IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

On Appeal from the Circuit Court of Monongalia County

v.

CASE NO. 09-F-125

BEN SKIDMORE,
Defendant / Appellant

DOCKET NO.

FILE
DEC 10 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS

PETITION FOR APPEAL

Raymond H. Yackel, Esq.
162 Chancery Row
Morgantown, West Virginia 26505
(304)296-8296

Counsel for Defendant

FILED
NOV 22 2010
JEAN FRIEND
CIRCUIT CLERK

TABLE OF CONTENTS

Table of Authorities		i
I.	Kind of Proceeding the Nature of the Ruling in the Lower Tribunal	1
II.	A Statement of the Facts of the Case	2
III.	The Assignments of Error relied upon on Appeal and the Matter in Which They Were Decided at the Lower Tribunal	4
IV.	POINTS AND AUTHORITY RELIED UPON, DISCUSSION OF THE LAW, AND RELIEF PRAYED FOR	5
V.	Conclusion	18

TABLE OF AUTHORITIES

Cases

State v. McGinnis, 193 W. Va. 147, 455 S.E. 2d 516 (1994)	*2,4,5,6,7,8,9,10,19*
State v. La Roch, 196 W. Va., 294, 470 S.E. 2d 613 (1996)	*5,6*
Dunlaps v. McBride, _W. Va._, 691 S.E. 2d 183 (2010)	*6*
State v McLaughlin, No. 34860	*10,11*
Patton v. State, 25 S.W. 3d 387, 292 (Tex. App. 2000)	*7*
*State v. Combs, No. CA 2000-03-047, 2005 WL 941133, at *2 (Ohio Ct. App.2005)*	*7*
State v. Fughgate 138 S.E. 2nd, 218 (W.Va. 1927)	*13*
State v Keeton, 272 S.E. 2nd, 817, 1980	*15*
State v. Brant, 252 S.E. 2nd, 901, 1979	*13,15*
State v Davis, 43 S.E. 2nd, Page 99	*13*
State v. Phillips, 93 S.E. 2nd, Page 828	*13,15*
State v. Bush, 442 S.E. 2nd, 437, (1994)	*13,15*
Syllabus .4, in part, State v. Burdett, 135 W. Va. 312, 63 S.E. 2nd, 69 (1950)	*14*
State v. Hickman, 338 S.E. 2nd, 188 (1985)	*14*
State v. Guthrie, 441 S.E. 2nd, 163 (W. Va. 1995)	*15*
State v. Kidwell, 62 W. Va. 466, 471, 59 S. E. 2nd, 494, 496 (1907)	*15,16*
State v. Robinson, 20 W. Va. 713, 1882	*15*

Statutes

West Virginia Rules of Evidence 403	2,4,5,9,10,19
West Virginia Rules of Evidence 404(b)	2,4,5,6,7,8,9,10,19

IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

v.

BEN SKIDMORE,

Defendant/Appellant.

On Appeal from the Circuit Court of Monongalia County Felony Case No. 09-F-125

DOCKET No. _____

PETITION FOR APPEAL

I. KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL

The Defendant Ben Chase Skidmore was found guilty of first degree murder at a jury trial which lasted from March 16 through March 19, 2010. At the conclusion of the guilt phase of the trial, the Court proceeded to the sentencing phase pursuant to a prior Order of the Circuit Court bifurcating the trial as a result of a Motion to Bifurcate previously filed by the State of West Virginia. At the sentencing phase on March 19, 2010, the Court allowed the State of West Virginia to introduce evidence of the Defendant's prior conviction for involuntary manslaughter in 1987, without any finding by the Court or analysis required by

Rule 403 of the West Virginia Rules of Evidence. Additionally, the Court did not entertain any consideration of an analysis under the McGinnis standard for Rule 404(b) evidence of the West Virginia Rules of Evidence. A the conclusion of the sentencing phase and after the introduction of the conviction evidence, the jury did not grant the Defendant mercy, and consequently the Defendant was sentenced to life in prison without mercy on March 19, 2010. A hearing on the Defendant's post trial Motions was held on May 20, 2010, at which time the Defendant raised all issues in his Motion for a new trial as set forth in this Petition for Appeal. The Court the denied the Defendant's Motion for a new trial on these errors.

