35551

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

STATE OF WEST VIRGINIA,

Appellee,

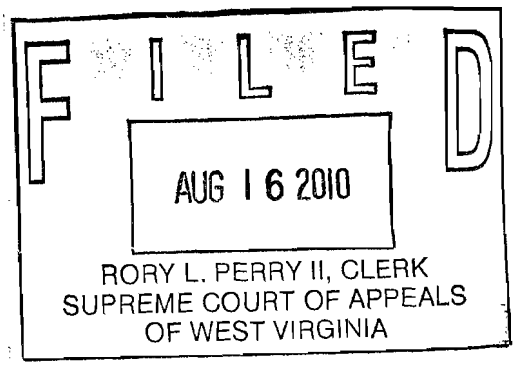
v.

FREDERICK K. FERGUSON, III

Appellant,

APPEAL NO: 35551

CASE NO: 06-F-90
CIRCUIT COURT OF
OHIO COUNTY



PETITIONER'S APPELLATE BRIEF

TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

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HON. ROBIN J. DAVIS, JUSTICE
HON. MARGARET L. WORKMAN, JUSTICE
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I. PROCEEDINGS AND RULINGS BELOW

A. Jurisdiction and Timeliness of the Appeal

This Petition for Appeal arises out of a criminal proceeding which originated in the Circuit Court of Ohio County, West Virginia. Petitioner, Frederick K. Ferguson, III was indicted by the September 2006 Term of Grand Jury of Ohio County for murder. On August 4, 2008 after a five day trial, the Petitioner was convicted of voluntary manslaughter. Post-trial motions were denied. The Petitioner was sentenced to a determinate term of fifteen (15) years imprisonment on September 29, 2008.

On October 6, 2008, a Notice of Intent to Appeal was timely filed. The undersigned attorneys requested transcripts. Due to unavailability of the trial transcript, additional time to file the petition for appeal was requested. On March 30, 2009, Mr. Ferguson was re-sentenced under Rhodes v. Leverette,160 W.Va. 781, 239 S.E.2d 136 (1977). Two more months to file the Petition for Appeal was allowed by an Agreed Order. A second Re-Sentencing Order became necessary and on September 15, 2009, Mr. Ferguson was again re-sentenced. The Petition for Appeal was filed on or about January 15, 2010.

At a regular term of the Supreme Court of Appeals held on May 4, 2010, this Court agreed to hear the Petition for Appeal, but limited consideration to the three Assignments of Error addressed herein.

B. Evidentiary Rulings Below including Contextual Explanation

It is true that in a criminal case, the State bears the burden of proving each and every element of the charged offense. However, most criminal cases seem to focus on one element or another. This case was no exception. The alleged victim, Maurice Sears, was dead. His death was undoubtedly the result of a firearm having been discharged. The bullet, which killed him, pierced Mr. Sears in the heart, lung, and pulmonary artery. He died nearly instantaneously.

It is also true that when the gun discharged, Mr. Sears was involved in a confrontation with Mr. Ferguson, the appellant. It was undisputed that Mr. Sears, the decedent, threatened to kill Mr. Ferguson by telephone before the incident. It was also undisputed that when Mr. Ferguson came to meet with Mr. Sears after the threat had been made, that it was Mr. Sears who initiated violent action against Mr. Ferguson.

The contested issues at the trial focused on the moments surrounding Mr. Sears' death. Did Mr. Sears, or Mr. Ferguson bring the gun? How violent was Mr. Sears? Did Mr. Sears die as a result of an accident, or when Mr. Ferguson acted in self-defense, or did Mr. Ferguson have any criminal responsibility? Did Mr. Ferguson have any mental state necessary to conviction of any crime, including premeditation, malice aforethought, specific intent to kill, recklessness or negligence? What happened to the gun? What did that mean?

The assignments of error which this Court has agreed to address all involve the exclusion of evidence, the defendant sought to introduce. The three assignments of error raise four separate exclusion issues (Assignment Two has two components.)

The first assignment of error is that: **the trial was fundamentally flawed when the Appellant was denied the right to cross-examine Officer Brown about his false grand jury testimony.** Before cross-examination of Officer Brown was begun, the State moved to prohibit cross-examination of Officer Brown about the grand jury testimony that the officer had given to obtain the indictment in the instant case. The trial court indicated it would consider that motion in camera. During the in camera proceedings, Officer Brown was asked if he had testified in reckless disregard of the truth before the grand jury. He said "Yes, I think I did." Nonetheless, cross-examination of the officer on this topic was prohibited. Not only did this interfere with cross-examination of the officer, it limited the ability of Mr. Ferguson to defend the allegations against him as the product of a prosecutorial and a law enforcement, "rush to judgment."

The second and third assignments of error involve three issues pertaining to the evidence of Mr. Sears as a first aggressor. During the autopsy of Mr. Sears a small quantity of marijuana, and twelve and one-half tablets of ecstasy[1] were found in Mr. Sears' rectal cavity. Toxicology tests found traces of marijuana in the blood of Mr. Sears, but no trace of ecstasy. Prior to trial, the defense investigated what these findings meant.

It was learned that ecstasy has no legitimate pharmacological use. The presence of these substances in the anal cavity of Mr. Sears seemed to eliminate any real possibility he was unaware of the materials in his rectum, or their illicit nature. But did Mr. Sears store these materials for his personal use, or was he a drug dealer? One or the other conclusions was a certainty, and both might have been true. What did that mean?

If Mr. Sears used ecstasy, what would it do to him? Did the lack of trace evidence indicate that any side effects would also be absent? To answer these questions, the defense retained Dr. Carl Ryan Sullivan, III. Dr. Sullivan teaches about addiction at the West Virginia School of Medicine. He maintains a medical practice in the same area at Chestnut Ridge Hospital. He prepared a report about ecstasy. He explained that a very short period after use, approximately eight hours, that drug would cease to be detectable in the blood. However, the side effects of ecstasy could last for up to a year after use. The side effects included increased aggression and paranoia, as a number of medical articles documented.

Although Dr. Sullivan's testimony had been found admissible as part of a pretrial defense motion, there was an objection to Dr. Sullivan testifying at trial. After conducting an in camera hearing, the trial court ruled that Dr. Sullivan's testimony was inadmissible expert testimony. Appellant has complained in his second assignment of error that this testimony should have been

[1] Ecstasy is the street name of controlled substance known in the scientific community as 3,4 methlyenedioxymethamphetamine. Scientists find this name cumbersome and use the anagram, MDMA, to refer to this drug. It has no legitimate pharmacological use. This brief will use either the street name or the scientific nickname.

admitted. His complaint includes the objection that the exclusion of this testimony violated the defendant's constitutional rights to present a defense. The presence of this drug, with these side effects, would have made it more probable than not that Mr. Sears was an unyielding first aggressor, motivated by a chemically enhanced sense of paranoia and chemically enhanced aggressive tendencies. Specifically, assignment two provides: **the trial was fundamentally flawed when the Appellant was deprived of the right to introduce evidence (a) that the decent, Maurice Sears, had MDMA in his rectal cavity when shot, (b) that MDMA would contribute to paranoia and aggression in users, even where MDMA is undetectable in the blood.**

The remaining complaint in assignment two related to the presence of a sufficient quantity of ecstasy in Mr. Sears rectal cavity to suggest he was a drug dealer. If it could be established, Mr. Sears was a drug dealer, the defense asserted he was more probably than not a person who did carry a firearm. Knowing that someone brought a firearm to the confrontation that resulted in the death of Mr. Sears, (he was, after all, shot to death), the Appellant suggested that person was Mr. Sears. The exclusion of this evidence interfered with proof of a plausible alternate hypothesis to the origin of the firearm. Such evidence would have impacted the jury's evaluation of the possible mental state of the Appellant (an element of the offense) at the time of the incident. The second part of the Second Assignment of Error was that **the trial was fundamentally flawed when the Appellant was deprived of the right to introduce evidence . . . (c) that drug dealers are likely to carry firearms.**

In the events leading to his death, the decedent regarded Ms. Gorayeb as chattel, to be possessed and to be controlled. This was a pattern of his life. Mr. Sears had assaulted several women. He brandished a gun towards one woman. The defense sought to introduce this evidence as evidence of Mr. Sears' character, predisposition to violent behavior, and his access to

firearms. The final assignment of error was that **the trial was fundamentally flawed by the exclusion of evidence that Mr. Sears had previously beaten several girlfriends.**

II. STATEMENT OF FACTS

Frederick K. Ferguson, III was born, and grew up, in Brooklyn, New York. For a time, he lived with his grandmother in South Carolina. He graduated from high school in the Palmetto State.

He returned to New York where he found employment. He participated in the United States Army Reserves. He acquired the nickname, "G.I."

From time to time he would travel. Because his brother had a friend in Pittsburgh, Fred and his brother would travel there, sporadically. On one such visit, Mr. Ferguson went a little further. He traveled to Wheeling. There, Mr. Ferguson met Patria Danielle Bledsoe, his fiancé. He subsequently relocated to Wheeling. He began to build a life. He and Ms. Bledsoe began to cohabit. They have a child, Giovanni. Their household also includes, Ms. Bledsoe's daughter from a prior relationship.

As part of building a life, Mr. Ferguson found gainful employment. He became a member of Local 1149 of the Laborers' Union. Prior to the incident giving rise to these charges, Mr. Ferguson had been employed regularly, as a construction worker. He had had two years of work at Shelly and Sand (T.T. p. 703/9 – p. 707/22).

