

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

APPELLEE,

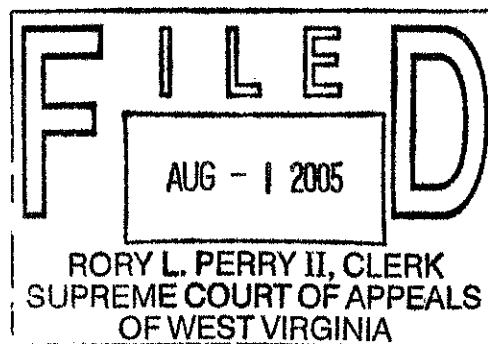
VS.

CASE NO.: 32694

LARRY G. DINGER,

APPELLANT.

APPELLANT'S BRIEF



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PROCEEDINGS BELOW

Petitioner was indicted on November 19, 2002 in the Circuit Court of Summers County, West Virginia, case number: 02-F-84 on a "generic" indictment alleging murder of a Mac Lilly without specification of the degree. The Court denied Petitioner's motion to quash the indictment upon transcript of the Grand Jury proceedings, where the Judge, upon the Grand Jury being deadlocked on returning an indictment, instructed them they could issue a general murder indictment not specifying the nature of the offense and "pass the buck" so to speak, to the petit jury. The State also, upon Motion to Compel discovery requested regarding autopsy results and tests of the "victims" hands to determine whether he at the time of the shot was still trying to either turn the pistol on defendant or take it away, was ordered on December 3, 2003 to provide them to the defendant. On February 18, 2003, the State filed its final witness list, including its intent to call "West Virginia State Police Lab personnel who conducted gunshot residue kit analysis (Name unknown to State) [who] can testify to report of gunshot residue kit analysis (report not received, upon receipt, will forward to Defendant.)" The case was called for trial in Summers County. On Voir Dire of the jury panel, due to potential juror's statements of knowledge, bias or prejudice for and against Petitioner, strikes for cause reduced the panel to 19. The Court then removed the case to Monroe County, West Virginia on Petitioner's previously denied motion for change of venue. At trial, the jury returned a verdict of Voluntary Manslaughter on May 16, 2003. During trial it was discovered the Gunshot Residue Test Kit (GSR) which the State had "lost" had been misplaced in the hands of the Sheriff, and never tested.

Defendant filed Motion for a New Trial, including as grounds the failure to produce the GSR kit test and results and a Motion to Delay Disposition pending a test result by a method to be agreed to by both counsel.

On June 16, 2003 the Court denied Motion to delay disposition and denied motions for a new trial, but ordered that the GSR test kit be tested, as could be agreed to by both counsel. The Court sentenced petitioner to 12 years determinate sentence (without a finding of use of a firearm, as such was not alleged in the indictment, found by the jury or requested by the State).

The Prosecuting Attorney sent the GSR kit to the State Police Laboratory without defense counsel's knowledge or agreement. The Laboratory technician's report came back with only a trace of gunshot residue on one of the victim's hands, on July 22, 2003. Defendant moved for independent testing by Robert White, former Director of the Forensic Laboratory of the State Police Laboratory (retired upon 30 years service). After months delay, the Circuit Court ordered on December 2, 2003 that this retest be done.

Petition for Appeal was filed January 5, 2004

On March 4, 2004, the report of Robert White was received which found gunshot residue on both hands (and that the prior laboratory report misstated actual findings). On March 16, 2004 Petitioner filed a Motion for New Trial on newly discovered evidence in the Circuit Court. Also Petitioner filed a Motion for Leave to Supplement Record and Amend Petition in the Supreme Court of Appeals, regarding the test results and report of Robert White. Both Motions were opposed by replies of the Prosecuting Attorney.

On April 1, 2004, the Supreme Court of Appeals granted leave to amend and supplement, and remanded the case "to the Circuit Court of Monroe County with directions to conduct a hearing on the pending Motion for a New Trial based on the grounds of newly discovered evidence, with leave to the petitioner to file for appeal following entry of an order deciding the Motion, or subsequent final order, as the case may be."

However, upon remand, the Circuit Court held hearing on June 7, 2004 on the GSR results. Robert White testified that the State Police Laboratory technician misread her results and her test found substantial gunshot residue on the victims hands; his test found even more residue; and such was consistent with the defendant and his witnesses' testimony that the victim still had his hands on the pistol when he was shot; and inconsistent with the testimony of the State's eyewitnesses.

On September 17, 2004 the Circuit Court denied Petitioners Motion.

STATEMENT OF FACTS

Petitioner/Defendant resided with a Tasha Pack in a small house up 9 miles of bad road, where it dead-ended, in Summers County, West Virginia.

On April 19, 2002 his 20 and 12 year old sons from prior marriage were visiting them. They went into Hinton, West Virginia to a restaurant for dinner. Tasha's ex-husband, Mark McBride showed up, intoxicated. Petitioner's party were cordial towards him. However he was removed from the premises by a Deputy Sheriff, who an off duty city police officer called because Mr. McBride had been previously "barred" from the restaurant for bad conduct. Mr. Dinger was asked by the deputy to give Mr. McBride a ride home in lieu of his being arrested. Mr. Dinger and his older son did so, but McBride asked to be let out short of going home. Mr. Dinger returned to the restaurant. "Mac" Lilly the later "victim" showed up. Mac Lilly being intoxicated, he asked them for a ride home. At Mac Lilly's house, no one was home. Mr. Lilly suggested they give him a ride to a local campground hangout to meet some people. The people he wanted to meet weren't there, so they took him back to his (parent's) house. At the house were Mr. Lilly's father, who appeared intoxicated; and Mark McBride. An argument and scuffle ensued between the Lilly's, therefore Mr. Dinger and his party went home, a few miles up the road.

About an hour (approximately 3:00 a.m.) later Mac Lilly and Mark McBride showed up at Mr. Dinger's residence. They were allowed in. Mac Lilly passed out on the sofa. Mark McBride began making incoherent verbal threats and on failing to desist after being repeatedly asked, Mr. Dinger punched him and knocked him down. Mr.

Dinger picked him up, he was given a wet towel, he sat in a chair for a while, and went outside and didn't come back.

About 8:00 a.m. Mark McBride came back in stating he slept in a ditch. Mac Lilly awoke, and observing Mark McBride's bruised face, got angry and argumentative. Mark McBride tried to start a fight with Mr. Dinger and his older son. After Mark McBride and Mac Lilly calmed down and shook hands with Mr. Dinger, at their request Mr. Dinger and his sons gave them a ride. On their return to the home, everybody laid down to rest some more.