II. A STATEMENT OF THE FACTS OF THE CASE

This is a very simple statement of facts, since it is not a "who done it" or a sufficiency of the evidence argument. The facts are that on or about April 26, 2009, Ben Chase Skidmore killed Steve Yarborough by striking him in the head at least 2 times with a hammer. This homicide occurred in Sabraton, Monongalia County, West Virginia, a block away from the Hardee's Restaurant on the East side of Route 7. At the time of the incident, Ben Chase Skidmore and Steven Yarborough were roommates, living with three (3) other construction workers at a home on Sturgess Avenue in the City of Morgantown. All five (5) of the men involved were construction workers , picking up work where ever it was available,

which at that time was in Morgantown, West Virginia.

Although the Defendant, the victim and the other roommates had known each other for nearly a year, the State's evidence was that there was a great deal of friction in the household concerning each person's contribution to the household expenses and cleaning of the house. The State's evidence was that the Defendant and Steven Yarborough had been arguing with each other for days prior to the incident. Ben Skidmore testified to the jury that argument was not as serious as the State made it out to be and this arguing was a daily routine with five (5) men living together in one (1) household.

The State and the Defendant agree that both the victim and the Defendant as well as the other members of the household were heavy drinkers, drinking every night after work and at the end of the work week from Friday evening through Monday morning, consuming cases of beer. Even the State in it's argument at the Post Trial Motions acknowledged on the record that everybody was intoxicated at the time the incident occurred, but that this intoxication did not render the Defendant incapable of forming the premeditation necessary to commit and be guilty of first degree murder.

Sometime during the late afternoon of April 26, 2009, the Defendant came from sitting outside on the front porch where he was drinking beer, walked

through the living room where the victim and other friends were sitting, walked into the kitchen, took his construction hammer and without saying a word or speaking to anyone, struck th victim on the head, hitting him at least two (2) times, and up to four (4) times, instantly causing his death. The Defendant was subsequently indicted by the May, 2009, Monongalia County Grand Jury and charged with first degree murder and remains incarcerated since the night of his arrest of April 26, 2009. The two (2) issues which the Defendant claims were errors committed by the trial court were the erroneous submission of a jury instruction on "gross intoxication" and by prior conviction evidence presented to the jury at the sentencing phase of the bifurcated trial without any evidentiary safeguards.

III. THE ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MATTER IN WHICH THEY WERE DECIDED AT THE LOWER TRIBUNAL

A. The trial court erred when it permitted the State of West Virginia to introduce into evidence at the sentencing phase the Defendant prior criminal conviction, without a Evidence Rule 403 analysis or a McGinnis 404 (b) type analysis.

B. That the trial court erred when it instructed the jury on the voluntary intoxication which would prevent the Defendant from forming the requisite premeditation and specific intent to commit first degree murder, when the Court in its instruction said the intoxication must be "gross" intoxication. The words "gross intoxication" as set forth in the jury instruction provides the jury with no parameters or guidance to the meaning of "grossly intoxicated." What may be

grossly intoxicated to one person who does not consume alcohol may be different than somebody who has two or three drinks every night after work. Consequently, an instruction such as this, if the Court is going to approve the words grossly intoxicated should be explained in more concise and commonly understood terms.

IV. POINTS AND AUTHORITY RELIED UPON, DISCUSSION OF THE LAW, AND RELIEF PRAYED FOR

A. The trial court erred by permitting the State of West Virginia to introduce into evidence the Defendant's prior criminal conviction at the sentencing phase of the bifurcated trial, without performing an analysis pursuant to Rule 403 of the West Virginia Rules of Evidence, as well as an analysis under the McGinnis standard required by West Virginia Rules of Evidence 404(b).

Six (6) weeks before trial State filed a Motion to Bifurcate the penalty phase from the guilt phase of the trial. At the time the State was relying upon *State v. La Roch, 196 W. Va., 294, 470 S.E. 2d 613 (1996). La Roch* held that a Trial Court has the discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.

