

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

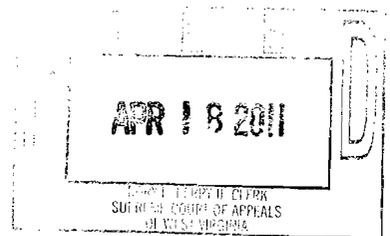
STATE OF WEST VIRGINIA

Plaintiff below/Respondent,

Vs.

No. ~~101413~~

11-0043



KENDRA SULICK,

Defendant below/Petitioner,

**APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY
HONORABLE CHRISTOPHER C. WILKES, JUDGE
CASE NO. 10-F-35**

BRIEF OF PETITIONER

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF AQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE
 - a. The State failed to offer sufficient evidence to prove that Petitioner actually committed the acts that are the basis of the counts for which she was convicted
 - b. The State failed to offer sufficient evidence to prove that Petitioner's acts constituted actual "force" or "threat of force"
 - c. The State failed to offer sufficient evidence to prove that Petitioner's acts were motivated by racial bias
2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED PETITIONER'S MOTION TO DISMISS THE PROCEEDING BASED ON THE UNCONSTITUTIONALITY OF WEST VIRGINIA CODE § 61-6-21
 - a. West Virginia Code § 61-6-21 is unconstitutional because it violates Article III, § 10 of the West Virginia Constitution and the Fourteenth Amendment of the United States Constitution as said statute is void for vagueness
 - b. West Virginia Code § 61-6-21 is unconstitutional because it violates Article III § 8 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution as it allows for a sentence that is grossly disproportionate to the character and degree of offenses sought to be prosecuted under said statute
3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR ARREST OF JUDGMENT AS THE COUNTS FOR WHICH PETITIONER WAS CONVICTED SIMPLY FAILED TO CHARGE AN OFFENSE AS THE SOLE USE OF RACIAL SLURS AND/OR OBSCENE GESTURES CANNOT BE CONSIDERED A VIOLATION OF WEST VIRGINIA CODE § 61-6-2
4. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL

STATEMENT OF THE CASE

Petitioner Kendra Sulick is appealing a sentencing order entered by the Circuit Court of Berkeley County, West Virginia on December 16, 2010, which wrongfully denied Petitioner's post-trial motions and sentenced the Petitioner to the penitentiary. (A.R. 1253-1260).

Petitioner was originally indicted by a Berkeley County Grand Jury for one (1) count of criminally violating the civil rights of another pursuant to West Virginia Code § 61-6-21(b) in criminal action number 09-F-26. (A.R. 5-7). Pursuant to the first indictment, Petitioner Kendra Sulick and her significant other, Bruce Poole, were jointly indicted under the singular count. (A.R. 5). Prior to trial under the first indictment, upon the motion of defendants, the singular count alleging a violation of West Virginia Code § 61-6-21 was dismissed, without prejudice, after the trial court found the language in said indictment to be insufficient as the count did fail to clearly state the nature and cause of the accusation against the defendants. (A.R. 190-192).

Subsequent to the dismissal of the indictment being prosecuted in 09-F-26, Petitioner Kendra Sulick was indicted by a Berkeley County Grand Jury in the February, 2010 term for nine (9) counts of criminal civil rights violations pursuant to West Virginia Code § 61-6-21(b) and three (3) counts of conspiracy to commit a criminal civil rights violation pursuant to West Virginia Code § 61-10-31 in criminal action number 10-F-35. (A.R. 354-360). Petitioner Kendra Sulick and Bruce Poole were not jointly indicted in the 10-F-35 proceeding. (A.R. 354-360). Bruce Poole was also indicted by a Berkeley County Grand Jury during the February, 2010 term for acts similarly alleged against

Petitioner; Bruce Poole's criminal action number was 10-F-32. Although separately indicted, all hearings and trial dates were simultaneously scheduled.

On April 5, 2010, Petitioner Kendra Sulick did file a written motion to dismiss the counts set forth in the pending indictment based on the unconstitutionality of West Virginia Code § 61-6-21; Bruce Poole did join in said motion to dismiss. (A.R. 383-424). On May 14, 2010, a hearing was held upon the motion to dismiss. (A.R. 1280-1345). By Order entered on May 21, 2010, the Circuit Court of Berkeley County, West Virginia did deny the motion to dismiss based and did note Petitioner's exception to the ruling. (A.R. 438-442).

