

NO. 35489

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

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CHARLESTON

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STATE OF WEST VIRGINIA, Plaintiff Below  
Appellee

vs.

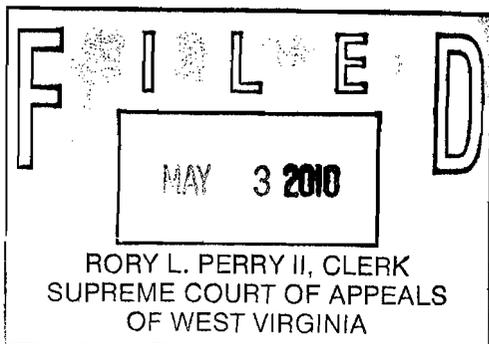
Appeal Granted From Judgement  
Of April 23, 2009 from the  
Circuit Court of Ritchie  
County, West Virginia  
Case No. 07-F-43

GREGG DULANEY SMITH, Defendant Below,  
Appellant.

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APPELLANT'S BRIEF

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA**

Comes now Gregg Dulaney Smith, the Appellant and Defendant below, by Counsel, and hereby files his Appellant's Brief with the West Virginia Supreme Court of Appeals, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, to hear and rule on this petition for appeal of the above-referenced case, in the Circuit Court of Ritchie County, West Virginia. In support of said Appeal, the Appellant submits the following:

**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

The Appellant was indicted in the October Term, 2007, to a four (4) Count Indictment, charging in Count One, Malicious Assault (hammer), 61-2-9 (a); Count Two, Malicious Assault (Shotgun), 61-2-9 (a); Count Three, Wanton Endangerment Involving a Firearm, 61-2-9 (a); Count Four, Attempted Murder, 61-2-1; 61-11-8. A jury trial was conducted on September 2, 3, 4 and 5, 2008. On September 5, 2008, the jury returned guilty verdicts against the appellant on all counts. Appellant filed post-verdict motions for a new trial. The motions were never ruled on. The Court sentenced the appellant on April 8, 2009, to 2 to 10 on count one; 2 to 10 on count two; 5 year determinate on count three; 3 to 15 for count four; all consecutive, one to the other. The appellant now timely files his Appellant's Brief, this Court having granted the petition herein.

## II. STATEMENT OF FACTS

Following a year long dispute between two (2) neighbors involving reports of destruction of property, flat tires, scratched vehicles, the victim being arrested for battery on the appellant, (but not prosecuted although caught on video), name calling, threats, indecent exposure by the victim, nails, spikes, and appellant's failure to get help from the prosecuting attorney after several meetings and no help in getting a peace warrant, appellant installed on his computer and peripheral therewith digital, wireless video cameras aimed at the narrow driveway separating the appellant from the alleged victim, a 270 pound, 10 year combat trained former Airborne Ranger. Said computer with its outside peripheral cameras and resulting computer data was owned by and in appellant's home. Thereafter, the victim in criminal violation of law, WV Code 61-3C-6 and 61-3C-9 and 61-3C-2, possessed appellant's "computer data" belonging to the appellant without authorization. At trial, the victim related how he purchased a "Gotcha" program and then began illegally intercepting the appellant's camera's images/video without authorization. On September 7, 2007, this illegal interception was occurring in violation of appellant's privacy rights and West Virginia law. At such time and place, a serious physical altercation finally broke out between appellant and the alleged victim, Tom Smith. All of Tom Smith's 270 pound Airborne Ranger body was working on his car's ball joints, this time with his pants on, not exposing himself to appellant's 8 year old daughter, and with his tools spread around. Appellant was leaving with his 8 year old daughter to go feed their horses, one of which was blind and expected to be put down; a daily routine. Trial testimony indicated that appellant owned a single shot .12 gauge shotgun and had it home from the farm to clean it. The shotgun was loaded and was going to be transported back to the farm in the trunk of appellant's car to use if needed with

the ailing old, blind horse. The appellant and his daughter went out to the back of his car for said purpose. The victim testified he heard the sound of jingling keys at first, with appellant at the back of appellant's car with a gun. The victim announced that appellant's tire was flat. Appellant put the shotgun on the ground behind his vehicle and came around to see the flat tire. An exchange of words occurred. Appellant, who had went over to speak with the victim empty handed, leaving the shotgun at the trunk, picked up the victims hammer, out of fear, and a struggle ensued. The victim alleges appellant struck him with his hammer in the struggle. The struggle progressed to the area near the rear of appellant's vehicle where the shotgun was on the ground. Appellant, out of fear, picked up the shotgun while the two struggled with the hammer. Now the two struggled with the hammer and the shotgun, each gripping both. After the victim made an "offensive move" toward the appellant, by his own testimony, he then and there tried to punch the appellant in the mouth. The victim gave no testimony that appellant some how dragged his 270 pound combat trained airborne ranger body back to where the shotgun was. The victim testified that at this time, the gun discharged at a time when the victim shoved the barrel "straight down". The blast seriously injured the victim. The victim gave no testimony of any words or threats from the appellant that appellant was going to kill him. Appellant grabbed the phone from his wife and spoke at length on a 911 call. The police arrived and were advised by the victim of the illegal video interception. Deputy Backus went inside the victims house without a search warrant to obtain property belonging to the appellant, illegally intercepted by the victim. Deputy Backus found the victim's "Gotcha" program up and running. Backus stopped it; saved it, rewound it and then viewed appellant's "computer data" without consent and without a search warrant. Backus then took a blank CD and recorded the illegal intercepted video taken