A hearing on the State's Motion was held on March 8, 2010, eight (8) days before the trial. At the outset of the Motion, counsel for the Defendant specifically requested that the State advise the Court which of the *La Roch* factors the State was relying upon in support of its Motion, particularly if the State intended to introduce evidence which may not be admissible at the trial phase but would (or maybe) admissible at the sentencing phase. Transcript, March 8, 2010, Page 2, 11, 19-22. In response, the State admitted it sought to introduce evidence of the

Defendant's criminal history, as that type of evidence would not be admissible during the State's case in chief. Transcript, March 8, 2010, Page 3, 11. 2-6.

At this Motion hearing neither the parties nor the Court were aware of the March 4, 2010, decision in *Dunlap v. McBride, _W. Va._, 691 S.E. 2d 183 (2010).* In Dunlap the Court found that

> [i]t is clear that the *La Roch* factors are concerned with a party being able to present evidence for sentencing that may not be admissible on the merits of a prosecution. In this case the State has a considerable amount of additional bad acts evidence involving Mr. Dunlap that may not have been admissible during the guilt phase, even if the State had timely brought the evidence to the Court's attention. However, this evidence was highly relevant as to the decision of whether Mr. Dunlap should receive mercy and obtain a sentence that would allow him to be eligible for parole. Ultimately, we agree with the Trial Court that "there is no evidence that would lead (us) to conclude that the bifurcation herein was constitutional error." More importantly, Mr. Dunlap has not articulated any plausible prejudicial effect from the bifurcation. Dunlap, *supra, Page 192*

The Defendant in Dunlap also argued that the State was improperly permitted to introduce evidence of another bad acts without the trial Court conducting a McGinnis 404(b) hearing. *State v. McGinnis, 193 W. Va. 147, 455 S. E. 2nd, 516 (1994).* The Court found no error, stating

> Mr. Dunlap has failed to cite any decision of this Court where we have required a McGinnis hearing for

> sentencing purposes only. As a general matter, "[t]he rules of evidence, including Evid. R. 404(b) regarding "other acts," do not strictly apply at sentencing hearings." *State v. Combs, No. CA 2000-03-047, 2005 WL 941133, at *2 (Ohio Ct. App.2005). See Patton v. State, 25 S.W. 3d 387, 292 (Tex. App. 2000)* "It has been held that Rule 404(b) does not apply to the penalty or punishment phase of a bifurcated trial." Moreover, "[a] Trial Court has wide discretion in the sources and types of evidence used in determining the kind and extent of the punishment to be imposed. And a sentencing Court is not restricted by the federal constitution to the information received in open court." *Elswich v. Holland, 623 F. Supp. 498 (S.D. W. Va. 1985) (citations omitted).* Therefore we find this issue to be without merit.

By the time the trial began, the Dunlap decision had been reviewed by everyone and its decision governed the procedural aspects of the penalty phase of the bifurcated trial and the introduction of the Defendant's prior criminal record into evidence. Consequently, Dunlap set the back drop for the sentencing phase of the Defendant's trial.

At the conclusion of the three (3) day trial beginning on March 16, 2010, the jury returned a verdict of guilty to first degree murder. The Court then sent the jury home for the night. The following morning the Court reconvened and the parties discussed the procedure for the sentencing phase of the bifurcated trial.

Acknowledging the Dunlap decision, the Defendant objected on the record that despite the findings in Dunlap there needed to be a McGinnis 404(b) analysis

for any of the State's evidence which involved prior criminal convictions. The Defendant further asserted that the Dunlap case did not provide constitutional safeguards against the introduction of this type of evidence without a McGinnis type hearing, i.e. the in camera analysis required by McGinnis. See Transcript, March 19, 2010, Page 547 11.7-Page 548 11. 548.

The Court overruled the Defendant's objection and stated

> "[b]ased upon my reading of it (Dunlap) is that you don't have to go through a 404(b) McGinnis analysis, that only applies during the guilt phase of trial." The Defendant made a blanket general objection to the 404(b) evidence and the proposed bad act and criminal conviction evidence proposed by the State." Transcript, Page 552, 11. 1-24.

