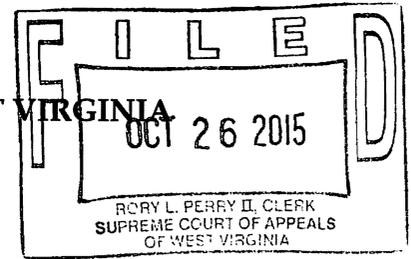


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

V.

No. 15-0684

**SCOTT A. NEAL, Defendant Below,
Petitioner**

PETITIONER'S BRIEF

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TABLE OF CONTENTS

I.	Assignments of Error	1
II.	Statement of the Case	2
III.	Summary of Argument	7
IV.	Rule 18(a) Statement and Rule 20 Request for Oral Argument	11
V.	Argument	12
	1. The Trial Court improperly denied the Defendant’s motions for acquittal based upon the State’s failure to meet the burden of reasonable doubt.	12
	a. The Trial Court misapplied the standard for Self-Defense set forth in <i>State v. Phelps</i> , 172 W. Va. 797, 310 S.E. 2d 863, 1983 W. Va. LEXIS 638 (W.Va. 1983) by limiting Self-Defense to those situations where the Defendant would only be in danger of serious bodily injury or death.	12
	b. The Trial Court erroneously found that the Defendant was not a resident of the home in which he was residing.	17
	2. The Trial Court erred in not making a finding that the Defendant “breached the peace” when brandishing the knife in his own home.	19
	3. The Trial Court erred in not permitting the Defendant to call a witness during the trial in this matter.	21
VI.	Conclusion	25
VII.	Certificate of Service	

TABLE OF AUTHORITIES

CASES

<i>Chrystal R. M. v. Charlie A. L.</i> , 194 W. Va. 138, 459 S.E. 2d 415 (1995).....	19, 21
<i>General Elec. Credit Corp. v. Timbrook</i> , 170 W. Va. 143, 291 S. E. 2d 383 (W. Va. 1982)..	21
<i>Rock v. Arkansas</i> , 483 U.S. 44, 107 S. Ct. 2704 (U.S. 1987).....	22
<i>State v. Baker</i> , 177 W. Va. 769, 356 S.E. 2d 862, (W. Va. 1987).....	13
<i>State v. Clark</i> , 51 W. Va. 457, 41 s.E. 204 (1902).....	14
<i>State v. Harden</i> , 223 W. Va. 796, 679 S.E. 2d 628, (W. Va. 2009).....	14, 15, 18,
<i>State v. Juntilla</i> , 227 W. Va. 492, 497, 711 S.E. 2d 562, 567 (2011) (per curiam).....	12
<i>State v. LaRock</i> , 196, W. Va. 294, 304, 470 S.E. 2d 613, 623 (1996).....	12
<i>State v. Laura</i> , 93 W. Va. 250, 256-57, 116 S.E. 251, 253 (1923).....	14
<i>State v. Long</i> , 88 W. Va. 669, 108 S.E. 279,(W. Va. 1921).....	20
<i>State v. Manns</i> , 48 W. Va. 480, 37 S.E. 613 (1900).....	14
<i>State v. Minigh</i> , 224 W. Va. 112, 124, 680 S.E. 2d 127, 139 (2009) (per curiam).....	12
<i>State v. Phelps</i> , 172 W. Va. 797, 310 S.E. 2d 863 (W. Va. 1983).....	5, 12, 13, 15, 16
<i>State v. Preece</i> , 116 W. Va. 176, 179 S.E. 524 (1935).....	14, 16, 17, 18
<i>State v. Schlatman</i> , 233 W. Va. 84, 88, 755 S.E. 2d 1, 5 (W. Va. 2014).....	22, 23
<i>State v. Ward</i> , 188 W. Va. 380, 424 S.E. 2d 725 (1991).....	23
<i>State v. W.J.B.</i> , 166 W. Va. 602, 276 S.E. 2d 550 (1981).....	13, 14, 15, 16, 17
<i>United States v. Valenzuela-Bernal</i> , 458 U.S. 858, 867 (1982).....	22
<i>Washington v. Texas</i> , 388 U.S. 14, 17-19 (1967).....	22

UNITED STATES CONSTITUTION

U.S. Const. amend. VI21, 22, 23

U.S. Const. amend. XIV.....21, 22

STATUTES

W. Va. Stat. §61-7-11.....19

W. Va. RULES OF CRIMINAL PROCEDURE

W. Va. Rules of Criminal Procedure, Rule 1623

Assignments of Error

I. The Trial Court improperly denied the Defendant's motions for acquittal based upon the State's failure to meet the burden of reasonable doubt.