from appellant's "computer data" as defined by West Virginia law, all without authorization and without a search warrant. Appellant maintained his justification. Two motions were filed to disqualify the prosecutor. The last such motion, filed by appellant's second counsel pretrial, was specifically based upon appellant's need for his testimony regarding the meetings he had with the prosecutor prior to the incident. Trial counsel subpoenaed the prosecutor for trial. The Court never took up said motion and the prosecutor was not disqualified. Insufficient evidence to support a conviction for attempted murder was adduced at trial. During the trial, the Court admitted into evidence the illegally obtained video evidence in violation of West Virginia law and appellant's reasonable expectation of privacy in said video, the video being protected "computer data" under West Virginia law, and the legislature's recognition of such privacy right. Post trial motions for a new trial were filed based upon the jury's failure to consider all of the evidence and lack of evidence on attempted murder. The Court never ruled on said motions. The Court sentenced the appellant to a combined 12 years to 35 years under the above circumstances and the circumstances of this case and said sentence is a violation of Article III Section 5 of the West Virginia Constitution, prohibiting a penalty not proportionate to the character and degree of the offenses herein.

**III. ASSIGNMENT OF ERROR  
POINTS and AUTHORITIES,  
DISCUSSION OF LAW**

**1. The Court Erred in Failing To Disqualify The Prosecuting Attorney and thereby denied the appellant his Constitutional Right To A Fair Trial.**

Appellant's first counsel filed a Motion To Disqualify Prosecuting Attorney, pretrial. This first such motion was predicated upon the grounds that prior to the indictment in this matter, the

appellant complained on various occasions to the police, alleging criminal actions of the alleged victim herein (Tom Smith). Appellant had been advised in each instance that the prosecutor felt prosecution was not warranted. Appellant herein also personally met with the prosecutor herein and provided a videotape showing the alleged victim herein attacking the appellant. Said video was given to the prosecutor along with the demand that Tom Smith be prosecuted for battery. Later, the prosecutor decided not to prosecute Tom Smith. As the appellant anticipated presenting Rule 404(b) evidence at his trial in an effort to prove his actions were justified against Tom Smith, Appellant filed his motion to disqualify citing “The videotape in the possession of Mr. Jones would be part of that evidence and there may be issues with regard to the authenticity or chain of custody of said tape.”, citing Karr, Jr. v. McCarty 187 W.V.a. 201.

A hearing was conducted by the Court on October 25, 2007. The Court found the moving party to “bare a heavy burden” (Trans. 10/25/09 Hearing, pg. 18, lines 12-16). The Court made a finding that the present facts were distinguishable from the Karr case, supra and ultimately found no grounds to recuse the prosecuting attorney.

Thereupon, appellant discharged his first attorney and hired new trial counsel. Appellant’s new trial counsel filed a second Motion To Disqualify Prosecuting Attorney. The second motion was grounded and premised not on the issue of the tape, but upon the necessity to call the prosecutor as a witness in the trial of this matter, going to appellant’s justification of his actions on the day of the wounding/shooting. Appellant had spoken with the prosecutor herein, prior to the day in question, on at least three occasions regarding getting assistance and advice from the prosecutor regarding his neighbor, Tom Smith. Counsel, in his motion, alleged that “As a part of his normal official duties, Mr. Jones gave the now Defendant advice regarding the

situation between Gregg Smith and Tom Smith, after Mr. Jones refused to pursue a peace bond against the now victim.” Appellant, in his motion, pointed out, “Mr. Jones must necessarily testify as a witness in the trial of this action, and he has been listed on the Defendant’s Amended Witness List.” In response, the State filed a “Motion” on August 22, 2008, to quash the subpoena of the appellant for the prosecuting attorney to be a witness in the trial of this matter. Thereafter, the record reflects no order and no ruling by the Trial Court on said two motions. The trial began September 2, 2008, with Stephen Jones not recused as prosecutor.

Rule 3.7 (a) of the West Virginia Rules of Professional Conduct provides as follows:

- a.) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
  - (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case; or
  - (3) disqualification of the lawyer would work a substantial hardship upon the client.

Here the issue of justification of the shooting/wounding of the alleged victim, by the appellant, was at issue and contested. As the prosecutor had direct contact with the appellant on matters going to justification of the shooting/wounding, his testimony was needed at trial to establish the appellant’s complaints to law enforcement and to the prosecutor himself regarding events establishing this same justification for the shooting/wounding he was now being charge with. Therefore, the prosecutor herein was a necessary witness to the defense and these specific instances could only be established through the testimony of the prosecutor himself. As such, Rule 3.7 (a) prohibited the prosecutor from being an advocate in the trial herein.