The sentencing phase of the trial began and the State introduced testimony of Detective Mark Martinez from Los Angeles who testified from his closed case files to an investigation of a homicide that occurred in 1986, which ultimately resulted in the conviction of the Defendant of Involuntary Manslaughter after a bench trial.

The state also presented the testimony of the victims wife who testified that

on the morning of the altercation with the Defendant her husband advised her that he and the Defendant had been arguing about household chores and money.

Over the hearsay objection of the Defendant the wife was permitted to testify in great detail about her husband's statements to her on the morning of his death and this testimony presented a picture of tension and strife in her husband's household with the Defendant and in essence the Defendant was doing nothing but causing problems in the household. No McGinnis analysis was performed on this evidence.

At the conclusion of the penalty phase the jury did not recommend mercy for the Defendant and he was sentenced to life in prison without mercy on March 19, 2010.

The Defendant timely filed post-trial Motions, and a hearing was held on May 20, 2010. The issues raised during these Motions were to the Court's diminished capacity instruction and the sentencing phase procedure which followed the Dunlap ruling. In particular, the Defendant objected to the introduction of the Defendant's prior conviction without the safeguard of McGinnis 404(b) and Rule 403 balancing analysis of its prejudicial vs probative value. This lack of McGinnis safeguards and Rule 403 balancing analysis were error, despite the 2010 Dunlap decision, which the Defendant argued deprived the

Defendant of any constitutional protections due to the introduction of this Rule 404(b) evidence.

As it turns out, this Court reviewed this same bifurcation procedure in *State v McLaughlin, No. 34860*, decided June 8, 2010, written by Justice Workman. In McLaughlin, the Court held as follows:

> The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for the purposes of determining a defendant's guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past , present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the Defendant guilty of first degree murder, so long as evidence is found by the trial court to be relevant under Rule 401 of the W. Va. Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the W. Va. Rules of Evidence. *McLaughlin, supra, p. 13* In the instant case, the Defendant timely made a McGinnis 404(b) objection to the introduction of the Defendant's prior conviction. The trial court denied this objection due to the decision in Dunlap, supra.

The Defendant also objected to the apparent evidentiary "free for all" which Dunlap permitted, which objection was also overruled by the trial court. The fact that the holding in the McLaughlin, supra., decision is to be applied prospectively as stated in Footnote 16, this Defendant timely raised the exact issues which

McLaughlin has set forth concerning the procedural safeguards for admissible evidence at the sentencing phase of a bifurcated trial, and as such the decision should be applied to the instant case which is on appeal.

B. The trial court failed to properly and completely instruct the jury about the Defendant's intoxication at the time of the homicide and his incapacity to form the specific intent to premeditate and/or deliberate the killing. The Defendant's primary defense in this case is whether or not the Defendant's voluntary intoxication deprived him of preventing him at the time of the killing of the mental capacity to from the requesite premeditation and malice to support a charge of first degree murder. The issue of the Defendant's intoxication was raised by the Defendant throughout the trial and the record clearly supports the conclusion that the Defendant as well as the victim and his other friends were heavily drinking on the days prior to and on the day of the killing. In fact, the State of West Virginia concedes this intoxication in their response to the Defendant's post-trial motions.

This is not a case of "who done it." The homicide occurred in the presence of three (3) individuals, all of whom were friends of both the Defendant and the victim. Without going into great detail of the testimony from the trial, the homicide occurred when the Defendant walked into the kitchen adjacent to the

room were the victim was sitting, grabbed his construction hammer and returned to the room, striking the victim at least two (2) times, perhaps four (4), in the head while the victim was sitting in his chair. The undisputed testimony is that both the Defendant and the victim, as well as the witnesses in the room, were all construction workers, moving from place to place from time to time to take advantage of the construction trade. When they were not working, they were drinking. On both the day prior to and the day of the homicide the testimony is undisputed that everybody was heavily drinking. In fact, during the afternoon of the killing, the Defendant went to the convenient store and bought an additional thirty (30) pack of beer to drink.

The Defendant's most persuasive trial argument was that due to his intoxication he did not have the capacity to form the requisite and premeditation and malice to kill the victim. Based upon the evidence produced at trial, specifically the testimony from the State's own witness concerning the amount of alcohol consumed by all of the parties on the date of the homicide, the Defendant proffered an instruction on diminished capacity.

