview of him that he told the truth in his earlier statement to police but did not tell the police that his dad pulled a gun first. The Prosecuting Attorney provided that information immediately to the defense.

Based on Captain Bohrer's testimony that his notes were rendered into his written report, the only evidence presented leads to the conclusion that the notes were not exculpatory but *inculpatory* of the Appellant. The circuit court heard testimony from Captain Bohrer. The circuit court also heard testimony from County Coroner Brining. Brining's notes contain a July 2005 reference to the decedent pulling a gun first, which he felt sure was information that he received from Captain Bohrer.¹ However, Captain Bohrer's testimony and Trejan's statements render Brining's speculation an impossibility. Captain Bohrer testified that he did not interview Trejan. Trejan's statements were that he told the police the truth but never told them that his dad pulled a gun first.

The Appellant did not prove that Captain Bohrer engaged in any bad faith in the routine practice of destroying the notes. Captain Bohrer's testimony that he never keeps his field notes after writing his reports belies any suggestion of bad faith. The Appellant fails the United States Supreme Court's Youngblood and Trombetta standards. The Appellant fails this Court's Youngblood standard.

This Court recognizes that:

The withholding by the prosecution of evidence "that is both favorable to the accused and material to guilt or punishment" violates a defendant's due process rights. *Pennsylvania v. Ritchie*,

¹ As was brought out in the State's cross-examination at trial, Coroner Brining's report also contained the error that the victim was shot in the back of the head, when the victim was plainly shot in the forehead.

480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40, 57 (1987). Evidence is “material to guilt or punishment” only if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.’ ” *Ritchie*, 480 U.S. at 57, 107 S.Ct. at 1001, 94 L.Ed.2d at 57, quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985).

State v. Roy, 194 W.Va. 276, 460 S.E.2d 277, 285 n.9 (1995).

The Appellant offered no evidence that there was anything in Captain Bohrer’s notes of exculpatory value, or that contradicted his written report and testimony, or that established a “reasonable probability” that if those notes existed today they would have compelled acquittal at trial. County Coroner Brining’s report references that Mr. Kidrick pulled a gun first, but Captain Bohrer’s pre-trial and trial testimony was that he has no recollection of telling Brining that. Captain Bohrer’s testimony is plain from the Preliminary Hearing and the Grand Jury that Mr. Kidrick had a firearm with him—it was found beside him—but that there was no evidence that Mr. Kidrick was attempting to use his firearm. Captain Bohrer’s testimony is plain that Sergeant Harmison was the officer that interviewed the children.

Even in Trejan’s July 2006 turnaround story with the State, as referenced by the circuit court’s October 3, 2006, Order, Trejan admits that he never told any police officer that his dad pulled a gun first. The only material evidence that was available on the issue of who pulled their weapon first is the July 2006 statement of Trejan, a statement given nearly four months after the Grand Jury met—a statement that the State provided to the Appellant immediately after it was received.

The circuit court considered all of these matters and found no bad faith on Captain Bohrer’s part. The circuit court further concluded that the best evidence available on the question of who pulled a gun first are witnesses who are available to testify at trial.

Trejan testified at trial that he does not know who had their gun first. Trejan admitted on cross-examination that he told the prosecutor during a meeting that it was his dad. The jury heard all of the evidence, had before them the circuit court’s instructions on self-defense and

“missing” evidence, and heard the argument of the Appellant’s counsel. The jury did not believe the Appellant acted in self-defense. The Appellant’s attempt to transform the vagaries of this small child’s memory of how his dad was shot in the head in his presence does not prove that there was exculpatory evidence that was not turned over to the Appellant. The Appellant was provided with all of the exculpatory evidence in the possession of the State and the Appellant used that exculpatory evidence in support of his assertion of self-defense. The jury was the only body to weigh that evidence at trial. They did not find the Appellant acted in self-defense. The Appellant does not prove that the jury’s verdict should be reversed. The Appellant does not prove that the circuit court erred in denying his motion to dismiss the indictment.

