IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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STATE OF WEST VIRGINIA, :

Appellee,

v. :

MICHAEL E. MARTIN, :

Appellant. :

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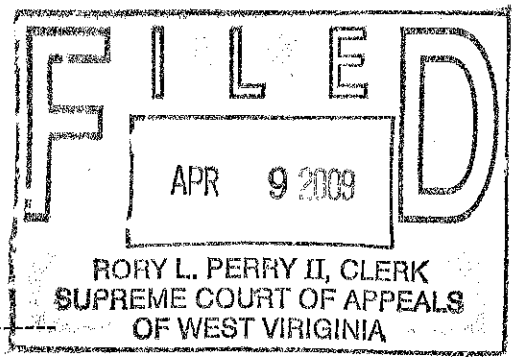
No. 34709
Circuit Court of Raleigh County
No. 07-F-68-K



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PROCEEDINGS AND RULINGS BELOW

On December 7, 2007, a Raleigh County Circuit Court jury found Michael Martin guilty of one count of murder in the first degree and one count of conspiracy. T-VII, 11-12.[1] The jury did not recommend mercy. Id. Mr. Martin was subsequently sentenced to life in prison without possibility of parole on the murder count, and one to five years for the conspiracy count. The sentences are to run consecutive to each other. S.VII-8.[2]

[1] Page numbers in the trial transcript will be noted as T-volume, #. Page numbers in the transcript of the motions hearing will be noted as M, #.

[2]Page numbers in the sentencing transcript will be noted as S, #

INTRODUCTION

Any possibility that Michael Martin would receive a fair trial was overwhelmed and destroyed by prosecutorial overreaching. Typical of the entire trial was the testimony of State Police Captain Scott VanMeter, who led the investigation in this case.

Over strenuous objection, the State was allowed to qualify VanMeter as an expert on the credibility of witnesses. He was then permitted to tell the jury that as an "expert," he knew that the State's two chief witnesses were credible and their testimony worthy of belief.

If that were not enough, VanMeter was also allowed to tell the jurors his opinion that Michael Martin had aided and abetted in the killing – in effect assuring them that as an expert policeman, he knew Mr. Martin was guilty. To further assure the jurors, VanMeter informed them that there was additional evidence gathered for the co-defendant's trial that the jury in Mr. Martin's case would not be seeing.

VanMeter's testimony in itself requires reversal of the conviction. Yet it was only the most spectacular example of an avalanche of prosecutorial excess. Four State witnesses were allowed to testify that in their opinion, Mr. Martin was predisposed to commit drug-related crimes. Some of these witnesses had not even seen Mr. Martin for seven years. Others seemed to base their testimony on rumors, stating that "it was known" or "any proactive police officer . . . would have known."

There is no doubt that when Mr. Martin claimed he was entrapped into a drug deal, the State was entitled to introduce evidence of predisposition to sell drugs. But the prosecutor went horribly overboard, converting the case into a trial not of the crime charged, but of Mr. Martin's

entire criminal past. Seven witnesses, including Mr. Martin's stepfather, were called by the prosecution to testify about Mr. Martin's criminal history. They were not limited to prior convictions: instead, they were allowed to testify about prior arrests, prior cases that did not result in conviction, prior crimes that the witnesses "knew" Mr. Martin committed (even though they gave no proof that these crimes occurred or that Mr. Martin committed them), and prior crimes they claimed Mr. Martin confessed to (with no finding of whether those confessions were voluntary, counseled, recorded, or even existed).

This "proof" went far beyond a predisposition to commit drug crimes. Some of the testimony was about a predisposition to be violent, even though the State gave no factual examples of violence by Mr. Martin. Some of the testimony was about parole violations, such as failure to go to counseling, failure to make appointments, leaving the county without permission, and failure to pay a monthly fee. Some of it was about unspecified obstructing charges, none of which has anything to do with propensity to sell drugs.

Much of the State's case on predisposition was not even factual. Four witnesses were allowed to give their opinion that Mr. Martin was predisposed, even though few if any verifiable facts were offered in support of that opinion, and even if that opinion was based on information and rumors seven to twelve years old.

Worst of all, despite the avalanche of predisposition evidence and opinion, the trial court never gave the jury a limiting instruction as to the use and purpose of this material. No instruction was offered at the time the evidence was introduced. No instruction was given at the end of the case.

Prosecutorial overreaching did not stop at opinion testimony and predisposition claims. It

extended deep into the indictment, charges and jury instructions.

The State indicted Mr. Martin for one count of first degree murder, including both premeditated and felony murder theories. The State and grand jury elected on the face of the indictment to specify that the underlying crime for the felony murder charge was the delivery of a controlled substance. Nonetheless, at the State's request, the judge instructed the jury that it could also convict upon a third, non-elected theory that the underlying felony was an attempted robbery. Even when the State failed to produce any evidence whatsoever of an attempt to rob, the prosecutor persisted in arguing the non-elected theory, and the court told the jurors they could convict on that non-elected theory.

Adding to the excess of charges, the State's own witnesses testified that the incident involved a chance encounter between the deceased, undercover Officer Smith, and Mr. Martin, who allegedly agreed to lead Officer Smith to a dealer who would sell him drugs. When an argument broke out between Officer Smith and the drug dealer, the drug dealer shot and killed the undercover officer. No one produced any evidence that Mr. Martin intended or premeditated a shooting. Neither of the State's two witnesses who were present during the entire incident saw or heard anything that could be construed as evidence of intent or premeditation by Mr. Martin. Nonetheless, the prosecutor was permitted to argue, and the judge instructed the jury that it could convict on a theory of premeditation.

The overzealous prosecution of Michael Martin mandates the reversal of his conviction on several grounds, including the following:

- It is reversible error for a police captain to testify as an "expert" that the other

State's witnesses are credible and telling the truth. Likewise, it is error for a police witness to tell the jury that in his opinion, the defendant is guilty as an aider and abetter. It is error for an officer to tell the jury that more evidence has been gathered about the crime, but they would not be hearing it. Captain VanMeter did all of these things.

