



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

Vs.

No.: 15-0894

**CHRISTOPHER R. WYCHE,
Defendant Below, Petitioner.**

**APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
HONORABLE MICHAEL D. LORENSEN, JUDGE
CASE NO. 14-F-48**

BRIEF OF PETITIONER

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ASSIGNMENTS OF ERROR

- I. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT PETITIONER’S PROPERLY MADE MOTIONS FOR JUDGMENT OF AQUITTAL.

- II. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT PETITIONER’S PROPERLY MADE MOTION TO SEVER PETITIONER’S TRIAL FROM HIS CO-DEFENDANT.

- III. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO STRIKE THE ONLY JOROR OF COLOR WITHOUT PROPER CAUSE.

- IV. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO SUPPRESS THE RESULTS OF THE GUN SHOT RESIDUE TEST.

- V. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO ADMIT EVIDENCE IN VIOLATION OF PETITIONER WYCHE’S DUE PROCESS RIGHTS.

- VI. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT PETITIONER’S MOTION FOR SUQUESTRATION AND PERMITTED OFFICER CHRISTIAN TO REMAIN AT COUNSEL TABLE BEFORE TESTIFYING.

- VII. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS

DISCRETION WHEN IT DENIED PETITIONER AN OPPORTUNITY TO DEVELOP EVIDENCE AT TRIAL ABOUT AN INVESTIGATING OFFICER'S EMPLOYMENT STATUS RELATED TO HIS TAMPERING WITH EVIDENCE.

- VIII. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT IMPROPERLY ADMITTED EVIDENCE OF A VIDEO DASHCAM WITHOUT PROPER AUTHENTICATION AND FOUNDATION.
- IX. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO MAKE INFLAMMATORY STATEMENTS DURING ITS CLOSING ARGUMENTS AS TO PETITIONER'S CHARACTER, THE INTELLIGENCE OF COUNSEL, AND THE EXISTENCE OF A GUN EVIDENCE NOT PRESENTED AT TRIAL.
- X. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT IMPROPERLY ADMITTED UNAUTHENTICALED RECORDS FROM NORTH CAROLINA DURING PETITIONER'S RECIDIVIST TRIAL.

STATEMENT OF THE CASE

Procedural History

This is a Petition for Appeal from a Sentencing Order entered by the Circuit Court of Berkeley County on August 19, 2015, which sentenced the Petitioner Christopher Wyche to the penitentiary for not less than 15 years for voluntary manslaughter; 5 years for wanton endangerment, with an additional 5 year sentencing enhancement for a total of 10 years; and 5 years for possession of a firearm.

During the February 2014 term of Court, Christopher Wyche was jointly indicted with codefendant Rashaun Boyd by a Berkeley County Grand Jury on one (1) count of Murder, one (1) count of Attempted Murder, one (1) count of Conspiracy to Commit Murder, one (1) county of Wanton Endangerment, and one (1) count of Person Prohibited from Possession of a Firearm.

On January 9, 2015, a pre-trial hearing was held and petitioner argued for suppression of gunshot residue, pre-trial statements, and severance of the trial. These motions were all denied by the Court. On January 13, 2015, a jury trial commenced against both defendants on all counts of the indictment. The trial concluded on January 22, 2015, and the jury returned a verdict finding Christopher Wyche guilty of Voluntary Manslaughter, a lesser included offense of count 1 (Murder); guilty of Wanton Endangerment; and guilty of being a Felon in Possession of a Firearm. The jury acquitted Wyche of one (1) count of Attempted Murder, and one (1) count of Conspiracy to Commit Murder.

The Petitioner filed timely post-trial motions as a result of the convictions, including Motion for New Trial and Renewed Motion for Judgment of Acquittal. The Court denied the motions by Order entered on May 4, 2015.

The State timely filed a Recidivist Information on February 5, 2015, alleging Petitioner was an individual previously convicted of two felony offenses that would subject him to an enhanced sentence for Life. A Recidivist trial was held on June 12, 2015, and the jury found Petitioner was previously convicted of possession with intent to sell and deliver cocaine in 2010, and accessory after the fact in 2011. The determination regarding accessory after the fact was later dismissed by the Court because WV classifies accessory after the fact as a misdemeanor.

The Court sentenced the Petitioner on August 3, 2015, to Voluntary Manslaughter (not less than 15 years); Wanton Endangerment (5 years, with an additional 5 years recidivist enhancement for a total of 10 years); and Felon in Possession of a Firearm (5 years). All sentences to run consecutively.

The Petitioner seeks to appeal his criminal convictions under those counts in the Indictment and Recidivist Information wherein he was found guilty and the entirety of the sentence. Further, petitioner requests his convictions and the sentence be reversed and/or set aside.

SUMMARY OF THE ARGUMENT

First, Petitioner Wyche's pre-trial suppression motions made before trial should have been granted. Petitioner asserts that the Berkeley County Circuit Court erred when it permitted the State to introduce gunshot residue improperly seized from Petitioner Wyche, introduce evidence of flight against Petitioner Wyche when in fact his co-defendant was driving the vehicle, and denied the Petitioner's motion for severance. Said errors, singularly and cumulative, deprived Petitioner Wyche of a fair trial.

Second, Petitioner Wyche's motion for Judgment of Acquittal made at the close of the State's case-in-chief and again after the close of evidence should have been granted. Petitioner asserts that the Circuit Court of Berkeley County, West Virginia erred when it denied Petitioner's motions as evidence submitted to the jury was insufficient to sustain convictions for Voluntary Manslaughter, Wanton Endangerment, and Prohibited Person in Possession of a Firearm.

Third, Petitioner Wyche's motion to exclude improperly admitted finger print cards received via mail from North Carolina authorities without the requirement of a records' custodian to authenticate said records violated the Petitioner's right to due process during his habitual offender trial. Petitioner asserts the Berkeley County Circuit erred when it denied Petitioner's motion to exclude such evidence inasmuch as Rule 901 of the Rules of Evidence did not provide a certification exception for fingerprint cards.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner affirmatively states that the issues raised in assignments of error 1, 2, 5, 7, and 10 are issues that involve either an assignments of error in the application of settled law, a case claiming an unsustainable exercise of discretion where the law governing that discretion is settled, an issue claiming insufficient evidence or a result against the weight of the evidence; an issue involving a narrow issue of law; or an issue in which a hearing is required by law.

Petitioner affirmatively states that the issues of error 3, 4, 6, 8, and 9 are issues that have been authoritatively decided and the issues raised in said assignments of error are appropriate for Rule 19 of the West Virginia Revised Rules of Appellate Procedure.

STATEMENT OF FACTS AND ARGUMENT

I. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT PETITIONER'S PROPERLY MADE MOTIONS FOR JUDGMENT OF AQUITTAL.