On June 2, 2010, Petitioner Kendra Sulick did file a petition for writ of prohibition with this Honorable Court seeking to prohibit prosecution based on the Circuit Court's error in denying Petitioner's motion to dismiss the indictment because of the unconstitutionality of West Virginia Code § 61-6-21. (A.R. 1346-1381). In said petition for writ of prohibition, Petitioner did argue that the trial court's denial of Petitioner's motion to dismiss was legal error plainly in contravention of a constitutional mandate, and if prosecution was allowed to proceed, there would be high probability that if a conviction were sustained under said code section that the conviction would be completely reversed. (A.R. 1348). *See Hinkle v. Black*, 208 W. Va. 258, 539 S.E.2d 765 (2000). After receiving Petitioner's writ of prohibition, this Honorable Court did direct the State to respond to the same but did ultimately determine that rule should not issue. (A.R. 1404).

On June 4, 2010, a pretrial hearing in the matter was held and certain rulings were made concerning trial procedure and evidence. (A.R. 722-803). At the June 4, 2010

pretrial hearing, based upon the objection of Petitioner, the trial court did order that the Petitioner's trial be held separately from Bruce Poole's trial. (A.R. 586-589). Further, at said pretrial hearing, upon motion of the State and agreement of the parties, the pleadings and record in criminal action numbers 09-F-26 and 10-F-35 were consolidated. (A.R. 46, 586-587).

On June 5, 2010, Petitioner did file a written motion to dismiss counts ten (10) through twelve (12) of the indictment, which charged Petitioner with acts of conspiracy to commit a criminal civil rights violation, based on the insufficiency of the language contained said counts. (A.R. 570-585). On June 7, 2010, the trial court did grant Petitioner's motion to dismiss counts 10 through 12 of the indictment, with prejudice. (A.R. 590-591).

On June 8, 2010, Petitioner did proceed to a trial by jury on Counts 1-9 of the indictment; all counts being violations of West Virginia Code § 61-6-21(b). (A.R. 1055-1238). On June 10, 2010, a Berkeley County Jury did find Petitioner Kendra Sulick guilty of count 1, count 6, and count 8 of the indictment and did find Petitioner Kendra Sulick not guilty of the remaining six (6) counts of the indictment. (A.R. 652-654).

After conviction, Petitioner Kendra Sulick did timely file certain post trial motions; specifically, Petitioner Kendra Sulick did file a motion for arrest of judgment, motion for new trial, and renewed motion for judgment of acquittal after discharge of jury. (A.R. 655-706).

On August 9, 2010, a hearing upon Petitioner's post-trial motions was held and the relief requested in said post-trial motions was denied by the Circuit Court of Berkeley County, West Virginia. (A.R. 1250-1252). Further, the Circuit Court of Berkeley

County, West Virginia deferred sentencing until a later date so that Petitioner Kendra Sulick could participate in a diagnostic evaluation. (A.R. 1250-1252, 720-722).

On November 29, 2010, a sentencing hearing was held and Petitioner Kendra Sulick was sentenced to a determinate sentence of two (2) years in the state penitentiary for her conviction under count 1; a determinate sentence of two (2) years in the state penitentiary for her conviction under count 6; and a determinate sentence of two (2) years in the state penitentiary for her conviction under count 8. All sentences were to be ordered to be served consecutively; said penitentiary sentences were suspended for a period of five (5) years supervised probation. (A.R. 1253-1261).

On January 3, 2011, Petitioner did timely file a written notice of appeal of said sentencing order. After receiving said notice of appeal, this Honorable Court did issue a scheduling order setting forth the applicable deadlines for perfecting Petitioner's appeal. Through said appeal, Petitioner seeks to have her convictions reversed, set aside or be granted a new trial.

STATEMENT OF FACTS

The charges set forth in the Petitioner's indictment stem from alleged acts of criminal civil rights violations as set forth in West Virginia Code § 61-6-21(b), West Virginia's "hate crime" statute.

