

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WARREN K. HOLLINGHEAD,**

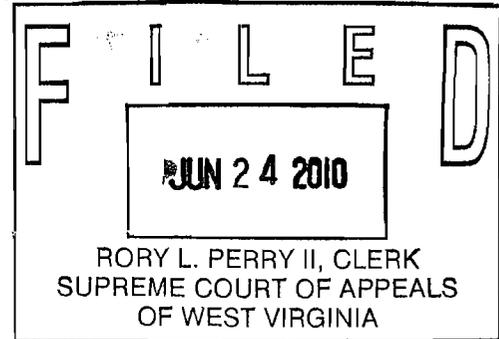
**Appellant,**

vs.

No.:35530

**JAMES W. CHILDERS, as  
ELECTED SHERIFF OF  
GREENBRIER COUNTY,**

**Appellee.**



**APPELLANT'S REPLY BRIEF**

Appellant herein, Warren Hollinghead, by counsel, Barry L. Bruce and Mark J. Jenkins, of Barry L. Bruce and Associates, L.C., does hereby respectfully submit Appellant's Reply Brief, and does move this Honorable Court to reverse the Greenbrier County Circuit Court's Order dated October 2, 2009, and herein states the following in support thereof:

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**Appellant,**

**vs.**

**No.:35530**

**JAMES W. CHILDERS, as  
ELECTED SHERIFF OF  
GREENBRIER COUNTY,**

**Appellee.**

**APPELLANT'S REPLY BRIEF**

Appellant, Warren Hollinghead, by counsel, Barry L. Bruce and Mark J. Jenkins, of Barry L. Bruce and Associates, L.C., does hereby submit Appellant's Reply Brief, and herein states the following:

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

Appellant filed a petition for review of the denial of his concealed weapons permit in the Circuit Court of Greenbrier County on March 13, 2009. By Order dated October 2, 2009, the Circuit Court denied the Appellant's petition for review of the denial of his concealed weapons permit.

Appellant filed his Petition for Appeal on January 20, 2010, with the Supreme Court of Appeals of West Virginia. After consideration thereof, this Honorable Court, by Order dated March 30, 2010, granted Appellant's Petition for Appeal.

**II. STATEMENT OF THE FACTS**

A criminal complaint was filed against the Appellant on September 15, 1994, in the Magistrate Court of Greenbrier County, West Virginia. The complaint alleged that the Appellant

violated West Virginia Code Section 61-2-9, (Simple Battery) by unlawfully physically contacting Brian Hollinghead, Appellant's nephew, at the residence of a third party, Shelia Smith.

Thereafter, on or about September 19, 1994, the Appellant plead no-contest to violating West Virginia Code Section 61-2-9, (Simple Battery) in the Magistrate Court of Greenbrier County, West Virginia.

Nearly three years later, on July 31, 1997, the Appellant filed an initial application for a concealed pistol/revolver license with Albert W. Lindsey, former Sheriff of Greenbrier County, West Virginia, and subsequently, on or about August 15, 1997, said application was granted.

On August 29, 2002, the Appellant filed a renewal application for his concealed pistol/revolver license with Albert W. Lindsey, former Sheriff of Greenbrier County, West Virginia, and subsequently, on or about October 15, 2002, said application was granted.

On September 14, 2007, the Appellant filed another renewal application for a concealed pistol/revolver license with Roger L. Sheppard, former Sheriff of Greenbrier County, West Virginia.

After considerable time elapsed without receiving notification from the Sheriff's department regarding his renewal application, Appellant's counsel, Barry L. Bruce, sent a letter to Roger L. Sheppard, former Sheriff of Greenbrier County, on August 5, 2008, wherein the Appellant respectfully requested that his concealed weapons license be re-issued due to the fact that he met the requirements of West Virginia Code Section 61-7-4 (a)(6) for the issuance of a concealed weapons license.

By letter dated August 8, 2008, Roger L. Sheppard, former Sheriff of Greenbrier County, West Virginia, denied the Appellant's request to renew his license to carry a concealed weapon, due to the fact that the Appellant had plead no-contest to a charge of battery, in 1994, in which the victim was Appellant's nephew. Sheriff Sheppard's letter stated that said conviction prohibited the Appellant from possessing a firearm pursuant to West Virginia Code Section 61-7-7.

By letter dated February 13, 2009, James W. Childers, current Sheriff of Greenbrier County, West Virginia, stated that he had reviewed the Appellant's file, and that he also was denying the Appellant's application because he was in agreement with the decision of Roger L. Sheppard, the former Sheriff of Greenbrier County, West Virginia, in that West Virginia Code Section 61-7-7 prohibited the Appellant from possessing a concealed weapons permit due to the fact the Appellant plead no-contest to a charge of battery in 1994.

### **III. ASSIGNMENTS OF ERROR**

West Virginia Code Section 61-7-4 clearly establishes the prohibitions which prevent an applicant from obtaining a license to carry a deadly weapon. The Circuit Court of Greenbrier County failed to properly apply West Virginia Code Section 61-7-4, to the facts of the instant matter. As such, the Appellant was wrongfully denied his right, under West Virginia law, to obtain a license to carry a deadly weapon.

#### **IV. DISCUSSION**

(1) The Legislative Intent Of WV Code Section 61-7-4 Dictates That The Appellant Should Be Granted His License To Carry A Concealed Weapon

The language of West Virginia Code Section 61-7-4 is clear and without ambiguities, and as such, the plain meaning of its provisions should be accepted without resorting to the rules of interpretation. Whiteside v. Whiteside, 222 W.Va. 177, 663 S.E. 2d 631 (2008); State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968).