About an hour later, two of Mark McBride's male relatives, Jason McBride and Kenny Ray Steele, showed up wanting to fight because of what had happened to Mark McBride. They pushed their way into the house (technically, a burglary). Tasha and Mr. Dinger persuaded them to leave. (Tasha Pack, having been married to Mark McBride, knew all these people. Larry Dinger had met none of them before this). As they left they said they would be back.

Everyone laid down again to rest.

About an hour later Mr. Dinger was awakened from the couch by numerous loud voices. Mr. Dinger, seeing a number of persons as he approached the screen door, picked up a 357 magnum double action revolver from a shelf near the door and stuck it in the back waistband of his pants as he went out.

Mark McBride, Mac Lilly, an Alex Cline, and Kenny Ray Steele were at the front porch, which was near ground level and 6 feet wide, threatening to fight. Tasha and Mr. Dinger's two sons were on the porch. Tasha approached Michael McBride, Jason

McBride and Valerie McBride Blankenship, who were in the yard and near two of the three vehicles which they had arrived in, to persuade them to leave. They would not listen. She ran to her parent's house about 100 yards down the road to call emergency 911, as there was no phone in this house.

Mac Lilly and Mark McBride threw a flowerbox from the porch so they could get on the porch to Mr. Dinger's right, within arms-length. Mac Lilly kept stepping onto and off the edge of the porch, slapping his chest, inviting a fight, and spat in Mr. Dinger's face. Mr. Dinger repeatedly asked them to leave. Mr. Dinger got his 12 year old son inside the screen door; then reached to pull his 20 year old son inside and tried to open the door. Alex Cline, to his left, slammed the door shut and blocked it with chairs which were sitting on the porch. Alex Cline said "You are not getting a "f---"gun". Mr. Dinger pulled the gun from his waistband, leveled it at the group and said "I don't have to, I have one." Mac Lilly grabbed the gun and said "If you pull a gun you'd better use it."

The testimony at trial of Mark McBride, Alex Cline and Valerie McBride Blankenship was that Mac Lilly first tried to turn the gun to point it against Mr. Dinger, then backed up 6 to 8 feet and Mr. Dinger shot him in the head.

The videotaped statement of Mr. Dinger, voluntarily given to the police; and the statements and testimony of his sons at trial was that when Mac Lilly grabbed the gun, it went off.

The testimony of Charles "Rocky" Lane, State Laboratory Firearms examiner was that the shot impact wound was 18 to 24 inches from the muzzle of the gun, that it was possible for the gun to fire and leave no burns on Mac Lilly's hands; and that the gun

would be within both Mr. Dinger and Mac Lilly's arms length. Also he testified a double action revolver will fire with or without the hammer cocked.

The Sheriff, who had realized at the time of the shooting that a GSR test of Mac Lilly's hands could be critical in resolving the conflicting statements about whether Mac Lilly still had his hands on the gun, preserved the evidence by "bagging" his hands, and requested the Medical Examiner make a GSR test kit.

(Counsel for defendant also requested that it be done two days later and requested in discovery and Motion to Compel, which was granted, that it be tested. Upon the testimony at trial of Dr. Kaplan, the Medical Examiner, the Sheriff realized the GSR kit which had "gone missing", had not been sent from the Medical Examiner to the State Police Lab, but returned to the Sheriff's office with Mac Lilly's clothes in a sealed box. Due to lack of experience, the Sheriff assumed the kit would have been sent to the Lab and it had been misplaced there. Subsequent to trial by the Circuit Court's Order, the State Police Lab tested the GSR kit and reported insubstantial residue. This inadequate report took months to be done. The Court then Ordered on Petitioner's Motion, that Petitioner have an expert also test.)

At the scene, Tasha had first called 911 for help; then after Larry and his sons came to her parents house and told what happened, called in the shooting. The others who had been with Mac Lilly had fled the scene.

The Sheriff arrived to a scene of tumult with Mac Lilly's cohorts and others who had returned with them, shouting and threatening. With assistance of back up deputies and State Troopers the scene was secured. Mac Lilly was lying next to the porch, dead

of a single gunshot to the forehead. Testimony at trial was that the body had been moved prior to the Sheriff's arrival.

Mr. Dinger was taken in and gave a voluntary videotaped statement. Other statements were taken. He was charged with murder.

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN NOT GRANTING A NEW TRIAL HEARING ON REMAND FROM THE SUPREME COURT OF APPEALS ON NEWLY DISCOVERED EVIDENCE (GUNSHOT RESIDUE TESTING OF THE VICTIM'S HANDS), CITING LACK OF DUE DILLIGENCE. Considering only the inadequate post trial report of the State Police Laboratory and ignoring the report, testing, and testimony of Robert White, defendant's expert (who in his 30 years of employment at the State Police Laboratory had created and run the GSR Testing Facility); the Court stated because the Laboratory technician's report (which misstated her own test results,) found no substantial residue (which was controverted on her test results and his own, by Robert White) that if the test report from the State Police Laboratory Report had been available at trial, it would not have made a difference.
2. THE TRIAL COURT ERRED IN ALLOWING "GRUESOME" PICTURES IN EVIDENCE; PARTICULARLY OF DECEDENT'S FACE AND HEAD, AS THEY WERE NOT PROBATIVE OF ANY MATERIAL FACT AND IMMATERIAL AS IT SHOWED NO FACT THAT WAS IN DISPUTE, AND WAS INTRODUCED SOLELY TO INFLAME THE JURY AND TO REPEATEDLY DISPLAY A GUNSHOT TO THE

HEAD TO THE JURY. The testimony of the Medical Examiner was neutral and there was no issue of cause of death. The testimony of the State Firearms Examiner was not in dispute and in fact favorable to the defense. The pictures provided absolutely no additional evidence or proved any matter in issue, but were used solely to inflame the jury's emotions.