The circuit court properly applied the Youngblood and Trombetta standards and denied the Motion to Dismiss at pre-trial since there was not proof that Captain Bohrer had any other evidence other than what he put in his report. Given that the Appellant fails to demonstrate that he was entitled to any relief under the the Youngblood and Trombetta standards, the Appellant fails to establish that the circuit court erred in denying the Motion to Dismiss. The State respectfully requests that this Court deny the Petition.

B. THE CIRCUIT COURT ACTED WITHIN ITS LAWFUL AUTHORITY, CONSISTENT WITH STATE EX REL. PINSON V. MAYNARD, 181 W.VA. 662, 383 S.E.2d 844 (W. VA. 1989), WHEN IT PROPERLY HELD THAT CAPTAIN BOHRER DID NOT COMMIT A WILLFUL AND INTENTIONAL FRAUD UPON THE GRAND JURY AND DENIED THE MOTION TO DISMISS INDICTMENT.

1. Standards of Review.

“[D]ismissal of [an] indictment is appropriate only ‘if it is established that the violation substantially influenced the grand jury’s decision to indict’ or if there is ‘grave doubt’ that the decision to indict was free from substantial influence of such violations.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261-62, 108 S.Ct. 2369, 101 L.Ed.2d 228, 238 (1988) (citing *United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938, 945, 89 L.Ed.2d 50 (1986) (O’Connor, J., concurring)).

Syl. Pt. 6, State ex rel. Pinson v. Maynard, 181 W.Va. 662, 383 S.E.2d 844 (1989).

2. Discussion.

The Appellant fails to prove that the circuit court abused its discretion in denying the Appellant's Motion to Dismiss Indictment. The Appellant fails to establish that Captain Bohrer committed a willful and intentional fraud upon the grand jury. This Court refused the Petition for Writ of Prohibition on this issue that the Appellant filed before trial. This Court is respectfully requested to deny the Petition for Appeal.

The Appellant shot and killed Mr. Kidrick in July 2005. In February 2006, Captain Bohrer presented his evidence to the Grand Jury, which returned the Indictment against the Appellant. In March 2006, a month after the Indictment, Captain Bohrer first interviewed seven year-old Trejan Kidrick. That recorded interview was provided to the Appellant.

In July 2006, the Prosecuting Attorney and the Assistant Prosecuting Attorney who tried the case interviewed Trejan Kidrick. Trejan *for the first time* stated, "My dad pulled a gun first and Turk pulled his and shot my dad. That's all I remember." Trejan also said at that time that he told the police at the hospital the truth and that he did *not* tell the police that his dad pulled the gun first. [Tr., Trejan Kidrick, 7/6/06, 6-7.] The Appellant acknowledges that this information was promptly provided by the State to the defense as possible exculpatory evidence.

The Appellant admits in his brief that Captain Bohrer did not interview seven year-old Trejan until after the Grand Jury presentment. The Appellant admits that seven year-old Trejan did not tell the Prosecutor that his father pulled a gun first until July 2006, several months after the Grand Jury presentment. The Appellant does not dispute Trejan's statement that he told the police at the hospital the truth and that he did *not* tell the police that his dad pulled the gun first.

The fact that seven year-old Trejan related a different story to the Prosecutor a year after the July 30, 2005, shooting does not change the facts that Captain Bohrer was working with *prior* to the February 2006 Grand Jury. The fact that seven year-old Trejan related a different story to Captain Bohrer a month *after* the February 2006 Grand Jury presentment does not change the facts that Captain Bohrer was working with *prior* to the February 2006 Grand Jury. Based on the

testimony at hearing, the prior testimony at the preliminary hearing and the various witness statements of record, the circuit court properly concluded that Captain Bohrer did not commit a willful and intentional fraud or perjury in his testimony before the Grand Jury.