In Karr, Jr. v. McCarty 187 W.Va. 201, 417 S.E. 2d 120 (1992), this Court upheld the disqualification of a Jackson County prosecutor and stated that the issue in this type of situation “was very simple”: Did the testimony of the prosecutor relate to an uncontested issue. “If the answer is No, Rule 3-7 mandates disqualification.” “Thus the legal principle is clearly stated in the rule, and all remains is a factual determination regarding whether the issue is contested or uncontested.” Here the issue of whether the prosecutor’s testimony, of the many complaints by the appellant, about the alleged victim herein, directly to the prosecutor was never decided by the Court, even after appellant’s second counsel raised the matter more succinctly in his motion pretrial. However, the issue of justification was clearly contested in this case and the prosecutor’s needed testimony goes directly to this defense. Here, applying the “simple test” of Karr, supra, the testimony of the prosecutor relates herein to a clearly contested issue: the justification of appellant’s actions in using force against the alleged victim herein. Here it is abundantly clear that the prosecutor herein, became a witness through dealings with the appellant as prosecuting attorney on appellant’s complaints about the alleged victim’s conduct, behavior, and actions, including allegations that the alleged victim committed battery on the appellant, caught on tape and on another occasion exposed his genitals and backside to the appellant and his eight year old daughter, together with multiple complaints of property damage, flat tires, and threats leading up to the allegations herein. The prosecutor herein acquired knowledge of facts through this professional relations with the appellant. Further, these facts lead to the events of the shooting/ wounding being charged herein and are closely related to the shooting/wounding herein and were acquired by the prosecutor through his consultations he had with the accused appellant herein. As such, the Trial Court should have recused the prosecutor herein as a matter

of law. Therefore, the Court's failure to do so denied the appellant a fair trial herein. This Court, in State v. Haught, 179 W.Va. 557, 371 S.E. 2d 54 (1988), in looking to whether a denial of request for a special prosecutor was error, made a point in its decision to make an important note that in that case neither the State nor the Appellant expressed any desire to call the prosecutor as a witness in the case. As such, it is important to note to this Court that appellant's second trial counsel indicated in his motion to disqualify that the prosecutor "must necessarily testify as a witness in the trial of this action." Further, counsel listed the prosecutor on the Defendant's Amended Witness List and subpoenaed the prosecutor who immediately filed a motion on August 22, 2008, pretrial to quash his trial subpoena. Thereafter, the Trial Court failed to address this matter going directly to a fair trial. Appellant was therefore denied his constitutional right to a fair trial.

**2. Appellant's sentence herein violates West Virginia Constitution, Article III, Section 5, that prohibits a penalty that is not proportionate to the character and degree of the offenses herein.**

The Appellant herein; Gregg Dulaney Smith, was sentenced to four sentences all to run consecutively, one to the other, as follows:

- 1.) Count One, Malicious Assault (hammer)....not less than 2 nor more than 10 years;
- 2.) Count Two, Malicious Assault (shotgun)....not less than 2 nor more than 10 years;
- 3.) Count Three, Wanton Endangerment Involving A Firearm.....definite term of 5 years;
- 4.) Count Four, Attempted First Degree Murder....not less than 3 nor more than 15 years;

Effectively this harsh sentence amounts to a combined sentence of not less than 12 nor more than 35 years in the penitentiary . This appeal arises out of an ongoing neighbor dispute that culminated in a physical altercation in the driveway between them. Counsel unsuccessfully argued at sentencing that appellant's actions on the day in question was a single act of aberrant behavior, the appellant, age 50, with no significant criminal history nor a history of violent behavior. The appellant contested the allegations herein at trial. The jury reviewed a video of the events that was surreptitiously and illegally intercepted by the alleged victim. The events of that day occurred very quickly. Deputy Kelley testified that the video "was not very long" when asked if "It was not two minutes long" (Trial Trans. P. 46, lines 21-23). Further, for a time period of "Just a little bit over year time," police were called there "25 to 30 times" (Trial Trans. P. 59, lines 1-14). On one such call, the alleged victim "hit" ie.. committed battery on the appellant. (Trial Trans. P 59, lines 22-25; Trial Trans. p. 60, lines 1-25; p. 61, lines 1-11; p. 62, lines 21-25). Allegations of flat tires, name calling, destruction of property were frequent. Deputy Kelley testified "it was an ongoing problem. We felt helpless to be able to do anything about it" (Trial Trans. p. 60, line 25; p. 61, line 1). The contents of appellant's phone call to 911 is set out in the trial transcript, verbatim at p. 102 through 109, and contains appellant's immediate report of the incident. Appellant relates that after Tom Smith repeated his name calling at his child when he was putting his shotgun in the trunk of his car prior to going to feed his horses. Appellant related that he went over to talk with him (empty handed) and that Tom Smith grabbed a hammer. Appellant related that he got the hammer away from Tom Smith and hit him with it in the struggle. Appellant returned to his yard. Tom Smith followed, a struggle ensued. The shotgun was picked up. Tom Smith grabbed it. The gun discharged at the time not captured by the video.