- a. The Trial Court misapplied the standard for Self-Defense as set forth in *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d 863, 1983 W. Va. LEXIS 638 (W. Va. 1983) by limiting Self-Defense to those situations where the Defendant would only be in danger of serious bodily injury or death.
- b. The Trial Court erroneously found that the Defendant was not a resident of the home in which he was residing.

II. The Trial Court erred in not making a finding that the Defendant "breached the peace" when brandishing the knife in his own home.

III. The Trial Court erred in not permitting the Defendant to call a witness during the trial in this matter.

Statement of the Case

On Wednesday, February 11, 2015, Fayette County Sheriff's Deputy W. R. Callison responded to a domestic battery complaint at 101 Britt St., Ansted, Fayette County, West Virginia. Appendix I, pg. 6. Upon arriving at the scene Deputy Callison observed Susan Showalter and Debbie Showalter who appeared to have lacerations on their hands which were bleeding. Id.

The victim, Susan Showalter, stated that she had arrived at the residence at sometime before noon. Appendix II, pg. 8. Susan Showalter and her mother, Debbie Showalter, had gone to the Fayette County Family Court for a mediation between Susan Showalter and the Defendant's brother, Steve Neal, concerning the custody and placement of their minor son. Id., pg. 7. Susan Showalter stated that she had been told by the Family Court Clerk, Vickie Jones, that Steve Neal had called the Family Court and said that his vehicle had broken down and he was unable to be present at the scheduled mediation. Id., pg. 7.

It was the testimony of Susan Showalter that Vickie Jones had told her that she could go to the Neal residence and try to get her child. Id., pg. 8. Susan Showalter and Debbie Showalter then drove from the Family Court in Fayetteville to the Neal residence in Ansted to retrieve her child. Id. Susan Showalter then went into the home of the Defendant, Scott Neal, and his brother, Steve Neal, *unannounced, and uninvited.* Id., pp. 18-19.

Susan Showalter went directly over to the child, picked him up, and then attempted to flee the residence. Id., pg. 20. At that point Steve Neal confronted Susan

Showalter after discovering her in his home, cursed at her, and attempted to physically prevent her from removing the child from his home. Id., pp. 20-21.

At this point the Defendant, Scott Neal, was awakened by the altercation and came out of his bedroom to discover his brother fighting with Susan Showalter over the minor child which was in between them. Id., pp. 48-50.

Susan Showalter states that during the altercation Scott Neal pushed her into the storm door, which broke the glass and caused lacerations on her arms, but Scott Neal testified that the overall movement of the fight, being in close proximity to the front doorway, inadvertently caused Susan to be pushed into the door. Id., pp. 12, 22, 50.

Scott Neal was able to separate Susan Showalter and Steve Neal and get the child free from the struggle. Id., pp. 50-51. Upon getting the child free Susan Showalter and Debbie Showalter, who at this point had also entered the home with a weapon in the form of a mop/broom handle, began to assault Scott Neal inside the home. Id., pp. 51-53, 42-43, 30, 33-34, 23-24.

During Susan and Debbie Showalter's assault on the Defendant, Scott Neal stepped several feet into the kitchen and grabbed a handful of knives from the dish strainer and said something to the effect of "I'll get you all out of here." Id., pp. 24, 31, 34, 43, 51.

At this point Debbie Showalter had used her cell phone to dial 911, and stated to the 911 operator that Scott Neal had "gotten knives." Id., pg. 31. Debbie Showalter and Susan Showalter then went outside to await the arrival of law enforcement. Id., pg. 32.

Deputy Callison arrived on the scene shortly after the 911 call and interviewed Scott Neal, Debbie Showalter, Susan Showalter, and Steve Neal. Id, pg. 38. After completing his investigation, Deputy Callison arrested Susan Showalter for Trespassing, Battery, and Domestic Battery; Debbie Showalter for Assault; Steve Neal for Domestic Battery; and Scott Neal for Brandishing. Id, pp. 42-43.

