

35520

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

INDICTMENT NO. 09-F-127  
JUDGE JOHN W. HATCHER, JR.

DENNIS R. GIBSON,

Defendant.

FAYETTE COUNTY  
CIRCUIT CLERK  
2009 DEC 11 P 3:14  
MICHELLE E. WRIGHT

ORDER FOR CERTIFIED QUESTION

On an earlier day came the defendant, Dennis R. Gibson, in person and with his counsel, Nancy S. Fraley, and the State of West Virginia by her Prosecuting Attorney, Carl L. Harris, for hearing of the Defendant's *Motion in Limine* to exclude from evidence an alleged prior conviction, obtained against the defendant for domestic battery on June 29, 1998.

The parties stipulated to the facts and submitted the issue to the Court. Based upon a review of the Motion, the statute in question, and the applicable case law, the Court does hereby **Certify** the following:

**FINDINGS OF FACT**

FILED  
DEC 14 2009  
CLERK  
FAYETTE COUNTY, WEST VIRGINIA

1. The above, single count indictment (a copy of which is attached hereto) charges the defendant with Third Offense Domestic Battery, a felony, as defined by West Virginia Code §61-2-28(d), with an alleged offense commission date of May 5, 2009.
2. Within the body of the indictment it is alleged that the defendant had previously been convicted of two separate offenses of domestic battery. The first on February 2, 2004, and the second, June 29, 1998.
3. West Virginia Code §61-2-28(d) outlines the offenses which may be used to enhance a domestic charge to a third offense felony, and then adds an

additional condition stating "if the offense [the current allegation] occurs within ten years of a prior conviction . . . "

4. The Defendant's position is that the aforementioned language requires the current (May 5, 2009) alleged offense to have occurred within ten years of a prior conviction for that prior conviction to be used to enhance the current allegation to a third offense felony status.
5. The State's position is that the aforementioned language requires only one of a Defendant's prior domestic battery convictions be obtained within ten years of the current (May 5, 2009) allegation to satisfy the statute.
6. The Court finds that the language within the aforementioned statute does not clearly communicate the intent of the legislature and for the Court to grant the Defendant's *Motion in Limine* would require the Court make law instead of ruling on law.

The question to be certified to the Supreme Court of Appeals of West Virginia is as follows:

**Must both of the two prior convictions for criminal acts of domestic violence [as defined and obtained in accord with West Virginia Code §61-2-28], which are alleged within an indictment charging a current allegation of domestic violence as a third offense felony, have been obtained against a defendant within ten years of said current allegation, for said prior convictions to be properly used to charge the current allegation of domestic violence as a third offense felony?**

The Court would answer the above question "Yes" for the following reasons:

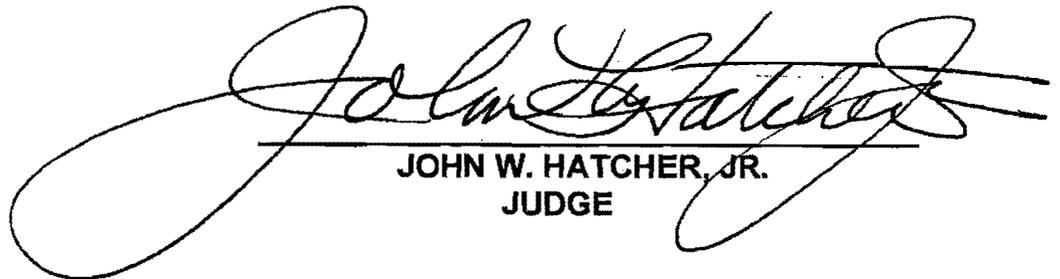
1. The statute in question contains ambiguous language, and applying the Rule of Lenity, the Court is required to strictly construe a penal statute against the State.
2. The public interest in punishing the serious crime of Domestic Violence is similar to the public interest in punishing the serious crime of Driving Under the Influence of Alcohol, and the purpose of enhancing the penalty and character of a third offense of either of such crimes to felony status is to punish and attempt to prevent a chronic problem; to enhance a current offense with the use of a prior conviction greater than ten years old is not consistent with that goal.
3. The Court is not aware of any statute of limitation which applies to only one, but not both, prior convictions.
4. The Supreme Court of Appeals of West Virginia has not directly addressed this issue. However, when the issue of the use of out of state DUI convictions was raised in State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001), the Court, absent any statutory language concerning out of state convictions, mirrored their handling of such prior convictions with the more artfully drawn language contained in the code defining third offense Driving Under the Influence of Alcohol. In a prosecution for third offense Driving Under the Influence of Alcohol, a felony, a prior conviction can only be used for the purpose of enhancement if it occurred within ten years of the current alleged offense.

Accordingly, it is hereby **ORDERED** that the above question be and the same is **HEREBY** certified to the Supreme Court of Appeals of West Virginia, recognizing that said Court may reformulate the aforementioned question.

It is further **ORDERED** that the trial heretofore scheduled in this matter be and the same is hereby continued generally, for good cause shown, pending resolution of the certified question.

The Circuit Clerk shall provide **CERTIFIED COPIES** of this Order to Carl L. Harris, Prosecuting Attorney, Nancy S. Fraley, Public Defendant, and to Rory Perry, Clerk of the Supreme Court of Appeals of West Virginia, 1900 Kanawha Boulevard East, Building One, Room E-317, State Capitol, Charleston, West Virginia, 25305.

**ENTERED** this 11<sup>th</sup> day of December, 2009.



**JOHN W. HATCHER, JR.**  
**JUDGE**

COPY

# Indictment

No. 09-F-127

STATE OF WEST VIRGINIA,

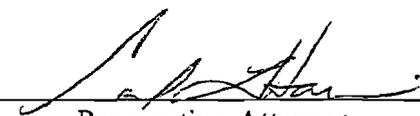
COUNTY OF FAYETTE, TO-WIT:

IN THE CIRCUIT COURT OF THE COUNTY OF FAYETTE

The Grand Jurors of the State of West Virginia, in and for the body of the County of Fayette, upon their oaths, and now attending the said Court, present that **DENNIS R. GIBSON**, on or about the 5<sup>th</sup> day of May, 2009, in the said County of Fayette, committed the offense of "third offense domestic battery" in that he did unlawfully, feloniously and intentionally make physical contact of an insulting or provoking nature with Stephanie N. Adkins, a family/household member, by striking her in the facial area with his fist, striking her in the stomach and arms, pulling her hair and/or pushing her to the ground, after having been previously convicted of the offense of domestic battery on February 2, 2004, in the Magistrate Court of Fayette County, West Virginia; and after having been previously convicted of the offense of domestic battery on June 29, 1998, in the Magistrate Court of Fayette County, West Virginia, against the peace and dignity of the State.

W. Va. Code § 61-2-28(d)

Found upon the testimony of R. S. Prince, duly sworn in open court to testify the truth and sent before the Grand Jury on the 8<sup>th</sup> day of September, 2009.



Prosecuting Attorney  
Fayette County, West Virginia