The alleged victim is a former combat trained, Army Airborne Ranger (Trial Trans. p. 112, line 19) serving 10 years, weighing 270 pounds (Trial Trans. p. 125, line 18). When Tom Smith first became aware of the appellant, he heard the jingling of keys (Trial Trans. p. 115, line 11) behind appellant's vehicle. Tom Smith had his tools and parts laying out working on ball joints (Trial Trans. p. 116, lines 11-12) along with his hammer. Tom Smith testified he received a broken arm and head injury from the appellant using his hammer. Tom Smith said his "Airborne Ranger training for the Army and Stuff" with his natural instinct kicked in (Trial Trans. p. 118, lines 15-18) the "gun" was left behind appellant's car (Trial Trans. 119, lines 1-2). Tom Smith, airborne ranger with medals, then testified, "we got almost back to the back of the car and he was jerking the hammer back again with his left hand out of my right hand and he's getting ready to hit me again. That is the only offensive move I done which I had no other choice. .... when he jerked the hammer back like getting ready to hit for the third time, I went like this and went to punch him right in the mouth,... right before I hit him, he hits me again in the arm...well after I got a hold of his arm again and he had the hammer and I actually was trying to get the hammer out of his hand. ... he reaches around like this behind the car, behind the bumper, the right rear bumper, right behind, he reaches down to the ground and comes up like this with a .12 gauge. The barrel comes up and I see it coming at me. It keeps coming, like, toward my chest area. I grabbed the barrel and I shoved it back...I grabbed the barrel and shoved it away from me,.... He got his hand on the shotgun, finger in the trigger area....I keep pushing,...and we end up getting over to the edge of his...car port....I got two things that are offensive coming at me, I need to get rid of one of them. I take the barrel, as I am holding out here, and he is trying to pivot it back to me,...if I can get one thing out, I am going to knock him out,....all this happens within

20 seconds, 30 seconds,...I almost got the hammer out of his hand...He lets go of the hammer with the left hand,...and real fast he comes down with both hands. He grabs with both hands on the barrel and he swings it back up,...the barrel instead of coming at my chest, it comes around, I got the barrel about four inches in front of my left....I can see the hammer...he pulls the trigger... I went like this and shoved straight down and at that time it blew nine tenths of my leg away, part of my ankle.” (Trial Trans. pp. 120-124)

The appellant had complained about Tom Smith and hired a lawyer who testified at trial regarding appellant’s efforts to get Tom Smith to stop his harassment and to get a peace warrant, (Trial Trans. p. 200, lines 1-5) and discussing of video taping to document Tom Smith’s harassment. (Trial Trans. p. 200, lines 9-10). Appellant’s 10 year old daughter testified at trial. Edith related “I heard him (Tom Smith) call us names. Tom Smith would give her and her dad the finger (Trial Trans. p. 206, lines 10-12); that Tom Smith, had at one time, pulled his pants down exposing his backside in front of her (Trial Trans. p. 206, lines 15-25) and also exposed part of his front side”. (Trial Trans. p. 207, lines 6-10) Her father always took his shotgun to go feed their horses (Trial Trans. p. 208, line 15) because of an old blind horse they expected to have to put down (Trial Trans. p. 208, line 25; p. 209, lines 1-3). Edith related at trial...”my father was going to put the shotgun in the trunk and then Tom Smith said that “we had a flat and my father started walking over there without the shotgun and he started walking over there looking at the tire. And Tom Smith said something else and then my father picked up the hammer.” (Trial Trans. p. 209, lines 8-13). Later, Edith says her dad and Tom Smith struggled with the hammer. “I saw Tom and him fighting over the hammer and the gun. Tom Smith was laughing when he was, when they were struggling over the gun and the hammer.”

The last thing she saw before the gun went off: “when it went up, I saw Tom pulling on it.” (Trial Trans. p. 211, line 3) Edith, on cross testified she saw her dad swing the hammer but not strike. (Trial Trans. p. 212, lines 10-16). Edith testified the shotgun was loaded “a couple of weeks back” (Trial Trans. p. 214, line 23). Edith testified the gun went off because Tom Smith pulled on it. (Trial Trans. p. 220, line 4). On May 31, 2007, criminal charges had been brought against Tom Smith for battering appellant on video tape (Trial Trans. p. 229, lines 14-25) but upon the State’s motion, it was dismissed. (Trial Trans. p. 231, lines 3-7). Tom Smith had admitted to the police on that occasion to “pushing him” (Trial Trans. p. 239, lines 24-25). Appellant’s wife testified to Tom Smith constantly calling her husband a pervert, retard, and fag boy (Trial Trans. p. 248, line 17) and heard Tom Smith say that he would put spikes into Gregg’s tires on several occasions and of many flat tires, around 20. (Trial Trans. p. 248, lines 24-25; p. 249, lines 1-8). The appellant testified at length to the problems he experienced with Tom Smith and the accounts of the day in question.

Standard of Review The Supreme Court of Appeals reviews sentencing orders under a deferential abuse of discretion standard unless the order violates statutory or constitutional commands.

State v. Lucas, 201 W.Va. 271, 496 S.E. 2d 221 (1991).

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5, that prohibits a penalty that is not proportionate to the character and degree of an offense. State v. Cooper, 172 W.Va. 266, 304 S.E. 2d 851 (1983); State v. Richardsen, 214 W.Va. 410, 589 S.E. 2d 552 (2003).