At trial, the State presented insufficient evidence upon which a jury could return a verdict of guilty on each of the counts in the indictment. The evidence at trial established that a fight broke out between Sampson Edmond, Boyd, Wyche, and Antoine Stokes in the parking lot at the Brick House Bar. (Tr. Vol. 2, pg. 80-82). A 911 call was then received by dispatch at approximately 2:58am on September 16, 2012, in response to the incident. (Tr. Vol. 2, pg. 54). Individuals present at the Brick House parking lot, including Antione Stokes, established that the lot was full of patrons who had just exited the bar just before closing time. (Tr. Vol. 2, pg. 177, 214-220). One trial witness, Shawntaney Parker, indicated the bar was so full that night that cars were parked on both the paved lots and on the grass, and that just before the fight occurred there

could have been hundreds of people standing around the lot. (Tr. Vol. 2, pg. 221). Similarly, Tamara Burnett testified that while the parking lot was not extremely full, there were a decent amount of people there. (Tr. Vol. 2, pg. 265).

The State presented only one actual witness to the fight, Antoine Stokes, who testified that he observed Mr. Edmond (the decedent) and Boyd in a fist fight. (Tr. Vol. 2, pg. 80, 122, 152). Stokes joined the fight and testified they were so close it was like fighting inside a phone both when describing the proximity of Edmond, Stokes, Boyd and Wyche during the fight. (Tr. Vol. 2, pg. 82, 127-128). Two gunshots rang out that broke up the men's fight. Mr. Stokes' uncontroverted testimony established that he never saw a firearm in the hands of Wyche or Boyd, he never saw Wyche or Boyd fire a gun, and he was never struck with a firearm during the fight by either Wyche or Boyd despite being within the close proximity with these individuals. (Tr. Vol. 2, pg. 83, 124, 175/Tr. Vol. 5, pg. 146-147). Further, Mr. Stokes advised officers in the investigation that he never saw any muzzle flashes the when shot rang out either. (Tr. Vol. 5, pg. 147). In fact, the evidence revealed that it was the sound of gunshots that actually broke up the fight between the individuals and at that point everyone in the parking lot began to run and flee the scene. (Tr. Vol. 2, pg. 130).

While fleeing from the area toward the back of the building Mr. Edmond stated he was hit, and Mr. Stokes assisted him to a location behind the building. (Tr. Vol. 2, pg. 133). During their flight, Mr. Stokes heard more gun fire. (Tr. Vol. 2, pg. 130, 147). Mr. Stokes called 911 and performed CPR upon Mr. Edmond. Mr. Edmond died from one gunshot wound. (Tr. Vol. 3, pg. 19).

Evidence at trial established that law enforcement officers from the Berkeley County Sheriff's Department (hereinafter BCSD) arrived at the Brick House shortly after 3:00am, and that

none of the officers adequately secured and searched the crime scene. (Tr. Vol. 3, pg. 124, 126, 139, 161/Tr. Vol. 5, pg. 30, 34). In fact, the officers' testimony established they were unsure who was even in charge of the investigation. (Tr. Vol. 3, pg. 137/Tr. Vol. 4, pg 57/Tr. Vol. 5, pg. 35, 86-87). Further, the BCSD did not have a standard operating manual or standard and consistent protocols for processing a crime scene. (Tr. 3, pg. 118). Criminal investigations, and the actual crime scene for that matter, were processed in accordance with the instructions from whomever the investigator in charge is at the time of the initial call.

In short, the officers did not search the entire grounds of the Brick House Bar for evidence (Tr. Vol. 3, pg. 124, 126, 139, 145), they did not get statements from any of the patrons still remaining in the parking lot upon their arrival, they did not write down any of the license plates of the cars in the lots so that potential witnesses could be identified and interviewed at a later date (Tr. Vol. 4, pg. 56, 140, 142/Tr. Vol. 5, pg. 135), and they never questioned the Brick House Bar staff on the night of the incident (Tr. Vol.5, pg. 135).

The State did introduce the bar's surveillance video of that night but none of the angles actually capture the shooting. What the back, right surveillance video shows is the following:

Two individuals assumed to be Stokes and Edmond enter into screen from the left making their way to the back, right side of the bar parking lot. They continue in the same direction, exiting the screen. An individual then enters the screen from the same direction Stokes and Edmond entered, pauses, and raises his arm in the direction of Stokes and Edmond, who are off-screen. The individual leaves the screen from the direction he entered. Seconds later, flashing lights are visible and then police enter the screen, the same direction from which the individual who raised his arm left the screen.

The State argued that the video is conclusive proof that Boyd followed Stokes and Edmond while shooting at them; it further argued that the individual that entered the frame after Stokes and Edmond was Boyd. (Tr. Vol. 6, pg. 160). The State said that when the individual raised his arm in

the direction of Stokes and Edmond the individual was raising a handgun and shot at them. The prosecutor demonstrated this action during closing by raising her arm and holding her hand up to demonstrate a hand gun in a firing position. However, the surveillance video is black and white, grainy, blurry, and of general poor quality; certainly insufficient to allow any reasonable person to positively identify someone in the video. Furthermore, there is no gun visible and no muzzle flash apparent that would be indicative of a gun being fired.

In fact, while Stokes was testifying, defense counsel played the surveillance video of the camera that filmed the entrance of the bar and asked Stokes to identify anyone he recognized in the surveillance video. Stokes, Edmond, Boyd, and Wyche all came on screen and Stokes was unable to identify any individual, including himself. (Tr. Vol. 2, pg. 159). Defense counsel asked Stokes if that was him in the video at a particular time in the video and Stokes was adamant that it was not him in the video. Admitting that it was him would conflict with his statement of how events occurred that night and the State's theory put forth during its opening statement. Defense counsel continued their questioning and Stokes eventually admitted that it was him in the video. The State, on redirect, attempted to rehabilitate this obvious blight on his testimony by clarifying that the video is of poor quality, which is why he had difficulty identifying himself on the surveillance video. (Tr. Vol. 2, pg. 181). The State set forth a confusing and unreasonable argument before the jury – that the surveillance video is of poor enough quality that it prohibits an individual from identifying themselves on that video, yet of sufficient quality to allow others to identify, beyond a reasonable doubt, the indistinct individual that raised his arm to be Defendant Boyd. (Tr. Vol. 6, pg. 160, 172). It should be noted that the video in which Stokes was unable to identify himself was of better quality than the surveillance video used to identify Boyd.

Officers did speak with Antoine Stokes after the shooting although no written statement was taken (Tr. Vol. 3, pg. 129), and Mr. Stokes provided a description of the individuals with whom he fought that night – he never testified Boyd or Wyche were the shooters. Consequently, law enforcement never investigated this offense to find the actual shooter, but merely sought to apprehend the individuals who engaged Mr. Edmond in the fight in the parking lot. Based on Stokes' description of the vehicle driven by Ms. Burnette, West Virginia authorities sent out a BOLO, and Maryland authorities stopped the vehicle and took Boyd and Wyche into custody. Swabs were taken of Wyche and Boyd to test for the presence of gunshot residue; the tests were positive. Swabs were also taken of Antoine Stokes to test for gunshot residue, and they were also positive.