At trial the State questioned Deputy Callison as to whether the incident was charged as a "Mutual Combat" to which Deputy Callison responded that it was not mutual combat. Id, pg. 43.

It was the testimony of Debbie Showalter at trial that Susan Showalter "pled guilty to domestic battery and no contest to the other two" and that Debbie Showalter pled "no contest." Id, pg. 35.

A bench trial was held in the matter on May 5, 2015 in Fayette County Magistrate Court where the Defendant and his brother, Steve Neal, were tried together; Scott Neal on the lone charge of Brandishing a deadly weapon in violation of W. Va. Code §61-7-11, and Steve Neal was tried on the charge of Domestic Battery. Appendix I, pp. 5, 7. Scott Neal was sentenced to a \$50.00 fine and assessed Court costs. Id, pg. 5.

The Defendant appealed his conviction within the time periods to Circuit Court and a Bench trial was held on the appeal on June 16, 2015. Appendix I, pg. 18, Appendix II, pg. 3. At some time prior to the June 16, 2015 trial, counsel for the State went to the Circuit Judge *ex parte* for the purposes of having the Defendant's Counsel removed from the case due to the fact that the Defendant was only fined in Magistrate Court and therefore would no longer qualify for Court-Appointed Counsel. Appendix

II, pg. 4. The Court ordered a bench trial set for June 3, 2015 and did not notice Counsel for the Defendant. Appendix I, pg. 21.

On June 3, 2015, the Defendant did not appear at the bench trial and the Court discovered that the Defendant was not served notice at the address which he placed on his appeal from Magistrate Court, so the Court rescheduled the hearing for June 16, 2015, again not sending notice to Counsel for the Defendant. Appendix I, pp. 30-31.

Counsel for the Defendant found out about the trial the day before the trial on June 15, 2015 during a phone call with the Court's Secretary in which he was inquiring about whether or not the matter had been set for a hearing. Appendix II, pg. 4. Counsel for the Defendant immediately went to the Judge's chambers and informed the Court that he would be representing the Defendant PRO BONO PUBLICO¹, and no further charges would be invoiced to Public Defender Services in regard to the representation of the Defendant. Id.

At the close of the State's case at the June 15, 2015 trial, Counsel for the Defendant moved the Court to dismiss the Complaint against the Defendant based on a theory of self-defense, citing *State v. Phelps*, 172 W. Va. 797, 310 S.E. 2d 863 (W. Va. 1983). Appendix II, pp. 45-46.

The Court ruled that the Defendant, Scott Neal, was not in his home and that there was no evidence that "he was in danger of serious bodily injury or death" and denied the Defendant's motion to dismiss. Id., pp. 46-47.

¹ The undersigned Counsel is still representing the Defendant on a PRO BONO PUBLICO basis and will not present a bill to Public Defender Services, or anyone else, for his representation of the Defendant in this matter after the decision of the Magistrate Court on May 5, 2015.

The Defendant testified in his own defense that he was living at his brother's house at the time of the incident, had his own bedroom there, and resided there for four months at the time of the incident. Appendix II, pg. 48.

At the conclusion of the Defendant's testimony, Counsel for the Defendant called the Defendant's girlfriend, who was in the home at the time of the incident. Appendix II, pg. 54. Counsel for the State objected as they had received no witness list from the Defendant prior to the hearing. Id., pg. 55. Counsel for the Defendant reiterated that the hearing was not properly noticed. Id.

The Court observed a woman sitting in the gallery of the Courtroom and asked if she was the Defendant's girlfriend. Id. Defense Counsel informed the Court that it was the Defense Counsel's wife. Id. The Court then upheld the State's objection and did not permit Ashley Hudson, the Defendant's girlfriend, to testify.

As the Defendant had no further witnesses, Defense Counsel renewed the Defendant's Motion to Dismiss grounded on self-defense based on physical violence against him from unlawful intruders in his home. Appendix II, pp. 54-55. Further, Defense Counsel argued that it would be impossible for the Defendant to breach the peace, as required by the statute, in his own home against two intruders who were engaging him in acts of physical violence. Id., pp. 58-59.