3. THE TRIAL COURT ERRED IN FAILING TO GIVE DEFENDANT'S "ACCIDENT" AND "INABILITY TO RETREAT" INSTRUCTIONS.
4. THE COURT ERRED IN NOT DISMISSING THE CASE UPON DEFENDANT'S MOTIONS AT THE CLOSE OF STATE'S CASE IN CHIEF AND UPON ALL THE EVIDENCE ON THE GROUNDS THAT THE STATE DID NOT DISPROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ACTED IN DEFENSE OF SELF AND FAMILY UPON THE ASSAULT BY THE VICTIM AND HIS 5 ALLIES.
5. THE TRIAL COURT ERRED IN NOT DISMISSING THE INDICTMENT ON DEFENDANT'S PRE-TRIAL MOTION UPON THE COURT IMPROPERLY INSTRUCTING THE GRAND JURY AT THE END OF THEIR LENGTHY DELIBERATIONS, THAT THEY COULD ISSUE A "GENERAL" MURDER INDICTMENT RATHER THAN ONE OF A DEGREE OF HOMICIDE, AND LET THE PETIT JURY DECIDE WHETHER IT WAS MURDER OR NOT.
6. THE TRIAL COURT ERRED IN NOT DISMISSING 1ST DEGREE OR 2ND DEGREE MURDER CHARGES PRIOR TO THE JURY'S DELIBERATION, AS THERE WAS

**INSUFFICIENT EVIDENCE AS A MATTER OF LAW OF PREMEDITATION OR
MALICE.**

ARGUMENT

1. THE "LOSS" OF THE GSR KIT BY IGNORANCE OF THE SHERIFF, PREVENTED THE DEFENSE FROM ACQUIRING EXCULPATORY EVIDENCE REGARDING THE ONLY SERIOUS FACT ISSUE AT TRIAL, THE RESULTS WHICH SHOWED THE "VICTIM" STILL HAD HIS HANDS ON THE GUN WHEN IT WENT OFF.

The retest of the Gunshot Residue Kit from the "victims" hands showed there was substantial gunshot residue on both of the victim's hands, and that the newly employed current State Police Laboratory technician's results also found the residue, but she incorrectly interpreted or reported the results. This evidence corroborated the testimony of Mr. Dinger and his witnesses, and that of "Rocky" Lane, the firearms expert witness. It also severely impeached the credibility of the other assailants who testified that the "victim" has ceased to try to take the gun away from Mr. Dinger. And it was evidence that not only was uncontroverted (The State's Laboratory technician was not called to testify on Rule 33 hearing), but as the Sheriff recognized at the scene of the crime, indicated whether or not the "victim" was still trying to take the gun away when he was shot. This was the only serious fact in dispute at Trial. The State claimed that the "victim" had retreated, let go of the gun, and petitioner deliberately and coldly shot him.

Because of the loss of the GSR kit samples, the results were unable to be obtained at trial, and in fact took many months to obtain after trial upon the Circuit court's post trial orders to test the kit.

The results of the test, not the samples taken were the evidence defendant requested in discovery; were ordered compelled to be provided; and were stated by the State to be its untended evidence in advance of trial. Pursuant to WVA Rule of Evidence 705, it is the experts opinion results which are evidence, and in fact the underlying data doesn't even have to be disclosed even on cross examination.

In State v Osakalumi, 194 WVA 758,461 S.E.2d 504 (1995), this Court said:

"When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law;(2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

In Osakalumi, the investigation officers threw away a stinking bloody couch during the lengthy time before the defendant was arrested. A "battle of experts" opinion ensued at trial as to whether the couch, if the defense had tested it, would

have corroborated defendants evidence the "victim" shot himself playing "Russian Roulette." See also: State v. Paynter 206 W.Va. 521, 526 S. E.2d 43(19999)(GSR Test Lost).

In this case, the Sheriff of Summers County, hearing conflicting statements about how the gunshot occurred, realized the criticality of trying to obtain evidence; "bagged" the victim's hands; and requested the GSR kit samples be taken by the medical examiner. Because of his lack of experience and training (elected Sheriffs are not required by West Virginia law to be trained at the State Police Academy) he assumed when the laboratory never could locate the GSR kit, it was lost. In fact it was discovered after the State's case, on recall of the Sheriff by the defense , that the GSR kit had been boxed up and sealed with the victim's clothes when returned by the medical examiner, and had been in the evidence locker (Trial Transcript Day III, pp 452-457). One of the Deputies involved in this case was asked the following:

Q "You're a certified law enforcement officer?"

A Yes, sir.

Q And that means you went to the State Police Academy, took courses, and passed?

A Yes, sir.

.....

Q And isn't it true, as I have been advised, that at the State Police Academy, they tell officers you have a gun. If somebody tries to take it away from you, that can be considered by you as deadly force, which may entitle you to shoot?

A Yes, Sir."

(Transcript, Trial Day III, p 422).

The Court below ruled, the defendant did not exercise due diligence in trying to secure the evidence at trial; and that of the State Police Laboratory report had been available at trial, being inconclusive, it would have not made a substantial difference (ignoring the testimony of Robert White, who was more experienced, and his uncontroverted testimony that the State Police Laboratory report was incorrect and misstated the actual results of that test).

When considering a Motion for a New Trial, the West Virginia Supreme Court of Appeals has stated that five criteria must be met:

A new trial of evidence will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) the evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

S1. Pt. 1, State v. O'Donnell, 189 W. Va. 628, 632, 433 S.E.2d 566,570 (1993); (the undersigned was O'Donnell's counsel at trial and on appeal);

Syllabus, State v. Frazier, 162 W. Va. 35,235 S.E.2d 534 (1979) quoting Syl. Pt.

1, Halstead v. Horton, 38 W. Va. 727, 18 S.E. 953 (1894), Syl. Pt. 1, State v.

King, 173 W. Va. 164, 313, S.E.2d 440 (1894). "If any of the foregoing essential five requirements is not satisfied or complied with, a new trial will not be granted on the ground of newly discovered evidence." State v. Helmick, 201 W. Va. 163, 167-168, 495 S.E.2d 262,266-267 (1997).

The Circuit Court below relied on an Ohio case, State v. Sheppard, 100 Ohio App. 399, 128 N.E.2d 504 (1955); to find that the defendant didn't exercise due diligence. Unlike in Sheppard the evidence didn't exist at trial: the testing results obtained by the State Police Laboratory weeks later; and Robert White's results obtained months later; and objective expert evaluation and testimony about the results.

Defendant requested informally in advance of trial that the victim's hands be tested for gunshot residue.

Defendant requested formally in discovery that the GSR kit be obtained, tested and test data and results be provided.

The Circuit Court ordered the State to provide such discovery on Motion to Compel. The State listed it to be part of its evidence, in pretrial list of witnesses and exhibits.

The State through inadvertence and ignorance "lost" the samples. The samples were in the State's custody in the Sheriff's evidence locker, inaccessible to the defendant.

Where the samples were wasn't known until the last few minutes of a 3 day trial.

Test results did not exist until after trial.