This Court in State v. Cooper, supra and in State v. Richardsen, supra, suggested factors affecting the subjective impact of a sentence include age of the appellant, statement of the victim, evaluations made in anticipation of sentencing. In those cases, the Court looked to the circumstances in each case and relevant facts.

Here at sentencing, conducted April 8, 2009, the Court heard the testimony of his father who established appellant's long work history in advanced electronics, that ended with health problems from damaged eyesight, causing appellant to go half blind. (Transcript 4/8/09 p.8, lines 1-16). Further, appellant is a vegan, who always has been quiet, shy and Christian, with no history of violence. (Transcript p. 10, lines 4-18). Dr. Art Calhoun testified he knew appellant for 15 years; that appellant has to use a cane at times due to back pain and sometimes a walker. (Transcript p. 16, lines 1-9). Dr. Calhoun testified appellant to be a quiet, non-violent man. Pastor Daniel Morikone testified to knowing petitioner 3 years as a quiet, nice, good guy. (Transcript p. 18, lines 22-25). Pastor Morikone testified to appellant's expression of remorse to him about the incident and the injury to the victim. Appellant expressed his regret and remorse at sentencing.

Given the overall circumstances outlined above, the combined 12 to 35 year sentence shocks the conscience and is constitutionally impermissible, under State v. Cooper and State v. Richardsen. Therefore, the appellant requests this case be remanded with directions that the appellant be sentenced appropriately, to a sentence proportionate to the character and degree of the offense.

**3. The Trial Court erred in never considering a motion for a new trial, based upon the failure of the Jury to consider all of the evidence and that the evidence did not support a conviction for Attempted First Degree Murder.**

All of the evidence in this matter presented at trial was sent to the jury room for the jury's deliberation excepting (most importantly) the video of the battery of the victim upon the appellant, Gregg Smith, which was admitted into evidence.

Trial counsel noticed that the television and video cart was external to the jury chambers during the deliberations and inquired of the Court bailiff why the evidence was not in the jury chambers. The bailiff stated that the jury indicated that it did not want that evidence in its chambers.

Trial counsel filed a motion on January 30, 2009, for a new trial, upon said circumstances and argued that appellant was entitled to have that evidence in the jury chambers whether the jury wanted it or not or actually would have viewed it or not, and the failure of the evidence to be present in the jury chambers constituted a deprivation of the appellant's constitutional right to a fair trial.

The State filed its response on February 4, 2009. A review of the docket herein reflects no decision on said critical matter.

Given this motion filed by prior counsel, error has occurred herein in the Court failing to take said matters into consideration and rule upon said matter affecting appellant's constitutional right to a fair trial.

**4. The evidence adduced at trial does not support a conviction for Attempted First Degree Murder.**

A review of the evidence admitted at trial, indicates that there was insufficient evidence that the appellant on September 7, 2007, committed the offense of Attempted Murder, W.Va. Code 61-11-8, by attempting to feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder Thomas F. Smith, taking said evidence in a light most favorable to the State.

A review of the testimony of the victim, Tom Smith, reveals that under the circumstances, appellant did not attempt to commit a murder against him. At trial, Tom Smith testified that the first thing he remembered while working on his car in the driveway as to the appellant was the jingling of keys of the appellant who was at the back of appellant's car at the trunk area with a shotgun. (Trial Trans. p. 115, line 11) appellant did not approach the victim with a gun nor a hammer. The victim had his tools and car parts laying out along with his hammer (Trial Trans. p. 116, lines 11-12). Apparently an exchange occurred and appellant and the victim struggled with the victims hammer. The jury herein convicted the appellant of two (2) counts of malicious wounding: one with a hammer (Count I); the second with a shotgun (Count II). The jury then convicted appellant of wanton endangerment involving a firearm, the same shotgun as Count 2. As the "shotgun was left behind petitioner's car (Trial Trans. p. 119, line 1-2) Tom Smith testified that "we got almost back to the back of the car and he was jerking the hammer" while the two continued to struggle with the victim's hammer. No testimony was offered by the victim that appellant, age 50, suffering from bad eyes and back pain drug the 270 pound, former 10 year veteran, Airborne Ranger (Trial Trans. p. 125, line 18) to the back of his car to use the shotgun to kill/murder the big, heavy, Airborne Ranger with all his hand to hand

combat training. The victim testified that at this important point he made an “offensive move” toward the appellant. Tom Smith testified at this important juncture. “I went like this and went to punch him right in the mouth” (Trial Trans. p. 120, line 6-8). “Right before I hit him he hit me again here in the arm.” (Trial Trans. p. 120, line 10-15) Then “at that time we were approximately right behind the ....in front of the back wheel of this car right next to where the gun was. (Trial Trans. p. 120, lines 17-19) As the two continued to struggle the victim testified “He reaches around like this behind the the bumper, the right rear bumper right behind, he reaches down to the ground and comes up like this with a .12 gauge.’ (Trial Trans. p. 121, lines 1-4). Both struggle over the hammer and the shotgun. The gun discharged at a time when the victim shoved the barrel “straight down” (Trial Trans. p. 124, lines 1-2). As a result, the victims leg was seriously injured. The jingling of keys testimony was consistent with defense witnesses’ testimony that appellant was taking the gun to his farm to use to put down his ailing horse if he needed to and that appellant was going to put the shotgun in the trunk of appellant’s car. There is no evidence that appellant was attempting to murder the victim during this very short in time exchange that the victim characterized as 20 to 30 seconds in duration (Trial Trans. p. 122, line 23). At no time did the victim allege or testify that at such time appellant said words or made threats that appellant was going to kill the victim, even all through the struggle.