The Court found that the Showalters "shouldn't have been over there to that home that evidently was owned or rented by the defendant's brother." Appendix II, pg. 60. The Court went on to find that the Defendant had no right to get involved in the altercation and had a duty to retreat to his bedroom, close the door and get back in bed

with his girlfriend. Id. The Court then went on to find that Scott Neal “on this particular day in question did brandish a dangerous and deadly weapon, a knife” and affirmed the decision of the Magistrate Court. Id.

Summary of Argument

The Petitioner's conviction must be overturned for the following reasons:

1. The Trial Court erroneously held that the Defendant was not entitled to an acquittal based upon self-defense because he was not in danger of "death or serious bodily injury." The proper finding, consistent with the Supreme Court's ruling in *State v. Phelps* would have included an analysis of whether the Defendant was facing "imminent physical violence."

It is clear from the testimony of every person at trial, including the victims, that the victims were uninvited, unannounced trespassers in the home of the Defendant, that Susan Showalter initiated physical violence, and further, was trying to remove a child from the Defendant's home, and that the victim, Debbie Showalter, entered the home with a weapon and physically assaulted the Defendant.

The Defendant was within his rights to use whatever force was necessary to remove the intruders from his home, and only after facing continual violence from both assailants did he brandish, at worst, a handful of steak knives. This would not even rise to the level of deadly force, but was merely a threat if violence were to have continued.

The Defendant ceased brandishing the knives as soon as the assailants left his home. It is clear from the record that there was a measured restraint on the part of the Defendant to meet "force with force."

The Trial Court also erroneously found that the Defendant was not residing in the home of his brother, even though he had lived there for a period of four months,

had his own bedroom and he affirmatively testified he was living in the home at the time of the incident.

The record is clear that the Defendant was residing in the home, and the Trial Court's ruling that he needed to be an owner or renter of the home is erroneous based upon the consistent rulings of the Supreme Court.

2. The Trial Court made findings that the Defendant did in fact brandish a deadly weapon, but failed to make a finding that the brandishing of that weapon was in fact a breach of the peace.

The victims/assailants had breached the peace when they unlawfully trespassed into the home, started a physical altercation, and assaulted the Defendant with a weapon.

It is impossible then for the Defendant to breach the peace when the peace had already been breached by the intruder assailants.

The statute under which the Defendant was charged and convicted, W. Va. Code §61-7-11 clearly states that the Defendant must have brandished or used "such a weapon in a way or manner to cause, or threaten, a breach of the peace."

The Defendant was in his own home, and the assailants breached the peace by entering that home and causing a physical altercation, and moreover, escalated that physical altercation by introducing a weapon to the situation. It is impossible for the Defendant to then breach the peace when the breach had occurred due to the alleged victims' conduct.

3. The trial court erred when refusing to allow the Defendant to call Ashley Hudson as a witness at trial.

The Defendant attempted to call Ashley Hudson as a witness at trial as she was in the home on the day in question at the time of the incident and her testimony could have corroborated the Defendant's testimony, aided in proving the Defendant's assertion of self-defense, or otherwise advanced his case.

The State's Attorney objected to the calling of the witness, citing that the Defendant had not provided a witness list or otherwise notified the State she would be a witness.

The Defendant responded that there was good cause for not notifying the State of the witness in that neither the State or the Court notified Defense Counsel of the Trial date and Defense Counsel only learned of the Trial the day prior to the hearing.

The Court should have found that the Defendant was not malicious in failing to provide a witness list to the State, and the Court should have ensured that the Defendant's rights to compulsory process and to present witnesses in his own defense were upheld.

Rule 18(a) Statement and Rule 20 Request for Oral Argument

In accordance with Rule 10(6) of the West Virginia Rules of Appellate Procedure, the Petitioner states that (1) he does not waive oral argument in this case, (2) this appeal is not frivolous, (3) the dispositive issues in this case have not been authoritatively decided, and (4) the decisional process would be aided by oral argument as certain matters in contention in this appeal are of first impression.