West Virginia Code Section 61-7-4 is clear, in that the Appellant's renewal application should have been denied **only** if the Appellant had been convicted of a crime of assault or battery under West Virginia Code Section 61-2-28 (Domestic Battery) or 61-2-9 (Simple Battery) in which the victim was a current or former spouse of the Appellant, current or former sexual or intimate partner of the Appellant, person with whom the Appellant had a child in common, person with whom the Appellant cohabited or had cohabited with, a parent or guardian of the Appellant, the Appellant's child or ward or a member of the Appellant's household at the time of the offense.

The uncontested facts of the instant matter demonstrates that the Appellant has never been convicted of a misdemeanor offense of assault or battery under the provisions of West Virginia Code Section 61-2-28 (Domestic Battery). In fact, the undisputed facts demonstrate that the Appellant has never been charged with violating West Virginia Code Section 61-2-28.

Likewise, the Appellant was never convicted of a crime under West Virginia Code Section 61-2-9, (Simple Battery) in which the victim was a current or former spouse of the Appellant, current or former sexual or intimate partner of the Appellant, person with whom the

Appellant had a child in common, person with whom the Appellant cohabited or had cohabited with, a parent or guardian of the Appellant, the Appellant's child or ward or a member of the Appellant's household at the time of the offense.

Consequently, the Appellant should be granted his license to carry a concealed weapons permit according to West Virginia Code Section 61-7-4.

**(2) The Circuit Court Misconstrued The United States v. Hayes Decision**

It must be stressed that the United States v. Hayes, 555 U.S. ---, 129 S.Ct. 1079, 172 L.E. 2d 816 (2009), decision has no relevancy to the instant matter. The Hayes decision dealt with the Federal Gun Control Act of 1968, 18 U.S.C. § 921.

Mr. Hayes was convicted of the crime of simple battery in West Virginia. Years later, Mr. Hayes was caught possessing firearms. He was later charged with violating the Federal Gun Control Act, which prohibits a person from possessing firearms after having been convicted of a domestic crime.

Mr. Hayes argued that he was not convicted of a domestic crime and therefore the federal act did not apply. The government argued that it did not matter if Mr. Hayes was convicted of a domestic crime at the state level as long as the victim of his crime fell within the definition of 'domestic relationship' as provided for by the federal act.

In Hayes, the Court held that Mr. Hayes could be convicted of violating the Federal Gun Control Act, even though he had not been convicted of a crime which required a showing of a domestic relationship. That is, it did not matter that Mr. Hayes was convicted of violating West Virginia Code Section 61-2-9, (Simple Battery) which is a non-domestic related offense.

The Hayes Court found that as long as evidence could be presented that the victim of Mr. Hayes' battery was within the group of domestic individuals defined by the federal act, the federal government could present such evidence, and could convict Mr. Hayes of violating the Federal Gun Control Act even though he had not been convicted of a state crime which required a showing of that domestic relationship.

The Circuit Court used this logic to reason that the Appellant **could have** been convicted of the current version of West Virginia Code Section 61-2-28, since the Appellant and the victim shared the necessary domestic relationship. The Circuit Court reasoned that the Hayes decision allows a court to look beyond what actually happened, and to hypothesize about what could have happened.

The Circuit Court's Order was incorrect for two reasons. First, the Hayes decision was addressing whether a person could be convicted of possessing firearms under the Federal Gun Control Act. The Hayes decision was simply stating that a person could be prosecuted under the Federal Gun Control Act if the government could show the victim fell under the definition of 'domestic relationship' as provided for by the federal act.

In our case, the West Virginia Legislature has clearly defined who, and who should not, receive a license to carry a concealed weapon. This Circuit Court should have not even looked to the Hayes decision.

Secondly, the Appellant could not have been charged with a domestic crime, even if this Court were to find that the 'what-if' standard did apply. The current version of West Virginia Code Section 61-2-28, states that the definition of family or household member is to be found by referencing West Virginia Code Section 48-27-204. The Circuit Court determined that the

Appellant could have been charged with violating West Virginia Code Section 61-2-28 as Appellant's nephew is one of the parties defined as a family member/household member pursuant to West Virginia Code Section 48-27-204.

However, at the time the Appellant was charged with his subject crime, West Virginia Code Section 61-2-28, used the definition of family/household member found in West Virginia Code Section 48-2A-2. The definition of family/household member in effect at the time of Appellant's crime, being September 1994, did **NOT** include nephew as a family/household member. In fact, the West Virginia Legislature did not add the current definition of family/household member until 2004, some ten (10) years after Appellant was charged. Consequently, the Circuit Court was wrong in finding that the Appellant could have been charged with violating West Virginia Code Section 61-2-28 in 1994.

AS SUCH, the Appellant respectfully requests this Honorable Court to find that Appellant meets the requirements for a license to carry a deadly weapon according to West Virginia Code Section 61-7-4 and that the Appellant is not prohibited from possessing a firearm according to West Virginia Code Section 61-7-7.

APPELLANT  
BY COUNSEL,



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**CERTIFICATE OF SERVICE**

I, Mark J. Jenkins, Barry L. Bruce and Associates, L.C., counsel for Appellant, Warren K. Hollinghead, certify that I have on this date served a true and correct copy of the foregoing **APPELLANT'S BRIEF**, by U.S. Mail, first class, postage prepaid on this the 23<sup>rd</sup> day of June, 2010, upon:

Patrick Via  
Prosecuting Attorney's Office  
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