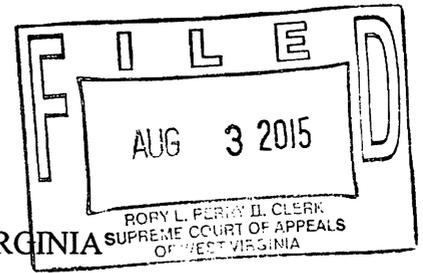


No. 15-0635



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Wiseman Construction Co., Inc., a West Virginia corporation,
Defendant Below, Petitioner,

v.

Maynard C. Smith Construction Company, Inc.,
a West Virginia corporation,
Plaintiff Below, Respondent;

David Tinchler, Director of the Purchasing Division of the
Department of Administration; West Virginia Lottery Commission,
a public corporation; John C. Musgrave, Director of the West
Virginia Lottery; Jason Pizatella, Cabinet Secretary of the Department
of Administration; and Robert S. Kiss, Cabinet Secretary of the
Department of Revenue,
Defendants Below, Respondents.

BRIEF OF MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.

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Defendants Below, Respondents.

BRIEF OF MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.

The Circuit Court of Kanawha County saved \$174,000 of scarce public funds by directing that a time-sensitive public construction project be completed by Maynard C. Smith Construction Company, Inc. (MCS), the undisputed low bidder.

The only basis for MCS's after-the-fact disqualification was a mistake in the State's instructions that, "The Proposal Form includes a section in which the references should be listed." The form had no such section, nor should it have – when construction of public facilities has already been designed and specified, as was the case here, the contract for the work is to be awarded to the licensed, bonded contractor who submits the lowest price. There is no authority for the State to alter these rules of the game with the subjective evaluation of "references."

The circuit court efficiently reviewed the parties' submission of the documentary evidence, conducted a hearing, and made detailed findings and conclusions to support the relief provided. This Court should affirm.

I. Statement of the Case

Under WVRAP 10(d), “no statement of the case need be made [in a respondent’s brief] beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner’s brief.” Petitioner Wiseman Construction Co., Inc., has relied largely on selected portions of the testimony of the witnesses called by the State who, of course, believed that they were correct in their challenged actions. Wiseman leaves unaddressed most of the evidence on which the circuit court relied, including other testimony of those same witnesses.

Each finding of the circuit court was amply supported by documentary evidence, the testimony of witnesses, or other proffered, undisputed portions of the record.¹ Those quoted below are particularly needful to augment Wiseman’s statement of the case.

<u>Finding</u>	<u>Appendix</u>
21. Notwithstanding Purchasing’s instruction, neither “SECTION I” nor “SECTION II” of Purchasing’s specified “BID FORM” (pages 00300-1 through -3) included a “section in which the references should be listed,” nor any other place where such information was invited or could reasonably have been provided. Nor was any information concerning references among the specified “REQUIRED DOCUMENTS” or otherwise addressed in Purchasing’s published requests for quotations.	019, 039, 045, 179-183
22. Both MCS and Wiseman, as well as the four other bidders on this project – The Neighborgall Construction Company, Jarrett Construction Services, Inc., BBL-Carlton, L.L.C., and Danhill Construction Company – are experienced contractors who have bidding histories with the State.	159

¹ Wiseman compares (pages 11-12) the circuit court’s findings to those proposed by MCS. “As an appellate court, we concern ourselves not with who prepared the findings for the circuit court, but with whether the findings adopted by the circuit court accurately reflect the existing law and the trial record.” *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996). *See also, Kalwar v. Liberty Mut. Ins. Co.*, 203 W. Va. 2, 7, 506 S.E.2d 39, 44 (1998) (“The defendant argues that a trial court cannot mechanically adopt findings of fact and conclusions of law proposed by an attorney. ... We have reviewed the circuit court’s order and hold that the findings and conclusions therein accurately reflect the existing law and the trial record.”). In any event, the judgment order (*App 002-014*) includes numerous findings and conclusions that differ from those proposed by MCS (*App 283-294*).