The Petitioner requests Oral Argument in this case pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. In support of the Petitioner's request, the Petitioner alleges that:

1. This is a case of first impression as to the application of the self-defense standard set out in *State v. Phelps*, 172 W. Va. 797, 310 S.E. 2d 863 (W. Va. 1983) in situations not involving death or serious bodily harm.
2. This is a case of fundamental public importance pertaining to the use of force in defending one's home and person against unlawful trespassers causing physical violence in one's own home.
3. This case involves constitutional questions as to the Defendant's due process rights in calling witnesses to testify on his behalf.
4. This case involves a ruling by the Circuit Court that is inconsistent with the clear direction of the Supreme Court in regard to the standard for self-defense set out in the Court's ruling in *State v. Phelps*, 172 W. Va. 797, 310 S.E. 2d 863 (W. Va. 1983).

Argument

I. The Trial Court improperly denied the Defendant's motions for acquittal based upon the State's failure to meet the burden of reasonable doubt.

- a. The Trial Court misapplied the standard for Self-Defense as set forth in *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d 863, 1983 W. Va. LEXIS 638 (W. Va. 1983) by limiting Self-Defense to those situations where the Defendant would only be in danger of serious bodily injury or death.**

"The Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011) (per curiam) (citing *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)). *Accord State v. Minigh*, 224 W. Va. 112, 124, 680 S.E.2d 127, 139 (2009) (per curiam).

The Defendant used only the amount of force necessary to repel his assailants in his own home, did not use deadly force, was justified in his actions in regard to the incident before the Court, and his reliance upon the defense of self-defense should have resulted in a dismissal of the charges against him in the Trial Court.

The West Virginia Supreme Court set out the test for self-defense in one's own home against an intruder in Syllabus Point 5 of *State v. Phelps*, :

"The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the

commission of a felony and the occupant reasonably believes deadly force is necessary." *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d 863, 1983 W. Va. LEXIS 638 (W. Va. 1983) *citing* Syllabus Point 2, *State v. W.J.B.*, 166 W.Va. 602, 276 S.E.2d 550 (1981).

The facts of the case before the Court are unique in that the Defendant did not actually use deadly force against the intruders, but only grabbed a knife or handful of knives from the kitchen during an assault on his person in his home. Appendix II, pp. 24, 31, 34, 43, 51.

What is not unique is that the assailants, Debbie and Susan Showalter, admitted in their testimony that they were trespassing, admitted they assaulted the Defendant in his home, admitted they were uninvited in his home, and admitted that they continued to assault him up until the time he grabbed several knives out of a kitchen dish strainer. Appendix II, pp. 17-18, 24, 28, 30-32, 35.

The amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return. Syllabus Point 1, *State v. Baker*, 177 W. Va. 769, 356 S.E.2d 862, 1987 W. Va. LEXIS 538 (W. Va. 1987).

Even if the Defendant was not justified in using the amount of force he used against his assailants, the Trial Court should have found that the level of force with which he met his attackers only escalated as the number of attackers increased and the attackers introduced weapons to the situation. The use of force the Defendant utilized

in repelling his was his action of grabbing a handful of, at best, steak knives. Appendix II, pg. 43.

The Defendant's utilization of a handful of steak knives from a dish strainer can hardly be classified as "deadly force," and the State could hardly deny as much as he was charged with the misdemeanor crime of brandishing. Appendix I, pg. 8.

If the Defendant's use of force was to be compared to the force utilized by his assailants, however, the Defendant would still be justified in his actions and entitled to an acquittal based upon self-defense.

The Supreme Court said in *State v. W.J.B.*:

"a person has the right to repel force by force in the defense of his person, his family or his habitation, and if in so doing he uses only so much force as the necessity, or apparent necessity, of the case requires, he is not guilty of any offense, though he kill his adversary in so doing." *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550, 1981 W. Va. LEXIS 586 (W. Va. 1981). "

State v. Laura, 93 W. Va. 250, 256-57, 116 S.E. 251, 253 (1923), referring to an instruction from *State v. Manns*, 48 W. Va. 480, 37 S.E. 613 (1900). *State v. Preece*, 116 W. Va. 176, 179 S.E. 524 (1935); *State v. Clark*, 51 W. Va. 457, 41 S.E. 204 (1902).