The Defendant's instruction rejected by the Court. A lengthy discussion was had on the record concerning the West Virginia cases involving voluntary intoxication. The cases discussed were *State v Keaton, 272 S.E. 2nd, 817, 1980,*

State v. Brant, 252 S.E. 2nd, 901, 1979, State v Davis, 43 S.E. 2nd, Page 99, State v. Phillips, 93 S.E. 2nd, Page 828, and State v. Bush, 442 S.E. 2nd, 437, (1994). Each of these cases involved voluntary intoxication and it's use to negate the elements of premeditation and deliberation of the crime of first degree murder and discussed the issue of whether or not "the accused may show that he was incapable in forming the intent necessary to constitute the crime..." *State v. Fughgate 138 S.E. 2nd, 218 (W. Va. 1927).* Although *Fughgate* involved a charge of forgery, the issue still involved intoxication and intent.

After lengthy discussions and arguments concerning the proposed instruction, on the afternoon prior to closing argument, the Court advised the parties that it would prepare an instruction overnight and submit it for review prior to opening statements. The following morning the Court provided an instruction, and advised the parties that if either had an objection they could make it on the record after closing arguments. That instruction is as follows:

> The Court instructs the jury that although voluntary intoxication and drunkenness will never provide a legal excuse for the commission of a crime, the fact that a person may have been grossly intoxicated at the time of the commission of the crime, may negate the existence of premeditation and deliberation, which is an element of the offense of murder in the first degree. So, the evidence that a Defendant acted while in a state of gross intoxication is to be considered and determine whether or not the Defendant acted with

premeditation and deliberation.

> If the evidence in this case leaves you with a reasonable doubt the accused was capable of forming premeditation and deliberation to commit the crime of murder in the first degree because of gross intoxication, then you should acquit the Defendant on the offence of murder in the first degree and deliberate on the lessor included offense of murder in the second degree.Transcript, March 19, 2010, Page 480, 11.3-20.

There was no discussion on the record prior to the Court giving this charge, and the Defendant timely objected to said charge at the conclusion of closing arguments. Trial Transcript, March 19, 2010, Page 534, 15-535, 2

West Virginia Courts have long recognized that proof of voluntary intoxication may serve to reduce a charge of first degree murder to second degree murder where the level of intoxication is "such as to render the accused incapable of forming an intent to kill, or acting with malice, premeditation or deliberation. *Syllabus .4, in part, State v. Burdett, 135 W. Va. 312, 63 S.E. 2nd, 69 (1950). See also State v. Hickman, 338 S.E. 2nd, 188 (1985)"* Therefore, there is no question of the propriety of the Court giving an instruction on voluntary intoxication, however, it then becomes an issue of the sufficiency of the instruction prepared and given by the Court.

Trial courts have broad discretion in formulating a charge to a jury, so long as the charge accurately reflects the law. Deference is given to the trial court's

discretion concerning specific wording of any instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion. *See State v. Guthrie, 441 S.E. 2nd, 163 (W. Va. 1995)*. However, a trial court's instructions to a jury must be a correct statement of the law, and must be supported by the evidence. The purpose of instructing a jury is to focus the jury's attention on the essential elements of the case and inform them of the permissible ways in which issues may resolve; if instructions are properly delivered, they succinctly and clearly will inform the jury of the role and decisions it must make. Guthrie, supra, Page 380-381

Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood issues involved and were not mislead by the law. Jury instructions can not be dissected on appeal, instead an entire instruction is looked at in determining its accuracy.

The jury instruction presented by the Court appears to come from *State v. Kidwell, 62 W. Va. 466, 471, 59 S. E. 2nd, 494, 496 (1907)*. The statement in *Kidwell*, however, is not the same statement that was used in *State v. Robinson, 20 W. Va. 713, 1882*, nor in any of the subsequent cases such as *State v. Brant, State v. Bush, State v. Phillips, State v. Robinson* as well as *State v. Keeton*. The use of the adjective "gross" by the Court is an anomaly other than in the *Kidwell* case.