For purposes of this brief, Petitioner Kendra Sulick will refer to Petitioner's family as the Poole-Sulick family and the victims' family as the Smith family. Petitioner Kendra Sulick's family is comprised of her significant other, Bruce Poole, and their two minor children. (A.R. 953). The victims' family is comprised of Brian Smith and his significant other, Bettyanne Obiri-Smith, their two minor children, and paternal

grandmother Constance Smith. (A.R. 952, 987). The Poole-Sulick family is Caucasian and the Smith family is African-American.

In 1995, Petitioner Kendra Sulick began residing at the home located at 45 Wisconsin Lane, Berkeley County, West Virginia. (A.R. 1144). In July, 2005, the Smith family began residing at 23 Wisconsin Lane. (A.R. 889) The homes where the families resided are in adjacent, close proximity to each other and members of the Poole-Sulick family had to directly pass the property of the Smith family when driving to their home. (A.R. 891-892, 941).

At trial, it was uncontested that from July 2005 until December 8, 2007 no incidents of racial prejudice, racial animosity, force, or threats of force, occurred between the two families. (A.R. 953, 981, 988). In fact, the relationship between the families was neighborly and only deteriorated after Bruce Poole shot two dogs owned by the Smith family on December 8, 2007. (A.R. 953, 988). On said date, the Akita-Lab mixed dogs were running free on the property owned by the Poole-Sulick family. (892, 988-989). Petitioner Kendra Sulick did not participate in shooting the dogs owned by the Smith family. (A.R. 964).

At trial, the State called the following witnesses in its case-in-chief: Bettyanne Obiri; Brian Smith; Lieutenant Brendan Hall, and Constance Smith. Petitioner sets forth the relevant portions the evidence presented in this case with as much detail as required:

BETTYANNE OBIRI-SMITH

At trial, Bettyanne Obiri-Smith only offered testimony relevant to the six (6) counts for which Petitioner was acquitted and offered absolutely no testimony to support the three (3) convictions for which Petitioner was ultimately convicted. (A.R. 916-928).

Specifically, Bettyanne Obiri-Smith did testify in great detail regarding the acts for which Petitioner was acquitted but failed to offer testimony regarding counts 1, 6, and 8 of the indictment.

Bettyanne Obiri-Smith testified that she called Petitioner Kendra Sulick an “ignorant bitch” and that she has participated in conversations where the Poole-Sulick family were referred to as “white trash.” (A.R. 938, 940). Bettyanne Obiri-Smith testified that she had filed a verified civil rights petition and that she was seeking injunctive relief in the form of a one hundred foot restraining order and monetary damages through said petition. (A.R. 947-948). Further, Bettyanne Obiri-Smith testified that she only felt threatened with Petitioner’s acts when Petitioner Kendra Sulick was “in her vehicle weaving her vehicle towards myself or towards my kids.” (A.R. 929).

BRIAN SMITH

Brian Smith testified that he had a good relationship with Petitioner Kendra Sulick until Bruce Poole shot his dogs and that said incident was the point when his relationship with Petitioner began to unravel. (A.R. 953, 964). Brian Smith testified that Bruce Poole shot his dogs and that Kendra Sulick did not shoot his dogs (A.R. 964). Brian Smith testified at the time that the dogs were shot they had gotten off their chain and were on the Poole-Sulick property. (A.R. 988-989).

Brian Smith testified that he was acquainted with an individual by the name of Bob Heavner and described Mr. Heavner as a “man that owns a lot of property in the park.” (A.R. 973-974). Brian Smith testified that Mr. Heavner owns a real estate lot between the Smith home and the Poole-Sulick home and that Mr. Smith has been trying to purchase land to “extend my property.” (A.R. 975).

Brian Smith agreed that after December, 2007, when the dogs were shot, that he called the police 26 times on members of the Poole-Sulick family. (A.R. 965-966). Brian Smith testified that he had called Petitioner's family "uneducated fucks", "mother fuckers", and that he had called Petitioner herself a "bitch". (A.R. 975, 990, 998).