The Circuit Court stated in its Order that:

"The Court concludes that the Defendant's Motion for New Trial must be Denied because due diligence on the Defendant's part could have ascertained the results [emphasis added] before the trial. Based upon Defendant's Motion to Compel dated January 17, 2003 and the State's Final Witness List dated February 18, 2003, it is clear the Defense Counsel knew that the victim's hands had been bagged at the crime scene in preparation for a Gunshot Residue test to be performed and that no test results [emphasis added] had been received. Had Defense Counsel been diligent in ascertaining the location of the test, testing could have been conducted during discovery and the results [emphasis added] could have been taken into consideration at the trial. However, even if Karen Powers at the State Police Laboratory had tested the Gunshot Residue Test Kit prior to the trial instead of after the trial, she would have reached the same conclusion – that there was one particle of Gunshot Residue on the face of the victim and none on his hands."

A defendant cannot conduct an independent investigation of the police's evidence locker; he can only request discovery. The State was the one guilty of lack of diligence in complying with the Order to Compel discovery.

The Circuit Court then stated that even if the State Police Laboratory report had been available at trial it wouldn't have made a difference as the lab technician (incorrectly) reported insubstantial evidence of gunshot residue on the victim.

The Circuit Court ignored the actual qualitative evidence, the "results", as it stated in its Order quoted above.

In the hearing on newly discovered evidence, the Prosecuting Attorney said "State would absolutely agree and stipulate Mr. White's an expert..." [in gunshot residue testing]. Tr. (Motion for New Trial 6/7/04 p. 8). Mr. White stated he had testified approximately 1,100 times when he was an employee of the State Police Laboratory.

Mr. White testified:

"Q Sir, if you will, for the record, tell us what is a gunshot-residue test.

A The gunshot-residue test that was performed in this case is a test of samples taken from the hands and face of the subject. Gunshot residue comes out of a gun when it's discharged in all the leak areas of the gun. Comes out the muzzle. Comes out around the cylinder, front and back of the cylinder, the hammer. And it comes out in a smoke cloud about three-foot diameter, roughly around three feet on each side of the gun, and deposits on whatever areas are near.

The samples are then collected with a special sticky material, sticky stubs that are dabbed on the hands and the face. Then, they're analyzed with an electron microscope.

Q And in your investigation of this matter, what materials did you obtain, what things did you look at as far as rendering any opinion?

A I looked at several documents that were given to me. I received the documents regarding the test done by the State Police Laboratory, samples taken from the hands "and face of Mac Lilly. I looked at the autopsy report. Copy transcript of Lane's testimony. And I analyzed the same samples at the laboratory analyzed from Mac Lilly.

Q Now go over that in some more detail. You know Clarence R. Lane or you knew him?

A Yes, very well.

Q You were able to – given a copy of a transcript of his testimony at the trial of this matter?

A Yes."

(Transcript Hearing Motion for New Trial pp. 10-11)

The testing procedure and analysis is not quick and simple:

"Q Okay. If you will then, sir, can you tell us what you did to perform your analysis?

A I rent a scanning electron microscope in Pennsylvania, up near Pittsburg. And I took those samples up to that laboratory and used the equipment there to analyze those samples. So I actually performed the same test that the State did.

Q Was your – what is a scanning electron microscope, for the record?

A This is an instrument. Pertaining to this case, it's used for gunshot-residue analysis. It's a very large instrument. It's not like a little microscope you look at with

your eyes, bent over. This is a big, large instrument, as big as this desk. And it has an electron beam that comes down and hits the sample in a chamber. And then by the electrons hitting the sample, the image is displayed on a screen, kind of like a television.

"And the second part of the scanning electron microscope is a detector. It detects the x-rays that are knocked off of the sample. And based on the energy of those x-rays, the instrument can tell you then if that particle contained lead or calcium or iron or barium or whatever was in it. And the samples then were analyzed with this instrument and determined what they were.

Q Let me interrupt you for a minute. I want to – you've attached to your report some printouts of what I would call pictures. Do those represent these displays and detector results?

A Yes. Those represent the particles that were identified and – the ones I identified by use of this instrument.

Q Do you have to use some kind of opinion, as far as the findings of this machine, or does it say, I found "x" substance?

A This instrument has an auto-search mechanism to it, such that it goes across the sample at the top and looks at all the particles. And then, it gets to the end of the samples, and goes over to the left, and starts again across until it looks at all the sample.

When a particle is found by the instrument that it believes there are – well, it detects x-rays, and then determines what those x-rays are by their energy level. And if

it's iron, it says it thinks its iron. If it's lead, it says it thinks its lead. Most of the time, it's correct. But the analyst has to go back and actually physically look at each one of those particles to make sure the instrument is correct. So, the analyst does have to look at the samples.

Q What do you look at?

A These are actual particles on a screen. And then – then on another screen, it has the extra data. It shows the peaks of certain energy levels, representing whatever – whatever metal it's looking at.

Q Are you able to identify by looking at that actual molecular structure of what you're looking at?

A Yes. The instrument has tried to identify it, and it made that determination. And then, it tells you where it was at. What I have to do then is go back and look at that particular particle and make sure that it's correct.

Q Does this equipment that you use differ in any degree of accuracy or kind of equipment from what was employed at the State Police Lab?

A It's very similar, if not the same instrument.

Q If you'll go on with what your procedural findings were.

A Well, I analyzed each one of those samples with this scanning electron microscope. The sample taken from the right hand, the left hand, and the face. And then I reported my conclusions there of what I actually identified by using this instrument."

He testified that analysis doesn't look for nitrates from gunpowder (or fertilizer or other substances) it looks for lead, barium and antimony, substances in bullet cartridges, and if they occur in combinations. The laboratory technician only counted the one combination of all 3 elements she found, not other combinations consistent with gunshot residue. His opinion was the victim's "hands were either near or on a gun going off." (Transcript hearing, Motion for New Trial p 23). He also testified that unlike the State's theory of the case his findings were inconsistent with that argument and testimony that the victim was 8 to 10 feet away from the gun; and consistent with defendant's statement and argument. (Transcript hearing, motion for New Trial p 30). Mr. White's extensive report and credentials were filed in the record of this case.

The State didn't call the State Police Laboratory technician to testify;

The Circuit Court in its opinion Order ruled upon a single page, single sentence, "report" of the State Police Laboratory Technician that did not disclose the underlying test data, and was so discredited by the findings of Mr. White, that not only did the State not seek to introduce it on Motion for New Trial Hearing, they did not even call her as a witness. The only evidence, which the Circuit Court ignored, was the testimony of Mr. White and his test results.