The State and the jury improperly relied upon the presence of gunshot residue on the hands of both Boyd and Wyche to convict them in this case. The State and the jury failed to consider the expert testimony of both the State's and the Defendant's gunshot residue experts who testified consistently that the existence of GSR cannot be used to prove who fired a gun, but merely who is present in the vicinity when a gun is fired or one who has come into secondary contact with GSR left behind on a surface. (Tr. Vol. 4, pg. 106-108). Specifically, both the State and Defense experts established that the GSR on Boyd's and Wyche's hands could have come from secondary sources such as being in the vicinity of the gun when it was fired at the Brick House Bar parking lot, or from any of the law enforcement contact they had that evening – handcuffs, officer gloves, officer flashlights, officer gun belts, the police cruiser, or the cells wherein they were detained until their release, or any myriad location that may have been exposed to firearms. (Tr. Vol. 4, pg. 106, 111-112, 117, 119/Tr. Vol. 6, pg. 17, 19, 22-34).

The State admitted physical evidence of the crime scene and clothing located in Wyche's vehicle. The physical evidence at the crime scene did not link Boyd or Wyche to the shooting. There was no attempt by investigators to fingerprint the shell casings found, there was no gun found to even determine if the shell casings were relevant. No bullets were recovered, even from the decedent. The clothing found in Wyche's vehicle had zero probative value.

The State presented evidence of the medical examiner. The medical examiner testified that he did not know how the shooting happened. He could not provide any hypothetical scenarios of how the shooting occurred. The only evidence the medical examiner was able to provide to the jury was that Edmond's death was the result of a gunshot wound, nothing more. (Tr. Vol. 3, pg. 19, 31-33, 36).

After hearing the testimony of all of the State's witnesses, not one witness sees Wyche in possession of a firearm, not one witness sees him fire a gun at the Brick House Bar, not one witness sees a muzzle flash come from his location, no gun was recovered from the Brick House Bar location, no gun was found in Wyche's vehicle, and no gun was found by the Maryland State Police officers involved in the short pursuit that resulted in Wyche and Boyd being taken into custody.

Finally, perhaps the most compelling evidence deduced at trial relates to two leads left uninvestigated by the BCSD. Deputy Christian, purported lead investigator, testified he received a Crime Solver's Tip about a green Lincoln on November 5, 2012, in connection with the instant shooting at the Brick House (Antoine Stokes originally indicated possible suspects may have been driving a black Cadillac or a green Lincoln). Also, Christian testified he received an anonymous tip on his cell phone about the same time, wherein the caller stated that Maurice Oliver was a subject who was telling people he was involved in the shooting in Martinsburg. (Tr. Vol. 5, pg.

157-158, 164, 170). The officer testified that he was able to determine the call originated from a Gwendolyn Aiken, but he never followed up on the call. (Tr. Vol. 5, pg. 209).

Deputy William Christian also testified he received a letter from the WV Crime Lab on October 21, 2014, which notified him that an individual named Roy Winston, who's DNA was found at the crime scene, was identified through CODIS. (Tr. Vol. 5, pg. 170). Deputy Christian testified that the investigation into Roy Winston was unfinished and still on his desk. (Tr. Vol. 5, pg. 172). Deputy Christian in fact indicated he was going to finish the investigation into Winston after he was finished with the trial. The State presented no evidence that Mr. Winston was ever eliminated as a suspect in this case; however, Deputy Christian did establish similarities between this crime committed in this case and the criminal history of Winston.

At trial, the State presented insufficient evidence to meet its burden of proving beyond a reasonable doubt all elements necessary to support Defendant's convictions for Voluntary Manslaughter, Wanton Endangerment, and Person Prohibited from Possession of a Firearm.

II. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT PETITIONER'S PROPERLY MADE MOTION TO SEVER PETITIONER'S TRIAL FROM HIS CO-DEFENDANT.

The Court improperly denied the Defendant Wyche's motion to sever the trial of the defendants. The Court issued certain pre-trial rulings that resulted in the Defendant Wyche filing a motion to sever the trials. Rule 14(b) of the Rules of Criminal Procedure reads in pertinent part that if the joinder of defendants in an indictment appears to prejudice a defendant or the State, the Court may sever the defendants' trials or provide whatever relief that Justice requires. Further, a

trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy. See Syl. Pt. 4, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). A criminal defendant has the Sixth Amendment right to confront witnesses and a compulsory means by which to call witnesses. U.S. Const. Amend. VI, W.Va. Constitution Art. III § 14.

The unitary trial of Wyche with Boyd prejudiced the Defendant Wyche inasmuch as the Court permitted the State to present video evidence of the co-defendant Boyd wiping his hands on his jeans after being asked to submit to a gunshot residue test during an interview with Officers Brendan Hall and William Christian of the Berkeley County Sheriff's Department. (Tr. 1/9/15, pg. 168/Tr. Vol. 5, pg. 22). Defendant Wyche asserts that the implication by the State to the jury that Boyd's actions are an attempt to remove GSR from his hands before the test impugns Defendant Wyche by his association with Boyd. (Tr. 1/9/15, pg. 182). Further, Defendant Wyche is denied an opportunity to cross-examine Defendant Boyd during the unitary trial because Boyd has a constitution right to remain silent. Furthermore, had separate trials proceeded, Wyche would have had the compulsory means by which to call Boyd as a witness.

Additionally, the Court's ruling with regard to the admissibility of the flight evidence prejudiced Defendant Wyche inasmuch as Defendant Wyche never drove a vehicle that evening. Specifically, Tamara Burnette drove away from the Brick House, (Tr. Vol. 2, pg. 274). After the initial stop on in Maryland when Ms. Burnett exited the vehicle, dash cam footage establishes Boyd was driving the vehicle that led officers on a short pursuit. Portions of the alleged flight were recorded by Maryland State Police through the automobile dashboard camera and the same establishes that Wyche is never the driver of the vehicle.

In certain circumstances evidence of flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscious or knowledge. Prior to admitting such evidence, the trial judge should hold an in camera hearing to determine the probative value of such evidence outweighs its possible prejudicial effects. See Syl. Pt. 14, *State v. Jessie*, 225 W. Va. 21, 689 S.E.2d 21 (2009) quoting Syl. Pt. 5, *State v. Payne*, 167 W. Va. 154, 342 S.E.2d 120 (1986).

This Court erred in ruling the video flight evidence was admissible in this unitary trial of the Defendants' guilty conscious or knowledge. Any decision on the part of Defendant Boyd to flee from law enforcement after being pulled over and allowing driver Burnette to exit the vehicle should not have been impugned upon Defendant Wyche to demonstrate he also had a guilty conscious. By failing to sever the trial Wyche was unable to distinguish his conduct from Boyd's conduct. Nor was Wyche able to adequately confront the actions of Defendant Boyd and cross examine him regarding his decision to flee from law enforcement after the initial stop in Maryland.

