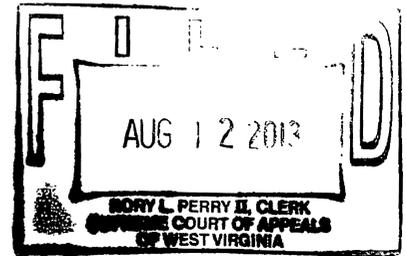


IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

FROM THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

(Circuit Court Case 10-F-68)

STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent

vs.) 12-1292

JUSTIN SEAN GUM,
Defendant Below,
Petitioner.

PETITIONER'S BRIEF

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PETITIONER’S BRIEF

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

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PETITIONER'S BRIEF
TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
ASSIGNMENTS OF ERROR

- I. The Circuit Court erred when it failed to grant the Defendant's request for a trial by jury for his charge of murder in the first degree, which failure was a denial of the Defendant's constitutional rights.**
- II. The Circuit Court erred when it held that sufficient evidence was presented at the hearing afforded by West Virginia Code Chapter 27-6A-6 to have supported a conviction of second degree murder.**

REQUEST FOR ORAL ARGUMENT

The Petitioner requests and believes that it is appropriate that this case be set for oral argument under West Virginia Rule of Appellate Procedure 19. The Petitioner believes that this case is not appropriate for a simple memorandum decision.

PROCEDURAL HISTORY OF THE CASE AND THE FACTS

In this case the Defendant and now Petitioner, Justin Sean Gum was charged with first degree murder by the shooting of his father James "Jay" Gum, on or about September 19th, 2010, which charges were brought in the Magistrate Court of Lewis County, West Virginia. The lower court appointed Thomas J. Prall and later James E. Hawkins, Jr. was also appointed as co-counsel. (Additionally, for the "trial", R. Russell Stobbs was appointed the guardian ad litem.) Later on November 15th, 2010, he was indicted by the Grand Jury of Lewis County, West Virginia, also for the charge of first degree murder. Then on June 13th, 2012, he was found to be mentally incompetent to stand trial after forensic examinations, reports, and testimony of Dr. Thomas Miller and Dr. Thomas Adamski, psychiatrists. Mr. Gum was then moved to the William R. Sharpe Hospital from the Central Regional Jail in an effort to regain competency, which had proved unsuccessful, and so the case moved on to a hearing.

This hearing came about based on this finding of incompetency of the Defendant by the circuit court, and its finding that he was not substantially likely to obtain competency, so it was held on September 5th and 6th, 2012, pursuant to West Virginia Code 27-6A-6, by the judge

sitting without a jury. Evidence and various testimony was presented. Besides incompetency, another important issue in this case, was that the Defendant was tested for his alcohol level shortly after the shooting incident was reported. The Defendant's alcohol level was tested several times and was first measured to be about .24 or three times the level of alcohol at which someone is presumed to be under the influence of alcohol in a driving while under the influence case. At that "trial" or hearing, the circuit court found that if he had stood trial before a jury, that there was insufficient evidence presented to have been convicted of first degree murder under West Virginia Code Chapter 61-2-1. The court found that "...there is reasonable doubt that pre-meditation and deliberation in this case has been proven beyond a reasonable doubt." App. 479. The Court However, the lower court found that there was sufficient evidence to find support a conviction of second degree murder. App. 479. Pursuant to that finding, the court then found that the Defendant should remain at the William Sharpe Hospital and subject to the circuit court's jurisdiction for a period of 40 years from September 19th, 2010. App.480.

The Defendant believes that a jury trial should have been held by the circuit court to determine what conviction the evidence would support to determine the length of jurisdiction of the lower court, and further believes that because the statute does not allow for a jury trial that it is unconstitutional, and that the lower court should have held as such and held a jury trial. Further, the Defendant believes that there was insufficient evidence presented to have supported a conviction of second degree murder due to a lack of malice and specific intent, and asks that this holding of the court be overturned and reversed, or remanded with directions, or that it makes whatever finding it believes to be appropriate and proper.