The Sheriff, at the outset of his investigation of the case, recognized that GSR testing of the "victims" hands would be critical in deciding the case. He attempted, but bungled, to get a GSR test done. He acknowledged on being recalled in the defense's case, that the results could be decisive as to whether the victim was struggling to get the gun, or not.

At trial the prosecutor adopted the position of the cohorts of Mac Lilly, that the defendant coldly and deliberately shot Mac Lilly after he had backed up "8 or 10 feet."

The results from lost kit and the testimony of Mr. White clearly and absolutely negate the State's theory of the case. The GSR results negate 1st degree murder, second degree murder and voluntary manslaughter. The GSR results support defendant's case, of self defense and defense of family and accidental discharge.

Unlike Osakalumi, the evidence was not lost, it was misplaced and believed to be lost. This case is very like those cases reported where forensic evidence collected and used to convict, upon being later subjected to DNA testing which did not exist at the time of trial, is found to exonerate. See State ex.rel. Rickey V. Hill, 2004 W.Va. Lexis 41, 603 S. E. 2d 177(2004). However, we in this case have test results, and they confirm the defense and negate the prosecution. See also State ex.rel. Justice v. Trent, 209 W.Va. 614; 550 S. E. 2d404(2001)(per curiam).

If the Circuit Court was correct, all persons who were on death row because forensic samples which existed at time of trial had not been DNA tested, who were later found to be innocent, would be dead, not exonerated.

2. THE TRIAL COURT IMPROPERLY ADMITTED "GRUESOME" PHOTOGRAPHS WHICH WERE OF NO PROBATIVE EVIDENCE, AS THE FACTS THAT THE DEFENDANT SHOT THE "VICTIM"; AND THE STATE'S EVIDENCE WAS THE SHOT WAS FIRED AT DISTANCE OF 18 TO 24 INCHES, AND THAT THE SHOT WAS FATAL WERE NOT IN DISPUTE.

While the admissibility of photographs is a matter within the sound discretion of the trial court, Rule 401 of the Rules of Evidence require a finding of relevance as to whether a photograph is probative of a fact of consequence in the case. State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994). Only if relevant, is evidence admissible. West Virginia Rules of Evidence 402. And only if relevant, is a balancing test on the record required to show the trial court properly exercised its discretion. West Virginia Rules of Evidence 403.

There was no probative value to the photographs. They were introduced solely to exhibit repeatedly to the jury a close up of a dead man with a bullet hole in his forehead.

Defense counsel repeatedly objected and implied objection in advance of presentation of the photographs (Trial transcript p. 8).

The defense in fact, as the trial Court had been advised ahead of time, stipulated Mr. Lane, the firearms examiner's qualifications, that the weapon tested was the weapon of the defendant, and that he tested it. (Trial Transcript pp. 156-157). The State now used an enlargement of the deceased's face and wound, (Trial transcript p. 161). However, as stated by the medical examiner, Mr. Lane relied on measurements of the powder stippling done by the medical examiner, not any photograph. (Trial transcript p. 162). The State taped up on a display the deceased's autopsy picture and Mr. Lane's test firing, and then as a demonstrative exhibit, referred solely to the test fire patterns, (Trial transcript pp. 159-163) and the medical examiner's report. The defense had no objection to Mr. Lane's testimony, and in fact on cross-examination,

reinforced it. (Trial transcript pp. 166-181). There was no reason, other than a bad reason, to repeatedly display the fact of a dead person to the jury, in blown up photographs; as what the State offered it for, the distance between the deceased and the defendant was 1) not in dispute with that witness, 2) determined from measurements, not any photograph, and 3) never controverted with the State's witness "Rocky" Lane.

The only times the expertise of "Rocky" Lane was challenged was by the State as to its presentation of the companions of Mac Lilly's testimony! Under Rule 401(b) evidence must also be offered for a proper purpose. The State kept putting up dead body pictures that Mr. Lane never used or relied on in making his determinations or presenting his testimony. The photographs were probative of nothing Mr. Lane testified to. Derr, supra.

3. THE COURT ERRED IN REFUSING DEFENDANTS INABILITY TO RETREAT AND ACCIDENTAL SHOOTING INSTRUCTIONS.

The defense offered the following instructions, which the Court refused:

Instruction No.:E- A person who is without fault in an altercation has no duty to retreat while acting in self defense. If the person is in a substantial degree at fault, he must retreat if able to do so, however, if from the fierceness of the attack or if they are prevented from retreating, or for other reasons they are unable to retreat, they will be excused by the law from not doing so.

Instruction No.F: Manslaughter or murder are the result of some intentional act which causes the death of another. Negligent or accidental homicide are neither manslaughter or murder. If the jury finds that the State has not proven beyond a reasonable doubt that Larry Dinger intentionally pulled the trigger the weapon causing it to fire, then you must find him not guilty, as he could not be held criminally responsible.

The Court gave, as part of its charge, a "generic" self-defense instruction, and instructed on murder and manslaughter.

There were facts in evidence to support defendant's instruction regarding no duty to retreat when prevented.

- i. Petitioner's voluntary statement, that he got his 2 year old back inside and when he tried to remove himself and his 20 year old from the porch one of the assailants slammed the storm door shut and threw chairs in front of it, saying "you're not getting a "f—ing" gun."
- ii. That assailant Alex Cline testified he did so block the door (Trial transcript pp. 298,325, 327-331).
- iii. Alex Cline admitted that the persons with him had already been up to petitioner's house before to cause a fight. (Trial transcript p. 339).

- iv. Mark McBride, the instigator of the incidents, admitted that Mac Lilly pushed Mr. Dinger and then when petitioner produced the gun, Lilly grabbed the gun and they were "wrestling" over it, but claimed Lilly let go of the gun and stepped back 5 feet. (Trial transcript pp 281, 285, 306). He and Mac Lilly took their shirts off when they first went to the porch. (A sure sign, if ever a person has seen a fight, that it is intended to be bloody.) (Trial transcript p.281). He admitted his dad bought all of them beer that morning so they could illegally get drunk along with smoking pot. (Trial transcript pp. 289-290, 362). He admitted he'd told the others that supposedly Mr. Dinger and his son stomped him. (Trial transcript p. 290) and he was at the center of the plan to have a fight. (Trial transcript p. 298).
- v. State's witness, Deputy Sheriff Roger Bircham answered this question by defense counsel, as follows:

Q: "And isn't it true, as I have been advised, that at the State Police Academy, they tell officers, you have a gun. If someone tries to take it away from you, that can be considered by you as deadly force, which may entitle you to shoot."