- Once the State elects to proceed on a theory of felony murder in the course of a drug sale, and the grand jury votes to approve that election, it is error to allow the state to argue or the jury to convict on a different, unelected theory of felony murder in the course of an attempted robbery.
- Even if it were not improper to permit the jury to consider the charge, the evidence of felony murder in the course of an attempted robbery was insufficient to support a conviction. There was absolutely no evidence of attempted robbery introduced at trial.
- The evidence was also insufficient to support a charge of premeditated murder. The incident began with a chance encounter, and there was no evidence that could be interpreted to show that Mr. Martin premeditated anything beyond a minor drug sale.
- The trial judge committed reversible error by failing to give the jury a limiting instruction as to the use and purpose of predisposition evidence.
- The amount of predisposition evidence was grotesquely excessive. Much of it also went far beyond the permissible scope of such evidence, encompassing allegations that did not result in convictions, alleged acts that were never proven

to have occurred, and bad acts that showed a general propensity to commit crime, but had nothing to do with a predisposition to commit drug sales.

STATEMENT OF FACTS

This case began with a social evening of dinner and bar-hopping by two off-duty Beckley police officers. It descended into a series of abortive attempts to make a spur of the moment undercover drug buy, culminating in the tragic shooting of an undercover police officer by a depraved drug dealer named Thomas Leftwich. And it ended in the trial of Michael Martin – a trial that focused less on the facts of the case than on the frequently expressed personal opinion of several police officers that Mr. Martin is a career criminal and guilty of aiding and abetting Leftwich.

The Night of August 28 and Early Morning Hours of August 29, 2006

Off-duty Beckley Police Officer Will Reynolds and Beckley undercover narcotics Officer Chuck Smith went to dinner together at Ruby Tuesday. The evening was meant to be social, not business. T-III, 135, 173-174. They had not discussed or planned doing any kind of undercover drug operation that night. T-III, 169-170. In fact, Reynolds was not a narcotics officer then, and was not even carrying his gun. T-III, 172, 143.

According to Reynolds, Smith had one small mixed drink with dinner, and Reynolds had "a couple" of beers. T-III, 174. They then moved on to Appleby's, where Reynolds had another beer, but does not recall Smith having anything to drink. T-III, 175. After Appleby's, they went to Billy Joe's Bar and Grill, where according to Reynolds, Smith had nothing to drink but a non-alcoholic Red Bull, while Reynolds had more alcohol. T-III, 176. Although Reynolds swore that this was the only drinking he saw Smith do, all parties agree that by 4:20 that morning, Smith's blood alcohol was measured at .07. T-V, 11, 20. A defense motion for independent testing of

the blood and urine samples was denied. M, 74.

Sometime while they were at Billy Joe's, Smith's girlfriend, Jasminda Gonzales joined them at the bar. T-IV, 142.[3] Jasminda Gonzales was not a policewoman, but according to Capt. Greg Tanner of the Beckley Police, she had helped the police in the past by serving as a decoy in a prostitution sting operation. T-IV, 36. The trial judge precluded defense counsel from questioning Ms. Gonzales about this. T-IV, 173, 175-6. Ms. Gonzales did testify, however, on direct examination that she had never before been taken on a drug investigation with Officer Smith. T-IV, 117-118.

After staying only a short while at Billy Joe's, they went to the Pikeview Lounge, where Reynolds had more to drink. T-III, 147. While at the Pikeview, a man named Timothy Blackburn approached Smith and had a private conversation with him, out of the hearing of Reynolds and Gonzales. Blackburn told Smith that he was going to buy drugs from a known dealer named Jelly Bread. T-III, 128; T-IV, 117, 143-4. Blackburn apparently knew that Smith was an undercover officer, and told Smith that he (Blackburn) had previously worked with another narcotics officer named Timothy Sweeney. T-III, 185.

At Officer Smith's direction, Reynolds and Gonzales got in the Jeep with him, and they followed Blackburn's pickup truck to 108 Saunders Avenue. T-III, 129. Smith informed the

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[3]Jasminda Gonzales testified that she met Smith and Reynolds at Billy Joe's, where they only stayed a short time, and she had one beer, but didn't finish it. T-IV,142. She then went with them in Smith's police Jeep to the Pikeview Lounge. Id. Reynolds did not remember seeing Ms. Gonzales at Billy Joe's, and thinks he first saw her at the Pikeview Lounge. T-III, 178. He was not sure if she showed up when they did, or if she was already there when they arrived. Id. At the time of the incident, Jasminda's last name was Gonzales. By the date of the trial, she had married, and her last name was Curran. This brief will refer to her by the name Gonzales, as she was called by everyone at the time of the incident.

others that they were going to a drug buy. T-III, 128-9. According to Gonzales, Smith had first refused Blackburn's offer, saying that Blackburn's plan was not the right way to do such an operation, and that Blackburn should call him to set something up properly at a later time, because "we don't do things like that." T-IV, 144-5. But Smith ultimately changed his mind and told Gonzales and Reynolds that they were going to follow Blackburn "and if that guy [Jelly Bread] is there, we are taking him down". T-IV, 146.[4]

When they arrived at Saunders Avenue, they waited for thirty to forty-five minutes, but no one showed up for the drug deal. T-III, 129. By now it was about 3:00 or 3:30 A.M. Id. At some point during that time, Blackburn left, but Smith, Reynolds and Gonzales stayed. They were then approached by a woman named Freda (Alfreda) Lawson, who said she knew what they were looking for and could find a dealer to sell them drugs. T-III, 130. Freda, Smith, and a man named Bobby Cook, who had been inside Freda's house, then walked together down the street towards an abandoned swimming pool that was a known location for drug dealing. Reynolds and Gonzales waited at the Jeep.

At this point, the stories told by Will Reynolds and Jasminda Gonzales become radically different.

Officer Reynolds claims that he was in cell phone communication, speaking with Officer Smith during this walk, and could see Officer Smith during the walk. T-III, 134-5. Reynolds says he became uncomfortable with the situation, drove the Jeep a short distance, and picked up Smith. T-III, 135.

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[4]Reynolds testified that he does not remember Smith saying that he would "take down" Jelly Bread. T-V, 9. Reynolds also did not remember riding in the Jeep with Gonzales from Billy Joe's Bar and Grill to the Pikeview Lounge. T-V, 8.

Jasminda Gonzales swore to a completely different set of facts.

She said that Smith was not in sight during the walk towards the swimming pool, T-IV, 122; that she became very nervous and told Reynolds to follow Smith and pick him up, id; that Reynolds tried to call Smith on the phone, but Smith did not answer, id; and that Reynolds then started driving towards the pool. Id. At some point, Smith sent them a text message saying he was OK, and soon after, Gonzales and Reynolds saw Smith, Freda and Cook near a car in the swimming pool parking lot, walking away from the car and up the hill towards them. They then picked up Smith. T-IV, 123. Gonzales said that from the look on his face, she knew something wasn't right and Smith was upset. T-IV, 124. Bobby Cook and Smith were yelling and cursing at each other. Cook told Smith "you are going to get yourself shot tonight." T-IV, 125. Gonzales then implored Smith to get in the Jeep. Id.