Petitioner is filing this appeal in order to have this Court review the lower court's rulings and find that West Virginia statute 27-6A-6 which bars jury trials for those who are mentally incompetent is unconstitutional. Further, the Petitioner believes the lower court ruling subjecting the Petitioner to the court's jurisdiction for 40 years should be reversed due to the evidence and defenses presented at the "trial" before the judge. The Petitioner believes that the longest he should have been subject to the court's jurisdiction was up to 15 years. This is because the Petitioner believes that the evidence at most could have only supported voluntary manslaughter. The Petitioner also believes the evidence may have only supported a conviction for involuntary manslaughter.

The period of time to perfect this appeal was extended to August 12th, 2013 by this Court.

The Petitioner also asks this Court for any other relief, remand, action or finding that may be appropriate or necessary, regardless of whether it is specifically requested for the benefit of our

still incompetent client who remains hospitalized as of the date of the filing of this brief for his mental illness.

ARGUMENT

I. The Circuit Court erred when it failed to grant the Defendant's request for a trial by jury for his charge of murder in the first degree, which failure was a denial of the Defendant's constitutional rights.

The Petitioner believes that he should have been afforded a trial by jury for such a potential restraint of liberty that can be and was occasioned by a court sitting without a jury present, pursuant to West Virginia Code Chapter 27, Article 6A, Section 6, for his charge of first degree murder. The statute in its entirety specifically reads,

"If a defendant who has been found to be not competent to stand trial believes that he or she can establish a defense of not guilty to the charges pending against him or her, other than the defense of not guilty of mental illness, the defendant may request an opportunity to offer a defense thereto on the merits before the court which has criminal jurisdiction. If the defendant is unable to obtain legal counsel, the court of record shall appoint counsel for the defendant to assist him or her in supporting the request by affidavit or other evidence. If the court of record in its discretion grants such a request, the evidence of the defendant and of the state shall be heard by the court of record sitting without a jury. If after hearing such petition, the court of record finds insufficient evidence to support a conviction, it shall dismiss the indictment and order the release of the defendant from criminal custody. The release order, however, may be stayed for ten days to allow civil commitment proceedings to be instituted by the prosecutor pursuant to article five of this chapter: *Provided*, That a defendant committed to a mental health facility pursuant to subsection (f) or (h), section three of this article shall be immediately released from the facility unless civilly committed."

The Petitioner believes that the court's denial of his request to declare this code section unconstitutional by oral request, and written motion, violated the Defendant's constitutional right to a trial by jury.

There is no reason, at least where there is as much at stake as in Petitioner's case, (in this case he was placed under the jurisdiction of the court for up to 40 years after the hearing), not to have had a trial by jury, other than the statute that was enacted by the legislature. Perhaps the reasoning of the adoption of the statute was for judicial economy but a similar amount of evidence, witness time, and the court's time would have been expended regardless of whether there was a trial by jury or a bench "trial" in this case. So this argument regarding judicial economy seems to lack merit. A trial by jury is a right of anyone in West Virginia who is charged with a misdemeanor that carries very little jail time occasioning a very limited loss of liberty.

Further, in the Petitioner's case, a restraint of liberty for up to 40 years was occasioned by the lower court's finding, without a jury, that he could have been convicted of second degree murder. At Sharpe Hospital he is suffering a significant loss of liberty, not only due to the period of time for which his liberty is curtailed but also due that it is similar to confinement in jail, he is in a locked unit there. According to our research, this request for a trial by jury has never been heard by this Court.

The statute, West Virginia Code Chapter 27-6A-6 requires that if a defendant has been found not competent to stand trial and can establish a defense of not guilty to the charges pending against him or her, other than the defense of not guilty by reason of mental illness, the defendant may request an opportunity to offer a defense on the merits. Then if the court grants the request, "... the evidence of the defendant and of the state shall be heard by the court of record witting without a jury. If after hearing such petition the court of record finds insufficient evidence to support a conviction, it shall dismiss the indictment and order the release of the defendant from criminal custody."