After being confronted with a video showing the witness yelling at one of the Petitioner's minor children, Brian Smith did admit to making certain derogatory comments and direct threats toward the minor child and the Petitioner's family. (A.R. 978). Specifically, said witness admitted to the following: Brian Smith admitted to calling members of the Poole-Sulick family "homeless fucks" (A.R. 978).; Brian Smith admitted to threatening to "beat the breaks" off members of the Poole-Sulick family (A.R. 979).; Brian Smith admitted to threatening to kill the Poole-Smith family by emptying out "the whole mother fucking house" and leaving nothing but "corpses." (A.R. 979, 980). The video referenced during said cross examination was entered into evidence as Defendant's Exhibit #1. (A.R. 1091, Defendant's Exhibit #1).

Brian Smith testified that he personally went to the Berkeley County Planning Commission to file a complaint against the Poole-Sulick family because of foul smells coming from the Poole-Sulick septic tank. (A.R. 982, 996).

Audio recordings of a 911 call was entered into evidence which illustrated an incident where Brian Smith was verbally fighting with Bruce Poole and antagonizing Mr. Poole to get his gun over a dispute concerning a log in the road. (A.R. 967-968, Def. Trial Exhibit #2).

Although denied by Brian Smith, a video recording of Brian Smith stealing a tire from Petitioner's property was also entered into evidence. (990, 1091, Def. Trial Exhibit #1).

Brian Smith testified that on one occasion he went to the Berkeley County Public Defender's office to talk with an investigator working on Bruce Poole's case after the investigator called him and when he got there he did not act inappropriately or attempt to intimidate the persons working at the office in any way. (A.R. 985-986).

After being confronted with all of the evidence, Brian Smith was forced to admit that he had been involved in a lot of disputes with members of the Poole-Sulick family and that many of the disputes did not involve Petitioner Kendra Sulick. (A.R. 989-990). In a similar manner as Bettyanne Obiri-Smith, Brian Smith only offered testimony relevant to the six (6) counts for which Petitioner was acquitted and offered absolutely no testimony to support the three (3) convictions for which Petitioner Kendra Sulick was convicted. (A.R. 951-1003).

LIEUTENANT BRENDAN HALL

Lead investigating officer, Lieutenant Brendan Hall, testified that in October, 2008 he first received a complaint from Constance Smith, Brian Smith's mother, after he had been directed to meet with her at the office of the Berkeley County Planning Commission. (A.R. 1003, 1013). Lieutenant Hall testified that he first met with Constance Smith after she visited the Berkeley County Planning Commission in order to complain about something regarding the Poole-Sulick property. (A.R. 1014). Lieutenant Hall testified that neither Brian Smith nor Bettyanne-Obiri Smith called him directly to complain about a hate crime but had called the office to complain about other "neighbor

disputes". (A.R. 1015). Lieutenant Hall agreed that the families appeared to be two neighbors that can't get along. (A.R. 1015). Lieutenant Hall testified that the instant proceeding was the first time he had ever filed a criminal civil rights complaint and believed that no one else in his office had ever done so either. (A.R. 1024-1025).

CONSTANCE SMITH

The last witness to be called by the State in its case-in-chief was Constance Smith; said witness feigned inability to remember and avoided truthfully answering all questions propounded to her on direct and cross examination. (A.R. 1025-1035).

After calling the foregoing witnesses, the State rested its case-in-chief and the Petitioner moved for judgment of acquittal pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure. (A.R. 1058-1078). The trial court ultimately denied Petitioner's motion for judgment of acquittal but did note Petitioner's exception to the same and her continuing objection to proceeding under the statute. (A.R. 1077-1078).

Petitioner called the following witnesses in support of her defense: Bailiff Robert Brining; Rose Miranda; Donna Seiler; Keith Allison; Mark Jenkins; and Kendra Sulick.

ROBERT L. BRINING

Court security officer Robert L. Brining testified regarding an incident that occurred on January 27, 2009 which involved Brian Smith; said incident was recorded using the Berkeley County Court System's security video, a copy of which was entered into evidence along with the other videos previously referenced. (A.R. 1083, 1091, Def. Exhibit #1). The incident involved Brian Smith becoming hostile toward Court Security and refusing to exit the building after he charged back into a courtroom after a hearing in the Magistrate Court of Berkeley County. (A.R. 1087). Robert Brining described Brian

Smith as being defiant and refusing to listen to his instructions even though no one was provoking him. (A.R. 1087-1088).