23. Wiseman, Neighborgall, and Jarrett submitted references on documents which were not part of the mandatory bid form or required documents provided by Purchasing. Wiseman included a list of Reference ## 1, 2, and 3 on a form not familiar to the Director of Purchasing but apparently taken from page “6” of some form of bid package, listing the names and contact numbers of several architects associated with other projects on which Wiseman had worked. Such a form was *not* included, either as page “6” or otherwise, in the Bidding Documents published by Purchasing for the subject CRFQ_LOT1500000004 and did not contain all of the information requested in the Qualification Statement. Neighborgall and Jarrett provided references on their own stationery. MCS, Danhill, and Carlton submitted their proposals with the specified “BID FORM” without any information concerning references.

019, 032, 159,
179-183

24. Wiseman’s “Reference #1” concerned a project involving “Exterior Historical Renovation / Restoration incl. Roofing,” and not a project for “building entrance and door replacement including selective demolition, carpentry, installation of replacement door frames, door and door hardware, remedial room finishing, and other related construction operations” as described in the instructions for the subject CRFQ_LOT1500000004.

019, 229-230

25. In evaluating the bids and in determining the lowest responsible bidder, the State did not even notice its mistake in the mandatory bid package forms, or the omission of references from half of the bid submissions, until the issue was raised by Wiseman after the apparent successful bidder was MCS.

075, 078, 191,
223

26. Though perhaps laudable on its face to have “references”, it is significant that neither Purchasing nor the Lottery nor anyone else has ever contacted the “references” submitted by Wiseman or otherwise made any use of that information other than in response to Wiseman’s request to disqualify MCS.

196-197, 202-
203, 205, 253-
254²

² Citing the testimony of Ms. Boyd, Wiseman emphasizes (page 3), that “[t]he call to [ZMM, Lottery’s consulting] architect about those references was made before litigation and during the review process. JA255.” This would be more precisely described as the “*re*-review process,” in that it came only *after* the initial determination to award the contract to MCS, and *after* the State’s receipt of Wiseman’s protest. No one with the Lottery or Purchasing had previously given any consideration whatsoever to any references or other indications of past experience, or the lack thereof, in any of the six contractors’ submissions. And, after receipt of Wiseman’s protest, the State’s consulting architects at ZMM relied on *their own* knowledge of the competing firms, *not* the thoughts of any of the references. Even up to the time of the hearing, no one with or acting on behalf of the State had made any contact with any of Wiseman’s references, nor suggested that they ever would have done so. The “references” were truly useless.

27. According [to] Defendant Tincher, the request for references is not typically practiced but may be used to assure a “qualified” bidder for a project in issue.	190, 194
28. Defendant Tincher could recall no other vendors being disqualified for not including references in a bid package, but since it was requested by the Lottery, who was also tasked with reference checks, in his opinion it was a mandatory requirement and not a “minor irregularity” which he had authority to waive.	216
29. Defendant Tincher agreed that a bad reference may not disqualify a vendor.	196-198
30. None of the “references” listed by Wiseman in the bid package were ever contacted, even during the “review process.”	217, 220, 230, 243, 265
31. The only “reference” ever consulted by any of the State Defendants was the Project Architect, Rodney Pauley, of ZMM, who worked on the project manual and other documentation (over 700 pages) which was part of the bid package. Mr. Pauley, consulted on March 23, 2015 (during the “review” process) indicated he was familiar with the work of both MCS and Wiseman, and they were <u>both</u> qualified to do the work required for the project.	243-244
32. Neither the Lottery nor Purchasing could specifically explain who requested that the 3 references be placed in the bid documents or why they were requested for this project.	193-194, 239, 245-249, 268- 269 ³
33. Neither of the other two of the three vendors who did not include references, including BBL Carlton Construction, the third lowest bidder, were disqualified.	262-263
34. Neither State Defendant asserts and the Court finds no need for references in evaluating competitive, fixed price proposals for an architect-designed and supervised, specification-based construction project to be performed by a license[d] contractor, subject to performance, maintenance, and payment bonding.	154-155, 219, 263

³ Cf., Wiseman Brief, page 12: “The language concerning identifying references had a legitimate and good governmental purpose intending as it obviously did to help assure that a qualified contractor for the job be selected.” No witness so testified, nor is there a single document that even suggests any such purpose.