Although Reynolds and Gonzales agree that Smith got in the Jeep, they again tell very different stories about what happened after that.

Reynolds says that when he picked up Smith, Freda and Cook "start[ed] hollering or something." T-III, 136. At the same time, Reynolds and Smith saw a red Chevy Corsica parked near the pool. When Freda and Cook began yelling, a person got out of the Corsica and ran away. The Corsica also drove off. Id. Although Reynolds admits that "we didn't have any idea" what the Corsica was doing or who was in it, they followed the car and pulled it over. T-III, 136-137. They patted down all the occupants and found nothing illegal. Reynolds doesn't remember searching the car, but acknowledges that they let the car and it's occupants go. T-III, 189-190.

Jasminda Gonzales, on the other hand, swore that Smith turned around and saw that the people in the Corsica were acting like they were about to leave. T-IV, 125. Smith then said,

"The car right there. They have drugs. Hurry up and get down there." T-IV, 152-3. Smith got in the back of the Jeep and Reynolds sped off towards the Corsica. Smith then got out of the Jeep, pulled his gun and announced to the people at the Corsica that he was a Beckley Police Officer. Id. The Corsica drove away. They chased the Corsica and ultimately stopped it. Id. As Officer Reynolds testified, their search turned up nothing illegal.

Despite the significant differences in Reynolds's and Gonzales's version of the facts, all parties agree that Michael Martin played no part in any of the night's events to this point.

After releasing the people in the Corsica, Smith, Reynolds, and Gonzales drove back to Freda Lawson's house, ostensibly to return her keys, which she had given them as security for the drug deal she was supposed to have arranged earlier that night.

Jasminda Gonzales testified that when they reached Freda's house, Reynolds went to the door and began "screaming and cussing," "being mean and nasty" with her, and behaving "very mean and hateful" towards Freda Lawson. T-IV, 156. Defense counsel made an offer of proof that Reynolds also urinated on Freda's door at this time, but the trial judge refused to permit counsel to ask any questions about this. T-IV, 173, 175. Freda went into her home and slammed the door shut. She opened the window and told Reynolds "you are the police and I'm not coming out." T-IV, 157.

At this point, the State asserts that Michael Martin appeared on the street for the first time and approached Officer Smith, who was standing with Reynolds outside Freda Lawson's door. Smith was startled to see Martin, and Reynolds said "what the hell are you doing here?" T-IV, 127. Smith then took Martin aside and they had a private five minute conversation. T-IV, 128. According to Reynolds, Michael Martin offered to obtain drugs for Smith. T-III, 143. They

allowed Martin to make a call on Smith's cell phone. T-III, 144-5. They all then got in the Jeep and began driving. Jasminda Gonzales became concerned because there was a lot of police equipment in open view in the Jeep that Martin could have seen. T-IV, 130. Smith and Martin began arguing over money, with Martin asking for front money to buy the drugs, and Smith refusing. T-IV, 129-130.

Ultimately they parked across the street from a house. Martin walked towards the house, reached the bottom of the street-level stairs, and then returned to the Jeep without going in the house or encountering anyone else. T-III, 148. He made another call on Smith's cell phone. Id. They argued over who would go into the house and who would not. Martin asked Smith to go in, Smith refused. Reynolds said they both would have to go in. Martin refused and said only Smith could go. T-III, 149-150.

After the call, Smith and Martin walked towards the house. T-III, 150. Officer Smith and Michael Martin were standing at the bottom of the steps, looking up at a person who stood on the steps. T-III, 152-3. Jasminda Gonzales testified that she saw Smith hand something to the person on the stairs. T-IV, 134. She then saw Smith pull out his badge and say, "Now you get to go to jail." T-IV, 135.[5] Seconds later, she heard shots and saw flashes. T-IV, 136. The man at the top of the steps had shot Officer Smith. The shooter fled. Michael Martin started to walk towards Reynolds and Gonzales, and then ran away. T-III, 160. Officer Smith died of his wounds that night. All parties agree that the shooter was a drug dealer named Thomas Leftwich. Leftwich has been convicted of murder in the first degree.

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[5]Officer Reynolds's testimony did not mention the exchange or Officer Smith's statement that "now you get to go to jail."

The Indictment And Trial of Michael Martin

Michael Martin was indicted on one count of murder in the first degree and one count of conspiracy. The murder count specified two theories: (1) premeditated murder and (2) felony murder in the course of the sale of a controlled substance. It is notable that the prosecutor and the grand jury explicitly elected on the face of the indictment to specify sale of a controlled substance as the only underlying felony for the felony murder charge.

When the case reached trial, however, the State advanced a third theory of murder: felony murder in the course of an attempted robbery. Over objection, the trial court permitted the prosecutor to argue this theory, T-V, 170-173, and instructed the jurors that they could convict on this theory. T-VI, 95-97.

Defense counsel at trial argued that there simply was no evidence of premeditation by Mr. Martin, and no evidence at all of an attempted robbery. In response to the allegation of felony murder in the course of a drug sale, the defense contended that Mr. Martin was entrapped into the drug deal by the inducements of Officers Smith and Reynolds.

Two of the State's witnesses, Officer Reynolds and Jasminda Gonzales, testified about the crimes charged in this case – what they saw and heard in the long night leading up to the shooting. Seven witnesses, however, were called by the State for little purpose other than to give their "expert" opinions that Reynolds and Gonzales were telling the truth, that Mr. Martin was guilty of aiding in the murder, or that Martin was a career criminal and predisposed to commit drug-related crimes.

The State called as a witness Onnie Cook, Mr. Martin's stepfather, who had raised him since he was four years old. Mr. Cook was compelled to tell the jury that his son had been in the

penitentiary, T-IV 45-6; that Mr. Martin had a long-standing addiction to crack cocaine, T-IV, 46; and that Mr. Martin had been paroled and then imprisoned again. T-IV, 47. The prosecutor tried to get Mr. Cook to say that his son supported his drug habit for a number of years by committing burglaries, break-ins and thefts, but Mr. Cook was unaware of that. T-IV, 56.

No limiting instruction was ever given about the purpose or proper use of this testimony.