The process for the circuit court to consider dismissal of an indictment on an allegation of improper evidence before the Grand Jury is outlined by this Court by Syllabus Points in State ex rel. Pinson v. Maynard, *supra*, 181 W.Va. 662, 383 S.E.2d 844 (1989):

2. "Except for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency." Syl. Pt., *Barker v. Fox*, 160 W.Va. 749, 238 S.E.2d 235, 235 (1977).

3. Once the defendant establishes a prima facie case of willful, intentional fraud in obtaining an indictment he is entitled to a hearing with compulsory process. *Barker v. Fox*, 160 W.Va. 749, 238 S.E.2d 235, 237 (1977).

4. "Most courts hold that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice." Syl. Pt. 12, in part, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782, 786 (1984).

5. When perjured or misleading testimony presented to a grand jury is discovered before trial and there is no evidence of prosecutorial misconduct, the State may withdraw the indictment without prejudice, or request the court to hold an *in camera* hearing to inspect the grand jury transcripts and determine if other sufficient evidence exists to support the indictment.

6. "[D]ismissal of [an] indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261-62, 108 S.Ct. 2369, 101 L.Ed.2d 228, 238 (1988) (citing *United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938, 945, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring)).

7. In reviewing the evidence for sufficiency to support the indictment, the court must be certain that there was significant and material evidence presented to the grand jury to support all elements of the alleged criminal offense.

Syl. Pts. 2-7, *id.*

Here, the evidence plainly supports the circuit court's finding of no willful, intentional fraud or perjury. The Appellant presented no evidence that any witness ever told investigating officers *before* the February 2006 Grand Jury met to consider the murder charge against the Appellant that Mr. Kidrick pulled his gun first. Without such evidence, the Appellant fails to even make out a *prima facie* case that Captain Bohrer's Grand Jury testimony was willfully and intentionally fraudulent.

This Court makes very clear the requirement that a criminal defendant make out a *prima facie* case when challenging the work of a grand jury. State ex rel. Pinson v. Maynard, *id.*, 383 S.E.2d 844, 848²; State ex rel. Whitman v. Fox, 160 W.Va. 633, 236 S.E.2d 565, 574-575 (1977). Lacking a *prima facie* showing of fraud, the integrity of the grand jury system is undermined, as is the efficient administration of justice, by further inquiry into the Grand Jury's work. Pinson, *supra*, 383 S.E.2d 844, 848, *citing* Barker v. Fox, 160 W.Va. 749, 238 S.E.2d 235, 236-237 (1977).

The closest the Appellant can come to a *prima facie* case is his attempt to bootstrap seven year-old Trejan's July 2006, memory change. However, as the circuit court recognized, that memory change came well after Captain Bohrer's February 2006 Grand Jury testimony. In addition, Trejan's memory change is contrary to what Trejan told Sergeant Harmison right after the shooting, as testified to by Sergeant Harmison at the September 2005 Preliminary Hearing. Captain Bohrer's testimony at the Preliminary Hearing and at the Motion to Dismiss hearing were consistent: he did not interview Trejan immediately after the shooting.

² In Pinson, this Court expressed concern that the circuit court erred in finding a *prima facie* case but did not need to address the issue since it was not raised. *Id.*, 383 S.E.2d 844, 848. Pinson requires the Appellant to make a *prima facie* case of willful, intentional fraud before reviewing the Grand Jury testimony or of reviewing the Grand Jury testimony *in camera*. In the case *sub judice*, the circuit court did not require the showing of a *prima facie* case before reviewing the Grand Jury testimony, but nonetheless arrived at the correct conclusion that there had been no willful, intentional fraud after hearing the evidence and reviewing that testimony.

The Appellant also makes a run at the notation in Coroner Brining's day-of-the-shooting report about the victim pulling a gun first, which Brining said was based on a telephone call with Captain Bohrer. This attempt to pit the Coroner against the lead police investigator also fails. Captain Bohrer testified credibly that he had no recollection of making such a statement to Brining. Whether Brining misheard or mistook a note of that telephone conversation is unknown. What is known is that there is no evidence to suggest that Captain Bohrer had any such information on July 30, 2005, upon which he could base such a statement to Brining. There is no evidence that Captain Bohrer had any such evidence at the time of his Grand Jury testimony in February 2006. Again, the only evidence the Appellant has that any witness saw Mr. Kidrick pull a gun first is Trejan's July 2006 change of memory—a change that occurred four months *after* the Grand Jury met.