In April 2006, while in Morgantown with friends, Mr. Ferguson met Elizabeth Gorayeb. They became friends. As friends, she often confided in him. While primarily a platonic relationship, there was one sexual encounter between Mr. Ferguson and Ms. Gorayeb. Mr. Ferguson realized this was a mistake, and redoubled his efforts to build his relationship with Ms. Bledsoe. (T.T. p. 706/1 – p. 708/12).

The prelude to the incident leading to charges against Mr. Ferguson occurred outside of his presence, and without his knowledge. It appears that before knowing Mr. Ferguson, Ms. Gorayeb met Maurice Sears. This occurred in February 2006. At some point, she started and maintained an ongoing sexual relationship with Mr. Sears. She did not meet Fred Ferguson until March 2006. (T.T. p. 264/16 – 265/1).

On May 16, 2008, Ms. Gorayeb received numerous phone calls from Mr. Sears. She told him not to come to her house. Family circumstances (the arrest of her mother) had caused her to become the physical custodian of her fourteen year old sister while the West Virginia Department of Health and Human Services assumed legal custody. Ms. Gorayeb, concerned that Mr. Sears' presence might jeopardize her custodial status, told Mr. Sears that a court order prohibited him from coming to her home. (T.T. p. 267/24 – 268/5).

Regardless of Ms. Gorayeb's wishes and indifferent her explanation about the existence of a court order, Mr. Sears came to the Gorayeb residence. Ms. Gorayeb had previously invited, a high school acquaintance, Melissa Sechrest to stay the night. Undeterred by Ms. Gorayeb's protestations, or Ms. Sechrest's presence, Mr. Sears intruded on the evening. (T.T. p. 269/11-20). He remained overnight.

He did not leave in the morning, either. Instead, he made demands. Mr. Sears insisted on reviewing information on Ms. Gorayeb's cell phone. When she refused his request, he wrestled her to the ground and took it. Ms. Gorayeb described this as an attack, although she justified his actions and said "he wasn't too aggressive." Clearly, Mr. Sears was determined to have his way. Ms. Gorayeb did acknowledge she was afraid and thought Mr. Sears would beat her (T.T. p. 273/12 – 274/2).

Ms. Gorayeb "took off" as Mr. Sears went through her cell phone. Her flight began when Mr. Sears saw a picture of Mr. Ferguson – just his head – "it was an innocent picture of him"

taken by Ms. Gorayeb. Ms. Gorayeb's mother, Claudia Gorayeb, who had been released from jail, called the police over this incident. Mr. Sears left the house.

The police arrived, but Elizabeth Gorayeb did not cooperate with them. She reported that her goal was to recover her phone. Aware that he had come to her home despite her explanation of a court order, she explained at trial that she had believed Mr. Sears would destroy the cell if the police became involved. She believed subsequent action by her, alone, would be the key to successful recovery of her cell phone. Consequently, she did told the police that she not wish to pursue the issue. The police left (T.T. p. 279/13 – 280/19). Mr. Sears returned.

It appears that at about this time, Mr. Ferguson was drawn into these events. He was at work, when he received an unsolicited phone call from Maurice Sears. During the conversation, Mr. Sears said Ms. Gorayeb was "his girl." Mr. Sears then threatened to kill Mr. Ferguson, his family and his kids. Mr. Ferguson understood these threats were directed at Patria Bledsoe, his child, Giovanni, and Ms. Bledsoe's daughter. Mr. Sears also threatened to find out where Mr. Ferguson worked (T.T. p. 709/18-23). As he hung up, Mr. Ferguson received a call from Ms. Gorayeb. She called to warn him that Mr. Sears was going to call. She recommended that Mr. Ferguson not answer. Fred Ferguson reported that it was too late, Mr. Sears had already called. (T.T. p. 710/1-3).

Again Mr. Sears called Mr. Ferguson. On this call, Mr. Sears demanded that Mr. Ferguson come down here [the Gorayeb residence] and talk. Mr. Sears said "I want that bitch [a reference to Ms. Gorayeb] to be here" (T.T. p. 710/10-17). Melissa Sechrest, a high school friend of Elizabeth Gorayeb, had been present in the house the night before. She remained as these events unfolded. She testified she could hear Mr. Sears on the cell phone when Mr. Sears returned to the house after the police left. She confirmed hearing the threats that Mr. Sears was making into the cell phone. (T.T. p. 399/9-10).

Mr. Ferguson evaluated the situation. He had been threatened with death and challenged to appear. He feared not going, because the threats to him included one to seek him out at work. He also knew that his real love interest was Ms. Bledsoe, not Ms. Gorayeb. On balance, he thought he could work it out. He decided to go where Mr. Sears had demanded, to the Gorayeb residence.

Mr. Ferguson took a precaution. He called a friend, Robert Hodge. He asked Mr. Hodge to go with him just in case Mr. Sears "had friends there to jump me" (T.T. p. 711/3-9). Mr. Hodge agreed. Mr. Ferguson drove to where Mr. Hodge lived. This was near to Mr. Ferguson's own residence, but Mr. Ferguson did not go home. Mr. Ferguson did not obtain a gun, nor did he carry one in his vehicle.[2] (T.T. p. 712/13-16).

Mr. Ferguson, accompanied by Mr. Hodge, traveled toward the Gorayeb residence. As they approached their destination, Mr. Ferguson saw a person he knew, Justin Gibbons. Mr. Ferguson knew Mr. Gibbons to be a friend of Mr. Sears. Mr. Ferguson attempted to use Mr. Gibbons as a peace maker. (The irony is Mr. Gibbons had responded to a call from Mr. Sears when Mr. Sears had called Mr. Gibbons to provide him support for a fight he planned on participating in.) Mr. Ferguson asked Mr. Gibbons "to talk to your boy and tell to calm down, that it's not that serious. He was supposed to be mad over a picture and it's really not that serious." (T.T. p. 715/9-14). Mr. Ferguson drove away.

Mr. Sears saw Mr. Ferguson as he was leaving. Mr. Sears hailed him down. When Mr. Ferguson stopped, Mr. Sears insisted that Mr. Ferguson return. (T.T. p. 714/22-24). Mr. Ferguson testified that he did return as Mr. Sears had requested because Mr. Ferguson thought

[2] The prosecution disputed this point at trial. It contended that Mr. Sears was not seen holding a firearm in his hands when he approached Mr. Ferguson's vehicle. The prosecution wholly discounted Mr. Hodge's report that Mr. Sears produced a gun from his clothing. It inferred, consequently, that Mr. Ferguson must have had one. No evidence that Mr. Ferguson had ever owned or possessed the type of weapon that fired the fatal shot was ever offered. The defense disclosed that Ms. Bledsoe had pawned a firearm of a different caliber than that which killed Mr. Sears, shortly after this incident. She testified it was still in their home after the incident, and after Mr. Ferguson's arrest, she needed money. The police recovered this firearm from the pawnshop. It was not the weapon that killed Mr. Sears.

any claim Mr. Sears was making to Ms. Gorayeb's affection was one Mr. Ferguson would not contest: "it wasn't that big of an issue" (T.T. p. 717/8-12). Mr. Ferguson reported that he pulled into the alley next to the Gorayeb house and attempted to exit the SUV. He could not open the door because Mr. Sears was leaning up against the SUV keeping the door shut. Then Mr. Sears began punching Mr. Ferguson in the face (T.T. p. 720/20-21).

This explanation was corroborated by several individuals. According to Claudia Gorayeb, Mr. Sears was saying "f--- this, f--- that – nigger, nigger" to the petitioner (T.T. p. 322/8-15). Sheila Swiger testified that Mr. Sears kicked the driver's side of the petitioner's SUV after an intense argument (T.T. p. 332/4-19) and then threw a punch into the petitioner's vehicle (T.T. p. 332/20). Claudia Gorayeb testified that Mr. Sears punched the driver, Mr. Ferguson, two times (T.T. p. 323/18-20). Melissa Sechrest also testified that Mr. Sears punched Mr. Ferguson twice after Mr. Ferguson attempted to exit the SUV. She explained Mr. Ferguson could not alight from the vehicle because Mr. Sears was standing in front of the door (T.T. p. 402/12-22).

Robert Hodge testified that upon reaching the house, making a u-turn and returning to the Gorayeb residence, he heard Mr. Sears yelling from the sidewalk to the stoop where Ms. Gorayeb was standing – "you're mine bitch" (T.T. p. 648/13). Mr. Sears was approaching the SUV "cussing, f---you, this is my girl and I'll kill you" (T.T. p. 648/22-24). When he got to the SUV, he was blocking the door so Mr. Ferguson could not exit the SUV (T.T. p. 650/6-14). Then, Mr. Sears start swinging and he was reaching at one point into his inside coat pocket (T.T. p. 649/11-13). At this point, Mr. Ferguson grabbed the arm of Mr. Sears and heard someone yell "he got a gun" (T.T. p. 720/20-21).

Mr. Hodge reported seeing Mr. Sears reaching for the gun somewhere between his inside pocket and his waist (T.T. p. 652/4-6). He saw the gun and saw Mr. Ferguson was trying to grab

his arm and "the gun went off – I was ducking down a little bit and the next thing I know I told him to pull off" (T.T. p. 654/3-12). After the shot Mr. Ferguson drove away. He couldn't even say what he was thinking – "I don't even remember – I really didn't come to even being part way focused until I almost hit a car dead on" (T.T. p. 721/17 – 722/3). Mr. Gibbons caught Mr. Sears as he went to the ground. Efforts to aid Mr. Sears were unavailing. He died virtually immediately. The firearm that discharged the bullet was never located.