It is unclear why he should be denied a jury trial in such a case just because he was found incompetent, especially when the stakes are so high. In this case, he was denied a jury trial and subject to the court's jurisdiction for 40 years. This arbitrary denial of a jury trial is hard to accept. Further, the court only found that the evidence supported a conviction for second degree murder. If that is the case, the statute says that if the court "...finds insufficient evidence to support a conviction, it shall dismiss the indictment and order the release of the defendant from criminal custody." The court did find that there was insufficient evidence to support a conviction for what was charged, first degree murder, perhaps this finding by the court supports a dismissal of the entire indictment against the Petitioner. It has not been interpreted.

In the case of Markey v. Wachtel, 264 S.E. 2d 437, 164 W.Va. 45 (W.Va. 1979), the West Virginia Supreme Court of Appeals stated in its Syllabus Point 1 that Article III, Section 10 of the West Virginia Constitution cannot be interpreted to require a constitutional right to a jury trial in a proceeding for the involuntary commitment of an adult to a mental health facility. However, a simple involuntary commitment proceeding, for a limited initial amount of time is not the situation we have here. Article III, Section 10 of the West Virginia Constitution states that, "...no person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." The Court in Markey notes that the West Virginia Constitution grants even more protection than the Fifth and Fourteenth Amendments of the U. S.

Constitution because neither of these Amendments contain the clause, "...and the judgment of his peers." Markey at 264 S.E. 2d 439.

Because of all of the above, the Petitioner requests that he be afforded a trial by jury to present his defenses other than the defense of mental illness and that the Court declare the section of West Virginia Code Chapter 27-6A-6 unconstitutional at least as it disallows jury trials for criminal defendants who are found to be incompetent to stand trial. The Petitioner would also ask that the Court do whatever else is necessary and proper to protect the incompetent Petitioner in this case.

II. The Circuit Court erred when it held that sufficient evidence was presented at the hearing afforded by West Virginia Code Chapter 27-6A-6 to have supported a conviction of second degree murder.

In this case, as discussed above, a hearing or trial was held pursuant to West Virginia Code Chapter 27-6A-6 in front of the lower court judge without a jury to determine whether the evidence supported a conviction. In this case the judge, with no jury to decide the issue, determined that the evidence supported a charge of second degree murder, not the charge of first degree murder for which the then Defendant was indicted, App. 274. This hearing in place of a jury trial was conducted this way because the Defendant Gum was found to be incompetent to stand trial and not likely to regain his competency. The trial was to hear about his defenses other than mental illness, including determining whether the State would be able to meet their burden of proof by presenting enough evidence to prove first degree murder, App. 4.

At the hearing it was stipulated that the .16 gauge shotgun was the gun that fired the fatal projectile. App. 8.

The Defense outlined in the opening statement by Mr. Hawkins that there were credible defenses to premeditation, malice and intent to kill. The Defense also explained that the specific defenses to the charges were diminished capacity, imperfect self-defense, a lack of specific intent, and a lack of premeditation. App. 22. With regard to the defense's assertion that there was insufficient evidence to find the Defendant guilty of first degree murder, the lower court agreed, apparently because of the Defendant's extreme intoxication and diminished capacity. When he was tested after the time of the incident he tested at .24, or three times the presumption of being under the influence of alcohol, the court noted that "... there's reasonable

doubt about premeditation and deliberation in this case.” App. 274. The court concluded that it did not believe that there had been a sufficient case to prove first degree murder. App. 274. However, the court concluded that if the case went to trial, a jury could find the Defendant guilty of second degree murder. App. 274.

The Defendant believes based on the evidence presented that the court properly determined that first degree murder could not have been properly proven but should not have ruled that it had presented enough evidence for second degree murder.