State Trooper Jason Davis testified that at some unspecified time in the past, he had "assisted in an investigation recovering an ample amount of stolen property that Michael Martin was involved in stealing and trading here in Beckley. . . . Through that investigation it was known that Mr. Martin would break into different establishments, steal property, then go trade that for crack cocaine." T-V, 30-31. Trooper Davis did not specify when these burglaries, thefts and drug use supposedly happened. He did not say whether Mr. Martin was ever arrested, charged or convicted in these incidents. He did not say he had any personal knowledge at all – just his belief that "it was known" – even though he did not say who "it was known" by or what his source of knowledge may have been.

Once again, the jury was given no limiting instruction as to the purpose or use of this testimony.

Immediately after Trooper Davis, the State called Detective Tim Palmer, of the Charleston Police. Admitting that he had no contact with Mr. Martin for the past seven years, Detective Palmer said that between 1995 and 2000, "We would work the worst areas of Charleston. And during that period . . . you would see Mr. Martin day or night in just about every high crime, high drug area there was in Charleston. And as far as the frequency of encounters, it would be if not every day, every other day you would see him actually out on the

street." T-V, 68. Det. Palmer went on to say that "Anyone who was a proactive police officer who worked in those areas would have known Mr. Martin." Id. Det. Palmer described a 1995 incident in which he claimed that Mr. Martin and a juvenile tried to sell him drugs in a Charleston housing project. T-V, 66-67. He said he arrested Mr. Martin then, but gave no information about whether that twelve year old case resulted in a conviction or even a charge.

At the end of his direct examination, Det. Palmer was asked by the prosecutor for his personal opinion of whether Mr. Martin "had a reputation for having a predisposition to commit drug-related crimes." T-V, 70. The Detective replied, "in my opinion that on the days that we would encounter him, there would rarely be a day I would say go by that he wouldn't commit some sort of crime. And it would seem like every officer that would encounter him, would – he would become violent. Whether it was serving a capias where he wouldn't show up for court or affected some other type of arrest, he always – also had a reputation for fighting the police." Id.

Once again, the jury was given no limiting instruction as to the purpose or use of this testimony.

Detective Robert Eggleton, of the Charleston Police, also acknowledged that he had no contact with Mr. Martin since 2000. He described an incident in 2000 where he took Mr. Martin into custody on charges of breaking and entering and possessing burglary tools, and Mr. Martin allegedly said that he committed the crime to buy crack. T-V, 74. On cross-examination, the Detective admitted that Mr. Martin had not been convicted of the supposed burglary, and had no idea if he had been convicted of anything regarding that incident. T-V, 76. In response to the prosecutor's questions, Det. Eggleton also said it was his personal opinion that Mr. Martin had been predisposed to commit drug-related crimes. T-V, 75-76.

Once again, the jury was given no limiting instruction as to the purpose or use of this testimony.

Following Det. Eggleton, the State called Beckley Police Officer Jeffrey Shumate. He testified that in 2001, Mr. Martin admitted to him that he had committed nine breakings and enterings between November, 2000 and April, 2001. T-V, 78-80. Officer Shumate also said that Mr. Martin told him that he committed the crimes to get crack. T-V, 82-3. Mr. Martin pleaded guilty to some of these break-ins and was sentenced to the penitentiary. T-V, 83.

In response to specific questions from the prosecutor, Officer Shumate also gave his personal opinion that Mr. Martin was predisposed to commit crack cocaine-related felonies. T-V, 84.

Once again, the jury was given no limiting instruction as to the purpose or use of this testimony.

Stanley Workman testified that he knew Michael Martin through his job as an enhanced supervision officer for the West Virginia Division of Corrections Parole Services. He told the jury that Mr. Martin had "a problem with using cocaine." T-V, 90. He testified that when Mr. Martin was paroled in 2005, he was classified as a "maximum security" parolee. T-V, 94. Workman continued by reciting the factual details of eleven violations lodged against Mr. Martin, including positive drug tests, possessing a crack pipe, failure to report for appointments, failure to report for required counseling, failure to pay a $40 supervision fee, and going to Kanawha County without receiving permission to leave Raleigh County. T-V, 98-9.

In response to specific questions from the prosecutor, Mr. Workman also gave his personal opinion that Mr. Martin was predisposed to commit crack-cocaine related crimes. T-V,

104.

Once again, the jury was given no limiting instruction as to the purpose or use of this testimony.

The next-to-last officer called by the prosecution was State Police Captain Scott VanMeter, the lead investigator on the case, who also participated in the questioning of the shooter, Thomas Leftwich. T-V, 124.

Over objection, the court permitted the prosecutor to qualify Capt. VanMeter, based upon his 22 years as an officer, as an expert on the credibility of the State's witnesses in this case. T-V, 129. Over objection, Capt. VanMeter was allowed to state that in his expert opinion, both Officer Reynolds and Jasminda Gonzales were believable and credible *in this case*. T-V, 132-3.

In response to a direct question from the prosecutor, and over objection, Capt. VanMeter testified that in his opinion, Mr. Martin was the aider and abettor of Thomas Leftwich. T-V, 126. He also told the jury that there was additional evidence that was not introduced in this case that was collected in the separate case against Leftwich. T-V, 127. VanMeter further gave sworn testimony that Timothy Blackburn was not involved in the murder. T-V, 128.

Once again, the jury was given no limiting instruction as to the purpose or use of any of this testimony.

ASSIGNMENTS OF ERROR

1. It was error to permit Captain VanMeter, over objection, to testify that as an expert on witness credibility in this case, he knew the State's key witnesses were credible and believable. It was also error to permit him to tell the jurors he believed Mr. Martin aided and abetted the shooter, and that there was additional evidence in the case that the jury would not hear.

2. The grand jury elected on the face of the indictment to charge Mr. Martin with felony murder in the course of delivering or attempting to deliver a controlled substance. It was therefore error for the prosecutor to argue and the judge to instruct the jury that they could convict on the unelected theory of felony murder in the course of an attempted robbery.

3. There was absolutely no evidence adduced of an attempt to rob Officer Smith. Thus, the conviction for felony murder must be reversed as legally insufficient.

4. The evidence was insufficient to prove Mr. Martin committed premeditated murder because the State proved no more than that Mr. Martin was present at the scene of the crime.

5. The trial court failed to give a limiting instruction about the jury's use of predisposition evidence introduced by the State. The court also erred by admitting evidence of crimes and bad acts that were irrelevant to any predisposition to commit drug crimes. The State also introduced excessive and unsubstantiated predisposition evidence.