III. STATEMENT OF THE CASE

A.Themes of the Defense

The trial was primarily a contest over what happened at the side of the SUV. Did Mr. Sears die in a struggle over a gun that **he** had brought to the scene? Or did Mr. Ferguson bring a gun, and deliberately slay Mr. Sears? The jury returned a verdict of guilty of voluntary manslaughter. Mr. Ferguson complains here that he was deprived of evidence which should have been admitted. Had that evidence been admitted, Mr. Ferguson asserts that his conviction for voluntary manslaughter would not have occurred.

B. Rulings Below

A significant theme of the defense was that the police and prosecution had engaged in a rush to judgment; that a careful unbiased investigation would not have resulted in Mr. Ferguson being charged at all, and certainly not with murder in the first degree. The defense had intended that part of this effort would have included a thorough probing of the police officer who had testified before the grand jury to secure the indictment in this case, Howard Keith Brown.

A second theme of the defense was that Mr. Sears was an unyielding first aggressor in the incident that led to his demise. Mr. Ferguson, it was asserted, merely responded to violence initiated by Mr. Sears, and that the death of Mr. Sears was an inadvertent product of an accident or self-defense. To this end, the defense sought to establish the violent propensities of Mr. Sears.

There were three components of this effort which were not admitted into evidence. First, during the autopsy of Mr. Sears, a plastic bag containing a small amount of marijuana and twelve and one-half tablets of "ecstasy" was found in the rectal cavity of Mr. Sears. Analysis of Mr. Sears' blood was positive for marijuana, but ecstasy was not detected. The defense investigation revealed that ecstasy was only detectable for approximately 8 hours after use, but that the effects could last as long a year afterwards. Dr. Sullivan, a professor of medicine at West Virginia University School of Medicine and a practicing physician concentrating on drug rehabilitation at Chestnut Ridge Hospital in Morgantown, was retained to testify about this drug, and its side effects. While the defense had secured a pre-trial ruling that such evidence was admissible, Dr. Sullivan was not allowed to testify after an in camera hearing was conducted during the trial. The trial judge found this testimony unreliable under the standards for admission of expert testimony.

Second, given the conflict about the origin of the firearm that killed Mr. Sears, the defense sought to introduce evidence that would suggest that Mr. Sears brought the gun. The quantity of the ecstasy, and the location in which it was found suggested to the defense that Mr. Sears was an illegal drug dealer. Such persons, according to numerous police affidavits for search warrants, frequently carry guns. This evidence was not admitted.

Third, Mr. Sears had a record for assaulting women in violent attacks. These women, and some of the police officers who had responded to the incidents as they occurred, were subpoenaed to testify. They were prohibited from testifying about the specific incidents, and were instead limited to giving negative character evidence. This restriction deprived the defense of the benefit of showing how this incident, with its origin in efforts to control Ms. Gorayeb, was part of a pattern of activity by Mr. Sears.

C. The Rush to Judgment and the Cross-examination of Officer Brown

Frederick K. Ferguson, III was arrested on the same day that Maurice Sears was shot, May 17, 2006. Mr. Sears had learned from television he was wanted for questioning, and he contacted a lawyer. The lawyer contacted the police. When he was taken to the police station, a complaint was filed charging him with first degree murder in connection with the death of Mr. Sears. Because Mr. Ferguson was charged with murder, the magistrate lacked authority to set any bail. In return for a promise by the prosecution for to promptly produce discovery material, Mr. Ferguson waived his preliminary hearing on May 24, 2006.

After some discovery materials were produced, Mr. Ferguson sought to be released on bail in the Circuit Court of Ohio County. Based on the material produced, a number of police reports, Mr. Ferguson was able to explain the threats against him that had preceded the incident with Mr. Sears, and the report that Mr. Hodge had seen Mr. Sears produce a firearm.[3] After a hearing held on July 20, 2006, Mr. Ferguson was released on bail. The bail set required the Appellant post a surety bond of $10,000, a personal recognizance bond of $90,000. In addition, the Court required that he remain on house arrest with electronic monitoring, with exceptions to permit Mr. Ferguson to work as a member of the Laborer's Union, and to attend church.

At the September 2006 term of court, Mr. Ferguson was indicted for first degree murder. After obtaining a transcript of the grand jury proceedings in February of 2007, Mr. Ferguson filed a pretrial motion to dismiss the indictment. In support of the motion to dismiss, Mr. Ferguson asserted that the sole witness before the grand jury, Officer Brown, had testified falsely in material respects. The motion incorporated various police reports that established inter alia, that the police had interviewed, Robert Hodge, who reported that the decedent brought the weapon to the confrontation that the decedent had he initiated with Mr. Ferguson that resulted in

[3] Mr. Hodge had been charged with the misdemeanor offense of being an accessory after the fact to murder. Those charges were dismissed, and have long been barred by the statute of limitations.

death. The police report directly contradicted the testimony of Officer Brown before the grand jury that the police had no information about the source of the weapon involved in the shooting. It impugned the conclusion that Officer Brown had offered to the grand jury that Mr. Ferguson had, in fact, brought a gun with him to the meeting with Mr. Sears. Consequently, this evidence called into question the basis for Officer Brown's opinions about Mr. Ferguson's criminal intent.

After a brief presentation, four pages of transcript, the grand jury proceeded to deliberate. (Exhibit 1 at pages 5-8). When the prosecution returned, at lease one and perhaps more,[4] of the grand jurors had questions. The questions that appear to have focused on whether evidence of premeditation sufficient to support a determination of probable cause of this element of first degree murder was present.[5] On page 9, one of the grand jurors indicated that "about four[6] of us" had determined there was no evidence of premeditation.

Instead of relying on the presentation made, the prosecution re-called Officer Brown in an apparent attempt to satisfy the concerns of the grand jury about probable cause. The officer was advised members of the grand jury had questions regarding premeditation and was invited to explain what evidence existed on that issue. He testified that there threats "between each other". Officer Brown said Mr. Ferguson went looking for Mr. Sears and Mr. Ferguson was the only person with a weapon, specifically a nine millimeter. The Officer described locating a slug in

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[4] There are several reference to remarks of "a grand juror" in the transcript. With such a reference, it is difficult to decipher how many grand jurors ultimately were speaking. In the passage, appearing in Exhibit 1 page 8 and 9 it seems there was more than one speaking grand juror. There is some inconsistency between the remarks of the grand juror quoted on page 9, lines 10-16 and the grand juror quoted on page 9 lines 17-20.

In other passages, it is not necessarily true that more than one grand juror has spoken. As may appear material, these instances will be discussed, infra.

[5] A GRAND JUROR: "Premeditatedly", what's the definition of that? Or are we looking deep into- at this level, what we're doing on a grand jury level? (Ex. 1, Pg. 8, Lines 19-22)

A GRAND JUROR: I think their question is – the question that came up was: "Was this"- they want to know if this was premeditated or if it was just a heat of the moment thing. Does it matter one way or the other what we say right now or later on the next jury will decide that? (Ex. 1, Pg. 9, Lines 1-6)

A GRAND JUROR: That's all. Well, a few people have the concern that they want premeditated out, so we're going to they didn't want to put the guy for first degree murder without knowing anything about it. So all that we're doing right now is saying this will go to jury – or will go trial and not- this is the charges he'll get right now. (Ex. 1, Pg. 9, Lines 10-16)

[6] As the grand jury was operating with 15 members, four persons with reservations would have been sufficient to prevent a finding by 12 persons of a true bill.

the coat of Mr. Sears at the hospital and a shell casing for a nine millimeter adjacent to Mr. Ferguson's vehicle where it was found.

In response to the specific question, "Mr. Ferguson drove from wherever he was at to the location of the shooting with a firearm?", Mr. Brown said, "That's correct." At that point grand jurors interposed questions. One focused on the timing of events. One asked a series of questions that purported to focus on premeditation. Officer Brown described arguing and fighting as a prelude to the shooting. When the Officer was asked to define premeditation, the prosecution prohibited such a question and offered instead to have the Judge provide such information. A series of questions from the grand jury were not answered as calling for legal conclusions.

Finally, Officer Brown was asked, "If there was another person in the car, how do you that Mr. Ferguson was the shooter?" He answered, "We had a witness that put the gun in Ferguson's hand". The reports do not identify any such person. There was no such testimony at trial.

Although the grand jurors were silent in response to the prosecutor's invitation to ask the witness additional questions, more questions were asked by the prosecutor. Sequentially, the Officer was asked if Mr. Ferguson had received a threatening call from Mr. Sears, if Mr. Ferguson obtained a nine millimeter, then traveled to meet with Mr. Sears. Officer Brown responded affirmatively to each subpart of this inquiry. The Officer was asked if the travel time was sufficient time for the formation of premeditation and responded that it was.

Finally Officer Brown offered the following summary narrative:

> Q. Well, detective, just one other question: Is there any other information you would like to provide to the grand jury?
>
> A. Yes. That the investigating detectives in this case determined that there was sufficient time for Mr. Ferguson to think about what he was doing, whether to go look for Maurice Sears or not. Maurice- or Ferguson obtained the nine millimeter, he went

> looking for Mr. Sears, went down to 23rd Street trying to find Maurice Sears down there, where the girl was, and did see Maurice Sears. At one point we have a witness that seen the vehicle pull up to the house and Maurice Sears was not there. He backed up, left the area, and then somewhere between three to five minutes, the vehicle showed back up again with Ferguson driving the vehicle. The vehicle was his vehicle. And at that time Maurice Sears was there. There was words exchanged. Maurice Sears went to the vehicle where he leaned inside the vehicle where more yelling was going on and we believe that was a small fight inside the vehicle, and that's when the witness stated she saw the gun and then the gun was fired. He had plenty of time to- Ferguson had plenty of time to think about what he was doing and not do that.