The Appellant also cites to Captain Bohrer's testimony to the February 2006 Grand Jury that the Appellant "admitted to me that he had shot Kidrick." This testimony appears to be based on the Appellant's statement after he fled the State and was being transported back to West Virginia that "he did what he had to do." Captain Bohrer testified to the Appellant making that statement at the September 2005 Preliminary Hearing. The impact on the Grand Jury of Captain Bohrer's reasonable inference of the Appellant's admission is simply speculation on the Appellant's part. It is undisputed that the Appellant shot and killed Kidrick; the Appellant's theory at trial was self-defense. With no evidence at the time of the Grand Jury that Kidrick pulled his gun first, the Appellant does not prove that there was any willful, intentional fraud in Captain Bohrer's testimony.

Neither Trejan's changed memory nor Brining's report justify a *prima facie* finding of willful, intentional fraud by Captain Bohrer. State ex rel. Pinson v. Maynard, *supra*. Nor does Captain Bohrer's reasonable inference from the Appellant's admission justify a *prima facie* finding of willful, intentional fraud by Captain Bohrer. *Id.* Having skipped the *prima facie* requirement and jumping to a review of all of the evidence, including the Grand Jury testimony, the circuit court still correctly concluded that there was no willful, intentional fraud or knowing

perjury by Captain Bohrer. *Id.*

The circuit court concluded that there was no willful, intentional fraud or perjury by Captain Bohrer. That conclusion should have ended the inquiry. However, the circuit court went above and beyond that finding, and covered the entire Pinson process to make a determination of the sufficiency of the evidence to support the Indictment.

The presence of willful, intentional fraud does not, alone, vitiate an indictment: “[D]ismissal of [an] indictment is appropriate only ‘if it is established that the violation substantially influenced the grand jury’s decision to indict’ or if there is ‘grave doubt’ that the decision to indict was free from substantial influence of such violations.” Syl. Pt. 6 (in part), State ex rel. Pinson v. Maynard, *id.*; Syl. Pt. 1, State v. Bonham, 184 W.Va. 555, 401 S.E.2d 901 (1991).

Syl. Pt. 5 of Pinson authorizes the circuit court to determine the sufficiency of the evidence upon a finding of willful, intentional fraud and no evidence of prosecutorial misconduct. There is no allegation or evidence of prosecutorial misconduct in this case. The circuit court correctly found that there was no prosecutorial misconduct. The circuit court correctly determined that there is sufficient evidence to support the First Degree Murder Indictment.

Excluding the testimony of Captain Bohrer that the Appellant finds offensive, the circuit court cited Captain Bohrer’s further testimony before the Grand Jury that the Appellant and Mr. Kidrick were both armed with firearms and had a confrontation at the motel which led to the Appellant shooting Mr. Kidrick once in the head. [Order Denying Defendant’s Motion to Dismiss Indictment, 10/3/06, p.10.]

A fuller review of the Grand Jury transcript reveals testimony that: 1) Mr. Kidrick had children with the Appellant’s girlfriend, Mary Davis; 2) Ms. Davis and the children were staying at a motel; 3) a telephone argument ensued between the Appellant and Mr. Kidrick; 4) Mr. Kidrick arrived at the motel a short time later; 5) the children saw Mr. Kidrick get out of a car

and walk to the motel room; 6) Mr. Kidrick and the Appellant confront each other; 7) each man had a firearm; and 8) the Appellant shot Mr. Kidrick in the head, resulting in his death. [Tr., Grand Jurors, 2/21/06, p. 4-5.]

Though the circuit court did not need to engage in the Syl. Pt. 5 review of the sufficiency of the evidence supporting the Indictment since it found no willful, intentional fraud, the circuit court still properly concluded that there is sufficient evidence to support the Grand Jury's probable cause standard for the First Degree Murder Indictment. State ex rel. Pinson v. Maynard, *supra*.