For second degree murder deliberation and premeditation need not be proven. However, malice must still be proven for second degree murder and is a type of criminal intent. State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994). It is the position of the defense there was no such malice in this case so the defense contends that the State could prove nothing more than voluntary manslaughter, if it is believed that there was a specific intent to kill, which we believe is also nonexistent in this case. State v. Kirtley, 162 W.Va. 249, 252 S.E. 2d 374 (1978); State v. Wright, 162 W.Va. 332, S.E.2d 519 (1978).

As the evidence is presented it is difficult to find malice towards his father that is necessarily included in second degree murder. In State v. Saunders, the Court held that there must be a reckless disregard for human life that includes a formed design against the life of the victim. A lack of a design or plan is discussed in the opening statement by the defense, where it is noted that it is undisputed and presented in the case that the Defendant called 911 to report the incident regarding his father, in fact he said that there was an emergency and that the crazy MF {his father} tried to kill me. App. 23. The Defense would argue that when you think someone is going to kill you that you don't have time to develop a formed design against such a person. This was especially true with his extremely high blood alcohol content. App. 23. Besides, it was undisputed that prior to this incident they were sitting around together drinking and listening to music.

During the hearing Psychiatrist Thomas Adamski remarked on the Defendant's blood alcohol level where he said it was "...incredibly high..." shortly before the Defendant gave his first statement of September 19th, 2010, and based on that .24 blood alcohol level the psychiatrist opined that he would have had from 15 to 18 drinks in his system. He also noted that about 12 hours later the Defendant was still intoxicated at about a .10 blood alcohol level. App. 41. Doctor Adamski further stated that the Defendant at .24 was quite intoxicated, which was apparently shortly after the incident. App. 45.

Dr. Adamski also noted that when someone drinks heavily they may know what they are doing but don't care about the consequences and that it is disinhibiting and that cognitive disorganization can occur. App. 46 – 47. Dr. Adamski noted further that volitional capacity, to weigh information and make a voluntary decision is impaired with intoxication. App. 48. It is based on this that it appears that the voluntariness of his actions would be impaired which would present a defense for both second degree murder and voluntary manslaughter. Further with voluntary manslaughter and second degree murder there must be a specific intent to not only shoot a gun but a specific intent to kill. This would seem to be much less likely for someone who had as much to drink as the defendant. It would seem that a lessened volitional capacity would also lessen or dissolve the ability to manufacture a formed design against the life of his father - which seems to negate the possibility that malice could have been shown that is required for second degree murder. State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929). The hearing's evidence, relying largely on the Defendant's statements, does not show what specifically happened in the shooting, making it harder to find these requirements for the various crimes. The doctor also noted that an ability to form executive plans is reduced for someone who is intoxicated. App. 52.

Then at the hearing Dr. Bobby Miller testified and said at the time of the shooting he believed the Defendant's blood alcohol was about .3 or .31, about 4 times the .08 standard for presuming someone is intoxicated when they are driving. App. 64. Dr. Miller further opined that he didn't have any intention to kill his father, especially at that specific moment. In fact the doctor said that he had impaired judgement at the time of the incident with his extremely high blood alcohol content and that would have had impaired judgement, was disinhibited, cognitively disorganized, unable to form executive plans and had diminished volitional capacity as also agreed to by Dr. Adamski. The doctor agreed with the defenses statement that all of those things diminish and impacts your ability to plan and carry out a premeditated plan. App. 70. In fact, the doctor found he had diminished capacity at the time of the incident which he related as an inability to form specific intent (to commit second degree murder or voluntary manslaughter). App. 71. An inability to form specific intent would negate the requirement in both types of murder and voluntary manslaughter. App. 71. The doctor also noted that the alcohol sample was drawn two hours after the interrogation and yielded a .24 result. App. 71 (He later said the answer regarding intent was yes and no but was qualified in the way that he had an intent to do things but not commit the offense as charged in the indictment. So he could do simple things but did not have the intent to think about the shooting.) The doctor apparently believed it was a

repetition of a previous plan with the intent to obtain alcohol, not to shoot or kill his father, and his execution was diminished. App. 72 -73.