Still the grand jury had questions. A grand juror asked, "Was there a witness that he went and obtained the gun?" Detective Brown said, "No. We don't know where he obtained the gun. We have no witness to that." As noted, Mr. Hodge was exactly such a witness.

This was not an insignificant discrepancy. The grand jury transcript demonstrated that the grand jury had real issues with finding that the shooting was premeditated. Judge Mazzone had been asked to define premeditation during deliberations. Officer Brown had been recalled after those instructions to be more specific about evidence of premeditation.

The false testimony was given in response to a grand juror's question. Specifically when asked a question about the origin of the weapon that fired the fatal shot, Wheeling Police Officer Howard Keith Brown denied that there was any witness on that issue. The existing police reports demonstrated this answer to have been false when given. Instead of verifying that the police had no witness, the police reports establish that accurate testimony by Officer Brown would have revealed that an individual who said he was with Mr. Ferguson when the gun discharged, Robert Hodge, had told police that Mr. Sears, the decedent, had brought a gun to the scene of his own death.

Despite the inconsistency between the testimony of Officer Brown before the grand jury with the police reports, the motion was denied without testimony from Officer Brown. At trial, the defense intended to cross-examine Officer Brown. This would have tended to impeach his credibility, and establish in part, a rush to judgment in deciding to charge Mr. Ferguson with

being a killer.[7] Anticipating a vigorous cross-examination, the prosecution objected to cross-examination of Officer Brown about his grand jury testimony. The trial court indicated it would address the issue in camera. During the in camera hearing, conducted at trial, Officer Brown acknowledged that his testimony before the grand jury was inaccurate, and given in reckless disregard for the truth.

Despite this admission, the cross-examination of Officer Brown, on the subject of his grand jury testimony, was disallowed.

D. Exclusion of Medical Evidence of the Decedent's Chemically Enhanced Aggression and Chemically Enhanced Paranoia

To avoid issues at trial, the defense filed a pre-trial motion in limine to insure the admissibility of certain evidence. In one aspect of that motion, the defense noted that during the autopsy of Mr. Sears, quantities of MDMA and a quantity of marijuana were found in the rectal cavity of Mr. Sears. The defense understood this discovery could only be a function of limited alternatives. The only logical inferences were that a) Mr. Sears was using these substances, or b) he was distributing these substances or c) he both used and distributed. These alternatives each,

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[7] Evidence of a rush to judgment, and other lapses were present throughout the trial.

A. During the trial, the prosecution elicited an opinion from the medical examiner that the fatal shot had been fired from more than 18 inches away from Mr. Sears. This opinion which was not contained in the autopsy report, depended on the absence of any stippling, or powder burns, at the wound site. The opinion, if valid, would have served as a significant evidentiary counter-point to Mr. Ferguson's explanation of being engage in a struggle with Mr. Sears when the gun discharged. On cross-examination, the medical examiner recanted his opinion about the 18 inch distance. Defense counsel asked the medical examiner about the conclusions in a learned treatise to the effect that multiple layers of clothing would lead to the same result, no stippling, as would a distance of greater than 18 inches from the barrel of a gun. Acknowledging the article written on gunshot wounds to be by the foremost authority in the world, the medical examiner agreed multiple layers of clothing would have the described effect. The medical examiner, further agreed that he had not been made aware the decedent was wearing a jacket, in addition to the two shirts contained in the body bag, when the decedent was shot.

B. Officer Brown also failed to "bag the hands" of the decedent after death. Consequently, the integrity of any gunshot residue on Mr. Sear's hands was effectively lost during transport of the body to the autopsy site.

C. Mr. Gibbons admitted at trial that he had come to provide support to Mr. Sears for a fight that Mr. Sears had intended to engage in. Yet, Mr. Gibbons' vehicle at the crime scene was not searched. What happened to the firearm that killed Mr. Sears? There was evidence that Mr. Gibbons went through the pockets of the body of Mr. Sears at the crime scene. Mr. Sears, who was clearly involved with illicit drugs, curiously, had no weapon, or money on his person when he died.

D. Officer Wroten admitted he destroyed a note, that the trial court described as a "smoking gun" that should have been produced during discovery.

E. Notes of the medical examiner, while ordered to be produced never were.

independently, support the conclusion that Mr. Sears was a violent person. It is evidence that Mr. Sears was the first aggressor, and an unyielding aggressor.

Consider first, the possibility that Mr. Sears was a mere user. The quantity of material discovered included, a fragment, one-half, of a tablet. This certainly was a suggestion that the possession had a personal use component. What would it mean in this case if Mr. Sears was an ecstasy user?

The answer to this question this question is beyond the scope of knowledge possessed by the average lay juror. It required expertise to answer. Dr. Sullivan was hired to explain about ecstasy. He was able to confirm that MDMA was a drug that, scientific evidence suggested, contributed to increased aggression and increased paranoia in users. The relevance of Mr. Sears having a chemically enhanced sense of aggression and a chemically enhanced attitude of aggression cannot be denied in this case.

Still, the toxicology test results did not detect ecstasy.[8] Did this mean that ecstasy was not having any impact on Mr. Sears? This too is not information within the knowledge of the average lay juror. It requires an appreciation of whether the effects of ecstasy last after the drug ceases to be detectable This is an answer which science provides an answer. The answer is that the side effects of aggression and paranoia persisted long after, as much as one year after, use of ecstasy. This is a radically longer period than the 8 hour period during which ecstasy can be detected after use. Numerous medical articles,[9] identified as learned treatises, were cited to the

[8] Marijuana was found in the toxicology screen. While marijuana might have been a calming influence on a user, it is sometimes used to come down from ecstasy use.

[9] Gable, Robert S., J.D., Ph.D., Acute Toxic Effects of Club Drugs, Journal of Psychoactive Drugs, Vol. 36, Issue 3, (2004); Gerra, Gilberto; Zaimovic, Amir; Ampollini, Roberta; Giusti, Francesca; Delsignore, Roberto; Raggi, Maria Augusta; Laviola, Gianni; Macchia, Teodora; Brambilla, Francesca, Experimentally Induced Aggressive Behavior in Subjects with 2.4-Methylenedioxy-Methatmphetamine ("Ecstasy") Use History Psycholigical Correlates, Journal of Substance Abuse, 13(4)(2001); Hoshi, Rosa; Pratt, Hannah; Mehta, Sachin; Bond, Alyson, J.; Curran, H. Valerie, An Investigation into the Sub-acute Effects of Ecstasy on Aggressive Interpretative Bias and Aggressive Mood – Are There Gender Differences?, Journal of Psychopharmacology, 20(2), (2006); Maldonado, E., and Navarro, J.F., MDMA ('Ecstasy') Exhibits An Anxiogenic-Like Activity in Social Encounters Between Male Mice,Progress in Neuro-Psychopharmacology & Biological Psychiatry, Vol. 23, Issue 2, (1999); Verheyden, Suzanne, L.; Maidment, Rachel; Curran, H. Valerie, Quitting Ecstasy: An Investigation of Why People Stop Taking the Drug and Their Subsequent Mental Health, Journal of Psychopharmacology, 17(4), 2003.

Court in support of these conclusions. Judge Mazzone, to whom the case was assigned pre-trial, ruled the proposed evidence admissible. At trial, the prosecution challenged the admission of evidence, on the purportedly new ground, that the evidence to be offered through Dr. Sullivan was not scientifically reliable. The trial court opined that "double blind studies" were needed for admission of the testimony despite Dr. Sullivan having explained such research had not been, and could not be ethically conducted, because of the determination of the Food and Drug Administration that there is no medical use for MDMA. The State's objection was sustained.

Pre-trial rulings, upon which Mr. Ferguson had relied in preparing a trial strategy, that the decedent had a violent character, that the decedent was prone to paranoia, and that the decedent had out-sized aggressive tendencies, were fundamentally altered.

E. Exclusion of Evidence that the Decedent Was a Drug Dealer Who Was Likely to Have Been Armed

It is also possible that the 12 ½ tablets of ecstasy were for distribution. Based on inquiries of law enforcement officers and retired law enforcement officers, 12 ½ pills of ecstasy was, in their collective opinion, a quantity more consistent with being a distribution amount than a personal use amount. This information, information not rebutted by the State, led to a substantial inference that Mr. Sears was a drug dealer. Numerous search warrant applications, collected by the defense, reflected the experience of law enforcement that drug dealers are frequently armed. Thus, on the issue of who brought the firearm to the meeting between Mr. Ferguson and Mr. Sears, the defense had identified a chain of evidence that, more probably than not, lead to the conclusion that Mr. Sears was likely to have been armed. This was material evidence not admitted at trial.

F. The Trial Was Fundamentally Flawed by the Exclusion of Evidence That Mr. Sears Had Previously Beaten Several Girlfriends

In the pretrial phase, discovery suggested that Mr. Sears enjoyed a sexual relationship with Elizabeth Gorayeb. The discovery also suggested that Mr. Sears did not deem it important that he remain faithful to Ms. Gorayeb. Instead it appeared that Mr. Sears had expressed some territorial claim to Ms. Gorayeb's affection. Despite several requests from Ms. Gorayeb to leave her alone, Mr. Sears continued to foist his attentions on her.