In determining the availability of self-defense to a criminal defendant, the Court in *State v. Harden* developed a five part test:

1. The Defendant must not have been the aggressor.

2. The Defendant must have a reasonable basis to believe he was at risk of serious bodily harm or death.
3. The Defendant must have believed he was at risk of serious bodily harm or death.
4. The Defendant must show that his or her actions were proportionate to the danger.
5. The Defendant must prove sufficient evidence on each of the elements before the burden shifts to the State to prove beyond a reasonable doubt that he did not act in self-defense.

State v. Harden, 223 W. Va. 796, 679 S.E.2d 628, 2009 W. Va. LEXIS 53 (W. Va. 2009).

While this test is effective in instances where a Defendant has utilized deadly force against an assailant, it fails if the assailant did not utilize deadly force and the Defendant did not use deadly force in regards to the second and third elements of the test.

If the Defendant, in a non-deadly force v. non-deadly force situation can prove the Fourth Element of the test in that his actions were proportionate to the danger, then the Defendant would have satisfied the requirements in *State v. W.J.B.*, and *State v. Phelps*. *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550, 1981 W. Va. LEXIS 586 (W. Va. 1981); *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d 863, 1983 W. Va. LEXIS 638 (W. Va. 1983).

The Court in *State v. W.J.B.* stated that “the amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return.” *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550, 1981 W. Va. LEXIS 586 (W. Va. 1981).

In the case of this Defendant, who did not use deadly force, it would be unjust to demand that he believe he was in danger of death or serious bodily harm before utilizing any force whatsoever. If he were to have done nothing, the two quarrelling parents might have very well severely injured the child they were fighting over, or their own fighting might have escalated to a point where someone was seriously injured.

Here the Defendant consistently employed that force that was necessary to prevent further violence in his home, consistently meeting force for force, and only resorting to drawing a weapon, *which he did not use*, until after his assailants utilized weapons against him.

The Trial Court also imposed a duty on the Defendant to retreat which is in clear contradiction to the well settled law of the State of West Virginia. Appendix II, pp. 60-61.

The Supreme Court said in *State v. Preece* in 1935, and *State v. W.J.B.* and *State v. Phelps* in 1981 and 1983, and it has been the settled law of the State of West Virginia ever since that “A man attacked in his own home by an intruder may invoke the law of self-defense without retreating.” Syllabus Point 4, *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d

863, 1983 W. Va. LEXIS 638 (W. Va. 1983) *citing* Syllabus Point 4, *State v. Preece*, 116 W.Va. 176, 179 S.E. 524 (1935)." Syllabus Point 1, *State v. W.J.B.*, 166 W.Va. 602, 276 S.E.2d 550 (1981).

It is uncontroverted in this case that the Defendant was attacked in his own home by two intruders causing physical violence, one of them with a weapon.

Appendix II, pp. 51-53, 42-43, 30, 33-34, 23-24.

Every single witness including the victims in this case testified that Susan Showalter and Debbie Showalter entered the Neal residence as uninvited, unannounced trespassers, Debbie Showalter wielded a weapon and struck the Defendant with it, Susan Showalter engaged in a physical altercation with both Steve Neal and Scott Neal, Susan Showalter struck and even head-butted Scott Neal in the face while her mother attacked him with a pole, and Scott Neal only resorted to grabbing, not stabbing, not slicing, not cutting, but grabbing a steak knife in the face of two attackers in his home. Id.

To even further prove that the Defendant, Scott Neal, met force with force, when the attackers fled the home after he grabbed the knife or knives, he *immediately threw them down and ceased his resistance.* Appendix II, pg. 52.

b. The Trial Court erroneously found that the Defendant was not a resident of the home in which he was residing.

The Trial Court made an erroneous finding of fact that the Defendant was not a resident of the home in which he was residing. Appendix II, pp. 46-47.

The Supreme Court has held in *State v. Harden* that “an occupant who is, without provocation, attacked in his or her home, dwelling or place of *temporary abode*, by a co-occupant who also has a lawful right to be upon the premises, may invoke the law of self-defense and in such circumstances use deadly force, without retreating, where the occupant reasonably believes, and does believe, that he or she is at imminent risk of death or serious bodily injury.” *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628, 2009 W. Va. LEXIS 53 (W. Va. 2009) *emphasis added*.