ARGUMENT

POINT ONE: OVER OBJECTION, CAPT. VANMETER WAS PERMITTED TO TESTIFY THAT AS AN EXPERT ON WITNESS CREDIBILITY IN THIS CASE, HE KNEW THE STATE'S KEY WITNESSES WERE CREDIBLE AND BELIEVABLE. HE WAS ALSO PERMITTED TO TELL THE JURORS HE BELIEVED MR. MARTIN AIDED AND ABETTED THE SHOOTER, AND THAT THERE WAS ADDITIONAL EVIDENCE IN THE CASE THAT THE JURY WOULD NOT HEAR.

No prosecution witness is permitted to testify that he or she believes the other prosecution witnesses are telling the truth. No prosecution witness is permitted to testify that he or she believes the defendant is guilty. State v. James B., 204 W.Va. 48, 55, 511 S.E.2d 459, 466 (1998); State v. Wood, 194 W.Va. 525, 532, 460 S.E.2d 771, 778 (1995); Syl. Pt. 7, State v. Edward Charles L., 183 W.Va. 641, 644, 398 S.E.2d 123, 126 (1990); State v. McCoy, 179 W.Va. 223, 229, 366 S.E.2d 731, 737 (1988). This is not a close or debatable question. It is the clearest of black letter law, premised in Rule 608 of the Rules of Evidence, the Due Process Clauses of the United States and West Virginia Constitutions, and extensive caselaw, supra.

Yet the trial court, over strenuous objection, permitted the prosecution to introduce exactly such testimony. In fact, the court admitted it under the guise of "expert testimony," thereby giving the jury the impression that it was not only true, but carried the stamp of approval of an expert with particular knowledge and understanding the jurors did not have themselves. The witness the State called was Scott VanMeter, a State Police Captain with twenty-two years experience, who had been designated the leader of the entire investigation in this case.

Q: In your years of experience and – 22 years of experience and as a result of your training, have you – do you have familiarity with comparisons of witnesses' testimony?

A: Yes, I do

[DEFENSE COUNSEL]: I object . . . T-V, 129.

THE COURT: I'll allow it. I'll preserve your objection . . . T-V, 131.

Q: Now as to your investigation of this case and coupled with your 22 years of experience as a law enforcement officer and captain of the State Police, from you entire investigation of this case, have you determined Officer Will Reynolds to be credible?

A: Yes.

[DEFENSE COUNSEL]: Objection.

THE COURT: I'm going to overrule the objection, but I'll preserve your exception.

Q: And based on your investigation in this case and your years of experience and your present position with the West Virginia State Police, have you also determined Jasminda Gonzales to be credible and believable as to this case?

[DEFENSE COUNSEL]: Same objection.

THE COURT: All right. And the same ruling.

A: Yeah. T-V, 132-133.

If this were not bad enough, Capt. VanMeter was also allowed to express his personal "expert" opinion that Michael Martin was guilty as an aider and abetter of Thomas Leftwich.

Q: . . . who, in this investigation is identified as the direct perpetrator?

A: That would be Thomas Leftwich.

Q: And who is

[DEFENSE COUNSEL]: Objection, your honor. If she's going to ask about a – for a legal conclusion.

[THE PROSECUTOR] I'm not.

THE COURT: All right. That's to be understood then.

Q: Captain, as chief investigator in this case, what is the status of this defendant with Thomas Leftwich as the direct perpetrator?

A: He's the aider and abettor.

[DEFENSE COUNSEL]: Judge, that's what I would object to. Whether he is an aider and abettor is a question for the jury.

[PROSECUTOR]: He's asked as the investigator in this case, your honor.

THE COURT: I'll allow it. Overruled. T-V, 125-126.

Nor did Capt. VanMeter's opinions end here. He also assured the jurors that Timothy Blackburn, the drug informer who began the evening's events by offering to set up a drug deal with Jelly Bread, had no involvement in the shooting. T-V, 128. He guaranteed that Blackburn's statement to the police, which was never introduced into evidence, was fully consistent with what Officer Reynolds and Jasminda Gonzales said about him. Id.

The flood of improper opinion testimony continued. Just to make sure the jury wasn't worried about gaps in the State's case, Capt. VanMeter told the jurors that he had collected additional evidence for the prosecution of Leftwich that was not being shown to this jury. T-V, 127. And in case the jurors might have been concerned about Reynolds and Gonzales telling such different stories, VanMeter assured them that as an expert, he knows it is common for truthful witnesses to tell inconsistent stories. And the fact that the stories are inconsistent, in his expert opinion, makes them more believable, because he is suspicious when two witnesses give

identical versions of the facts. T-V, 132.

It is well settled that the jury is the sole judge of a witness's credibility. McCoy, 179 W.Va. at 229, 366 S.E.2d at 737, citing State v. Bailey, 151 W.Va. 796, 155 S.E.2d 850 (1967). As this Court held in Edward Charles L., a witness "may not give an opinion as to whether he personally believes the [other State's witnesses], nor an opinion as to whether the [crime] was committed by the defendant." 183 W.Va. at 644, 398 S.E.2d at 126, Syl Pt.7.

In McCoy, this Court explained why such improper testimony is particularly damaging when it comes from an expert witness. In that case, a rape counselor let the jury know that she believed the complainant was telling the truth. This Court reversed, holding that, "[h]er testimony amounted to a statement that she believed the alleged victim, and by virtue of her expert status she was in a position to help the jury determine the credibility of the most important witness in a rape prosecution." McCoy, 179 W.Va. at 229, 366 S.E.2d at 737.

This is exactly what happened here. Captain VanMeter, the chief investigator in the case, was allowed over objection to give his opinion that he believed the two main prosecution witnesses were telling the truth. The only difference between McCoy and Mr. Martin's case is that the improper testimony in Mr. Martin's case was much worse. Captain VanMeter did not stop with his opinion that Reynolds's and Gonzales were telling the truth. He also improperly opined that Mr. Martin was an aider and abettor, and told the jurors he had collected additional evidence that they would not hear.

The only justification the prosecutor gave for this evidence was that "You can rehabilitate credibility by another witness's opinion as to that witness's credibility. . . . I believe it's Rule 609 or 608 [of the West Virginia Rules of Evidence]." T-V, 131. This is simply wrong.

Rule 609 deals with impeachment with prior convictions -- a subject that is interesting, but has nothing to do with this case.