5. **The Court erred in admitting the video obtained by the victim Tom Smith and the Police in violation of West Virginia law, appellant's expectation of privacy therein and his rights under Article 3, Section 6 of the West Virginia Constitution thereto .**

Standard of Review: As the Circuit Court's ruling on the suppression motion herein involved purely a legal determination, the standard of review herein on appeal, is DE NOVO, State v. Stuart, 192 W.Va. 428, 452, S.E. 2d 886 (1994); State v. Mullens, 221 W.Va. 70 (2007).

- A. West Virginia Code 61-3C-3 (a) defines "Access" to mean:

"To instruct, communicate with, store data in, retrieve data from, Intercept data from or otherwise make use of any computer, computer network, computer program, computer software, computer data or other computer resources"

- West Virginia Code 61-3C-3 (b) defines "Computer" to mean:

"An electronic, magnetic, optical electrochemical or other high speed data processing device performing logical, arithmetic or Storage functions, and includes any data storage facility or communication facility related to operating in conjunction with such device.

The term "computer" includes any connected or directly related device, equipment or facility, which enables the computer to store, retrieve, or communicate computer programs, computer data on the results of computer operations to or from a person, another computer or another device, but such terms does not include an automated typewriter or typesetter, a portable hand-held calculator or other similar device.

- West Virginia Code 61-3C-3 (c) defines the word "computer data" to mean:

"Computer data" means any representation of knowledge, facts, concepts, instruction or other information computed, classified, processed, transmitted, received, originated, stored, manifested, measured, detected, recorded, reproduced, handled or utilized by a computer, computer network, computer program or computer software and may be in any medium, including, but not limited to, computer print-outs, microfilm, microfiche, magnetic storage media, optical storage media, punch paper tape or punch cards, or it may be stored internally in read-only memory or random access memory of a computer or any other peripheral device.

West Virginia Code 61-3C-3 (l) defines the word computer resources to mean:

“Computer resources” includes, but is not limited to, information retrieval; computer data processing, transmission and storage; and any other functions performed, in whole or in part, by the use of a computer, computer network, computer software or computer program.

West Virginia Code 61-3C-9 makes it a crime to possess computer data without authorization which a person knows or reasonably should know was obtained in violation of any section of this article 61-3C-9 states:

**“61-3C-9. Unauthorized possession of computer information, etc.**  
Any person who knowingly, willfully and without authorization, possesses any computer data, computer software, computer supplies or a computer program which he knows or reasonably should know was obtained in violation of any section of this article shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than two hundred nor more than one thousand dollars or confined in the county jail for not more than one year, or both.”

West Virginia Code 61-3C-6 makes it illegal to possess without authorization “Computer data” as follows:

**“ 61-3C-6. Unauthorized possession of computer data or programs.**  
(a) Any person who knowingly, willfully and without authorization possesses any computer data or computer program belonging to another having a value of five thousand dollars or more shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than ten thousand dollars or imprisoned in the penitentiary for not more than ten years, or both.  
(b) Any person who knowingly, willfully and without authorization possesses any computer data, or computer program belonging to another and having a value of less than five thousand dollars shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars or confined in the county jail for not more than one year, or both.”

The legislative findings of West Virginia Code 61-3C-2 are as follows:

**“61-3C-2. Legislative findings.** The Legislature finds that:  
(a) The computer and related industries play an essential role in the commerce and welfare of this state.  
(b) Computer-related crime is a growing problem in business and Government.  
(c) Computer-related crime has a direct effect on state commerce and can result in serious economic and, in some cases, physical harm to the public.  
(d) Because of pervasiveness of computers in today’s society, opportunities

are great for computer related crimes through the introduction of false records into a computer or computer system, the unauthorized use of computers and computer facilities, the alteration and destruction of computers, computer programs and computer data, and the theft of computer resources, computer software and computer data.

(e) Because computers have now become an integral part of society, the Legislature recognizes the need to protect the rights of owners and legitimate users of computers and computer systems, as well as the privacy interest of the general public, from those who abuse computers and computer systems.

(f) While various forms of computer crime or abuse might possibly be the subject of criminal charges or civil suit based on other provisions of law, it is appropriate and desirable that a supplemental and additional statute be provided which specifically proscribes various forms of computer crime and abuse and provides criminal penalties and civil remedies therefor.