In light of Wiseman’s wholesale reliance on State ex rel. E.D.S. Federal Corp. v. Ginsberg, 163 W. Va. 647, 259 S.E.2d 618 (1979), discussed below, a critical omission in its statement of the case is the fact that the State sought proposals to undertake architecturally designed and specified construction. The Director of Purchasing, Mr. Tincher, acknowledged that in such cases “the law says that we are required to award to the lowest bidder meeting specifications. ... I don’t know of any situation where we did not award a contract to the lowest responsible bidder on a construction contract.” *JA192, 196*. The Lottery’s witness, Ms. Boyd, also confirmed that the award was to be based solely on the prices proposed by qualified bidders, “the process being cost-driven.” *JA242, 263, 266*.

II. Summary of Argument

When specified construction services are sought from licensed, bonded contractors, the State must make the award to the low cost bidder. Only when State agency evaluations include substantive, qualitative criteria other than price are procurement decisions entitled to the deferential standard of “fraud, collusion, or such an abuse of discretion that is shocking to the conscience.”

In this case, the Lottery and Purchasing published instructions erroneously describing the required form, a mistake that resulted in only half of the experienced, qualified bidders providing needless “references.” By the State’s admission, nothing about “references” could lawfully inform the procurement decision, even if the information had been wittingly requested. Thus, the circuit court properly exercised its authority to correct the irrational disqualification of MCS, and to require that the public work be performed at the lowest cost.

III. Oral Argument and Decision

There is no substantial question of law other than those correctly resolved by the circuit court; this case can be resolved by memorandum decision. WVRAP 21(c). If argument is held, then MCS requests 20 minutes in which to address the Court. WVRAP 19(e).

IV. Argument

A. Standard of Review.

MCS agrees with Wiseman (page 6) that the circuit court's findings of fact are to be accepted in the absence of clear error, while its conclusions of law are to be reviewed *de novo*.

B. The Circuit Court Correctly Interpreted and Applied the Law to the Facts

1. Judicial Review of State Procurement Decisions⁴

Wiseman's position throughout this proceeding has been that Ginsberg

vests wide discretion in the public officials when awarding a contract to the lowest responsible bidder. Second, the agency is cloaked with the heavy presumption that the agency has properly discharged its duties and exercised its discretionary powers in a proper and lawful manner. Next, to be successful the challenger (in this case Smith [MCS]) has to show fraud, collusion, or such an abuse of discretion that it is shocking to the conscience, Ginsberg syl. pt. 3.

See Wiseman Brief, page 7 (emphasis by Wiseman). The State took the same position before the circuit court. *JA070*. MCS disagreed. *JA183*.

The judgment included (*JA012*) a finding that

10. It is fundamentally unfair for State agencies to pit qualified, sophisticated well-established businesses against one another to argue about the purpose of language in bid documents that no one in charge can explain where the language came from or why it was there or how vendors were supposed to furnish

⁴ This subsection is responsive to Wiseman's first assignment of error (pages 8-12). *See* RAP 10(d) ("Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible.")

it, and even upon the review of bids, was never reviewed or relied upon. It is indeed this conduct that is shocking to the conscience of the Court.

The circuit court's "conscience" is its own, and ample reason exists in the record to view the disqualification of MCS as "shocking." However, it remains our position that such a finding was not required in this cost-driven procurement of construction services.

Although they cited it repeatedly before the circuit court, neither Wiseman nor the State addressed the facts of Ginsberg, which involved the purchase of computer services:

The Department of Welfare did not establish detailed specifications for the hardware or the software involved in its Request For Proposal. The Department was soliciting both a specific way to solve its problem and a further definition of the problem. There are many ways to achieve a system for processing medicaid claims. The State's Request For Proposal and subsequent clarification through a question and answer session with representatives of the bidders on one side and the Department staff on the other gave notice that the purpose of the Request For Proposal was to generate creative alternatives for managing medicaid claims.

Ginsberg, 163 W. Va. at 650-651, 259 S.E.2d at 621 (footnote omitted). The analogue to this approach in procuring construction services has come to be known as "design-build."