The Defendant testified in his own defense that he was living at his brother’s house at the time of the incident, had his own bedroom there, and resided there for four months at the time of the incident. Appendix II, pg. 48.

The Defendant, at a minimum, was in a temporary place of abode, and in reality in his own home at the time of the incident. He was in his own home, and asleep in his bedroom with his girlfriend and child at the time of the incident. Id. According to the Defendant’s own uncontroverted testimony, he had lived in the residence for four months. Id.

The case law is clear as it applies to the situation of the Defendant. Even in *State v. Preece* the Defendant was a *resident of a Hotel*, much less than someone who had lived in a domestic home for a period of four months and had his own bedroom. *State v. Preece*, 116 W.Va. 176, 179 S.E. 524 (1935) *emphasis added*.

In the case before the Court, the Defendant was clearly a resident of the home in which he had resided for a period of four months.

II. The Trial Court erred in not making a finding that the Defendant “breached the peace” when brandishing the knife in his own home.

"Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a de novo standard of review." Syllabus Point 1, in part, *Chrystal R. M. v. Charlie A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

The Trial Court never made a determination if the Defendant actually breached the peace when he brandished the knife or knives in his own home during the incident in question. Appendix II, pp. 56-64.

W. Va. Code §61-7-11 states that:

“It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace.” W. Va. Code § 61-7-11.

A necessary element to the crime forbade by W. Va. Code § 61-7-11 is that the Defendant, “brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace.” Id.

One of the victims, Debbie Showalter, testified that she was on the phone with the 911 operator when the Defendant retrieved several knives from the kitchen during the altercation. Appendix II, pg. 31. If Debbie Showalter had already called the authorities concerning the incident that was ongoing at the Neal residence at the time of her call, then the peace would have already been breached due to her own and her daughter’s own conduct.

At this point, the Peace had already been Breached by the victims in that they had entered the home of the Defendant and his brother, unannounced and uninvited, admittedly trespassing, and admittedly committing a battery on the Defendant. Id.

The Defendant contends to this Court that it is impossible for him to “breach the peace” in his own home, not in public, when he has been attacked by unlawful intruders.

The Supreme Court in *State v. Long* defined a breach of the peace as follows:

“The term 'breach of the peace' is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by an act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of the public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. By 'peace' as used in this connection is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members. Breach of the peace is a common-law offense.

State v. Long, 88 W. Va. 669, 108 S.E. 279, 1921 W. Va. LEXIS 130 (W. Va. 1921).

In a more modern sense, the Court has addressed the issue of the existence of the breach of the peace in regards to creditor/debtor relations by saying that “[t]o

determine if, during self-help repossession, a breach of peace has occurred, courts inquire mainly into: (1) whether there was entry by the creditor upon the debtor's premises; and (2) whether the debtor or one acting on his behalf consented to the entry and repossession. In general, the creditor may not enter the debtor's home or garage without permission." *General Elec. Credit Corp. v. Timbrook*, 170 W. Va. 143, 291 S.E.2d 383, 1982 W. Va. LEXIS 773, 33 U.C.C. Rep. Serv. (Callaghan) 1583 (W. Va. 1982)

In cases such as those referenced in *General Elec. Credit Corp. v. Timbrook*, it would be inconceivable if, for instance Timbrook, were to have been charged with a "breach of the peace" after General Electric entered his dwelling unannounced and uninvited without consent and initiated a physical altercation to recover the property for which General Electric claimed a security interest.

As this question has not been addressed by the Court in a Criminal context, the Court should find that a Defendant has an affirmative defense to a charge of brandishing if in fact an assailant has breached the peace before the Defendant did, and the Defendant acted in self-defense when brandishing the weapon.