ROSE MIRANDA

Rose Miranda has been a friend of both Kendra Sulick and Bruce Poole for approximately twelve (12) years and has visited their home on several occasions. (A.R. 1092). Rose Miranda testified that she had witnessed Brian Smith intentionally blocking the road with his car on a regular basis for convenience and to antagonize the Poole-Sulick family. (A.R. 1093-1094). Rose Miranda testified that she witnessed Brian Smith's brother simulate masturbation toward herself and one of Petitioner's minor children while in the presence of Brian Smith. (A.R. 1094-1095).

Rose Miranda testified that she witnessed Brian Smith enter the Poole-Sulick property with an older gentleman and lady for the purpose of taking pictures. (A.R. 1096). Rose Miranda testified that during this incident Brian Smith told her to "get back inside" and that soon they were going to "have all the property there and that they were going to build condos." (A.R. 1096-1097).

DONNA SEILER

Donna Seiler, Berkeley County Planning Code Officer, testified that she had occasion to speak with Brian Smith and Constance Smith in her capacity as a Berkeley County Employee; as part of her job responsibilities, Donna Seiler handles all of Berkeley County's planning code complaints. (A.R. 1103-1104). Donna Seiler testified that Brian Smith had filed a formal written complaint and a verbal complaint against Petitioner Kendra Sulick and Bruce Poole. (A.R. 1104-1005). Donna Seiler testified that she had also received one written complaint and several verbal complaints from

Constance Smith against Petitioner Kendra Sulick and Bruce Poole. (A.R. 1105). Donna Seiler testified that these complaints included allegations of unlicensed vehicles being on the Poole-Sulick property, allegations of improper trash and debris being on said property, and allegations of a failed septic. (A.R. 1105-1006). Donna Seiler testified that the first building code complaint was made by Constance Smith on October 2, 2008. (A.R. 1106). Donna Seiler testified that, on a later date, Brian Smith and Constance Smith approached her to complain about the planning commission's failure to prosecute the Poole-Sulick family; specifically, the following testimony was given regarding this incident:

Q. ...When was the next time you had an occasion to meet with either Brian Smith or Constance Smith?

A. It was several months later and Ms. Smith came in again. She was agitated that things were not moving as quickly as she had wanted. Myself and Keith Allison who is the sanitarian of the County were unable to find failed septic. There were no signs. There was nothing on the ground basically is what I'm trying to tell you. At that point she was frustrated and she informed me that I didn't understand oppression and that possibly the reason I wasn't doing my job was because I was white also.

(A.R. 1108).

Donna Seiler testified that members of the Smith family continued to make unjustified complaints with the Berkeley County Planning Commission against the Poole-Sulick family and that she never observed Kendra Sulick making any racial slurs against the Smith family. (A.R. 1110-1111). Donna Seiler further testified that she was aware that an individual by the name of Heavner was seeking to acquire property close to the Smith and Poole-Sulick property in order to build a subdivision. (A.R. 1113-1114). Lastly, Donna Seiler testified that whenever she would visit the Poole-Sulick property Brian

Smith would immediately approach her car upon leaving and ask about her investigation and that she found said actions to be strange. (A.R. 1119).

KEITH ALLISON

Keith Allison is an employed by the Berkeley County Health Department as a water sanitarian. (A.R. 1121). Keith Allison testified that in his job capacity, he could not condemn property but that it was in his power to recommend condemnation. (A.R. 1127). Keith Allison testified that Brian Smith and Constance Smith came into his office to complain about a septic tank on the Poole-Sulick property but that said complaint was completely without merit. (A.R. 1122). Keith Allison testified that Brian Smith became “very loud” and “verbal” with him during one meeting and that Constance Smith had asked him if “he was ever oppressed.” (A.R. 1125). Keith Allison testified that he believed Brian Smith was trying to intimidate him. (A.R. 1125).