While Rule 14(b) is discretionary with the Court, by denying Defendant Wyche's motion the jury was able to improperly consider the actions of Defendant Boyd (both wiping his hands down his pants before the GSR test and fleeing the scene in a vehicle) in its deliberation on Defendant's Wyche's indicted counts. In essence, Defendant Wyche was denied a constitution right to confront and cross examine all witnesses against him given Defendant Boyd did not testify at trial and had a right to maintain his silence.

III. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO STRIKE THE ONLY JUROR OF COLOR BASED UPON RACE.

During the preemptory challenge phase of the trial, the State was permitted to strike a juror who was a person of color from the jury pool, M.W. (Tr. Vol. 1, Pt. 2, pg. 115). During *voir dire* potential jurors were examined by the Court, the prosecution, and the defense, to determine

competence, willingness, and suitability to hear, deliberate and decide this case. The State exercised one of its peremptory challenges and struck Mr. M.W. from the pool of qualified jurors depriving Mr. Wyche of a jury of his peers. By admission Mr. M.W. is a man of color whose mother is from Cuba. The United States Supreme Court took up this issues in *Batson v. Kentucky*, 476 U.S. 79 (1986), wherein the Court ruled that a prosecutor's use of peremptory challenge in a criminal case—the dismissal of jurors without stating a valid cause for doing so—may not be used to exclude jurors based solely on their race.

Upon the State's election to strike Mr. M.W., Defendants Wyche and Boyd raised a *Batson* challenge, and objected to Mr. M.W.'s exclusion on the basis of race. (Tr. Vol.1, Pt. 2, pg 115). The State then offered it struck Mr. M.W. inasmuch as he disclosed he had a pending misdemeanor charge for DUI in Berkeley County that was investigated by the BCSD (Tr. Vol. 1, Pt. 2, pg. 116); however, such reasoning is merely pretext for the improper strike. Mr. M.W.'s status as an individual charged with a misdemeanor offense pending in Berkeley County was not sufficient to warrant a strike for cause, and clearly is not sufficient justification to warrant an unconstitutional preemptory strike by the State. The Court's ruling permitting the State to utilize such a practice is unconstitutional inasmuch as it violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

Further, in support of Wyche's argument that the pending offense against M.W. was merely pretext, the Petitioner notes that M.W. was accepted as a qualified juror in a matter that proceeded to trial a couple weeks after Mr. Wyche's trial, *State v. Grove* case number 14-F-118. Further, the *Grove* matter was investigated by the BCSD with Officer Christian as the lead investigator. The trial took place between February 10, 2015 and February 12, 2015, approximately three weeks *after* the trial of Wyche and Boyd. It is important to note that the defendant in *Grove* was white

and M.W. was permitted to sit on the jury despite any pending criminal matter of M.W. There was no attempt by the prosecution to strike him once he was qualified as a juror despite his pending criminal charge. Yet he was stricken by the prosecution in the Wyche and Boyd trial where both defendants are African-American; furthermore, he was the only person of color of the jurors that showed up for jury selection in the Wyche and Boyd trial. Clearly, then, the preemptory strike the prosecution used to remove M.W. from the Boyd and Wyche jury was pretext, and the strike was clearly based upon M.W.'s status as a person of color.

IV. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO SUPPRESS THE RESULTS OF THE GUN SHOT RESIDUE TEST.

In this case, evidence at trial established that a shooting occurred at 2:58 a.m. on September 16, 2012 at the Brick House Bar parking lot in Berkeley County, West Virginia. At approximately 3:35am, the Maryland State Police began pursuing the vehicle occupied by Defendants Boyd and Wyche. (Tr. 1/9/15, pg. 17). After a short pursuit, the vehicle was stopped by the Maryland State Police on MD 68 and the occupants were placed in handcuffs and transported to the Maryland State Police barracks in Hagerstown, Maryland (neither Boyd nor Wyche were charged with any offense that evening but were released after West Virginia officers interviewed them and collected GSR kits from them). (Tr. 1/9/15, pg. 87).

Officer Hall and Officer Christian of the BCSD testified that they arrived on scene in Maryland at 4:30am. (Tr. 1/9/15, pg. 67/Tr. Vol. 3, pg. 206). Defendant's Boyd and Wyche were then transported to the Maryland State Police Barracks and then the Washington County Sheriff's Office at the Detention Center to be interviewed by the West Virginia officers. (Tr. 1/9/15, pg. 51-52, 62/ Tr. Vol. 3, pg. 208). Neither Christian nor Hall know who transported the Defendants,

the manner of their transport, the cleanliness of the police cruisers they rode in, or the cleanliness of the cells wherein they were held. (Tr. 1/9/15, pg. 69, 71, 92-93/ Tr. Vol. 3, pg. 211).

It is undisputed that both co-defendants continuously remained in custody after their arrest and throughout their respective interrogations by the West Virginia officers. All interrogations were conducted in the interview room at the Washington County Sherriff's Office, which was audio and video recorded. Further, it was the intent of the West Virginia officers to improperly collect evidence from Boyd and Wyche while they were in custody in Maryland. (Tr. 1/9/15, pg. 53, 102). Despite their lack of authority in Maryland and their lack of knowledge of Maryland law, these officers were in investigative mode while in a foreign jurisdiction. (Tr. 1/9/15, pg. 65). Officers Hall and Christian exercised no lawful control over the Maryland authorities, but yet Maryland conceded its authority, its procedures, its facilities, and its alleged charges to West Virginian officers improperly working and seizing evidence outside their jurisdiction.

Evidence revealed that Boyd was the first person to be interviewed by Officers Hall and Christian beginning at 6:17am. (Tr. 1/9/15, pg. 60, 123). Defendant Boyd was given his *Miranda* warnings, and officers administer a Gunshot Residue Screening. (Tr. 1/9/15, pg. 55/ Tr. Vol. 3, pg. 195). The entire screening is recorded by the interview room camera.

The next person to be interviewed was Tamara Burnett at 6:40am. (Tr. 1/9/15, pg. 66). Officers Hall and Christian read Tamara Burnett her *Miranda* warnings, and she was not administered a Gunshot Residue Screening. Sierra Frisby was interviewed next at 7:18am by Officers Hall and Christian. She was read her *Miranda* warnings, and was not administered a Gunshot Residue Screening. Jimmy Vick was then interviewed at 9:20 a.m. by Officers Hall and Christian. Vick was read his *Miranda* warnings, and invoked his right to have an attorney and the

interview was ceased. Despite the interview ending, a Gunshot Residue Screening was performed on Jimmy Vick at 10:00 a.m.