Given that the Appellant fails to demonstrate that he was entitled to any relief under the State ex rel. Pinson v. Maynard standards, the Appellant fails to establish that the circuit court erred in its ruling denying the Motion to Dismiss. The State of West Virginia respectfully requests that this Court deny the Petition for Appeal.

C. THE CIRCUIT COURT DID NOT ERR IN ADMITTING RECORDS OVER THE APPELLANT'S OBJECTION.

The Appellant still identifies no place in the record where police records were admitted into evidence over the hearsay objection of the Appellant. The Appellant fails to establish that the circuit court erred in this manner. The State of West Virginia respectfully requests that this Court deny the Petition for Appeal.

D. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION AT THE PRE-TRIAL HEARING IN ADMITTING INTRINSIC EVIDENCE OF THE APPELLANT PISTOL-WHIPPING MR. MONEYPENNY AND THE PHONE CALL TO THE VICTIM.

1. Standard of Review.

Whether "other bad acts" evidence is subject to analysis under **W.V.R.E. 404(b)**³ turns

³ **W.V.R.E. 404(b)** reads: "Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

on whether the evidence is “intrinsic” or “extrinsic” to the charged crime. Intrinsic evidence is admissible independent of 404(b) analysis and is admissible over a **W.V.R.E. 403**⁴ objection. See State v. LaRock, 196 W.Va. 294, 313, 470 S.E.2d 613, 632 (1996). In LaRock, this Court explained:

In determining whether the admissibility of evidence of “other bad acts” is governed by Rule 404(b), we first must determine if the evidence is “intrinsic” or “extrinsic.” See United States v. Williams, 900 F.2d 823, 825 (5th Cir.1990): “ ‘Other act’ evidence is ‘intrinsic’ when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.” (Citations omitted). If the proffer fits in to the “intrinsic” category, evidence of other crimes should not be suppressed when those facts come in as *res gestae*-as part and parcel of the proof charged in the indictment. See United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (stating evidence is admissible when it provides the context of the crime, “is necessary to a ‘full presentation’ of the case, or is ... appropriate in order ‘to complete the story of the crime on trial by proving its immediate context or the “res gestae” ’”). (Citations omitted). It seems doubtful this case could have been presented appropriately without showing when and how the young victim received the injuries that appeared on his body. Evidence the defendant was responsible for all the injuries to the victim would seem to “ ‘complete the story of the crime.’ ” Masters, 622 F.2d at 86. (Citation omitted). Indeed, evidence admissible for one of the purposes specified in Rule 404(b) and *res gestae* not always is separated by a bright line. See United States v. Cook, 745 F.2d 1311, 1317-18 (10th Cir.1984), *cert. denied*, 469 U.S. 1220, 105 S.Ct. 1205, 84 L.Ed.2d 347 (1985).

Id., 470 S.E.2d 613, 632 n. 29.

2. Discussion.

The Appellant was charged with the murder of Ronald Kidrick at the Relax Inn in the

accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.”

⁴ **W.V.R.E. 403** reads: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

pre-dawn hours of July 30, 2005. The Appellant and Mr. Kidrick were both romantically involved with Mary Davis. Mr. Kidrick was the father of Mary Davis' son Trejan and considered a father to her son Chris. Ms. Davis, Trejan and Chris were living at the Relax Inn. The State provided pre-trial 404(b) notice to the Appellant that it intended to introduce evidence that immediately prior to the shooting the Appellant beat a Mr. Moneypenny with a gun in Ms. Davis' room in front of Trejan and Chris and then threw Moneypenny out.