In response to further questions to Dr. Miller regarding the effects on the Defendant of his alcohol consumption, the exchange goes as follows, which indicates his lack of ability to reflect at the time of the shooting, and to lack the specific intent to reflect and to lack the ability to specifically intend to not only shoot but also kill his father. State v. Wright, 162 W. Va. 332, 249 S.E.2d 519 (1978).

Question from Defense Attorney James Hawkins: “And he was unable to reflect upon his actions at that point in time, is in your opinion, diminished.”

Answer from Dr. Miller: “Yeah, he – exactly, and to this day, or the last time I spoke to him, if you ask him why he did it, he says he doesn’t know.”

Question from Defense Attorney James Hawkins: “And that’s what deliberation is, coming up with a plan, considering it, and acting upon it.”

Answer from Dr. Miller: “I agree. In fact, you know, in my imagination, it’s my belief that if there had not been a first gun incident, there would not have been a murder. That he was repeating something that – the fact that it hadn’t worked in the past was not relevant to him at that moment.”

Question from Defense Attorney James Hawkins: “And when you’re impaired and your volitional capacity is diminished, you don’t have the ability to reflect.”

Answer from Dr. Miller: “Or to evaluate.”

App. 81.

The medical examiner Doctor Hamada Mahmoud testified at the trial. Notably, he testified that the victim had a very high level of blood alcohol also, a .24. App. 130. This supported the information that both parties had been drinking heavily the night of the shooting and would make an argument between them more likely.

During the hearing Deputy Davis then testifies that the Defendant never said he had a plan to kill his father. Specifically, Davis says that there was never a stated plan to kill his father, even after he was given two long statements by the Defendant and being with him for hours. App. 171. Mr. Hawkins questions the Deputy as to whether his father was becoming angry or aggressive with him. The officer said that the Defendant said his father was mad and he didn’t know why. The officer also said that his father was yelling at him but he didn’t know what the argument was about and that his father had the appearance of being angry. App. 172. In the throes of intoxication of .3 or so at the time of the incident, it is no wonder that things happened in the fog they occurred with the Defendant’s drinking, and his father’s intoxication at the time, which was also reportedly a .24, App. 416.

Defense attorney Hawkins then questions Deputy Davis about the local medical examiner's report that there was a fight by the father with his son and his son reporting he was slapped by his dad, which was according to the 911 report. App. 173. The officer said the Defendant denied any physical contact against him by his father in contrast to the 911 report. However, the officer didn't deny that there was a reported argument and that he believed physical contact was mentioned in the 911 reports. The officer further states that the Defendant reported he didn't know why he got the gun that killed his father. App. 174. It is further pointed out that in his statement to the officer the Defendant said he couldn't really say what he was going to do with the gun. App. 174. All of this indicates a clear lack of plan and intention by the Defendant which is required for both a second degree murder conviction and a voluntary manslaughter conviction.

More information about the lack of intent and a plan is shown further in the statement to Deputy Davis, and officer Davis rightly reports that he never in the statements he took ever said he intended to shoot his father. App. 175. In fact, the Defendant says in the statement that he let the gun go off and turned his head and pulled the trigger. App. 175. Further the Deputy says that his father was coming at him at the time of the shooting. App. 179. The statement by the Defendant as to whether he met his father at the middle of the stairs was that, "No, I didn't meet him there, he was coming down, coming down to me." App. 180. It is also pointed out from an earlier incident between the father and his son that the Defendant had no intent to shoot him that time either. App. 181 - 182. It was also related in the statement to the officer that the Defendant answered yes as to whether he was afraid of his father. App. 182. The officer asked the Defendant why he pointed a gun toward him and squeezed the trigger. The Defendant said he was coming at me and stuff. App. 182. The Deputy then admits that the victim had previously "Knocked me down and stuff." This shows evidence of the previous history of the victim's violence toward his son. App. 183.