Finally, Christopher Wyche was interviewed at 9:42am, but his Gunshot residue screening is not performed on camera, and there is no time indicated on the Gunshot Analysis and Scene information Form. (Tr. 1/9/15, pg. 109-110, 113). Also, at the time GSR was improperly seized from Mr. Wyche he was handcuffed and being held in a cell, yet he had not been read his *Miranda* Warnings and there is no evidence that his consent was given. (Tr. 1/9/15, pg. 112, 130).

Finally, at 9:31:34am, Officers Hall and Christian give Defendant Wyche his *Miranda* warning, and several minutes later Officer Hall asks Officer Christian if he wants to do a GSR screening of Christopher Wyche only to learn that Officer Christian had already been taken care of it off camera. This singular question and answer comprises the total amount of video evidence describing the circumstances surrounding the GSR screening of Christopher Wyche. It is undisputed that a search warrant was never obtained for Christopher Wyche's GSR screening nor was he given his Miranda warnings until *after* the GSR screening occurred. (Tr. 1/9/15, pg. 83-85, 112).

That on January 7, 2015, Counsel was first served with the previously requested forensic case file from the West Virginia State Police Lab; said case file, exclusive of procedure manuals, exceeds 350 pages. (Tr. 1/9/15, pg. 46). Said forensic case file contains all of the information submitted to the West Virginia State Police Lab and forms the basis for the November 12, 2012, results of examination submitted by forensic analyst Koren K. Powers. Included in said forensic case file is an "Evidence/Recovered Property Chain of Custody Form." The form is used to establish chain of custody so that the November 12, 2012 results can be entered into evidence at trial. The State failed to timely disclose said evidence to Petitioner Wyche.

A. Christopher Wyche's GSR testing results should have been suppressed as the collection and recordation of evidence used as the basis for said results is woefully insufficient and cannot establish a credible chain of custody between the taking and testing of said evidence.

“The preliminary issue of whether a sufficient chain of custody has been shown to permit the admission of physical evidence is for the trial court to resolve. Absent abuse of discretion, that decision will not be disturbed on appeal.” Syl. Pt. 2, *State v. Davis*, 164 W.Va. 783, 266 S.E.2d 909 (1980).

When an object or article has passed through several hands while being analyzed or examined before being produced in court, it is not possible to establish its identity by a single witness, but if a complete chain of evidence is established, tracing the possession of the object or article to the final custodian, it may be properly introduced in evidence. Syl. Pt. 2, *State v. Chariot*, 157 W. Va. 994, 206 S.E.2d 908 (1974).

In this instance, not only did the BCSD fail to follow proper procedure, but the State did not properly log the time of the alleged GSR screening, and the GSR screening of Defendant Wyche did not occur in the interview room as stated on the chain of custody submission form; consequently, any results gleaned as a result of this evidence should have been inadmissible. The State was unable to provide a description of the circumstances surrounding the collection of Wyche's alleged GSR screening. (Tr. 1/9/15, pg. 83-85, 110, 112-113, 125, 130).

The State's expert testified that she could make no assurances as to reliability of the sample and whether it could have been tainted before she received it. Therefore, the Court should have suppressed any mention of GSR as the State failed to establish an adequate chain of custody.

B. Christopher Wyche's GSR Testing results should have been suppressed because the GSR screening violated the rights afforded to him under the 4th Amendment of the United States Constitution and Article III, Section 6 of the West Virginia Constitution.

Defendant affirmatively states that Defendant Wyche's GSR testing should have been suppressed because the search violated the prohibition against warrantless search and seizure protected by the Fourth Amendment of the United States Constitution and Article III, Section 6 of the West Virginia Constitution.

"Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution-subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative." Syl. Pt. 1, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980), overruled in part on other grounds by *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

Examples of recognized exceptions to the general warrant requirement include certain brief investigatory stops, searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consensual searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable. Warrantless Searches and Seizures, 37 Geo.L.J. Ann.Rev.Crim.Proc. 39, 40 (2008). See also *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973). *State v. Farley*, 230 W. Va. 193, 737 S.E.2d 909 (2012).

Maryland law enforcement in this case failed to seek a warrant to allow for the GSR search or screening of petitioner Wyche while he was being held, in handcuffs, inside their detention facility. (Tr. 1/9/15, pg. 95). Further, Maryland allowed West Virginia law enforcement officers who were acting improperly outside their jurisdiction to search Defendant Wyche and seize evidence from him. (Tr. 1/9/15, pg. 53, 65, 67, 76, 102, 112).

In this case, there is absolutely no conceivable exception to allow this search to occur without the issuance of a warrant. First, the search was not made incident to an arrest as the State did not have probable cause to arrest as evidenced by the fact that the Defendants were not held by Maryland or West Virginia authorities and were released by Maryland. (Tr. 1/9/15, pg. 117). In fact, a warrant for Defendant Wyche's arrest was not entered by a Berkeley County Magistrate until February 27, 2013; over five (5) months after the alleged incident. (Tr. 1/9/15, pg. 119). Second, no exigent circumstances existed as no one was in danger as a result of the failure to search or seize. Additionally, the fact that officers waited several hours to actually administer the test demonstrates there was not sense of urgency on their part to preserve the evidence or keep it from contamination. Third, Officers Christian and Hall testified they did not have probable cause to effectuate an arrest at the time of the taking of the GSR test. Fourth, there is absolutely no evidence that this search of Defendant Wyche was consensual as no description of when, where, or how the search occurred. Fifth, no GSR was in plain view as evidenced by Officer Christian's testimony. (Tr. 1/9/15, pg. 151). Lastly, obtaining a warrant would not have been impractical. The officers had more than four hours from the time Maryland authorities stopped Wyche and Boyd and the eventual GSR test, plenty of time to request a warrant. As such, the warrantless search constituted an unreasonable search and seizure and violated Defendant's constitutional rights as secured by the Fourth Amendment of the United States Constitution and Article III, Section 6 of the West Virginia Constitution.

The West Virginia authorities admitted that they had no probable cause when they interviewed the defendants and took the GSR tests. (Tr. 1/9/15, pg. 81). Case law in West Virginia states that a police officer acting outside of his jurisdiction has the same authority to arrest as a **private citizen**. *State v. Horn*, 232 W.Va. 32, 750 S.E.2d 248 (2013)(Emphasis added), *State ex*

rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999). In the case of a felony, the felony crime must have been committed and the person making the arrest must reasonably believe that the person arrested committed the felony. *State v. Horn*, 232 W.Va. 32, 750 S.E.2d 248 (2013).