Ms. Davis, Trejan and Chris all testified at the McGinnis [State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516 (1994)], hearing. The gist of that testimony was that Moneypenny was brought over to Ms. Davis' motel room in the night by one of Ms. Davis' friends, who could not take him to her parents' home because he was drunk and beat up by bouncers; that Ms. Davis was cleaning his wounds when the Appellant came in; Ms. Davis opined that the Appellant "thought the worst;" that the Appellant beat Moneypenny with his fists and a gun; that Moneypenny was then thrown out; that Chris then called Mr. Kidrick since Kidrick was supposed to have come and picked he and Trejan up earlier; that the Appellant and Kidrick argued, with the Appellant saying "you want some come and get some"; that Trejan and Chris kept going outside to check on Moneypenny's well-being; that Trejan and Chris were outside with Moneypenny when Kidrick arrived and the Appellant shot and killed him.

The circuit court ruled that this evidence was intrinsic to the charged crime. This ruling is consistent with this Court's reference in footnote 29 of LaRock: " 'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." The telling of the story of the Appellant's unprovoked beating of Moneypenny in Ms. Davis' motel room is "inextricably intertwined" with the shooting of Kidrick and "necessary preliminaries to the crime charged." The telling of the story of the Appellant's unprovoked beating of Moneypenny is part of the *res gestae*, the context that the jury must hear to have the complete story.

Without being told of the Appellant's unprovoked beating of Moneypenny, the jury

would not understand the violence in the motel room that prompted Chris to make the final phone call to Kidrick. The jury would not understand that that call prompted arguing between the Appellant and Kidrick. The jury would not understand that that call prompted Kidrick to finally come to the Relax Inn where he knew the children were exposed to the Appellant's gun and the Appellant's violence. The jury would not understand why Chris and Trejan were outside tending to Money Penny when Kidrick arrived to be met with a bullet in the head from the Appellant's gun.

The State put this evidence on through a McGinnis hearing so the circuit court would properly have the testimony before it. The circuit court, upon hearing the evidence, properly ruled that the evidence was intrinsic. As intrinsic evidence, it was not subject to further 404(b) analysis. LaRock, *supra*. As intrinsic evidence, it was not subject to **W.V.R.E.** 403 analysis as to whether it was prejudicial to the Appellant.

The Appellant fails to establish that the circuit court erred in permitting the admission of this intrinsic evidence. LaRock, *supra*. The State of West Virginia respectfully requests that this Court deny the Petition for Appeal.

E. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AGAIN AT THE CLOSE OF ALL EVIDENCE.

1. Standard of review.

The standard of review utilized by the Supreme Court when reviewing the denial of a motion for acquittal is:

“Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.” *State v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969).” Syllabus Point 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Syl. Pt. 3, State v. Taylor, 200 W. Va. 661, 490 S.E.2d 748 (1997).

This standard of review for a motion for acquittal, where the “question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt”, *id.*, differs slightly from the standard of review when reviewing the sufficiency of the evidence supporting a conviction. The standard for reviewing the sufficiency of evidence to support a conviction is :

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 the 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 weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syllabus Point 3, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

The specific inquiry of the appellate court in reviewing the sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt:

The function of an 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. Syl. Pt. 1, State v. Guthrie, [*supra*].

Syl. Pt. 1, State v. Hughes, *supra*.

2. Discussion.

The circuit court properly exercised its discretion in denying the Appellant's motions for acquittal based on the evidence presented at trial, as viewed in a light most favorable to the State.

The evidence is summarized in the Statement of Facts, *supra*. That the Appellant intentionally shot the victim, Ronald Kidrick, was not in dispute in this case. Viewing the evidence in the light most favorable to the State, the jury had before it evidence directly and circumstantially inculcating the Appellant including: 1) the Appellant shot Ronald Kidrick in the head; 2) Kidrick died as a result of that gunshot wound; 3) shortly before the shooting, the Appellant beat Money Penny with his fists and a gun in front of Kidrick's children; 4) one of the children called Kidrick; 5) the Appellant told Kidrick "you want some come and get some"; 6) the Appellant then called an associate, Ziggy, to the motel; 7) Kidrick arrived from Shepherdstown shortly thereafter and the Appellant shot him; and 8) the Appellant immediately fled the scene.