A: "Yes, sir."

f. Another of the assailants, Mark McBride, testified when Mr. Dinger produced the gun, Mac Lilly stepped forward and grabbed it. (Trial transcript p. 355). He tried to turn the gun to point at petitioner. (Trial transcript p.370). He testified Mac Lilly then stepped back 8 feet and was shot, (Trial transcript p. 370). He admitted they had blocked the road to prevent anyone leaving the premises, with their vehicles. (Trial transcript p.372).

Valerie McBride Blankenship also testified Mack Lilly grabbed the gun and turned it and pointed it towards Larry Dinger, calling him a "pussy". (Trial transcript pp. 397, 404, 417-418). She claimed Mac Lilly stepped back and was shot at "six to eight feet ...". (Trial transcript p. 398.) She knew Tasha Pack had gone "to call the law". (Trial transcript p.416).

- g. Deputy Worley, who took statements of all the witnesses, testified the statements were accurate, although the above witnesses disputed accuracy.
- h. Mr. Dinger's taped statement; his son Matthew's testimony; and his son Brandon's testimony were that Alex Cline blocked the door when Mr. Dinger tried to retreat. When Mr. Dinger

produced the gun Mac Lilly grabbed it, and it "went off". (Trial transcript pp.475-477; 509-510).

As stated above, Mr. Lane testified the shot was fired at a distance of 18 to 24 inches, and that the gun could be fired with or without first cocking the hammer.

The court's general instruction for self-defense was insufficient to fit the facts of the case. An abstract instruction is not sufficient, State v. Whitt, 96 W.Va. 268, 122 S.E.742 (1924). The weight of the evidence was that Mr. Dinger tried to retreat and on being prevented from doing so produced a gun, and Mac Lilly grabbed it. The State's own evidence was that Mac Lilly tried to shoot Mr. Dinger. To counter the use of a deadly weapon, defendant was entitled to the instruction, which was correct, that he having been blocked from retreat, he could be justified in using a weapon in the face of a continued mob assault. See State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

Further, defendant's video taped statement played for the jury, and his sons' statements; and Rocky Lane's testimony that their version of the shot being fired by Mac Lilly grabbing the gun was entirely possible, (Trial transcript pp. 172,181), supported an accidental shooting instruction. See State v. Bowles, 117 W.Va. 217, 185 S.E. 205 (1936); State v. White, 171 W.Va. 658, 301 S.E.2d 615 (1983); State v. Legg, 59 W.Va. 315, 535 S.E. 545 (1906): "Where, upon a trial for murder, the killing is shown to have been done with a deadly weapon, and the defendant relies upon accidental killing as an excuse, it is a question for the jury as to whether the killing was intentional, or the result of an accident. And when the evidence tends, in an

appreciable degree, to establish both theories, it is the duty of the Court to instruct the jury presenting both, if asked to do so."

On the evidence, the raising of the defense, and the request it was clear error for the Court to refuse the instructions and only instruct on murder and manslaughter.

4. THE STATE DID NOT DISPROVE SELF-DEFENSE OR DEFENSE OF OTHERS, BEYOND A REASONABLE DOUBT.

The evidence was undisputed that petitioner was faced with an assault (for the third time) by 6 assailants, on his front porch, with his children also threatened, and that he attempted to retreat. The evidence was overwhelming that Mac Lilly tried to either take the gun or turn it against petitioner. The prosecution's theory and argument was that in West Virginia you are entitled to take a mob of 6 people to stomp someone to revenge a relative and in a "fair fight" you don't carry or use a gun!

Where there is competent evidence to show that the accused believed and had reasonable grounds to believe, that he was in danger of losing his life or suffering great bodily harm at the hands of several assailants acting together, he may defend against any or all of said assailants ..." State v. Green, 157 W.Va. 1031, 206 S.E.2d 923 (1974). There was absolutely no evidence petitioner planned on shooting Mac Lilly, and in fact had not even met him before the previous evening, and

had last seen him after giving him a ride home once Mac Lilly was persuaded not to fight over the incident with Mark McBride.

In fact, as it was his household, Mr. Dinger had no duty to retreat, State v. Phelps, 172 W.Va. 797, 310 S.E.2d 863 (1983); State v. Preece, 116 W.Va. 179, 179 S.E.524 (1935); State v. Bates, 181 W.Va. 36, 380 S.E.2d 203 (1989) (per curiam).

The only evidence adduced by the State to disprove self defense was that the 3 assailants who testified said they weren't armed (yet Alex Cline said he told the others that he saw Dinger pick up the gun on the way out, and they still attacked !?!). They also testified falsely, against the testimony of Mr. Lane, that Mac Lilly stepped back 5, 6, or 8 feet and was shot; not at 18-24 inches and within the arms length of Mr. Dinger and Mac Lilly. All the circumstances were as said in Bates, supra, "When initially confronted, the defendant attempted to flee rather than shoot, even though there is evidence he had a pistol in his pants. This militates against a conclusion that he acted with malice or premeditation, or even recklessly or in the heat of passion." The State's evidence did not disprove self defense or defense of his children. In fact the statement of Alex Cline given to Deputy Worley was that he blocked Mr. Dinger's retreat and said "You're not getting a "f—ing" gun." Clearly Alex Cline thought somebody in Mr. Dinger's shoes would want a gun. Clearly Mac Lilly was not dissuaded by the gun, but attempted to take the gun or

shoot Mr. Dinger with his own gun. As in State v. Cook, 204 W.Va. 591, 515 S.E.2d 127 (1999), the defendant avoided the conflict, tried to terminate it, but here also tried to retreat. But unlike the Cook case, supra, this trial court didn't even adequately instruct the jury. Unlike Cook, supra, nobody had yet gotten "stomped" but it was clear what the intentions of those 6 assailants were, especially Mac Lilly and Mark McBride who had taken their shirts off to avoid getting Mr. Dinger's blood on them; who knew "the law" had been called; who had been repeatedly asked to leave; and who when confronted with a gun did not cease, but attempted to take the gun away.

It is as stated in Cook, supra, that a claim of evidentiary insufficiency faces a burden of showing that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Mr. Dinger had 5 more shots in the gun, one for each of the 5 assailants remaining. Even though they did not even then immediately retreat, not another shot was fired.

The only evidence of the State to rebut, which was patently false, was those assailants claimed Mac Lilly stepped back 5 or 6 or 8 feet and was then shot. This testimony of the other, surviving assailants was elicited by the State, and directly contradicted the testimony of State's witness, Rocky Lane. If clearly was perjury and should have been disregarded. Therefore the only competent evidence presented by the

State to rebut self defense or defense of others was the testimony of the same three perjurious witnesses that they were unarmed. Even if that were true, there was no evidence Mr. Dinger knew they were unarmed. Mr. Dinger was confronted with the immediate threat of mob violence against him and his sons, which mob was not dissuaded by the sight of a gun.