Rule 608(a) deals with the introduction of evidence about the character or reputation for truthfulness of a witness. As this Court pointed out in Wood, Rule 608(a)(1) limits such evidence to "opinion testimony concerning a witness's general character or reputation for truthfulness or untruthfulness, but prohibits any opinion testimony as to a witness's truthfulness on a particular occasion." Wood, 194 W. Va. at 532, 460 S.E.2d at 778 (citations omitted). Capt. VanMeter was never asked about the character or reputation for truthfulness of either Reynolds or Gonzales. Indeed, he could not have offered an opinion on that subject because nothing in the record suggests VanMeter knew either of them well enough to have such an opinion. Reynolds was a lower-ranking employee of a completely different agency from VanMeter, and Gonzales was a civilian who VanMeter may never have heard of before this case. Moreover, the words "character" and "reputation" do not even appear in his testimony on this point, or in the prosecutor's questions on the issue. Rather, VanMeter was explicitly asked whether he believed their testimony ***in this case***:

> Q: Now, ***as to your investigation of this case*** and coupled with your 22 years of experience as a law enforcement officer and captain of the State Police, ***from your entire investigation of this case***, have you determined Will Reynolds to be credible? (emphasis added) . . . .
>
> A: Yes.
>
> Q: . . . Have you also determined Jasminda Gonzales to be ***credible and believable as to this case?*** (emphasis added). . . .
>
> A: Yeah. T-V, 132-133.

This is exactly what this Court said was prohibited by Rule 608. Mr. Martin's conviction must therefore be reversed.

Of course, this is not the only aspect of Capt. VanMeter's testimony that mandates reversal. Over objection, he assured the jury that he believed Mr. Martin aided and abetted Thomas Leftwich in killing Officer Smith. This is precisely the kind of opinion of a defendant's guilt that this Court condemned in Edward Charles L., 183 W.Va. at 644, 398 S.E.2d at 126, Syl. Pt.7. Indeed, in Mr. Martin's case it was particularly destructive because Capt. VanMeter immediately followed up his opinion testimony by informing the jurors that he was the one who decided to arrest Mr. Martin and Leftwich and charge them with murder.

> Q: Captain VanMeter, whose decision was it that this defendant and Thomas Leftwich should be arrested for the first degree murder that day? Was that your ultimate decision?
>
> A: It was my ultimate decision, but I spoke to the Prosecuting Attorney's Office. T-V, 126.

Capt. VanMeter further bolstered these improper opinions by improperly referring to unspecified supporting evidence he had gathered that for an unspecified reason would not be shown to the jurors, T-V, 127, and by assuring the jurors that he knew Timothy Blackburn was not involved in the murder. T-V, 128.

As a result of the grossly excessive and improper opinion evidence given by Capt. VanMeter, Mr. Martin's conviction must be reversed.

POINT TWO: THE GRAND JURY ELECTED ON THE FACE OF THE INDICTMENT TO CHARGE MR. MARTIN WITH FELONY MURDER IN THE COURSE OF DELIVERING OR ATTEMPTING TO DELIVER A CONTROLLED SUBSTANCE. IT WAS THEREFORE ERROR FOR THE PROSECUTOR TO ARGUE AND THE JUDGE TO INSTRUCT THE JURY THAT THEY COULD CONVICT ON THE UNELECTED THEORY OF FELONY MURDER IN THE COURSE OF ATTEMPTED ROBBERY.

The one and only murder count of the indictment, properly signed by the prosecutor and the foreman of the grand jury, charges a felony murder theory as follows: "did . . . in the commission of or attempt to commit a felony of delivering a controlled substance, slay, kill and murder one Charles E. Smith III." Indictment 07-F-68-K, January 10, 2007, Raleigh County[6].

No motion was made to amend the indictment, or to obtain a second indictment.

Justice Cleckley has written that "The words of the indictment must stand alone as the sole record of what the grand jury actually considered." 1 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 666 (2d ed. 1993). Neither the State nor the grand jury is required to elect a specific felony to support a felony murder charge, Stuckey v. Trent, 202 W.Va. 498, 505 S.E.2d 417 (1998). However, if the grand jury chooses to elect a specific felony and inscribe it on the face of the indictment, the prosecution is stuck with that choice, and may not add additional theories without first obtaining the approval of the grand jury.

The Grand Jury Clause of Article III, Section 4 of the West Virginia Constitution says that a person may be tried only on felony offenses for which a grand jury has returned an indictment. This Court has repeatedly stated: " 'A valid indictment or presentment can be made

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[6]The indictment also included the theory of premeditated murder in the same count.

only by a grand jury; and no court can make an indictment in the first instance or alter or amend the substance of an indictment returned by a grand jury.'" Syllabus Point 5, State v. McGraw, 140 W.Va. 547, 85 S.E.2d 849 (1955); Syllabus Point 2, State v. Pruitt, 178 W.Va. 147, 358 S.E.2d 231 (1987). The United States Supreme Court in Ex parte Bain, 121 U.S. 1, 10, 7 S.Ct. 781, 786 (1887), explained the reason for this rule:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says no person shall be held to answer, may be frittered away until its value is almost destroyed.

The United States Supreme Court has also noted that when a jury returns a general verdict of guilty but was instructed on alternative theories of guilt, that verdict must be reversed if one of the alternative theories was legally invalid. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064 (1957); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931). The alternative theory of felony murder in the course of attempted robbery was legally invalid because of the grand jury's act of explicitly charging the theory of felony murder during a drug deal.

In Mr. Martin's case, the grand jury took the unusual step of indicting Mr. Martin specifically for felony murder in the course of delivery or attempted delivery of a controlled substance. This Court must accept that as a conscious and deliberate choice by the grand jury to limit the scope of the prosecution to that theory of felony murder. As Justice Cleckley noted, the language of the indictment reflects what the grand jury considered and what the grand jury decided to charge the defendant with. It was therefore error for the trial court to submit an

additional theory of felony murder to the jury and to instruct them that they may convict based upon that unelected theory.

POINT THREE: THERE WAS ABSOLUTELY NO EVIDENCE ADDUCED OF AN ATTEMPT TO ROB OFFICER SMITH. THUS, THE CONVICTION FOR FELONY MURDER MUST BE REVERSED AS LEGALLY INSUFFICIENT.