The Appellant's primary focus in his Brief on the sufficiency of the evidence is on the element of premeditation. The Appellant takes on a heavy burden in proving this allegation. Syllabus Point 3, State v. Guthrie, *supra*. In Guthrie, this Court also holds that:

Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.

Syllabus Point 5, State v. Guthrie, *id.* See Syl. Pt. 4, State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000).

The jury had evidence before it of the Appellant's opportunity to reflect on the intent to kill. That evidence included testimony that, after getting his jealous anger up beating Money Penny with a pistol, the Appellant taunted Kidrick on the phone "you want some come and get some." The jury had evidence before it that some period of time passed before Kidrick

arrived from Shepherdstown. The jury had evidence before it that the Appellant had opportunity to leave the Relax Inn during the time before Kidrick arrived, but did not. The jury had evidence before it that when Kidrick finally arrived, the Appellant shot him in the head. The jury could find beyond a reasonable doubt that the Appellant deliberated and premeditated killing Kidrick during the time that elapsed between his taunting Kidrick on the phone and Kidrick's eventual arrival at the motel. State v. Catlett, supra; State v. Guthrie, supra.⁵

The burden of establishing self defense is upon the Appellant. State v. Whittaker, 221 W.Va. 117, 650 S.E.2d 216 (2007). This burden is slight, as the defendant need only show sufficient evidence to create a reasonable doubt that the killing occurred through an act of self defense; if successful, the burden is then upon the State to prove beyond a reasonable doubt that the defendant did not act in self defense. *Id.*; see also State v. Shingleton, 222 W.Va. 647, 671 S.E.2d 478 (2008) (affirming malicious wounding conviction where evidence did not support giving a self defense instruction).

Seven year old Trejan testified at trial that he saw his dad drive up with a friend in a car, get out of the car and walked near Turk. Turk turned around and shot him. He saw Turk with gun in his hand, also his dad. He could not tell who had the gun in their hand first. [Tr., 11/15/06, 144-146.] On cross-examination, Trejan acknowledged that he told the prosecutor that his dad pulled his gun first, although, as is well described through this Brief, this statement to the prosecutor contradicts Trejan's two prior statements to the police.

The Appellant's only unequivocal testimony of self-defense is the partisan testimony from "Ziggy," the friend of the Appellant's whom the Appellant called to come to the Relax Inn

⁵ As the record plainly demonstrates, the Appellant is wrong when he asserts that there was no evidence presented to the jury of premeditation. Even were he correct, the remedy is not dismissal of the case. The Indictment for Murder is the same whether the charge be Murder in the First Degree or Murder in the Second Degree; the degree depends on the proof at trial. State v. Justice, 191 W. Va. 261, 445 S.E.2d 202, 208 (1994); **W. Va. Code** § 62-9-3. Here, the State presented sufficient evidence for the jury to consider Murder in the First Degree; the jury returned a verdict of guilty for Murder in the Second Degree.

while the Appellant was awaiting the arrival of Kidrick. Ziggy's testimony on cross-examination revealed his partisanship to the Appellant. Ziggy's credibility on this issue was for the jury to determine. The question of which of Trejan's versions of the story of what happened that night was also an issue for the jury. The circuit court properly ruled that, with the evidence before the jury, the jury could make the determination. [Tr., 11/15/06, 242-243.]

Even were this slim evidence sufficient to create a reasonable doubt on the issue of self defense, necessitating a shift to the State to prove beyond a reasonable doubt that the Appellant did not act in self defense, the State still met its burden. Viewing the evidence in the light most favorable to the State, the jury had before it sufficient evidence to find beyond a reasonable doubt that the Appellant did not act in self defense. The Appellant was armed with a firearm. The Appellant knew that Kidrick was worried about the safety of the children Trejan and Christopher since the Appellant just beat Money Penny with his fists and a gun in the children's presence. The Appellant taunted Kidrick to come get some. While the Appellant waited for Kidrick to arrive, he called his associate Ziggy to the scene. When Kidrick arrived the Appellant shot him in the head, killing Kidrick. The Appellant immediately fled the scene. There was no evidence that Kidrick fired a gun. The Appellant was arrested in another state weeks later.