"Design-build" is defined as providing responsibility within a single contract for design, construction or alteration of a building or buildings, together with incidental approaches, structures and facilities to be constructed, in which services within the scope of the practice of professional engineering or architecture, as defined by the laws of the State of West Virginia, are performed by an engineer or architect duly licensed in the State of West Virginia and in which services within the scope of construction contracting, as defined by the laws of the State of West Virginia, are performed by a contractor qualified and licensed under the applicable statutes. The design-build method of construction may not be used for any other construction projects, such as highway, water or sewer projects.

See W. Va. Code § 5-22A-2(3).

The Lottery building renovation at issue in this case was *not* design-build. Rather, the State took the traditional approach: the Lottery hired its own architect to design and specify the project, and contractors then submitted fixed-price bids to complete the work. This distinction is essential to understand Syllabus Point 3 and the rest of this Court's Ginsberg opinion:

A State agency which awards a public contract upon criteria *other than price* is clothed with a heavy presumption that the contracting agency has properly discharged its duties and exercised discretionary powers in a proper and lawful manner; accordingly, the burden of proof in any action challenging the award of a contract by an unsuccessful bidder or a taxpayer is upon the challenger who must show fraud, collusion, or such an abuse of discretion that it is shocking to the conscience.

* * * *

It might be instructive to analogize the case before us to a simpler problem which could arise in a State Hospital. If the State Department of Health were to request bids for the delivery of one crate of U. S. Government Grade A eggs to Weston State Hospital every Monday morning the specifications would be sufficiently definite that only price and reliability need be considered. On the other hand, if the Department of Health requested a proposal for the overall feeding of inmates at Weston State Hospital, price alone would not be the only criterion. Let us assume that two proposals were received: the first proposal set a price of \$2.19 per inmate per day with a menu dependent upon heavy starches including a meat meal three times a week; the second proposal set a price of \$2.50 per inmate per day and included a roast beef or chicken meal on Sundays along with one meat meal every weekday. Certainly *under these conditions* the Department of Health would be entitled to consider the second proposal the better bid notwithstanding its slightly higher per unit price. This is exactly the type of evaluation process which occurred in the case before us.

* * * *

The Court is troubled by the potential for litigation where a contracting agency legitimately predicates its award of a contract on criteria other than price, yet we are reluctant to avoid one evil by denying access to the courts along the lines articulated in *Pioneer v. Hutchinson*, supra lest we foster a new evil, namely cavalier disregard for the public's interest in efficient public expenditures. Consequently, when the State finds that *criteria other than price* militate in favor of accepting a higher bid the wisest course, particularly when litigation is anticipated, is to file a written opinion along with the bid award setting forth the criteria relied upon in awarding the contract. If, for example, a State agency has had experience with the low bidder before which demonstrates great unreliability of delivery dates, that fact should be set forth in the opinion. While such an opinion is not mandatory, it is enormously useful to a trial court attempting to understand the motivation of the contracting authority; since great discretion is reposed in the contracting authority by statute, the courts should not guarantee any particular result, but rather only the rationality of the process by which the results are determined and the fidelity with which the contracting authority is following the statutory directives.

Ginsberg, Syl. Pt. 3, 163 W. Va. at 657, 660, 259 S.E.2d at 624, 626 (emphases added).

As District Judge Goodwin noted in Mid Atlantic Storage Systems, Inc. v. City of Milton,

903 F. Supp. 995 (S. D. W.Va. 1995):

In *State ex rel. E.D.S. Federal Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979), the state supreme court discussed the breadth of discretion that courts should give the state and its subdivisions in determining which bidder is the lowest responsible bidder within the meaning of *W.Va.Code* § 5-22-1 (1994). Although this case raises a slightly different issue -- when original bids may be rejected and new bids solicited -- than does *Ginsberg* and involves procedural concerns not the subject of *Ginsberg*, *Ginsberg* offers insights into the public policy and practical concerns that inhere in a court's decision to interfere in a municipality's bidding process. *Ginsberg* involved the challenge of an unsuccessful bidder to the West Virginia Department of Welfare's decision to award a contract for a new computer system for Medicaid claims to The Computer Company instead of the plaintiff. The *Ginsberg* court declined to second guess the Department's decision because of the complexity and subjective nature of that decision.