Here, while a shooting did occur, the officers that performed the search of Boyd and Wyche admittedly had no probable cause or reasonable grounds to suspect they had committed the crime. (Tr. 1/9/15, pg. 81). Both Hall and Christian acknowledge that no probable cause existed to warrant an arrest by the West Virginia authorities, and accordingly no charges were filed against them by West Virginia. The Maryland authorities had less probable cause, even on their own charges, and let Boyd and Wyche leave when West Virginia authorities were finished their search and seizure and questioning. Therefore, the only excusable basis for which West Virginia authorities could collect the GSR evidence was if they had probable cause plus exigent circumstances. Neither was present and the GSR should have been suppressed.

C. Defendant Wyche's GSR testing results should have been suppressed because the GSR screening violated the Defendant's 5th Amendment right against self-incrimination and his 6th amendment right to counsel.

The Defendant was not read his Miranda warning until *after* the GSR screening was performed. (Tr. 1/9/15, pg. 112, 130). The Fifth Amendment privilege against self-incrimination has been interpreted to provide protection only where incriminating evidence of a testimonial or communicative nature is sought from a witness through the vehicle of state compulsion. *State v. Bush*, 191 W. Va. 8, 442 S.E.2d 437 (1994).

Prior to any questioning, a person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he

indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. See *Miranda v. Arizona*, 384 U.S. 436, 444-5, 86 S.Ct. 1602, 1612 (1966) (Emphasis added).

In this case, Defendant's right against self-incrimination and his right to have an attorney present during the GSR screening was violated because he was never given his *Miranda* warning until after the GSR screening - it is undisputed that Wyche was not given his *Miranda* warning prior to the GSR screening being conducted.

D. Christopher Wyche's GSR testing results should have been suppressed pursuant to Rule 401 and Rule 403 of the West Virginia Rules of Evidence and the WVSP should have been prohibited from testifying regarding its results concerning the same.

Rule 401 of the West Virginia Rules of Evidence establishes that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403 of the West Virginia Rules of Evidence provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded

when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence. Syl. Pt. 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

After applying the law to the facts of this case, the GSR tests are not only irrelevant because they were not properly collected, but said result should be suppressed pursuant to Rule 403 of the West Virginia Rules of Evidence as the probative value of the same is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Further, by not being properly documented, results reached by the West Virginia State Police Lab should be excluded because they may be tainted or unreliable.

Christopher Wyche's GSR testing results should have been suppressed inasmuch as the State failed to make relevant evidence available regarding the GSR screening and such failure violated the Defendant's due process right under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Failure to make available the actual GSR screening information to Defendant Wyche is a violation of Defendant's constitutional due process rights. A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. (Tr. 1/9/15, pg. 128). Therefore, a prosecutor's disclosure duty under *Brady* includes disclosure of evidence that is known only to a police investigator and not to the prosecutor. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982), Syl. Pt. 1, *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007).

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as

exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial. Syl. Pt. 1, *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007).

The procedures surrounding the taking and preservation of Wyche's GSR testing is critical in this case. The discovery in this case detailing the manner by which the evidence was collected is incomplete, and the officer's recollection was not clear or contrary to the information contained within the bench notes and the packaging of the samples.

The failure to turn over evidence of the actual testing scenario prejudiced the Defendant as Wyche has not been able to explore the issue before trial and prepare an actual defense based on the actual testing scenario, if in fact, the test occurred – given there is no video proof of the test such as what exist for Defendant Boyd. After requests, the forensic case file for the GSR testing from the WVSP lab was turned over to counsel to review four (4) days before trial. As such, the failure to describe or provide video or audio evidence of the GSR testing violates Defendant's constitutional due process rights as secured by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

V. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO ADMIT EVIDENCE IN VIOLATION OF PETITIONER WYCHE'S DUE PROCESS RIGHTS UNDER BRADY.

The Defendant asserts that a new trial should be granted based upon the prejudicial errors resulting from the State's *Brady* violation in failing to disclose, until the eve of trial and at trial, critical discovery, including exculpatory material, needed to adequately prepare a defense at trial. *Brady* does not only require the disclosure of exculpatory evidence but it requires that such

evidence be disclosed in a timely manner so that the Defendant can use it effectively. Such disclosure is required even in the absence of a motion by the Defendant. *State v. Cowan*, 197 S.E.2d 641 (W. Va. 1973). Moreover, a Brady violation cannot be remedied by the State having an open file policy. *State v. Kennedy*, 517 S. E.2d 457 (W. Va. 1999). The State's failure to timely provide exculpatory evidence amounts to violations of Defendant Wyche's constitutional due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Testimony at trial suggests that law enforcement stopped actively investigating suspects Wyche and Boyd this case in November 2014. Defense counsel for both Wyche and Boyd met with the Prosecuting Attorney for a discovery conference on December 10, 2014, and were advised to direct their questions to the investigating officers inasmuch as she was unable to answer questions about the evidence in the case. Approximately one week before trial, the State began to disclose the bulk of its discovery. These discovery delays, including the late disclosure of the GSR testing protocols amount to violations of Defendant Wyche's constitutional due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Additionally, it was not until the State's last witness, lead investigating Officer Christian that the defense learned that Deputy Christian was still investigating this case. Specifically, DNA was recovered from the scene at a location wherein blood evidence was also located. There was a CODIS hit that showed this DNA evidence belonged to a Roy Winston and that Mr. Winston has a violent criminal history. (Tr. Vol. 5, pg. 170). At trial, Officer Christian characterized the status of the investigation into Winston as unfinished and sitting on his desk. (Tr. Vol. 5, pg. 172). Officer Christian testified that he had not followed up on this lead when he received it, but testified that it would be important to do so before the close of evidence of the trial of Boyd and Wyche. Unfortunately for petitioner Wyche that investigation was never closed before the close of the

State's case inasmuch as Christian was the State's final witness before resting its case-in-chief. (Tr. Vol. 5, pg 228). The fact that the State would seek an indictment against Defendant Wyche while the investigation into potential suspects was still ongoing is unconscionable and clearly demonstrates prejudice against the Defendant.

Defense counsel did not learn of the ongoing investigation, particularly Roy Winston, until Officer Christian testified. Officer Christian was the State's final witness before resting its case, and Christian's failure to adequately follow up on a lead of an individual whose DNA was recovered from the Brick House parking lot the night of shooting violates Defendant Wyche's constitution right to due process. The evidence presented by the State to convict Defendant Wyche is circumstantial and had Officer Christian completed his investigation before trial, it could have led to direct evidence that exculpates Defendant Wyche. Presumptively, the investigation is still ongoing while Wyche and Boyd stand convicted. Whether the State was acting in bad faith, or through inadvertence, Defendant Wyche has been prejudiced in his ability to use late-disclosed exculpatory material.

VI. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR SUQUESTRATION AND PERMITTED OFFICER CHRISTIAN TO REMAIN AT COUNSEL TABLE BEFORE TESTIFYING.