As a matter of law, the charge should have been dismissed on the right of defense of self and family.

5. THE COURT ERRED IN INSTRUCTING THE GRAND JURY, IN NOT ADVISING THEM THAT THEY COULD RETURN AN INDICTMENT FOR LESS THAN MURDER.

The Court granted defendant's pretrial motion for a transcript of the Grand Jury proceedings.

The transcript of the grand jury presentation that is a lot longer (in fact the longest the undersigned has ever seen) than usual. After 36 pages of the proceedings the Grand Jury had the following questions and the Judge was asked to instruct them:

"Mr. McNeely: What you all heard the judge say, you listen to the evidence, and if this is the only evidence you heard—you get the judge to explain what murder means because what the sheriff is here to do and I'm here to do in this case is we're attempting to lay out both sides as we understand it, as neutrally as we can and let the Grand Jury decide

whether a true bill ought to be returned. I would suggest you have the judge in to explain to you what murder means.

Grand Juror B: Can I just try to summarize what actually happened and see if I got it straight in my head? There are too many people.

Mr. Dinger, his two sons, and Tasha Pack were in this house on this morning, Saturday morning, and Mr. McBride and his friends came up, is that correct?

The Witness: Mr. McBride was there the night before.

Grand Juror B: All night?

The Witness: Most of the night. I think him and Mr. Dinger had a fight.

Mr. McBride said that Larry Dinger and Matthew Dinger beat him and kicked him with cowboy boots. In fact, he was beat up. Mr. Dinger said he hit him once because he kept wanting to fight with him. He left in the early morning hours and came back again, I believe Mr. McBride said there may have been another altercation. The Dingers say there wasn't and he left once. I think -- I don't remember exactly. I'm thinking he made like three trips and kept coming back. When he kept coming back, he kept bringing these little guys with him, basically kids, all like 20 years old.

And one of you asked me awhile ago about the alcohol content. It was .18, and the legal limit is .10.

Grand Juror T: What time of day was the shooting?

The Witness: He contacted me—I may be wrong on this. I think right after noon. I'm thinking.

Grand Juror J: Pictures were taken in the daytime?

The Witness: It was in the daytime, no doubt about that. It was mid day is what it was. 12:33 is when they called me. I think I arrived on the scene at like 12:47 --dispatched me at 12:31 and I arrived on the scene at 12:47.

Grand Juror B: You got Mr. Dinger, his two children and his girlfriend in a house and Mr. McBride is coming back more or less on his own and with friends even though they keep saying, "get out of here, go on," that kind of stuff, and he keeps coming with more people basically every time.

The Witness: Basically, what happened during the course of that morning up until the shooting occurred, there was never any altercation.

Grand Juror B: Then Mr. Dinger turns to go into the house and one of Mr. McBride's buddies stops him from going in. He is still on the porch with all these people Mr. McBride has brought there, and the situation is getting worse every time.

The Witness: Bear in mind that all six of these people weren't standing in front of him.

Grand Juror B: I know, but the people that are out there are all Mr. McBride's buddies?

The Witness: They were from —

Grand Juror J: He couldn't get away and he couldn't get inside. He was trapped.

The Witness: I can't show you this on the picture from probably here in this road maybe one or two of them in the yard. I have to review every one of the statements to be accurate.

Grand Juror B: Mr. Dinger drunk?

The Witness: No. He had been drinking the night before because they were all at the Bobcat Den. We put two of them out of the Bobcat's Den the night before.

Grand Juror W: Did any of these friends of McBride's – did you have to take weapons from any of them?

The Witness: No.

Grand Juror W: None of the other guys had anything?

The Witness: No.

Grand Juror W: Baseball bats, no nothing?

The Witness: Nobody had a weapon on that side of the team, whatever you want to call it. Only weapon I recovered was actually from a guy that was not even related. I don't know what his name was. I caught him going down the road with a loaded pistol. After I took the gun from him, I searched everybody else to make sure nobody else on the scene had a gun. I didn't want to get shot nor did I want anybody else shot.

By Mr. McNeely:

a. Statements taken from Mr. Dinger and his son, did they allege that anybody in the McBride party displayed baseball bats, rocks, weapons of any description?

A. Absolutely not. Nobody made any other than kick-your-butt threats, something like that. Something a bunch of guys who had too much alcohol might say. There was no other weapons, there was no sticks, no rocks, no baseball bats, nothing else involved weaponwise except the one Mr. Dinger had.

Mr. McNeely: Do you all want the judge to come in and explain what a murder indictment is?

(Judge Irons enters the Grand Jury room.)

Judge Irons: Is there a question?

Grand Juror J: We want you to define murder.

Judge Irons: Lesser included—

Mr. McNeely: What an indictment for murder would include.

Judge Irons: What lesser included offenses there are?

Grand Juror B: Uh-huh.

Judge Irons: Murder is murder. You got first degree murder, you got second degree murder, you got voluntary manslaughter, you got involuntary manslaughter, typically.

Grand Juror J: Can you differentiate?

Judge Irons: Well, involuntary manslaughter is just a misdemeanor. In every case you got someone that was killed. Maybe I should start at the top and work down.

The most serious type of murder is first degree murder, a crime for which the penalty is life imprisonment.

First degree murder—there are several different ways you can have first degree murder, but typically it's a murder that is a malicious killing of another human being. If there is premeditation, it's first degree murder; if there is no premeditation – if you think about killing them before killing them, that is premeditation. If there is premeditation, it's first degree murder. If there is no premeditation, it's second degree murder. Second degree murder is less serious. The penalty can be up to 40 years in the penitentiary. But in both first degree and second degree murder there has malice. If there is no malice, which can be voluntary manslaughter or involuntary manslaughter.

Voluntary manslaughter is where you intend to kill somebody but you're not acting in a malicious manner and that tends to be term of court sometimes about whether or not a person is acting in malicious fashion or not. Involuntary manslaughter is not a felony but still has a penalty of 5 to 18 years. Then there is lesser included offense of involuntary manslaughter sometimes referred to as negligent manner and somebody gets killed. It's a misdemeanor and carries a penalty of up to a year in jail.

Does that answer your question?

Grand Juror B: I think our question is if we think it's one of those lesser offenses.

Judge Irons: You can ask Mr. McNeely to go back and draft an indictment for one of the lesser offenses.