In so doing, the *Ginsberg* court distinguished between court intervention into the substantive and the procedural parts of a government body's decision making process. According to the *Ginsberg* court, trial courts should not substitute their judgment for that of the state or its subdivisions in cases in which subjective factors beyond price come into play. "Certainly," explained the Court, "[s]tate officials are not required to accept the lowest price where service, delivery dates, continuity in supply, and other factors not directly related to cost are involved, particularly where these elements have a far greater impact upon the efficiency of [s]tate government than minor differences in price." *Ginsberg*, 163 W.Va. at 659, 259 S.E.2d at 626. The lesson applicable to this case is that the Court should not second guess the City of Milton's decision to include or not to include cathodic protection in the specifications for welded-steel tanks unless that decision resulted from fraud or collusion or was *obviously* wrong. Only in the rarest of instances will a court find that technical issues over which engineers disagree have an *obviously* right or wrong answer.

Mid Atlantic Storage Systems, Inc., 903 F. Supp. at 997.

This is not the first occasion on which the Circuit Court of Kanawha County has corrected an irrational decision to disqualify a low bidder through needless, mistaken formality. Schindler Elevator Corporation v. Tincher, et al., No. 04-MISC-0313 (Circuit Court of Kanawha County, April 6, 2005) addressed the disqualification of a low bid on the ground that the corporate seal appeared on a separate page attached to a bid bond. No one suggested that there

had been anything fraudulent, collusive, or otherwise nefarious on the State's part. Nor did the circuit court address whether its "conscience" was "shocked." The contract was simply directed to the contractor that submitted the low bid. *JAI20A-K* (pending amendment).

MCS respectfully suggests that, in light of Ginsberg, Mid Atlantic Storage, and Schindler, trying to calibrate conscience-shocking public procurement with cases involving altered deeds, governmental land seizure, judicial sales of realty, excessive jury verdicts, police brutality and other civil rights violations (*see* Wiseman Brief, pages 8-11) is a needless exercise that misapprehends the law. The circuit court did exactly what it should have done: consider the rationality of the State's decision to disqualify the low bidder, MCS, given the nature of the procurement, *i.e.*, the completion of specified construction services by bonded contractors subject to licensure under West Virginia law. As shown below, the circuit court correctly applied that standard.

2. MCS's Disqualification Was Irrational and Appropriately Redressed⁵

The bid package, on its face, contained an aberrant instruction. The solicitation was so flawed that half of the contractors who responded treated the instruction as the mistake it was.

21. Notwithstanding Purchasing's instruction, neither "SECTION I" nor "SECTION II" of Purchasing's specified "BID FORM" (pages 00300-1 through -3) included a "section in which the references should be listed," nor any other place where such information was invited or could reasonably have been provided. Nor was any information concerning references among the specified "REQUIRED DOCUMENTS" or otherwise addressed in Purchasing's published requests for quotations.

* * * * *

23. Wiseman, Neighborgall, and Jarrett submitted references on documents which were not part of the mandatory bid form or required documents provided by Purchasing. Wiseman included a list of Reference ## 1, 2, and 3 on a

⁵ This subsection is responsive to Wiseman's second and third assignments of error (pages 12-16).

form not familiar to the Director of Purchasing but apparently taken from page “6” of some form of bid package, listing the names and contact numbers of several architects associated with other projects on which Wiseman had worked. Such a form was *not* included, either as page “6” or otherwise, in the Bidding Documents published by Purchasing for the subject CRFQ_LOT1500000004 and did not contain all of the information requested in the Qualification Statement. Neighborgall and Jarrett provided references on their own stationery. MCS, Danhill, and Carlton submitted their proposals with the specified “BID FORM” without any information concerning references.

JA008, 009.

But even if the State’s bid package *had* included a “section in which the references should be listed,” the information could never have lawfully informed a rejection of MCS’s low bid. Purchasing and the Lottery were both invited repeatedly to show otherwise.⁶ When they failed, the circuit court appropriately determined that for the State to have sought, talked to, or otherwise relied upon “references” in selecting a contractor for the Lottery building renovations would have been not only useless, but lawless:

34. Neither State Defendant asserts and the Court finds no need for references in evaluating competitive, fixed price proposals for an architect-designed and supervised, specification-based construction project to be performed

⁶ When questioned about the efficacy of the requirement of “references” from licensed, bonded contractors, Mr. Tincher agreed that such a condition could create unprecedented problems:

Q Would you agree with me that if this instruction were to be interpreted and used in such a fashion it’s going to tilt the playing field and startup companies, neophytes, even though they are well-qualified by personal experience, even though they have a bond, even though they have a license as prescribed by our laws, they are not even going to be allowed to compete for this project, are they?