All parties in this matter moved to sequester witnesses from the courtroom at pre-trial and trial, but specifically the Petitioner moved to exclude Officer Christian given a concern about the poor investigation in the case. (Tr. Vol. 1, Part 2, pg. 128). Rule 615 of the West Virginia Rules of Evidence provide that upon a party's request, the Court must order witnesses excluded so they cannot hear other witnesses' testimony. However, under the same Rule, it is discretionary with the Court whether an investigating officer identified as the State's representative may remain in

the courtroom. Upon Defendant's objection to Officer Christian remaining in the room until such time as he testified, the State identified him as its representative. (Tr. Vol. 1, Part 2, pg. 129).

The motion by Defendant Wyche to sequester Officer Christian was crucial to the Defendant's case inasmuch as the case was purely circumstantial and hinged upon the officers' proper use investigatory technique and procedure. The prosecutor identified Deputy Christian as the investigating officer. The assumed investigating officer, William Christian, testified that his supervisor Gary Harmison was in charge of the investigation. (Tr. Vol. 5, pg. 35, 86-87). While in contrast, Gary Harmison testified that William Christian was in charge. (Tr. Vol. 3, pg. 42). To make matters more confusing, Deputy St. Clair testified that Deputy Denny Streets was his senior officer on the scene, although he believed it was Harmison who instructed him on his responsibility in the investigation to utilize Total Station. (Tr. Vol. 4, pg. 52-53).

By posturing Deputy Christian as the lead investigator so that he could remain in the courtroom, allowed him to listen to the testimony of other officers and alter his responses to paint the investigation in a more favorable light to the prejudice of the Defendant. The purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another and to discourage fabrication and collusion. *State v. Omechinski*, 196 W. Va. 41, 468 S.E.2d 173 (1996). Officers are no different than any other witness with regard to credibility and honesty, and their testimony should not be viewed in a more favorable light merely because they are officers. Likewise, the fact that an officer is permitted to remain does not preserve the purpose of the rule inasmuch as officers can shape testimony and fabricate testimony just like any other witness.

Here, Officer Christian was permitted the opportunity to listen to each officers' testimony. It was apparent during the course of trial that the investigation was sloppy and each Officer was pointing his finger to the other as to who was in charge. Clearly, the rule to sequester was intended

to remove any likelihood a witness may change or alter his testimony. Here, Officer Christian had every reason to alter or shape his testimony to bolster and give credibility to the investigation. This unfair tactical advantage prevented the Defendant's due process right to a fair trial. As evidence of this fact, when it became clear during questioning of several witnesses that the Defense was interested in the unfinished investigation involving Winston and Oliver, on January 20, 2015 Officer Christian provided color photographs of Winston and Oliver not previously provided to counsel. (Tr. Vol. 5, pg. 166). The photographs were proffered to counsel as a result of its questioning of certain witnesses (who were not Christian), and they were offered in an effort to thwart the line of questioning regarding the alternative suspects that had not been fully eliminated by Officer Christian. Had he been excluded from the courtroom, Christian would not have had notice of the Defense's tactic advantage regarding the unfinished investigations into suspects Winston and Oliver. At trial, presumably the investigation is over and all that is left is the determination of guilt or innocence.

VII. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT DENIED PETITIONER AN OPPORTUNITY TO DEVELOP EVIDENCE AT TRIAL ABOUT AN INVESTIGATING OFFICER'S EMPLOYMENT STATUS RELATED TO HIS TAMPERING WITH EVIDENCE.

After the investigation in this case, Deputy Denny Streets was indicted for felony embezzlement (of firearms from the BCSD evidence locker) and fraudulent schemes. (Tr. Vol. 3, pg. 173). The instant case involves a shooting death at the Brick House Bar wherein co-defendants are alleged to have possessed firearms, although no firearms were recovered during the investigation in this matter. The evidence at trial is uncontroverted that Deputy Streets was the senior officer abandoned at the crime scene with Officer St. Clair while other officers left the Brick House to mark evidence and pursue leads. (Tr. Vol. 3, pg. 158/Tr. Vol. 4, pg 16).

During questioning of Chief Harmison, former Officer Streets' supervisor, counsel inquired about Streets' role in this investigation, the status of his employment, and the purpose for his termination. The Court denied the defense an opportunity to investigate these matters before the jury, and counsel should have been permitted to impeach the quality of the investigation and the integrity of the officers left behind to document and collect physical evidence in this case. (Tr. Vol. 3, pg. 172). The possibility that a gun may have been recovered at the scene by former officer Streets, and then subsequently removed and hidden is a probability in this case, and not mere conjecture.

This case involves an allegation that co-defendants possessed two firearms of different calibers. It is highly probable that if these firearms existed, then they disappeared or are non-existent because Officer Streets collected them and then sold them for financial gain. It is that very conduct for which Officer Streets was indicted. (Tr. Vol. 3, pg. 173). The Defendant should have been permitted the opportunity to cross examine law enforcement supervisors regarding former Officer Streets' actions in this case, and his reputation regarding the manner with which he treated physical evidence left in his custody.

VIII. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT IMPROPERLY ADMITTED EVIDENCE OF A VIDEO DASHCAM WITHOUT PROPER AUTHENTICATION AND FOUNDATION.

Rule 901 of the West Virginia Rules of Evidence states in pertinent part that to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. W.Va. Rules of Evidence 901. (2014).

Here, the State sought the introduction of the Maryland State Trooper's dashboard camera video without the testimony of the actual Maryland State Trooper that recorded it. (Tr. 1/9/15, pg 8/Tr. Vol. 2, pg. 242). Defense objected and raised rule 901 and failure to lay a proper foundation for its admittance. The court granted the State an opportunity to respond. The State, in its motion in support of the admittance of the dashboard camera video, merely cited three cases. They were *State v. Day*, 191 W.Va. 641, 447 S.E.2d 576 (1994), *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1998), and *State v. Adkins*, 191 W.Va. 480, 446 S.E.2d 70 (1994). A brief description of the cases cited by the State follows:

In *Adkins*, someone other than the photographer introduced a photograph of an arson scene into evidence. The court held there was no error because the individual that testified at trial was personally familiar with the arson scene and testified that the photograph accurately depicted the scene of the fire as he saw it upon his inspection of the premises.

In *Day*, video from a retail store's surveillance camera that depicted Petitioner shoplifting was admitted at trial through the arresting officer. The court held there was no error because 1) the officer testified that he watched the video before it left the store and 2) the video had either been in his or the evidence room's custody, and 3) the officer testified the video had not been altered or changed from the officer's initial viewing of the video at the retail store.

In *Dunn*, the defendant wanted, but was refused by the trial court, to introduce his driver's license for the purpose of supplementing his testimonial explanation of his physical appearance 1 week before the crime occurred. The State argued the license could only be admitted through the photographer. The Court held there was error because the driver's license should have been admitted pursuant to the "Pictorial Testimony Theory." That is when a picture is not used as

substantive evidence, but is used merely to explain evidence such as charts/graphs/maps. The license could be used as a pictorial depiction of his verbal testimony of his appearance.