On May 16, 2006, Mr. Sears insisted that he would spend the night at Ms. Gorayeb's home, even though he was not welcome there. During the morning of May 17, 2006, Mr. Sears found Ms. Gorayeb's cell phone. The camera feature of this phone had a recent photograph of Mr. Ferguson. When this photo was discovered by Mr. Sears, he became enraged. He took Ms. Gorayeb's phone, and called Mr. Ferguson. As part of a series of contacts with Mr. Ferguson, which were witnessed by Ms. Gorayeb and others at her home, Mr. Sears threatened to kill Mr. Ferguson, his girlfriend and his children.

Aware of this kind of information prior to trial, Mr. Ferguson gave notice of his intention to offer evidence that the decedent, Maurice Sears, was a violent person who had likely initiated the incident that led to his death. Specific examples of assaults committed by Mr. Sears that contributed to his reputation as a violent person were identified. The defendant proposed to offer the following evidence which he sought to have declared admissible in this proceeding:

1. Attacks on Tracy McWhorter by Maurice Sears on or about April 1. 2005. Six police officers responded to a 911 call to a residence. When they broke the bedroom door, Ms. McWhorter was being attached by Mr. Sears with a belt.

2. Attacks on Renya Lee on or about June 2, 2004 as reflected on documents filed in the Office of the Clerk of Ohio County reflected that Ms. Lee had been punched in the stomach while pregnant for coming into Mr. Sears' presence with another man. Ms. Lee reported that Maurice Sears had threatened to "shoot her" as part of this incident.

The State objected to the motion of Mr. Ferguson as an effort to prove character. Prior to trial, Judge Mazzone ruled the evidence of these specific incidents inadmissible. The trial court refused to revisit this issue under Rule of Evidence 404(b). In the view of the defense, the evidence should have been admitted under Rule of Evidence 404(a), 404(b) and 405(b) to show that Mr. Sears had a character for violence, that he had a propensity for violence, that Mr. Sears asserted territorial claims to the affection of women, that Mr. Sears did not act mistakenly in threatening people, and that he had the intent to use and access to firearms. As a substitute, Mr. Ferguson was limited to calling individuals who knew Mr. Sears and testified to his violent character. Still, he lost the power of the available evidence.

IV. ASSIGNMENTS OF ERROR

1. The trial was fundamentally flawed when the Mr. Ferguson was denied the right to cross-examine Officer Brown about his false grand jury testimony and to develop evidence of a "rush to judgment" in his prosecution.

2. The trial was fundamentally flawed when the Appellant was deprived of the right to introduce evidence (a) that the decedent, Maurice Sears, had MDMA in his rectal cavity when shot, (b) that MDMA would contribute to paranoia and aggression in users, even where MDMA is undetectable in the blood, and (c) that drug dealers are likely to carry firearms.

3. The trial was fundamentally flawed by the exclusion of evidence that Mr. Sears had previously beaten several girlfriends.

V. SUMMARY OF THE ARGUMENT

Mr. Ferguson was denied the constitutional right to cross-examine Officer Brown about his false grand jury testimony and to develop evidence that the case against him was the result of a "rush to judgment" and not a fair evaluation of the facts. The Rules of Evidence contemplate cross-examination about the credibility of a witness.

Mr. Ferguson was denied his constitutional right to present evidence of a defense. The trial court should have admitted evidence (a) that the decedent, Maurice Sears, had MDMA in his rectal cavity when shot, (b) that MDMA would contribute to paranoia and aggression in

users, even where MDMA is undetectable in the blood, and (c) that drug dealers, like the decedent, are likely to carry firearms.

Mr. Ferguson was also denied a constitutional right to admit evidence that Mr. Sears had previously beaten several girlfriends. Such evidence is admissible under the Rules of Evidence.

VI. ARGUMENT

A. The trial was fundamentally flawed when the Appellant was denied the right to cross-examine Officer Brown about his false grand jury testimony.

1. Constitutional Considerations

As noted above, Mr. Ferguson's legal team had a basis to challenge the credibility of Officer Brown. His team was prepared to advance the idea Mr. Ferguson had been charged as a result of a rush to judgment, a rush to arrest somebody, rather than as a product of a careful complete unbiased investigation. The prohibition on cross-examining Mr. Brown about his grand jury testimony deprived Mr. Ferguson of the opportunity to develop this evidence. This is error on several levels, including a denial of Mr. Ferguson's constitutional right to confront witnesses against him.

This is a clear right. For example in Pointer v. Texas, 380 U.S. 400 (1965) the Supreme Court of the United States described the fundamental importance of the right of confrontation, and the attendant right of cross-examination. This has remained an unbroken core concept in American law. See, United States v. Scheffer, 523 U.S. 303 (1998); Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14 (1967); Taylor v. Illinois, 484 U.S. 400 (1988); Crane v. Kentucky, 476 U.S. 683 (1986); Chambers v. Mississippi, 410 U.S. 284 295 (1973); Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Smith v. Illinois, 390 U.S. 129,(1968); Davis v. Alaska, 415 U.S. 308 (1974); and, Delaware v. Van Arsdale, 475 U.S. 673 (1986).

While the standard of review for a ruling on a discretionary matter is historically tied to the abuse of discretion standard, the standard of review for abridgement of constitutional rights is de novo.

West Virginia has long required that a defendant should be entitled to a full and fair opportunity for cross-examination. State v. Crockett, 164 W.Va. 435, 265 S.E.2d 268 (1979) relying on State v. Pietranton, 137 W.Va. 477, 72 S.E.2d 617 (1952).

It is hard to imagine a situation a police officer is willing to acknowledge that his testimony under oath in before the grand jury that indicted a defendant was given "in reckless disregard for the truth" that prohibiting his examination did not deprive the defendant of some trial advantage. It is particularly troubling where a significant part of the defense was designed to show the existence of reasonable doubt through the failure of the investigation to be done without the goal of reaching a foreordained result.[10]

2. Evidentiary Considerations

West Virginia has determined the proper scope of cross examination. In syllabus point 5 of State v. Mongold, 220 S.E.2d 259, 647 S.E.2d 539 (2007) the Court held "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term `credibility' includes the interest and bias of the witness', inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has

[10] Significant milestones at the trial included: a) the admission by the medical examiner that his conclusion that the fatal shot was fired from more than 18 inches had been compromised by his not having been made aware that the decedent was wearing a coat when shot; b) the failure of Detective Brown to "bag the hands" of the decedent to prevent the loss of reliable gun shot residue evidence from the decedent; c) the intentional destruction of notes by Officer Wroten after the prosecution had agreed to provide discovery in return for waiver of a preliminary hearing; d) the failure to search vehicles, particularly that of Justin Gibbons, at the crime scene.

discretion as to the extent of cross-examination.' Syllabus point 4, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982)."

Some cases from around the nation make this point with examples that are thankfully not part of West Virginia's legal legacy. In Kittleson v. Dretke, 426 F.3d 306 (5th Cir. 2005) the Court of Appeals for the Fifth Circuit granted federal habeas corpus relief where limitations on cross-examination left the jury with a false sense of what had occurred. After a police officer intimated that he had received an allegation of misconduct about a defendant from a second individual, the defendant sought through cross-examination to show that the second accuser recanted almost immediately. This effort was frustrated. The testimony before the jury left them with a false impression about accusations which were made against a defendant.

In United States v. Stock, 948 F.2d 1299 (D.C. Cir. 1991) the Court of Appeals found limitations on the ability of the defendant to cast doubt on the reliability of a police officer as a witness to have been erroneous. In this case, the officer testified to statements made by the defendant that had not been included in his police report, the original complaint, or his grand jury testimony. The Court of Appeals acknowledged that the limit on cross-examination precluded defense counsel from showing the officer had memory difficulties, or was fabricating evidence. The Court did not reverse the conviction holding that the evidence offered by the defendant was so incredible that the error was harmless.

In Woods v. Kuhlman, 677 F.Supp. 1302 (S.D. N.Y. 1988) limitations on the cross-examination of a police officer were found fatal in habeas proceedings. There an officer who had received information from a victim that the defendant had not been involved with a car stolen from the victim, prepared a complaint omitting all such information. Finding credibility of the officer to be a significant issue at trial, as it always is, the Court granted the habeas petition.

The outcome is similar in state courts. In Redding v. State, 844 N.E.2d 1067 (Ind. App. 2006) a conviction was reversed where a defendant was prohibited from cross-examining various physicians about their awareness of the molestation of a child victim by another person, and the possibility that the injuries observed were the result of that incident, and not the result of contact with the defendant.

In Sorge v. State, 915 So.2d 707 (Fla. App. 2005) a murder conviction was reversed because of a denial of confrontation and cross-examination rights. At the defendant's first trial, the State presented testimony of an individual who was incarcerated with the defendant. The testimony seriously undermined an insanity defense. The witness said he was testifying not to curry favor but to vindicate his own sense of justice. After the conviction was reversed, the same witness who had made a favorable plea to his own charges. He was then subpoenaed for the subsequent trial and failed to appear. His testimony from the first trial was read into the record over the objection of the defendant. Finding that the change in circumstances warranted a new opportunity to cross-examine the non-appearing witness, the conviction was again reversed.

In Tomenga v. State, 864 So.2d 525 (Fla. App. 2004) the Court reversed a conviction for sexual assault for limiting cross-examination of the key witness about conflict between her and the defendant. Contributing to the reversal was the exclusion of a witness, disclosed on the eve of trial, who would have testified to admissions of a false accusation of rape by the key witness. Finding a deprivation of due process, the conviction was reversed.