At a motions hearing on October 30, 2006, the prosecutor told the judge and defense counsel that she had received information from unspecified people (apparently jailhouse snitches) that Mr. Martin had told them he and Leftwich had planned to rob Officer Smith. M, 40. She would therefore be asking the court to instruct, and the jury to convict, on a theory of felony murder in the course of an attempted robbery as well as felony murder in the course of delivering a controlled substance.

At trial, however, the prosecution never produced any of those witnesses, and introduced absolutely no evidence that Mr. Martin had ever said or did anything about robbery. Not a single witness testified to hearing anyone plan, discuss, or threaten a robbery. Although Jasminda Gonzales and Officer Reynolds saw the shooting, neither testified to seeing or hearing anything that even suggested a robbery.

In her closing argument, the prosecutor gave only two reasons she thought the felony murder was committed in the course of an attempted robbery, T-VI, 125-6:

1. Mr. Martin was a drug addict who had committed theft and burglaries in the past to support his habit. And

2. Mr. Martin was unemployed.

That was it. The State had nothing else to offer in support of its attempted robbery theory.

When a sufficiency of the evidence claim is raised on appeal, the facts of the case must be

viewed in the light most favorable to the prosecution. State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). But in this instance, there is no evidence to view in any light. The State simply introduced nothing in support of its case. The "statements" the prosecutor talked about at the motions hearing were never introduced. No other witness said anything about a robbery or plan to rob.

The fact that a man is an unemployed drug addict who in the past committed burglary is not sufficient proof to convict him of attempted robbery at a future time.[7] Since the State proffered nothing else to support the charge, the evidence was legally insufficient. Mr. Martin's conviction therefore violates the Due Process Clauses of the United States and West Virginia Constitutions.

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[7]It should also be noted that the evidence of past burglaries was introduced solely for the limited purpose of showing a propensity to commit drug sale related crimes.

POINT FOUR: THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. MARTIN COMMITTED PREMEDITATED MURDER BECAUSE THE STATE PROVED NO MORE THAN THAT MR. MARTIN WAS PRESENT AT THE SCENE OF THE CRIME.

There was absolutely no evidence introduced that Mr. Martin intended or premeditated the killing. The evidence was therefore insufficient to support the charge of premeditated murder. See State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

All parties agree that Michael Martin and Officer Smith met by chance. They had not previously known each other. Officer Smith and his companions had made several unsuccessful attempts to buy drugs or make an arrest that night, and as they were engaging in a loud argument with Freda Lawson, Michael Martin happened along. Mr. Martin could not have planned or premeditated a killing, because he had no idea he would even meet the officers. There was no evidence that he had made any advance plans with Leftwich. Officer Reynolds admitted that he could not hear anything Leftwich said on the phone to Mr. Martin, and nothing Mr. Martin said suggested a shooting.

The shooting took place very suddenly as Officer Smith was, according to Jasminda Gonzales, arguing with Leftwich. Leftwich gave no warning before he fired. Ms. Gonzales did not hear any threats to kill or shoot anyone. Mr. Martin did not say or do anything to suggest that he thought there would be a shooting. In short, Michael Martin was merely present during the shooting, but did nothing else that would indicate he intended it to happen or premeditated any harm to the officer at all. Given those circumstances, there was nothing from which a reasonable juror could infer premeditation or that Martin had an intent to assist Leftwich in the shooting.

See Syllabus Point 1, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994). ("Merely witnessing a crime, without intervention, does not make a person party to its commission unless his interference was a duty . . ." (citations omitted)). In Mayo, the defendant, at the request of some friends, got his gun and went in a car with his friends to accompany them when they tried to peacefully resolve a billing dispute with an auto repair shop. After a discussion to settle the bill failed, one of the people in the car with Mr. Mayo shot and killed the father of the shop owner. Noting that Mr. Mayo did not participate in the verbal argument, and did not fire a shot at the deceased, this Court held that the evidence was insufficient to convict him of murder. Id. at 83, 443 S.E.2d at 240. This Court also found it significant that there was no evidence that Mayo planned with or encouraged the shooter to commit the crime. Id. at 85, 443 S.E.2d at 242.

Mr. Martin's case contained even less evidence of complicity or premeditation of a homicide than Mayo. Unlike Mayo, Mr. Martin did not have a gun. Unlike Mayo, Mr. Martin did not have any knowledge of a simmering dispute between Leftwich and Officer Smith, because there was no ongoing dispute. Mr. Martin had no way of knowing that an argument would break out, or that Leftwich would suddenly pull a gun and start firing.

The evidence was therefore insufficient to convict Mr. Martin of premeditated murder. His conviction must be reversed as violative of the Due Process Clauses of the United States and West Virginia Constitutions. U.S. Constitution, Fourteenth Amendment; West Virginia Constitution, Article III, Section 10.

POINT FIVE: THE TRIAL COURT FAILED TO GIVE ANY LIMITING INSTRUCTION ABOUT THE JURY'S USE OF PREDISPOSITION EVIDENCE INTRODUCED BY THE STATE. THE COURT ALSO ERRED BY ADMITTING EVIDENCE OF CRIMES AND BAD ACTS THAT WERE IRRELEVANT TO ANY PREDISPOSITION TO COMMIT DRUG CRIMES. THE STATE ALSO INTRODUCED EXCESSIVE AND UNSUBSTANTIATED PREDISPOSITION EVIDENCE.

The Court's Failure To Give Any Limiting Instruction

The trial judge failed to give any limiting instructions at all to guide the jurors in how they could, and could not, consider the massive amounts of predisposition evidence introduced by the State.

The prosecution called seven witnesses to testify about more than a dozen crimes and bad acts committed by Mr. Martin in the past. This evidence included convictions, arrests that did not result in convictions, acts for which there was never an arrest, drug crimes, break-ins, theft crimes, drug addiction, crimes of violence, parole revocation, resisting arrest, obstruction, and more. The evidence ranged from criminal convictions to broad generalizations and rumors such as "anyone who was a proactive police officer would have known . . ." about Mr. Martin's criminal tendencies. See Statement of Facts, 13-17.

Yet not once did the court ever instruct the jury as to the limited purpose of this evidence, or the limited use they could make of it. Not when the evidence was introduced, and not even at the end of the case.

The law governing introduction and use of predisposition evidence is governed by Rule 404(b) of the West Virginia Rules of Evidence. State v. Hager, 204 W.Va. 28, 35, 511 S.E.2d

139, 146 (1998); State v. Houston, 197 W.Va. 215, 234, 475 S.E.2d 307, 326 (1996); State v. Dillon, 191 W.Va. 648, 661, 447 S.E.2d 583, 596 (1994); State v. Nelson, 189 W.Va. 778, 784, 434 S.E.2d 697, 703 (1993). Each of these cases cites Syllabus Points 1 and 2 of the seminal case of State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994), for the principle that the trial court must:

> 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. . . . The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Id. at Syllabus Points 2 and 1, respectively.