III. The Trial Court erred in not permitting the Defendant to call a witness during the trial in this matter.

"Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a de novo standard of review." Syllabus Point 1, in part, *Chrystal R. M. v. Charlie A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

The Trial Court infringed upon the Defendant's Federal Sixth Amendment Rights, made applicable on the States through the Fourteenth Amendment, by denying

him the ability to call a material witness in his Defense without a clear showing that he was motivated by a desire to gain a tactical advantage by failing to disclose the witness. U.S. Const. Amend. 6, U.S. Const. Amend. 14, *State v. Schlattman*, 233 W. Va. 84, 88, 755 S.E.2d 1, 5, 2014 W. Va. LEXIS 108, *10-11, 2014 WL 959555 (W. Va. 2014)

The Sixth Amendment to the United States Constitution states that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. Amend. 6

The United States Supreme Court has stated that “[t]he right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call “witnesses in his favor,” a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). Logically included in the accused's right to call witnesses whose testimony is “material and favorable to his defense.” *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37, 1987 U.S. LEXIS 2732, 55 U.S.L.W. 4925, 22 Fed. R. Evid. Serv. (Callaghan) 1128 (U.S. 1987) citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

The West Virginia Supreme Court recognized there are limitations upon the right to call witnesses necessary to maintain fairness in the Courts:

“The constitutional concerns raised by the exclusion of an untimely-disclosed defense witness were addressed by this Court in syllabus point one of *State v. Ward*, 188 W.Va. 380, 424 S.E.2d 725 (1991):

[W]here a trial court is presented with a defendant's failure to disclose the identity of witnesses in compliance with West Virginia Rule of Criminal Procedure 16, the trial court must inquire into the reasons for the defendant's failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness' identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and article II[I], § 14 of the West Virginia Constitution to preclude the witness from testifying.

188 W.Va. at 381, 424 S.E.2d at 726 (footnote added).

State v. Schlatman, 233 W. Va. 84, 88, 755 S.E.2d 1, 5, 2014 W. Va. LEXIS 108, *10 11, 2014 WL 959555 (W. Va. 2014)

In the case before the Court, the Defendant untimely disclosed his witnesses due to the fact that Counsel for the State had gone to the Court *ex parte* and had Defense

Counsel removed from the case, and thereafter giving no notice whatsoever of the proceedings to Counsel. Appendix I, pp. 30-31.

Due to the lack of notice, which was raised to the Trial Court at the time of the State's objection, it was impossible for Defense Counsel to timely notice the State of the Defendant's witness list.

The exclusion of the material witness who was present at the time of the incident was a material defect in the Trial of the Defendant, and was a clear violation of the Defendant's Federal Constitutional Rights to compulsory process and calling witnesses to testify on his behalf.

Conclusion

The Defendant in this case was in a clear situation of asserting his right to self-defense. He was in his home, asleep, with his girlfriend and child when an unannounced trespasser entered his home and brought with her imminent physical violence. The Defendant awoke and did everything he could to diffuse the situation when a second attacker entered his home with a weapon; both attackers fighting him and his brother over his infant nephew, his brother's son.

Far too often in this State similar situations result in the needless death of the occupant of the dwelling or the unlawful entrant of the dwelling. The Defendant in this case never exceeded the necessary force to diffuse the situation, even while being attacked with a weapon. Further, he was not even afforded his Constitutional Right to present witnesses in his own defense.

It is a complete miscarriage of Justice that the Defendant was convicted of Brandishing a Deadly Weapon. He was convicted of brandishing, at worst, a handful of steak knives, against two trespassers who were *convicted* of assaulting him in his own home. The Defendant respectfully prays this Honorable Court to overturn his conviction, enter an Order of Acquittal, and any and all such other relief the Supreme Court deems just and proper.

Submitted Respectfully,
SCOTT NEAL
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff
Below, Respondent

V.

No. 15-0684

SCOTT A. NEAL, Defendant Below,
Petitioner

CERTIFICATE OF SERVICE

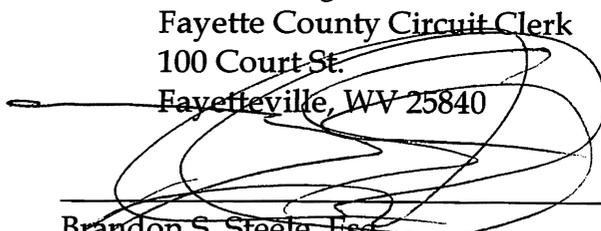
I, Brandon S. Steele, Esq., hereby certify that I served the foregoing PETITIONER'S BRIEF and Appendix by depositing a true copy thereof in the United States Mail, postage prepaid, or hand delivery, on this 26th day of October, 2015, to the following:

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