They then further discussed the second statement made to the officer. It was noted that the Defendant said once again, as in the first statement, that he didn't remember even looking at him when he pulled the trigger. App. 185.

The 911 tapes, already admitted were then played. App. 188 - 190. The first tape played went as follows:

EMERGENCY OPERATOR: 911. Where is your emergency?

JUSTIN GUM: Yes, I need a – emergency right now at 5950 U. S. Highway 33 West, right now.

EMERGENCY OPERATOR: Hang on just a second.

JUSTIN GUM: Okay.

EMERGENCY OPERATOR: What's the problem?

JUSTIN GUM: Crazy mother f*cker tried to kill me.

EMERGENCY OPERATOR: How did he try to kill you?

JUSTIN GUM: He was coming at me. I mean –

EMERGENCY OPERATOR: Is he still there?

JUSTIN GUM: Right now, yeah, he's still dead. Come on to the house –

EMERGENCY OPERATOR: Stay on the line with me, okay, do not hang up.

JUSTIN GUM: Okay

App. 533.

The defense noted that the Defendant's statement was that the crazy MF tried to kill me, and the officer agreed and said it was consistent with the father coming down the stairs toward his son. App. 190.

Another tape was played of a 911 call where the Defendant was saying he (his father) was coming at him yelling and screaming and that they had both been drinking. App. 190, App 534. Later Deputy Davis says that he agreed that the Defendant had consistently said that his father was coming after him and also made the statement he had to shoot him. The Defendant also said that his father was going to kick his ass in the 911 call. The officer agrees that all of these 911 calls were consistent statements by the Defendant. App. 193 -194. The officer further said the Defendant never admitted he had any hostility or malice toward his father and never admitted an intent to kill him. App. 198.

Defendant said he thought his father was going to grab the gun from him according to a suspicion from him. App. 211- 212. It is important that the officer even notes that the Defendant didn't hold the gun on his shoulder pocket where it would normally be fired from but instead on the collar bone which does not indicate much intent to accurately and properly fire the weapon or put much thought into it. The officer stated the (recoil) bruise on the Defendant was just above his right nipple area. App. 212 -213.

The attorney for the Defendant then asked Deputy Davis if the evidence was consistent that when the firearm was discharged he was not looking at his father. The officer agreed and this would certainly indicate a lack of specific intent to kill when you are not even looking when you are firing a gun. There is no evidence to refute this. Certainly between holding the gun awkwardly discussed above and then not looking when firing negatives any intent that might be

found. Perhaps the evidence provided about this shooting would support a conviction for involuntary manslaughter where the accused caused the unintentional death of the victim. App. 214. State v. Craig, 131 W.Va. 714., 51 S.E. 2d 283, 290 (1948). Further, the officer admitted that he didn't know how the gun got into the hands of the decedent when he was found, indicating he could have ended up holding it when he was shot since there was no evidence otherwise, and this further supports the notion that the victim intended to grab the gun from his son. App. 215. The Defendant couldn't remember how it got there. He said he wasn't there when the gun went off. App. 215.

A former deputy, Charles Kirkpatrick testified as to what was undisputed when he was watching the Defendant. He says the Defendant was explaining the day to him but stopped short of speaking all the way to the time of the actual firing of the gun. App. 224. He said that both he and his father been drinking which was undisputed by the evidence in the case. According to Kirkpatrick, his dad started yelling at him and then his father got very loud. The Petitioner then said he saw madness in his father's eyes and knew where his father kept his gun. App. 224. The officer said he then got quiet after that point.

Mr. William Conrad, a firearms expert also testified. In the cross examination of this expert for the defense, he found that the bruise on the Defendant was consistent with someone who just pointed a gun and closed their eyes like the Defendant had stated all along in questioning, based on the location of the bruise on his upper chest, not the normal firing point. App. 243.