The cases previously cited are factually distinguished from the case at hand. Here, the Maryland Trooper (Shaffer) through whom the dashboard camera video was admitted was not personally familiar with the scene of the chase. (Tr. Vol. 2, pg. 243). Trooper Shaffer did he even know the date it was recorded. (Tr. Vol. 2, pg. 243).

The Trooper who recorded the video was Trooper Conner, and according to Trooper Shaffer's testimony he was no longer employed by the Maryland State Police as of shortly after this incident involving Petitioner Wyche. (Tr. Vol. 2, pg. 243). Proper introduction of the video does not fall under the Pictorial Testimony Theory because it was used as substantive evidence, not merely to explain evidence already submitted. Therefore, the State failed to comply with Rule 901 by properly authenticating the dashboard camera video through reliable evidence that could verify that the thing was what the State claimed it was, and the Court improperly admitted the video with a proper foundation by which the video could be admitted.

IX. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE TO MAKE INFLAMMATORY STATEMENTS DURING ITS CLOSING ARGUMENTS AS TO PETITIONER'S CHARACTER, THE INTELLIGENCE OF COUNSEL, AND THE EXISTENCE OF A GUN EVIDENCE NOT PRESENTED AT TRIAL.

The State prosecutor's closing argument was inflammatory and violated Wyche's due process right to a fair trial. Federal courts have recognized that a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated. *U.S. v. Cannon*, 88 F.3d 1495 (8th Cir. 1996) quoting *U.S. v. Solivan*, 937 F.2d 1146, 1150 (6th Cir. 1991). "Four factors are taken into account in determining whether improper prosecutorial comment is so

damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl Pt. 6, *State v. Sugg*, 193 W.Va. 338, 456 S.E.2d 469 (W.Va. 1995).

The Eighth Circuit Court considered whether the comments made by the prosecuting attorney prejudiced the two African-American defendants in *U.S. v. Cannon*, 88 F.3d 1495 (8th Cir. 1996). The court used a similar analysis as set forth in *Sugg*. The prosecutor stated that the defendants were "bad people" and commented on the fact that they were not locals. *Id.* at 1503. The court found that the prosecutor gave the jury an improper hook from which to hang a guilty verdict. *Id.*

Here, the Prosecutor Neely stated, "*Samson (sic) Edmond is dead because they don't have the social graces God gave geese in this instance.*"

This comment clearly was used to paint the defendants as animals or less than human - bad people. It also references religion and religious deity. The comment petitions from the jury religious sympathy and demands some form of judgment based on defendants' lack of God-given graces, as if they were forsaken and unable to be good. Additionally, this comment references the defendants' character. Character evidence was not admitted at trial. The State essentially made a conclusive remark regarding the defendants' character and credibility despite the fact that such evidence was never presented before the jury.

The State also improperly commented on defense counsels' inability to understand an investigation when it remarked that Mr. Stanley was not an investigator, he is a lawyer, and she

then pointed to her lead investigator and argued he was the real investigator who wore a badge, went to school, and learned how to do this. (Tr. Vol. 6, pg. 235). Further, she argued that it was not her fault that defense counsel could not understand The Station. (Tr. Vol. 6, pg. 237). Such remarks against defense counsel is not only unethical, it further prejudiced the defendants and prevented them from having a fair trial. Counsel's role in any criminal trial is challenge the jury to examine the evidence. Impugning trial counsel in an effort to deflect away this poor investigation was improper and violative of Petitioner's right to a fair and impartial trial.

The State misstated evidence that was before the jury. The State made the argument that the gun was still out there and probably still in the woods. Yet, officers testified a search was conducted and no guns were recovered. Such misrepresentation of the facts, alone and along with the previously mentioned prejudicial comments, prejudiced the defendants and prevented them from having a fair trial.

One of the duties of a trial court is to ensure due process is achieved and that each party has a fair trial. The comments by the State in closing argument, alone destroyed the Defendants' right to due process and a fair trial. Therefore, a new trial should be granted.

X. EVEN WHEN LOOKING AT THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT IMPROPERLY ADMITTED UNAUTHENTICATED RECORDS FROM NORTH CAROLINA DURING PETITIONER'S RECIDIVIST TRIAL.

The Court permitted the State to introduce what it characterized as a self-authenticating "Certified Pen Packet," which were Finger Print Cards from the North Carolina authorities without a custodial of the record to authenticate such records. (Tr. 6/12/15, pg 93). The records came with a cover letter that indicated the copies of inked impressions may not be identical to the subject of your inquiry and have not been verified by fingerprint comparison; therefore, a NC records

custodian should have testified to lay a proper foundation and authenticate the records before they were admitted before the jury to the prejudice of the Petitioner. (Tr. 6/12/15, pg. 94).

The purpose the State sought to admit the records was to establish a link between the Petitioner and certified copies of court orders for Mr. Wyche for convictions out of North Carolina without the need of a records custodian.

The State argued that *U.S. v. Ibarra*, established the proposition that such public records were self-authenticating. *U.S. v. Ibarra*, 502 U.S. 1 (10th Circuit 1991). In the alternative, the State argued that are business records that are kept within the course and under West Virginia law anybody within the chain of custody can testify to the chain.

Finger print cards are clearly not self-authenticating under Rule 902 of the West Virginia Rules of Evidence. Moreover, North Carolina records made, stored, and used in the regular course of business are not business records of local law enforcement officials. Merely putting a stamp on a piece of correspondence and sending it to another in the mail does not establish a business record exception or a link in a chain of custody. In essence the State argues that Deputy Christian's mere possession of finger print cards from North Carolina places him within the chain of custody.

The records custodian is the person responsible keeping records in the ordinary course of business. In litigation, business records, such as hospital charts, are often allowed into evidence with a certificate signed by the records custodian responsible for the records, verifying the completeness and accuracy of the records or copies thereof. In this manner, the records custodian is saved the time-consuming duty of appearing personally in court. There is no such recognized certification exception for the admission of Pen Packets and the Court improperly permitted the State to admit the finger print cards in violation Petitioner's Wyche's right to a fair trial.

Counsel had four months to prepare for the recidivist trial of Petitioner, and secure witnesses necessary to establish every element of the determination under West Virginia's Habitual Offender Statute W. Va. Code § 61-11-18.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted; that the judgment of the Circuit Court of Berkeley County be reversed.

Respectfully submitted
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

Vs.

No.: 15-0894

**CHRISTOPHER R. WYCHE,
Defendant Below, Petitioner.**

CERTIFICATE OF SERVICE

I, Kimberley D. Crockett, do hereby certify that on this 4TH day of January 2016, I have served a true copy of the **APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY HONORABLE MICHAEL D. LORENSEN, JUDGE CASE NO. 14-F-48** upon the State by hand deliver to:

CHERYL SAVILLE, ESQ.
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Martinsburg, WV 25401

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