It appears that the Court may have taken this instruction from the West Virginia Homicide Jury Instructions Project, prepared by Professor James R. Elkins and students at West Virginia University College of Law, Spring, 2006. The Court's instruction seems to follow the standard instruction set forth in that project. However, the West Virginia Homicide Jury Instructions Project has a proposed new jury instruction, that sets out to clearly define what a jury may consider whether a Defendant was "grossly intoxicated." Your Defendant asserts that the instruction composed by the Court came from an arcane statement of the law in 1907, which has long since been reviewed and expanded upon since that time in the different cases set forth herein. It is clear that in all the cases since *State v. Kidwell*, the word "gross intoxication" have been removed and the word "intoxication" has been substituted therein.

In light of the importance of this particular instruction to the Defendant herein, the Court should have added the information contained in the West Virginia Homicide Jury Instructions which sets off in greater and more detailed language the meaning of "grossly intoxicated" which would allow the jury to have wording which would enable them to evaluate what is "gross intoxication." In the instant case the Court on its own prepared the jury instruction, and essentially deprived the Defendant from requesting that the Court add additional language

into the instruction to more fully explain and give guidance to the jury on what is "gross intoxication." The correct instruction should have been

> **Proposed Jury Instruction**: Voluntary intoxication does not excuse a crime. The Defendant may, however, produce evidence to show that [he] [she] did not, by any reason of intoxication, possess a element of intent [that is, _____] that is a necessary element of the crime of _____. You may find the Defendant not guilty of _____, and consider whether the Defendant may be guilty of the lessor offense of ___, if the Defendant can show that:
>
> 1) [he] [she] was so grossly intoxicated;
>
> 2)[he] [she] could not have formed the intent to _____[that is, the specific element of intent necessary to prove the occurrence of the offense in question];
>
> 3) the intoxication actually prevented [him] [her] from forming the required intent; an
>
> 4) the intent required by the offense was not formed prior to the intoxication.
>
> In determining whether or not the Defendant was grossly intoxicated you may consider:
>
> 1) the amount of [alcohol] [drugs][intoxicants] consumed and its effect on the Defendant;
>
> 2) the amount of time between the Defendant's consumption of the [alcohol][drugs][intoxicants] and the Defendant's alleged criminal acts;
>
> 3) the Defendant's conduct as observed by others; and
>
> 4) [the results of tests administered to determine the use

and quantities of][alcohol][drugs][intoxicants] consumed.]

The use of [alcohol][drugs][intoxicants] does not excuse the commission of a criminal act if the use of [alcohol][drugs][intoxicants] merely:

1) arouses passions;

2) alters perceptions;

3) releases inhibitions; or

4)clouds reason or judgement.

While the Defendant continues to object to the "grossly intoxicated" in the submitted instruction. In the event this Court believes that is the proper standard, clearly the trial court had the duty and the obligation to more clearly define the words gross intoxication so that the jury can have meaningful discussions and consideration of that issue.

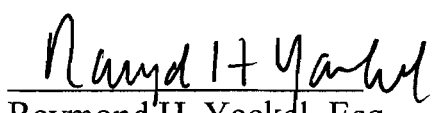
V. CONCLUSION

On the issue of the faulty jury instruction prepared by the Court in response to the Defendant's proposed instruction, the Defendant respectfully requests that he be granted a new trial due to the faulty instruction. Since the facts of the case were only susceptible to three (3) possible verdicts, one being not guilty and the other two being first degree and second degree murder, the faulty instruction

deprived the Defendant of a meaningful consideration by the jury of his intoxication.

The failure of the trial court to have a Rule 403 analysis of the Defendant's prior conviction in California before submitting it to the jury, an/or the failure of the Court to hold a McGinnis 404(b) analysis requires that the sentencing portion of the Defendants bifurcated trial be remanded for a new hearing.

Respectfully submitted,
Raymond H. Yackel, Esq.
Counsel for the Defendant



Raymond H. Yackel, Esq.
Counsel for Defendant and Appellant
West Virginia State Bar #4150
162 Chancery Row
Morgantown, WV 26505