More technical problems have resulted in reversing convictions where the right to cross-examine was denied. In People v. Acevedo, 113 Cal.Rptr.2d 884, 93 Cal. App.4th 757 (2001) the defendant desired to cross-examine a prosecution expert. On direct examination, the expert testified that using a standard conversion ratio the actually urine test results would yield an equivalent blood test result excess of that allowed by statute. The defense attempted to explore

whether the standard conversion ratio would vary in specific individuals, including the defendant, and yield a potentially non-criminal equivalent blood test ratio. This cross-examination was not allowed. It was held a violation of due process, and the conviction was reversed. Similarly, in Woodall v. Stock, 216 S.W.2d 530 (Tex. App. 2007), a total ban on cross-examination of an Intoxilyzer expert on the reliability of the equipment resulted in reversal of a conviction.

Mr. Ferguson does not believe the error can be considered harmless error under the applicable constitutional standard. In Delaware v. Van Arsdale, 475 U.S. 673 (1986) the Supreme Court held that the restrictions on the right of cross examination would only be harmless when "assuming the damaging potential of cross-examination were fully realized" the error was harmless beyond a reasonable doubt.

B. Parts (1) & (2).
The trial was fundamentally flawed when the Appellant was deprived of the right to introduce evidence (1) that the decedent, Maurice Sears, had MDMA in his rectal cavity when shot, [and] (2) that MDMA would contribute to paranoia and aggression in users, even where MDMA is undetectable in the blood. . . .

a. Constitutional Considerations

Mr. Ferguson sought to introduce evidence that would have tended to support his assertion that the decedent was the first aggressor in the confrontation that led to his own death. Such evidence is relevant. See W.Va. Rule of Evidence 402(a)(2) and State v. Woodson, 181 W.Va. 325, 382 S.E.2d 519 (1989). Mr. Sears made the first threat to kill. Mr. Sears prepared for a fight that he intended to have. Mr. Sears struck the first blows. This was known. But the jury never heard that Mr. Sears had a chemically heightened sense of aggression and paranoia from his exposure to MDMA. The jury never heard that Mr. Sears was likely a drug dealer. The jury never heard that drug dealers often carry guns. Whether the conviction for the lesser

included offense of voluntary manslaughter would have been rendered by a jury that heard such evidence is consequently in doubt.

Mr. Sears had a constitutional right to present a defense within the rules of evidence. This right has been clear since at least the decision in Washington v. Texas, 388 U.S. 14 (1967). In Taylor v. Illinois, 484 U.S. 400, 408-409 (1988) the Court said;

> As we noted just last Term, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39 (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, e.g., Chambers v. Mississippi, 410 U.S. 284, (1973). Indeed, this right is an essential attribute of the adversary system itself. "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." United States v. Nixon, 418 U.S. 683 (1974).
>
> The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14 (1967).
>
> The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." Id., at 18, . We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.

This right was denied.

b. Evidentiary Considerations

i. Relevancy Conditioned on Another Fact: Ecstasy in the Decedent's Rectal Cavity

All relevant evidence is admissible. W.Va. Rule of Evidence 402. Relevant evidence is evidence that tends to make some fact of consequence to the final outcome more probable than not. W.Va. Rule of Evidence 401. Because detailed explanations sometimes require that several facts exist simultaneously to prove a particular point, and because the process of offering proof sometimes does not permit all the necessary facts to be proven at the same time, or through a single witness, Rule 104(b) of the W.Va. Rules of Evidence permits a party to offer evidence conditioned on proof of other facts.

That was Mr. Ferguson' s objective. During the decedent's autopsy, the medical examiner found 12 ½ tablets of ecstasy in the rectal cavity in the rectal cavity of Mr. Sears. Alone, that fact may not have been relevant. However, in combination with evidence that Mr. Sears used ecstasy and was subject to its side effects, or distributed ecstasy and so participated in the violent world of drug trafficker, or both, the evidence about the discovery of ecstasy should have been permitted.

ii. The Decedent's Use of Ecstasy and Its Side Effects

Dr. Sullivan was prepared to offer testimony that the side effects of ecstasy make a person paranoid, and aggressive. This would be true, according to Dr. Sullivan and the available medical literature, for up to one year after use. This is long after ecstasy becomes undetectable in the human body.

This evidence would have tended to make Mr. Sears's attitude consistent with that of being a first aggressor. In all likelihood, it would have explained why Mr. Sears was an unyielding first aggressor. It would have explained why Mr. Ferguson was unable to reason with Mr. Sears to avoid all violence. Clearly such evidence would have been relevant.

The trial court ruled that Dr. Sullivan's testimony was not reliable. Under existing West Virginia case law, such a determination is reviewed de novo. Syllabus point 1 of Craddock v. Watson, 197 W.Va. 62, 475 S.E.2d 62 (1996) establishes, inter alia, that; "The trial court's determination regarding whether the scientific evidence is properly the subject of scientific, technical, or other specialized knowledge is a question of law that we review de novo." (Emphasis added.)

Dr. Sullivan's testimony was based upon his experience and his review of peer reviewed medical literature. The best understanding of the ruling by Judge Recht was that he found Dr. Sullivan's testimony inadmissible under his view of Gentry v. Magnum, 195 W.Va. 512, 466 S.E.2d 171 (1995). Gentry was intended to liberalize the admissibility of useful scientific evidence. Trial courts have been instructed to err on the side of admissibility. See e.g., State v. McCracken, 218 W.Va. 190, 624 S.E.2d 537 (2005) (firefighter's testimony admissible in arson case).

One of the problems with the establishing a rule for admissibility of expert testimony is that the purposes of offering expert testimony vary widely. In tort cases, the issue often involves causation of an injury, and the extent of the injury. See e.g., San Francisco v. Wendy's International, Inc., __ W.Va. __, 656 S.E.2d 485 (2007)(plaintiff sought to prove the causation of food poisoning without a sample of the food) and Watson v. Inco Alloys International, Inc., 209 W.Va. 234,545 S.E.2d 294 (2001)(the issue was whether a technical expert could explain claims of a defective design and inadequate warnings). But in other civil cases, value is important. In Teter v. Old Colony Co., 190 W.Va. 711, 441 S.E.2d 728 (1994) a real estate appraiser's opinion was found always admissible on the issue of real estate value. In criminal cases, different topics often arise. For example, in State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990) the question of whether symptoms experienced by an alleged child sexual assault victim were

consistent with symptoms of other known victims was deemed admissible.). In State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990) the admissibility of the medical examiner's testimony about cause of death was considered. It is perhaps the result of the study of so many different aspects of human endeavor, and the context in which litigated disputes arise, that the purpose for which expert testimony can be offered seems limitless.

The primary purpose the United States Supreme Court addressed this issue in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, (1993) and that this Court followed suit in Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993) was to explain how new claims of expertise should be evaluated. While a legal test that is rooted in the scientific method represents the best perfect kind of test in some cases, cases involving technical and engineering problems do not lend themselves to an analysis rooted in the scientific method. See Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137(1999) and Watson v. Inco Alloys International, Inc., supra. A different analysis for persons imbued with specialized knowledge will also be needed. The real estate valuation expert will testify as a result of using a different methodology.

Consequently, a flexible approach to prevent conclusions borne of "junk science" and to admit testimony of real usefulness has been the core of judicial inquiry. One size does not fit all. This Court said so in State v. Lockhart, 208 W.Va. 622, 542 S.E.2d 443 (2000). The Court of Appeals for the Eleventh Circuit said so eloquently, and at length in United States v. Brown, 415 F.3d 1257 (11th Cir. 2005). There the issue was whether a particular chemical compound was "sufficiently similar" to another substance, a controlled substance, such that the first compound should also be considered a controlled substance. Not surprisingly, there was a "battle of experts."

> The question, then, is whether expert opinion evidence that does not meet three of the four Daubert factors nevertheless can be admitted. In the right circumstances, the answer to that question is "yes." The Supreme Court made clear in its Daubert opinion that the factors it set out there were not to be rigidly applied, but were instead to serve as

> guidelines for federal district courts applying Rule 702. The Court said, "[t]he inquiry envisioned by Rule 702 is, we emphasize, a flexible one," Daubert, 509 U.S. at 594 "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test," at 593
>
> The decision in Kumho Tire elaborated on the flexible nature of the inquiry. There the Court pointed out that "Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Id. at 141. Whether the Daubert opinion factors are even pertinent to assessing reliability in a given case will "depend[ ] on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.* at 150 (internal marks omitted). Because the applicability of the Daubert factors depends on the individual facts in a particular case, the Court said that it could:
>
> > neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor [could it] now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.
>
> Id. at 150. This means that expert testimony that does not meet all or most of the Daubert factors may sometimes be admissible.

Id. at 1267-68.

So if even factors identified by the United States Supreme Court are often not the right ones, what are we to do about Dr. Sullivan's testimony here? In reversing Judge Recht in an earlier case, State ex rel. Jones v. Recht, 221 W.Va. 380, 655 S.E.2d 126 (2007) the Supreme Court of West Virginia held that under Gentry all that needed to be shown was that expert testimony would assist the trier of fact in understanding of relevant information. Excluding Dr. Sullivan's testimony eliminated any possibility that the jury would be assisted. That conclusion was, consequently, erroneous. Dr. Sullivan would have provided the link between exposure to ecstasy and paranoia and aggression in Mr. Sears. Paranoia and aggression were factors that would have aided Mr. Ferguson in proving that it was Mr. Sears who was an unyielding, and irrational first aggressor. Exclusion of this evidence, previously determined by Judge Mazzone to be admissible, crippled Mr. Ferguson's defense.