The trial court did none of this. Instead, it allowed the jury to hear extensive evidence of Mr. Martin's past misdeeds, while providing absolutely no guidance about how that evidence should, or should not be used.

This failure was plain error[8] in the most literal sense of the term. That it is error cannot be disputed. Every case on the subject explicitly says that a limiting instruction *must* be given. See, e.g., State ex rel Caton v. Sanders, 215 W.Va. 755, 762, 601 S.E.2d 75, 82 (2004). This is not a matter of discretion. McGinnis even specifies exactly what the instruction should say.

That the error was plain is also beyond doubt. McGinnis is not an obscure decision that a trial judge cannot uncover without slogging through volumes of the Southeast Digest, or digging beneath layers of Westlaw. It is perhaps the most well-known decision of this Court in the field

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[8]"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus Point 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

of criminal evidence. It has been cited more than sixty times in written court decisions from all over the country. It has been cited dozens of times in secondary sources, such as encyclopedias, treatises and articles.

It is also beyond question that the trial court was aware long before trial began that the State would be introducing massive amounts of 404(b) evidence against Mr. Martin. Pre-trial hearings were held on the subject. McGinnis Hearing, November 15, 2007. Given the way this case was litigated, it would be plain to any trial court that the standard McGinnis instruction must be given. The trial court in Mr. Martin's case ignored the plain import of McGinnis.

Finally, the massive amount of predisposition evidence turned Mr. Martin's trial into one more about his past misdeeds than his guilt or innocence of the crimes for which he stood trial. In light of the total lack of evidence of the attempted robbery and Mr. Martin's participation in the shooting, this overreaching by the prosecutor, which was sanctioned by the court, rendered an impartial verdict on the issues of guilt and mercy virtually impossible. The fundamental fairness and basic integrity of Mr. Martin's trial was therefore obviously skewed. See Syllabus Point 17, State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996). The conviction therefore must be reversed.

The Excessive Amount of Rumor, Improper, Unsubstantiated, And Unreliable Opinion Evidence Of Crimes And Bad Acts

The State called just two witnesses, Officer Reynolds and Jasminda Gonzales, to testify about the shooting and the events that led up to it. By contrast, they called seven witnesses, Cpl. Davis, Det. Palmer, Det. Eggleton, Det. Shumate, Parole Officer Workman, Capt. VanMeter, and even Mr. Martin's stepfather, Onnie Cook, to testify about Mr. Martin's past bad acts. Many of

these witnesses repeatedly expressed their opinion that Mr. Martin was predisposed to commit drug crimes. These witnesses spoke in the language of rumors: "it would seem," "any proactive police officer . . . would have known," "it would seem like." See Statement of Facts, 13-17. Witnesses told the jury that Mr. Martin had committed many crimes in the past, both drug-related and otherwise; that he was predisposed to commit break-ins to support his addiction; frequently was violent and resisted arrest. All this, coupled with the failure to give a limiting jury instruction, could not help but convince the jurors that the case was really about Mr. Martin's past, and that it was alright to convict him and recommend no mercy because of his criminal history, regardless of whether he was really liable in this case, and regardless of whether the facts of this case merited a recommendation of mercy.

In State v. Knight, 159 W.Va. 924, 931-933, 230 S.E.2d 732, 736-737 (1976), this Court approvingly quoted Justice Stewart's minority opinion in United States v. Russell, 411 U.S. 423, 443-444, 93 S.Ct. 1637,1648 (1973), which warned, "a test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion and rumor - all of which would be inadmissible in any other context - in order to prove the defendant's predisposition."

This Court continued in Knight by holding that "we see no reason why the evils and abuses envisioned by Mr. Justice Stewart regarding the introduction of 'all kinds of hearsay, suspicion and rumor' should be permitted . . ." Knight, 159 W.Va. at 931-933, 230 S.E.2d at 736-737. Yet that is exactly what happened in Mr. Martin's case. No documentation was provided for the police claims, sometimes from seven to twelve years in the past, that Mr. Martin committed all those bad acts. No proof was offered that "It would seem" or "any proactive

police officer would have known" about Mr. Martin's alleged predisposition. See Statement of Facts, 13-17. Instead, hearsay, rumor and suspicion were permitted to substitute for evidence. This violated Mr. Martin's due process rights to a fair trial. U.S. Constitution, Fourteenth Amendment; West Virginia Constitution, Article III, Section 10.

The problem was made even worse by the excessive amount of prior crime and bad act evidence introduced by the State – an improper tactic referred to by this Court as "shotgunning," State v. Thomas, 157 W.Va. 640, 656, 203 S.E.2d 445, 456 (1974); State v. Zacks, 204 W.Va. 504, 511, 513 S.E.2d 911, 918 (1998). Shotgunning occurs when the prosecution introduces so much evidence of collateral crimes and bad acts, that the trial of the crime with which the defendant is charged is overwhelmed by the allegations of past criminality, and in effect becomes a trial about the earlier crimes. This forces the defendant to spend a disproportionate time explaining his prior record, and tacitly encourages the jury to make the natural, but improper inference that if the accused did all those other bad things, he must be guilty of today's charge.

At Mr. Martin's trial the State called two witnesses who claimed to see Mr. Martin participate in the crime charged on one night. The State also called seven witnesses to testify about an eleven year course of collateral criminal behavior. While the prior crimes evidence was supposedly introduced to show a propensity to be involved in drug sales, it also included crimes completely unrelated to selling drugs, such as resisting arrest, and crimes such as stealing, that are common to drug addicts, but only peripherally related to sale. See Statement of Facts, 13-17.

The cumulative effect of the errors surrounding collateral crimes and bad acts – the failure to give any limiting instruction, the disproportionate amount of prior crimes evidence, and tenuous relationship between many of those acts and the crime of selling drugs – require that

Michael Martin's convictions be reversed.

RELIEF REQUESTED

Michael Martin's convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, do hereby certify that on the 9th day of April, 2009, I sent the foregoing Brief For Appellant by U.S. Mail to Kristen L. Keller, Prosecuting Attorney, Raleigh County, 215 Main Street, Beckley, West Virginia 25801.

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