The Court had to look at whether there were any defenses other than mental illness in this case to the charge of first degree murder in the indictment. It is clear there were other defenses and that these were evident in the hearing of this case. The circuit court rightly found that there was insufficient evidence to prove all the elements of first degree murder beyond a reasonable doubt because the reasonable doubts were clearly shown.

We believe that the standard for sufficient evidence under 27-6A-6 is reasonable doubt and we believe that there was also reasonable doubt as to whether the Defendant would have been convicted of either second degree murder or even voluntary manslaughter. Reasonable doubt is the evidentiary standard in a criminal case.

At least three defenses were used in this case, diminished capacity, imperfect self defense and accident. As Mr. Hawkins said at the hearing, there is a clear lack of premeditation, malice and intent to kill. App. 253. There was only evidence presented that he had diminished capacity and nothing offered that he was not. The defense of diminished capacity is not a mental illness defense but a lack of intent defense. When someone has diminished capacity it doesn't mean

they can't function and even shoot a gun and the simple actions that this entails. It deals with the ability to contemplate, formulate, execute, review and reflect. Mr. Gum did not have that ability as shown by the evidence.

We would also offer that there was no malice which is required in both first and second degree murder. It appears that the Petitioner was reacting to what was perceived as a very real threat. This was evidenced by his thought during the 911 call that his father was trying to kill him. Nothing shows that the Petitioner was the aggressor but there is some evidence all the way through the hearing that the deceased was, and he like the defendant had been drinking heavily. The lack of malice is further shown by his 911 calls in his effort to help his father. Instead the evidence showed his father was coming toward him and he had to shoot for his own protection.

There is also the lack of specific intent by the Petitioner to kill his father. And that intent as earlier discussed must be specific intent to kill. He doesn't even look toward his father when the gun is fired, that is unrefuted. And his diminished capacity that affected his volitional capacity was affected with his very heavy drinking. With all this it is very well possible that there was enough evidence to prove involuntary manslaughter but with the lack of specific intent to kill, a conviction or finding of sufficient evidence for voluntary manslaughter is inappropriate as is a conviction for second degree murder.

There was also the question of how the gun ended up in his father's hands when he was found. He may have grabbed the gun, which indicates a struggle consistent with the Defendant's statements all along.

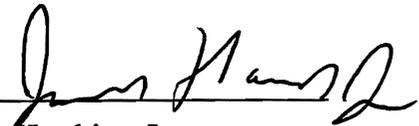
The doctrine of imperfect self-defense, which may also apply to lessen the degree of culpability in this case, and taking away the malice requirement for second degree murder.

CONCLUSION

Due to all of the above, and what may be apparent from the record, whether or not it be cited here, the Petitioner hereby requests that he be granted a new hearing or jury trial, and that the Court find that the evidence presented at the hearing before the judge supported a conviction of nothing greater than voluntary or involuntary manslaughter, and that the second degree murder finding be overturned and reversed, and that this Court grant the incompetent Petitioner other such relief as it deems appropriate.

Dated this 12th day of August, 2013.

Justin Sean Gum, Defendant below, Petitioner,
By Counsel,



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CERTIFICATE OF SERVICE

The undersigned Thomas J. Prall, Attorney for the Petitioner, Justin Sean Gum, certifies that on the 12th day of August 2013, he served his PETITIONER'S BRIEF, and PETITIONER'S APPENDIX, hereto attached, on Mr. Michael Smith, Lewis County Prosecuting Attorney, P. O. Box 686, Weston, WV 26452; Ms. Laura Young, Esquire, Acting Director of Appellate Division, Attorney General's Office, 812 Quarrier Street, 6th Floor, Charleston, WV 25305 or their designate; and on R. Russell Stobbs, Attorney and Guardian Ad Litem for Justin Sean Gum, PO Box 1167, Weston, WV 26452.

This was accomplished by hand delivery to them or their office staff on this day at the above addresses.

Dated this 12th day of August 2013.

A handwritten signature in black ink, appearing to read 'T. Prall', is written above a horizontal line.

Thomas J. Prall