This ruling was erroneous under West Virginia law. In San Francisco v. Wendy's International, Inc., supra, this Court considered the admissibility of certain medical testimony in a tort case involving exposure to "tainted meat." The Court explained that a trial court was

determine if the proposed expert met the minimal qualifications for expertise. Does the proposed expert have the minimum educational or experiential basis or some combination thereof in a field which is relevant to the inquiry at hand that would assist a trier of fact. Clearly Dr. Sullivan is such a person.

Second the question is whether the opinion to be offered is derived from a scientific methodology. Here Justice Starcher explained that

> the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. . . .
>
> As noted above, . . .[there are] several factors a trial court can apply to assess the reliability of expert testimony: whether the scientific theory and its conclusion can be or have been tested; whether the scientific theory has been subjected to peer review and publication; whether the scientific theory's actual or potential rate of error is known; and whether the scientific theory is generally accepted within the scientific community.

Id. at 493. Importantly, these are not the only factors. The Court then goes on to explain how a doctor's opinion of food poisoning was the result of a proper "differential diagnosis." It also explains how a food safety expert could logically opine that it the hamburger eaten by the plaintiff was tainted with e. coli bacteria at the time of its ingestion. There were no double blind studies in San Francisco. Instead, there was good science.

In Watson v. Inco Alloys International, Inc., supra the issue was what standard should be used to admit technical, and not scientific testimony. The Court held that the key inquiry was whether the testimony would assist the trier of fact. Expert testimony assists a trier of fact whenever an expert can share knowledge not available to the average lay juror. That is also true here. How long is ecstasy detectable in the blood? Can it effect a user even if it is not detectable? If so, for how long? What does ecstasy do? These are questions the average lay juror, and perhaps trained jurist, would not be able to answer without technical assistance.

Whether Dr. Sullivan's proposed testimony should be characterized as scientific, or technical, or the product of specialized knowledge, the result is the same. He knows things about

ecstasy and addiction that the average juror did not know. He knows this for real reasons grounded in his study of the art of medicine. He can explain that while there are variations in individuals, exposure to ecstasy causes predictable consequences. This was relevant to the topic at hand and useful to the trier of fact.

The admissibility of this evidence was determined pre-trial by Judge Mazzone to whom the case was originally assigned.[11] Nonetheless at trial, Judge Recht held that the reasoning of Judge Mazzone required the defendant to establish a scientific basis for admissibility of evidence that would establish a nexus between such a substance and the purported conduct. Dr. Sullivan, a professor of medicine at West Virginia University with particular knowledge of addiction issues, testified in camera. He opined that while the scientific literature did not contain "double blind" studies, that the scientific literature was sufficiently adequate to allow him to opine that there was a nexus between the chronic use of MDMA and increased levels of aggression and paranoia (TT p. 613/8 – 616/6).

While finding the evidence relevant, the Court held that the defendant failed to establish the admissibility of the scientific testimony under Gentry v. Mangum, supra, and without such testimony the evidence was otherwise inadmissible (T.T. p. 631/18-20). Dr. Sullivan identified a number of articles from peer reviewed medical journals that supported his conclusions regarding paranoia and aggression in a chronic user. He indicated the determination by the FDA and MDMA had no legitimate use, and consequently should be established as Schedule I controlled substance, as explaining the lack of "double blind" studies. Given this constraint, the available literature concerning animals and self-reported histories by users of MDMA was the best available scientific evidence. In his opinion, there was an adequate basis for his conclusion.

[11] The matter was transferred for trial to Judge Recht when it became obvious that the anticipated trial length could not be accommodated by Judge Mazzone's schedule.

The State's remedy was vigorous cross-examination or to call a rebuttal expert. Exclusion of competent evidence was wrong.

The trial court assumed relevance. Still it seemed to have concluded that only "double blind" studies were "good science". In Lockhart, the Court reemphasized that the test for admissibility did not depend on a checklist, and instead reiterated that the factor in Gentry, and Daubert and Wilt were not exhaustive. By insisting on "double blind" studies the trial Court has gone too far. It has excluded evidence that was relevant. It has excluded evidence that was scientific. It has excluded the best scientific evidence available on the grounds of mere speculation. The limits of the science could have been and should have been evaluated by a jury.

B. Part 3
The trial was fundamentally flawed when the Appellant was deprived of the right to introduce evidence . . . (3) that drug dealers are likely to carry firearms.

a. and b. Constitutional and Evidentiary Considerations

The only other possible explanation for Mr. Sears to have had a quantity of illicit drugs in his rectal cavity, beside from being a user, was that he was a dealer. If he was an illegal drug dealer, would that information have been relevant to understanding the confrontation between Mr. Sears and Mr. Ferguson? Mr. Ferguson believes that answer is yes. Mr. Ferguson was prepared to call a witness, a former law enforcement officer with numerous years experience as a member of a federal drug task force, who would have opined that 12 ½ tablets of ecstasy was a quantity more consistent with distribution than personal use. This would have established Mr. Sears as a drug dealer.

Drug dealing is a violent activity. The experience of the federal courts is that firearms have become "tools of the trade" in illegal drug trafficking. See e.g., United States v. White, 875 F.2d 427 (4th Cir. 1989). See also, United States v. Cresta, 825 F.2d 538 (1st Cir 1987); United States v. Wiener, 534 F.2d 15, 18 (2d Cir.), cert. denied, 429 U.S. 820 (1976); United States v.

Marino, 658 F.2d 1120, 1123 (6th Cir.1981). This conclusion is the view of law enforcement today. Counsel for Mr. Ferguson located numerous search warrants filed in Ohio County West Virginia in which various police officers obtained search warrants to look for firearms because of their unanimous view that drug dealers are likely to carry guns.

Mr. Ferguson sought to introduce this technical and specialized knowledge of police officers in his defense. If Maurice Sears was a drug dealer, then he was, in the collective wisdom of law enforcement, likely to have been in possession of a firearm. In the language of Rule of Evidence 401 it made "a fact of consequence to the determination, more probable." He had previously acted consistently with such possession; he had threatened to "shoot" Renya Lee.

The instant trial involved a question of who brought the gun that discharged and killed Mr. Sears. The evaluation of the case as whole changes if Mr. Sears brought the gun that resulted in his own death. Would the status of Mr. Sears as a drug dealer made it more probable than not that he would have been a person likely to have a tool of his illicit trade, a firearm, when he confronted Fred Ferguson? The answer is obviously yes. Had Mr. Sears killed Mr. Ferguson, the prosecution would assert this connection existed. Facts and inferences are neutral things. The logical inferences of facts do not exist only for prosecutors to obtain convictions.

The drugs discovered in the autopsy were admissible because there is a coherent and logical nexus from those drugs to the identity of Mr. Sears, and not Mr. Ferguson, as the person who brought the gun. Not to admit this evidence deprived Mr. Ferguson of his constitutional right to present a defense. See Argument at B. Part 1 and 2, Constitutional Considerations, above.

C. The trial was fundamentally flawed by the exclusion of evidence that Mr. Sears had previously beaten several girlfriends.

1. and 2. Constitutional and Evidentiary Considerations

As noted earlier, the attempt by Mr. Sears to assert ownership of Elizabeth Gorayeb was the root of the incident that led to his death. This was not the first time Mr. Sears attempted to dominate a woman. Public files in the Office of the Circuit Clerk of Ohio County revealed that Mr. Sears had been involved in:

1. Attacks on Tracy McWhorter by Maurice Sears on or about April 1. 2005. See police reports and domestic violence complaint from Case No. 05-M-561 from the Magistrate Court of Ohio County. And 05-D-62, and Family Court Case No. 05-DV-60; and,

2. Attacks on Renya Lee on or about June 2, 2004 as reflected on documents from 04-CJD-25 AR in the Circuit Court of Ohio County and 04-D-122 from the Family Court of Ohio County, and Petition for Appeal to the Circuit Court in which Ms. Lee reports Maurice Sears had threatened to "shoot her."

Mr. Ferguson asserts this, too, is evidence existed which supported the view that the Mr. Ferguson, who was not the initial aggressor, had reasonable grounds to believe he was in imminent rear of bodily injury, and had the lawful right to act in self-defense. State v. W.J.B. 166 W.Va. 602, 276 S.E.2d 550 (1981). "The reasonableness of the defendant's belief and conduct depended upon the past actions of the deceased, and for this reason the victim's history of threats, brandishing of arms, and violence toward the defendant and his family **and his general reputation for violence were admissible evidence on the issue of self-defense."** Id. at 613, 276 S.E.2d at 556. See also, State v. Bowyer, 143 W.Va. 302, 101 S.E.2d 243 (1957); State v. Peoples, 106 W.Va. 262, 145 S.E. 389 (1928); State v. Porter, 98 W.Va. 390, 127 S.E. 386 (1925); Annot., *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self-Defense by One Charged with Assault or Homicide,* 1 A.L.R.3d 571 (1965).

Furthermore, "In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that the deceased was a the

time of the killing, making a murderous attack upon the defendant, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, ..." State v. Mitchell, 214 W.Va. 516, 590 S.E.2d 709 (2003) quoting State v. Louk, 171 W.Va. 639, 301 S.E.2d 596 (1983) and relying upon Dietz v. Legursky, 188 W.Va. 526, 425 S.E.2d 202 (1992). Any suggestion that West Virginia Law limits the defendant to the introduction of evidence of specific incidents of which he was aware (the apparent position of the prosecution) was obliterated in Mitchell.[12]

The defendant submits that the evidence that he was approached by Mr. Sears, who had earlier threatened to kill him is sufficient competent evidence to allow the defendant to offer evidence of the character of the decedent, Maurice Sears, as circumstantial evidence of his

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[12] We expound that:

The test of our Rule 404(a)(2), as well as its federal counterpart, does not use the term 'self-defense', but refers to the concept of the victim as 'the first aggressor'. The notes of the Advisory Coummittee of the Federal Rules make it plain that this rule covers several situations, i.e., 'evidence of a violent disposition to prove that the person was the aggressor in an affray' or 'an accused may introduce pertinent evidence of the character of the victim, as In support of a claim of self-defense to a charge of homicide'. This is essentially the same as our pre-existing evidentiary rules.