A No.

Q Are you aware of any construction project [let] by the State of West Virginia in your 18-year history in which a bidder has been deemed disqualified because the entity did not have requisite experience by prior construction projects?

A I don’t recall any.

JA198.

by a license[d] contractor, subject to performance, maintenance, and payment bonding.

* * * *

9. The Legislature has not statutorily authorized, nor has Purchasing promulgated rules, under which references are to be sought or utilized in the evaluation of competitive bidding on construction projects. *Cf.*, W. Va. Code §§ 5A-3-3 to -5; CSR §§ 148-1-1, *et seq.* Nor has Purchasing mentioned references in the “Vendor Procurement Guide” (September 2014), “Agency Master Terms and Conditions” or AIA A101-2007 and A201-2007 mentioned therein (04/13/2015), or “Purchasing Master Terms and Conditions” (04/13/2015), each published on Purchasing’s website.

JA010, 012. Thus, the circuit court could only conclude:

11. The plaintiff in this case has clear right to the relief sought as set forth in Ginsberg. The plaintiff has established through the uncontroverted and overwhelming weight of the evidence that the process utilized by the State Defendants in disqualifying the plaintiff as a bidder for the construction project in issue was fatally flawed.

12. Further, the State Defendants have a legal duty to assure that the processes by which bid documents are reviewed and awards are made are done in a manner that assures the integrity of the process without an abuse of discretion that results in an outcome not supported by any factual rationale or legal authority.

13. The Code of State Rules governing the Purchasing Division of the Department of Administration, CSR §§ 148-1-1, *et seq.*, “is an explanation and clarification of operative procedures” of the agency.

14. Specifically, CSR § 148-1-4.6 authorized the Director to “waive minor irregularities in bids or specifications when the Director determines such action to be appropriate”. In this case, the Director determined he had “no authority” to determine that the “mandatory requirement” for references to be waived as he deferred to the Lottery’s discretion to include that “requirement”. Based upon the evidence, and the lack of any rationale in requiring vendors to include three references for this project, this Court finds it was indeed within the discretion of the Director to waive this unexplained anomaly in the bid documents.

15. This is not a matter of a Court deciding what would best suit the needs of a state agency, in this case, the Lottery. This Court finds that the State Defendants’ decision to disqualify MCS and to award the contract to Wiseman is completely irrational and has no support in the statutory law, the enacted code of the state rules or any precedent in any state or federal court. See generally, Mid

Atlantic Storage Systems, Inc. v. [City] of Milton, et al., 903 F. Supp. 995 (S. D. W. Va. 1995).

16. MCS is a qualified, responsible and disappointed bidder whose proposal conformed to all lawful, rational requirements of the bidding process.

JA012, 013.

District Judge Goodwin's understanding of Ginsberg is again instructive in this context:

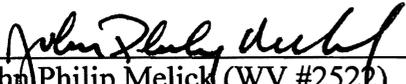
The *Ginsberg* court, however, emphasized that the *process* of making decisions should be rational. According to the court, "[t]here is no question that a bidder who goes to the expense of preparing a complex proposal has the right to rely upon both the contracting authority's integrity and intelligent use of discretion." *Id.*, 163 W.Va. at 657, 259 S.E.2d at 625. Furthermore, "courts should not guarantee any particular result, but rather only the rationality of the process by which the results are determined..." *Id.*, 163 W.Va. at 657, 259 S.E.2d at 626. The Court **FINDS** that the City of Milton's decision to rebid the contract was based on a significant misunderstanding and thus was not rational. Furthermore, the Court **FINDS** that the proper remedy for this procedural defect is to place the parties in the positions that they were in before the misunderstanding occurred.

Mid Atlantic Storage, 903 F. Supp. at 997.

V. Conclusion

This Court should affirm the judgment.

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