The circuit court properly denied the motions for acquittal at the close of the State's case and at the close of all evidence and properly allowed the matter to be submitted to the jury. State v. Taylor, *supra*. The State of West Virginia respectfully requests this Court to deny the Petition for Appeal.

F. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR NEW TRIAL AND MISTRIAL.

1. Standard of Review.

The standard for reviewing the sufficiency of the evidence are the same standards in Argument E, *supra*. The standard for the granting of a mistrial is "In the trial of a criminal case the trial court, acting under Code, 62-3-7, may, for manifest necessity, discharge the jury and order a new trial. Such action will not afford basis for a plea of former jeopardy." Syl. pt. 1, State

v. Shelton, 116 W. Va. 75, 178 S.E. 633 (1935).

2. Discussion.

The Appellant makes no argument factually or legally in his Brief as to how the circuit court allegedly erred in denying these motions. The Appellant does not brief these issues before this Court or cite any place in the record where these matters allegedly occurred. The circuit court properly denied the motions for new trial and acquittal at the post-trial motions hearing. State v. Taylor, supra. The Appellant has proven no manifest necessity which would have required the circuit court to declare a mistrial. State v. Shelton, supra. The State of West Virginia respectfully requests this Court to refuse the Petition for Appeal.

G. THE CIRCUIT COURT PROPERLY IMPOSED THE STATUTORY SENTENCE OF FORTY YEARS.

1. Standard of Review.

The sentencing court is given broad discretion in imposing sentence, as long as it is within the statutory limits and not based on an impermissible factor. State ex rel. Massey v. Hun, 197 W. Va. 729, 478 S.E.2d 579 (1996).

2. Discussion.

The statutory sentence for the offense of second degree murder is a determinate sentence of not less than ten (10) nor more than forty (40) years, with the proviso that such person is not eligible for parole before serving a minimum ten (10) years. **W. Va. Code § 61-2-3.**⁶

The Appellant shot and killed Ronald Kidrick in front of Kidrick's young children. At his sentencing hearing, the Appellant told the circuit court why he had no remorse:

So truthfully speaking, remorse coming from me, you may not see it but I don't show it because I was told not to show it because it shows weakness and my weakness is that if I feel

⁶ **W. Va. Code § 61-12-13(a)** allows one to be eligible for parole after serving one-fourth of a definite term sentence. In the Appellant's case, that would be ten years—the same as the minimum he is required to serve under **W. Va. Code § 61-2-3**.

remorse for this man I am taking my life then it is nothing, you know what I mean. Lifestyle, I lived the lifestyle, he lived it. It is the way it happened. I am saying telling you straight that is what happened you be in the drug game.

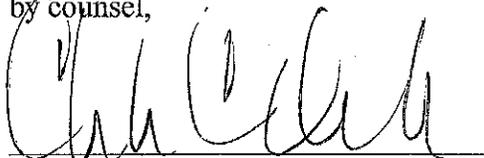
[Tr. 1/29/07, 52.]

The sentence imposed is the statutory sentence and was properly imposed. State ex rel. Massey v. Hun, supra. The Appellant should not be rewarded for his calculated killing of a man in front of the man's children. The Appellant should not be rewarded for his arrogant lack of remorse. The circuit court's imposition of the statutory forty year sentence in this case is proper. The State of West Virginia respectfully requests this Court to deny the Petition for Appeal.

VI. CONCLUSION.

For the foregoing reasons, the State of West Virginia respectfully requests that this Honorable Court affirm the judgments of the jury and the trial court, and deny the Petition for Appeal.

Respectfully submitted,
State of West Virginia,
by counsel,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **APPELLEE STATE OF WEST VIRGINIA'S BRIEF** on this the 11th day of May, 2009, by ___ hand-delivery, x first-class mail, postage prepaid, ___ facsimile to:

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