Legursky, 188 W.Va. at 531, 425 S.E.2d at 207. We also provided that "'[c]learly, under Rule 404(a)(2) the accused in a criminal case may initially introduce character evidence to prove that the victim was the first aggressor.' Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers§ 6.2(F)(1)(a)(1986). See also 2 Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence § 404[06](1992)." Legursky, 188 W.Va. at 532, 425 S.E.2d at 208. Additionally, we interpreted Rule 404, wherein this Court stated:

Importantly, 'the admission of reputation evidence of the victim's character under Rules 404(a)(2) and 405(a) **renders knowledge of the character by the defendant unnecessary,** since the evidence is offered merely to permit a jury to circumstantially infer that the victim was the aggressor'. Cleckley, Sec, 6.2(F)(1)(1986 1992 Supp.) (Emphasis supplied). See also Weinstein and Burger, p. 404[6], at 404-41-42 ('Even if the accused is unaware of deceased's reputation, evidence of it may be introduced pursuant to Rule 404(a)(2).').

Legursky, 188 W.Va. at 532, 425 S.E.2d at 208.

Considering the facts of this case, the evidence concerning Mr. Woollard's general reputation for being a violent person was relevant and admissible evidence. The testimony of Dee Toothman and Lisa Smith with regard to Mr. Woollard's reputation may have shed light on an issue at the very heart of this case with regard to who was the first aggressor in this altercation. Presentation of such evidence with regard to his reputation during previous relationships may have left the jurors more capable of making a fully educated decision. It was even more important given that Mr. Woollard's testimony was that Ms. Mitchell was the first aggressor on the day of the shooting, as well as during the other altercations between the two prior to the shooting. Given the facts here, the evidence of Mr. Woollard's reputation during other situation where he behaved violently was justified to demonstrate a consistency with how he may have acted on the day that Ms. Mitchell shot him. It was relevant to demonstrate to the jury that his violent conduct was consistent with his past behavior and that Ms. Mitchell therefore had a reasonable apprehension for imminent fear of seriously bodily harm or death. We find that the circuit court abused its discretion by refusing to allow Ms. Mitchell and her trial counsel to present evidence concerning Mr. Woollard's general reputation for being a violent person. (Emphasis added).

Mitchell at 522-23, 590 S.E.2d at 715-16

character for lawlessness and violence pursuant to Rule 404(a) of the West Virginia Rules of Evidence. Character may be proven under W.Va. Rule of Evidence 405(b) by specific evidence of the character trait. This was prohibited by Judge Mazzone in a pre-trial ruling on the defendant's motion in limine. It was error under the Rules of Evidence. It was error of a constitutional dimension in that it deprived Mr. Ferguson of the right to present a defense as set forth elsewhere herein.

VII. REMEDY

Clearly, Mr. Ferguson believes that relevant admissible evidence was excluded from his trial. He has appealed. Should his conviction be reversed, as requested, the traditionally remedy is to remand for a new trial. When persons in this circumstance have complained that the new trial is barred by double jeopardy principles, courts have been swift to say that, by appealing, a defendant has waived the right, except when there was insufficient evidence, to complain that he should not be tried again.

Still there are circumstances when actions of a defendant are not truly the result of his own choice, but are dictated by the actions of others. This is true in connection with principles of double jeopardy. Normally, a motion for a mistrial, like an appeal, is the product of a defendant's choice of alternatives. Normally, a motion for a mistrial is deemed an implied waiver of the right against a second trial. However, where outrageous government conduct is deemed so egregious that a defendant's motion for a mistrial comes as the result of having been provoked into making it, the defense motion is not automatically deemed such a waiver, and examination of whether the defense was truly provoked by a prosecutor seeking an advantage is required under the doctrine of "manifest necessity." Arizona v. Washington, 434 U.S. 497 (1978).

Mr. Ferguson contends that where the appeal is required as the result of trial errors caused by the State, double jeopardy principles should also bar retrial. In the instant case, the Appellant contends that two of the issues briefed herein,[13] the prohibition on cross-examination of Officer Brown, and the exclusion of the testimony of Dr. Sullivan, reflect not only zealous advocacy, but represent a blatant and deliberate effort to manipulate the system of justice without regard to existing law, or any logical extension thereof. The reality is that before he was indicted, Mr. Ferguson articulated at a bond hearing that there was evidence, known to the police, that Mr. Sears was the person who brought a weapon to the confrontation. The prosecutor heard that explanation from defense counsel. The grand jury was not told of this evidence. It was told, instead, that such evidence did not exist. Efforts to prevent the Officer who told this lie to be cross-examined about it, and hide the underlying misconduct were actively, and successfully, pursued by the prosecutor.

In addition, after losing a Mr. Ferguson's pre-trial motion in limine to determine that very clearly identified evidence of the decedent's drug use, and violence, and the likelihood that he was armed was made in the defendant's favor, the prosecutor continued, without legal foundation, to resist this evidence.

There could have been one fair trial. There was not. The prosecutor deprived Mr. Ferguson of that right, and deprived the citizens of Ohio County of that right, as well. The prosecutor abandoned his "quasi-judicial" role.[14] But Mr. Ferguson is the one who suffers the incarceration, he suffers the loss of family contact, he suffers the loss of the continuation of his life, while the State remains aloof. This cannot be allowed.

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[13] The Appellant originally filed a petition for appeal on several additional issues. This Court has restricted the scope of this appeal to the issues addressed herein. To the extent some of the unconsidered issues would augment the position of the defendant on the double jeopardy issue, restricting the argument in accordance with the order of the Court is not intended by Appellant to be a waiver of such issues.

[14] Prosecutors have been long been held to a different standard than ordinary litigants. State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (W.Va., 1977) (While the Court found extensive misconduct, the case was remanded for a new trial.)

This Court should recognize that in the rare case, the case of manipulation of the system by the prosecutor, that even where a defendant appeals after having been convicted, some errors are so fundamental that a retrial must be barred under the federal, or perhaps, the State constitution. See State v. Lettice, 221 Wis.2d 69, 585 N.W.2d 171 (Wis. App., 1998) This is one such case.

VIII. CONCLUSION

Appellant, Frederick K. Ferguson, III, asks that this Court vacate his conviction for voluntary manslaughter be vacated and reversed, that the charges against him be dismissed and barred, or, in the alternative, that he be granted a new trial, or for such other relief as may appear to be appropriate.

Respectfully Submitted,

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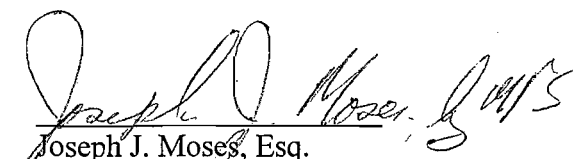

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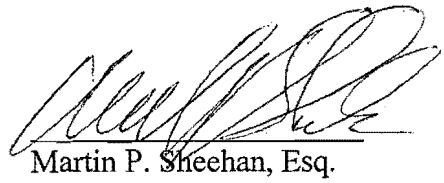
CERTIFICATE OF SERVICE

I, MARTIN P. SHEEHAN, do certify that service of the PETITIONER'S APPELLATE BRIEF was served upon the following by HAND DELIVERING a copy thereof, this 13th day of August, 2010.

Scott Smith, Esq.
Prosecuting Attorney's Office
1500 Chapline Street
Wheeling, WV 26003



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separated from her alleged damages cause by Wheeling Island.

The existence, causation and exacerbation of pre-existing emotional distress require the testimony of a medical expert. "... [W]here the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable, or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not prove the future effect of the injury to a reasonable certainty. In such situation, medical or other expert opinion testimony is required to establish the future effects of the injury to a reasonable degree of certainty." *Jordan v. Bero,* 158 W.Va. 28, 53, 210 S.E.2d 618, 635 (1974). Appellant's complicated, pre-existing issues require expert testimony to sort them out from her alleged damages in this case.

This is especially true in light of Wheeling Island's expert's report which notes that Appellant failed to identify any events occurring at Wheeling Island as a cause of emotional distress. Rather, Appellant identifies her prior experiences as the cause of emotional distress. The prior experiences identified by Appellant are numerous and significant. Dr. Bailey opines that Appellant's emotional issues are **not** causally related to her experiences at Wheeling Island. Rather, they were caused by the numerous other events. It surely takes a credentialed expert to render such opinions. Lay witness testimony is insufficient and Appellant has no testimony to counter the same. Therefore, Appellant's contention that no expert witness is necessary is not supported by the facts of this case.

VII.

RELIEF REQUESTED

For all the reasons stated herein, your Appellees respectfully request that this Honorable Court deny Appellant's Appeal and grant such other and further relief as this Court deems just and proper.

Respectfully submitted

WHEELING ISLAND GAMING, INC., d/b/a WHEELING ISLAND RACETRACK & GAMING CENTER, and MARK WEST, individually,

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CERTIFICATE OF SERVICE

Service of the foregoing **APPELLEES' RESPONSE TO APPELLANT'S BRIEF** was made upon the Petitioner by mailing a true copy thereof by United States mail, postage pre-paid, to her attorney, this 26th day of August, 2010, addressed as follows:

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