Here appellant owned and operated a computer defined above in 61-3C-3(b) which necessary by reason of said legal definition included 2 digital wireless cameras that transmitted digital images to appellant's computer. Said cameras were storage devices/communication devices that were related to or operating in conjunction with such device. The cameras were connected by airwave transmission and were directly related devices, equipment which enabled appellant's computer to store, retrieve or communicate computer programs, computer data, or the results of computer operations to or from another device. Appellant's computer, in his home, met the definition of computer, computer data and computer resources as defined above. The cameras are clearly a peripheral device. The video here in question is clearly "computer data" as defined by West Virginia Code 61-3C-3 (e).

As such, appellant's computer, with his cameras working in conjunction therewith, are protected under West Virginia Code 61-3C. More particularly, petitioner's right to privacy is also therein protected. West Virginia Code 61-3C-2 (e) specifically recognizes the legislatures purpose in protecting appellant's "privacy interest" as being a member of the general public in using his computer with his cameras and the "computer data" they generated.

During the trial herein, as prior counsel had challenged the admissibility of the video as a violation of law, etc, the Court took up the matter again. The Court wanted to determine if the

video came under a “protected statutory authority” (Trial Trans. p. 50, lines 3-4). The Court adjourned for the day to consider whether WV Code 61-3C-1 et. seq. made it a violation of law for Tom Smith to capture the video of the events as charged. Trial counsel presented WV Code 61-3C-1 et. seq. to the Court. (Trial Trans. p. 51, lines 13-25; p. 52, lines 1-72). The Court ruled that facts of this case fell outside the definitions of WV Code 61-8-28; 61-1D-1 and 61-3C-1. The Court referred to the hearing on a motion in limine. The Court reasoned that as appellant’s camera was wireless and not hard wired that the same was analogous to the interception of wireless telephone transmissions (Trial Trans. p. 54, lines 1-25; p. 55, lines 1-4). The Court concluded “as a matter of law, I find the statute for any of those three applicable statutes do not protect the capture of wireless photo generated communicated communications (Trial Trans. p. 55, lines 2-4).

Thereafter, the video was admitted as evidence at trial. The testimony of Deputy Backus revealed that the victim had a program called “Gotcha” and was using it to capture appellant’s video using appellant’s computer with its peripheral camera devices without authorization. The program was up and running following the altercation. (Trial Trans. p. 70, lines 19-23). Backus stopped it, saved it, rewound it and then viewed appellant’s “computer data” without consent and without a search warrant. (Trial Trans. p. 70, line 25; p. 71, lines 1-2). Backus then burned/copied a CD from the victims illegally intercepted “computer data” from appellant’s computer with peripheral digital wireless cameras. (Trial Trans. p. 71, lines 5-8). Therefore, in addition to the victim violating WV Code 61-3C, the officer further violated it by copying the video and therein also violated appellant’s right to privacy thereto. Later at trial, the victim testified how he actually intercepted appellant’s “computer data” from appellant’s computer. (Trial Trans. p. 134, line 25; p. 135, lines 1-25; p. 136, lines 1-25; p. 137, lines 1-25; p. 138, lines 1-10). A review of said testimony of Backus and the victim makes it abundantly clear that both possessed “computer data” belonging to the appellant, obtained in violation of

law as set forth in WV Code 61-3C-9 and knowingly, willfully and without authorization, possessed “computer data” belonging to the appellant of some value as defined by WV Code 61-3C-3 (a),(b),(c),(e),(l), and ®, as prohibited by WV Code 61-3C-6 making it a crime to do so. Further, said “computer data”, belonging to the appellant, was obtained without consent and without a search warrant.

Given the Legislative findings herein and this law, particularly 61-3C-2 (e), appellant enjoyed an expectation of privacy in his computer and the “computer data” thereto related and generated by the cameras. Further, given that the Legislature made it a crime to possess unauthorized computer data belonging to him in the form of video data from his cameras, appellant had a reasonable expectation of privacy in his computer in his home together with the “computer data” generated by his cameras. No such video evidence was obtained via the search warrant of appellant’s home and computer. The video evidence herein was obtained without a search warrant; without consent; and, from a source that had illegally obtained said evidence from appellant in an area where appellant clearly had an expectation of privacy, both as a matter of law and otherwise as a reasonable expectation. Said warrantless obtained evidence was presented at trial in violation of appellant’s Fourth Amendment Rights and is therefore reverseable error.

B. This Court, in State v. Mullens, 221 W.Va. 70 (2007), reviewed the protection of Article III, Section 6 of the West Virginia Constitution and prohibited police from sending an informant into the home of another to record oral communications under the authority set forth in W. Va. Code §62-1D-1 et. seq. (1987) when the police had not prior obtained authorization to enter a home to do so pursuant to W.Va. Code §62-1D-11 (1987).