Grand Juror B: It's not necessarily a murder indictment. Say, if it was voluntary manslaughter, the indictment should read voluntary manslaughter. Does it all fall under murder?

Judge Irons: Typically, what happens is when a person is charged with murder, there is an indictment for simple murder and the petit jury sorts out what it is.

Grand Juror J: We don't have to sort it?

Judge Irons: No.

Grand Juror J: Thank you.

Grand Juror B: That's what he said, but he said you should explain it.

Mr. McNeely: They needed to ask you what a murder indictment meant.

Judge Irons: Okay.

Grand Juror J: Thank you, Judge.

(Judge Irons leaves the Grand Jury room.)

Grand Juror J: Are there any other questions?

The Witness: If it would help you understand maybe a little better, the last statement that I took concerning this investigation.

Mr. McNeely: This is from the individual about the car or something shooting the car?

The Witness: And the statement he made concerning this, would it help any? I took one last statement. I didn't actually take it, the State Police were talking to this guy about another incident and he volunteered to give them this statement concerning this. If it would help to maybe show maybe there was some thoughts about this beforehand. Would that help you any?

Grand Jury J: To me, a guy who walks out on the porch with a gun in the back of his pants is thinking about it. But if I'm carrying a gun, I'm thinking about using it. Otherwise, I don't carry it.

Mr. McNeely: Before you all get to deliberating, do you want us to read anymore statements or ask any more questions of us whatsoever, have the Sheriff go get this other statement? Anything else we would have, we will share it with you.

Grand Juror B: I don't think there is any doubt, based on what you said. There is a man dead and this man says he shot him. We were concerned about whether it's cold-blooded murder or self-defense.

Grand Juror A: It's not for us to say.

Mr. McNeely: that's why I said ask the Judge.

Grand Juror B: He answered that.

Mr. McNeely: So if there are not other questions, we will withdraw.

(WHEREUPON, the witness, the prosecutor, the court reporter left the grand jury chambers. At the conclusions of their deliberations, the prosecutor and the court reporter returned to the grand jury chambers and the proceedings were had as follows):

GRAND JURY FOREPERSON BALL: True bill."

(End of proceedings.)

The Court first of all, instructed the Grand Jury as to involuntary manslaughter as it being a misdemeanor (Tr. Grand Jury, p.41); then advised the Grand Jury it earned a (Felony) penalty of 5 to 10 years (Grand Jury transcript, p.42). He also advised them there was a "lesser" criminal offense of "negligent homicide" and that it carried a penalty of "up to a year in jail". (The penalty for involuntary manslaughter). The Grand Jury obviously was considering less than a murder indictment, but after the Judge told them "typically, what happens is when a person is charged with murder, there is an indictment for simple murder and the petit jury sorts out what it is.", the Grand Jury ended its deliberations with a juror statement that what the indictment should be was "It's not for us to say.", (Grand Jury transcript p. 44).

While an Indictment may be returned in the form of a charge of murder, W.Va. Code §62-9-3, the Court improperly gave the jury the advice that there was a "lesser offense" included of negligent homicide, and lead it to believe it was not their province to return an indictment for less than murder. It was stated in State v. Heaton, 23 W.Va. 73 (1883) that it is precisely the function of the Grand Jury to find that "the evidence required by law to provide that it is sanctioned by the accusing body." While the Court in this case did not deliberately seek to unfairly influence the Grand Jury, it did not properly advise the Grand Jury of its duty to find sufficient evidence as to the elements of the offense. See State ex rel. Hernstead v. Dostert, 173 W.Va. 133 313 S.E.2d 409 (1984).

While the role of the Grand Jury is minimized in its function as a limit on prosecutions, it should not be discarded. Where the Grand Jury was improperly and confusedly instructed on the law and advised it could abdicate all responsibility to a petit jury, the procedure in this case essentially voided any real purpose for a Grand Jury. Grand Juries do, on occasion, not return a true bill. The Grand Jury, where it was concerned about the level of the offense, was improperly advised to ignore its duty to consider the elements of the varying degrees of homicide, as well as its ability to not return a true bill, and "pass the buck."

Upon motion to quash the indictment, pretrial, the trial court denied the motion.

6. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER A SECOND OR FIRST DEGREE MURDER VERDICT.

There was absolutely no evidence of malice nor any of premeditation, outside use of a deadly weapon (State v. Kirtley, 162, W.Va. 249, 252 S.E.2d 374 (1978)).

The defendant was the victim of an unprovoked assault(s). State v. Morris, 142 W.Va. 303, 95 S.E.2d 401 (1956). He attempted to retreat inside his house from the porch. No substantial time elapsed between his being blocked from retreating to his producing the weapon to the deceased grabbing the weapon and trying to turn it against the defendant, and the discharge of the weapon. Since the defendant was "only" convicted of voluntary manslaughter this alone is not grounds for reversal of the verdict. Kirtley, supra. However, the evidence was without conflict (except the State's eyewitnesses contradicted the State's expert witness as to the distance at which the shot was fired.)

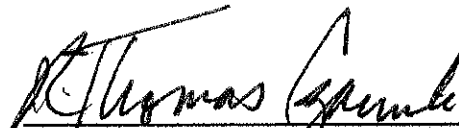
In the whole context of the case, the reality is that the trial court impermissibly broadened the scope of the jury's deliberations, which in fact benefited the State in obtaining a verdict of guilt as to any offense. It sent a message to the jury that they could consider murder versus manslaughter rather than manslaughter versus not guilty.

RELIEF REQUESTED

Petitioner requests that either that his conviction and sentence be vacated and the case remanded for entry of a judgment of acquittal; or that he be granted a new trial.

Dated this the 1st day of August, 2005.

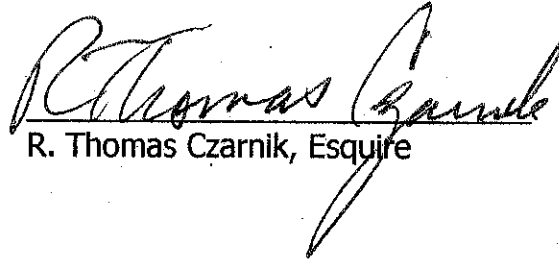
Respectfully Submitted



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CERTIFICATE OF SERVICE

I, R. Thomas Czarnik, hereby certify that I mailed by U.S. pre-paid postage a copy of the foregoing Brief on Appeal to Dawn E. Warfield, Esquire, Deputy Attorney General, Office of the Attorney General, Charleston, WV 25305; dated this the 1st day of August, 2005.



R. Thomas Czarnik, Esquire