In so doing, this Court looked to the provisions of 62-1D-1 et. sq (1987). W.Va. Code 62-1D-3 (a) (1) makes it unlawful for anyone to intentionally intercept, attempt to intercept or procure any other person to intercept any wire, oral or electronic communication. A violation

of this provision is a felony offense, 62-1D-3 (a) (3). The decision in Mullens, supra, notes at page 86, “ Further, the act provides that evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding”, W.Va. Code 62-1D-6. This Court in Mullens, supra, looked to Article 3, Section 6 of the West Virginia Constitution, which provides:

“The rights of the person to be secure in their houses, persons, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

This Court reiterated that the provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution. Further, this Court in Mullens, said “This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than it’s federal counterpart.” This Court in Mullens, supra, made an emphatic point that: “For this reason, the jurisprudence of this Court addressing Article III, Section 6 has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” This Court went on to apply the rule of constitutional interpretation that when two constructions may be placed upon a statute, one of which renders it constitutional and the other unconstitutional, it is the duty of the Court’s to so limit the statute as to make it comply with constitutional requirements. The Court went on to interpret this statute to require prior judicial authority before entering a home.

Here, looking to W.Va. Code 62-1D-2 (l) “Electronic Communication” means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electro-magnetic, photo electronic, or photo optical system, but does not include: (1) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit; (2) any wire or oral communications; (3) any combination made through a tone-only paging device.”

W.Va. Code 62-1D-3(a) states:

“Except as otherwise specifically provided in this Article it is unlawful for any person to:

1. Intentionally intercept, attempt to intercept or procure any other person to intercept,...any wire, oral, or electronic communication; or
2. Intentionally disclose...to any other person the contents of any... electronic communication. Knowing or having reason to know that the information was obtained through the interception of a ,... electronic communication in violation of this article; and
3. Intentionally use or disclose...the contents of any...electronic communication or the identity of any party thereto, knowing or having reason to know that such information was obtained through the interception of a...electronic communication in violation of this article.”

W.Va. Code 62-1D-3(e) states:

“It is lawful under this article for a person to intercept...electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the Constitution or laws of this State.”

W.Va. Code 62-1D-6, states in pertinent part:

“Provided, that evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding.”

Under the logical ruling in Mullens and applying it to the above facts, the alleged victim’s interception by his “Gotcha” program of appellant’s computer generated video data located in appellant’s home was a violation of W.Va. Code 62-1D-3(a) (1), 62-1D-3(a)(2) and (3), appellant’s video data being “Electronic Communication” under 62-1D-2(l) and not radio portions of a cordless telephone communication. Therefore, under the provisions of 62-1D-6, this video, was not admissible in the trial herein. Should this Court view the victim as a person under W.Va. Code 62-1D-3(e), being a person who was a party to the communication, then the reasoning and ruling of Mullens requires that the victim and the police needed prior judicial authorization as the computer and its video data were located inside the home of the appellant,

and therefore protected under Article III, Section 6 of the West Virginia Constitution. Here however, the alleged victim was not a party to the electronic communication to come under 62-1D-3(e). This case does not involve the recording/interception of a two-party oral conversation inside appellant's home with the alleged victim being one of the parties. Here, the alleged victim utilized an illegal "Gotcha" program to intercept appellant's video/computer data from inside appellant's home, without consent and without judicial authorization., all from a remote location in the alleged victim's home. As such, the alleged victim is not a "party to the communication" as contemplated by W.Va. Code 62-1D-3(e). The situation here in question does not involve a two-way electronic communication between the alleged victim and the appellant, inside appellant's home, but does involve the illegal, intentional interception and disclosure of appellant's "electronic communication" in the form of his video/computer data located inside appellant's home, by the alleged victim, in violation of 62-1D-3.

Given the above, the trial Court's ruling that this video data/electronic communication was analogous to the interception of wireless telephone communication is clearly in error, particularly given that W.Va. Code 62-1D-2(l), defining "electronic communication", specifically excludes "(1) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." Therefore, in addition to the above discussion of the warrantless violation of appellant's expectation of privacy in his computer data/video in his home under W.Va. Code 61-3C-2, 61-3C-3, 61-3C-6 and 61-3C-9, appellant's right to be secure in his home, papers, and effects against unreasonable searches and seizures, under West Virginia Constitution Article III, Section 6 was violated as well as his rights to be free from intentional interception of electronic communication in the form of his video/computer data located in his home under 62-1D-3

**PRAYER FOR RELIEF**

The appellant further respectfully requests that this Court reverse the rulings of the Circuit Court and remand the case for a new trial, and/or order proportionate sentencing.

Respectfully submitted  
GREGG D. SMITH,  
By Counsel

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IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA, Plaintiff Below  
Appellee

Judgement

vs.

GREGG DULANEY SMITH, Defendant Below,  
Appellant.

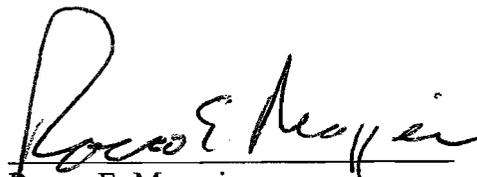
Appeal Granted From

Of April 23, 2009 from the  
Circuit Court of Ritchie  
County, West Virginia  
Case No. 07-F-43

**CERTIFICATE OF SERVICE**

I, Rocco E. Mazzei, hereby certify that I have served this **APPELLANT'S BRIEF**, on the 30<sup>th</sup> day of April, 2010, by mailing a true copy thereof in the United States Mail, postage prepaid to the addressee listed below:

Thomas W. Smith  
Attorney General's Office  
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