MARK JENKINS

Mark Jenkins was called as a rebuttal witness and testified that Brian Smith had lied on two occasions during his direct examination; specifically, that he had never called Brian Smith and that Brian Smith was lying when he testified that he never came to his office to try and intimidate him. (A.R. 1138). Mark Jenkins further testified that Brian Smith used the words “mother fucker” and “fuck” several times during their meeting and that he said “what the fuck do I got to worry about, what the fuck is [Bruce Poole] going to do to me.” (A.R. 1143).

KENDRA SULICK

Kendra Sulick took the stand in her own defense and testified that she had spoken a single racial slur to the Smith family during one altercations after they had threatened

her, backed her up against a car, and called her a crack whore. (A.R. 91). Petitioner testified that she had never yelled racial slurs at their children, never ridden her ATV and yelled racial slurs, and never attempted to drive her automobile at a high rate of speed toward any member of the Smith family. (A.R. 1146-1148). Petitioner Kendra Sulick testified that Brian Smith had called her a “crack whore” on several occasions and that their family had called one of her children uneducated after being diagnosed with a learning disability. (A.R. 1147). Petitioner Kendra Sulick testified that Brian Smith had threatened to take the Poole-Sulick property on several occasions after the dogs were shot. (A.R. 1147).

On cross examination, Petitioner Kendra Sulick agreed that until the dogs were shot the families got along from 2005 until December 8, 2007. (A.R. 1149). Petitioner Kendra Sulick further testified that she did not shoot the dogs but was home during the incident and that the Smith’s dogs were not chained or tethered; that said dogs attacked a dog owned by the Poole-Sulick family; that the Smith dogs ripped the ear off of the Poole-Sulick dog; and that the dogs were shot after charging Bruce Poole. (A.R. 1150-1151). Petitioner Kendra Sulick further testified that she had also called the police on the Smith family on several occasions because they were discharging automatic firearms in close proximity to the Poole-Sulick property. (A.R. 1154).

After concluding the Petitioner’s case, the jury was then transported to the Smith property and the Poole-Sulick property for a view. (1160-1161).

On June 10, 2010, the jury did improperly find that Petitioner Kendra Sulick guilty of count 1, count 6, and count 8, of the indictment and did find Petitioner Kendra Sulick not guilty of the remaining six (6) counts of the indictment. The three (3) counts

for which the jury did render a verdict of guilty against said Petitioner were limited to the use of racial slurs and/or gestures and did not allege any actions of “force” or “threat of force.” In turn, Petitioner Kendra Sulick was acquitted of all the counts in the indictment which alleged said Petitioner committed some physical act of “force” or was alleged to have made an actual “threat of force.”

SUMMARY OF THE ARGUMENT

Petitioner was improperly convicted of three (3) counts of violating West Virginia Code § 61-6-21(b), West Virginia’s “hate crime” statute. Although West Virginia Code § 61-6-21 has been in existence since 1985, as of this date, the Supreme Court of Appeals of West Virginia has never interpreted West Virginia Code § 61-6-21(b) and, upon information and belief, there is no record of any prosecutions in the entire State under this statute. *See Hate Crime Law in West Virginia*, 107 W. Va. L. Rev. 699, 704-705. As such, this Honorable Court has never addressed the constitutionality or application of West Virginia’s Hate Crime Statute making the issues raised in this brief issues of first impression. As always, Petitioner has maintained that the use of racial slurs and obscene gestures are despicable, however, use of the same, without “force” or “threat of force” is not a hate crime as set forth in West Virginia Code § 61-6-21(b). For purposes of analysis throughout, the entirety of West Virginia Code § 61-6-21 states as follows:

(a) All persons within the boundaries of the state of West Virginia have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation or sex.

(b) If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or

laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

(c) If any person conspires with another person or persons to willfully injure, oppress, threaten, or intimidate or interfere with any citizen because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, and in willful furtherance thereof to assemble with one or more persons for the purpose of teaching any technique or means capable of causing property damage, bodily injury or death when such person or persons intend to employ such techniques or means to violate this section, each such person shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

(d) The fact that a person committed a felony or misdemeanor, or attempted to commit a felony, because of the victim's race, color, religion, ancestry, national origin, political affiliation or sex, shall be considered a circumstance in aggravation of any crime in imposing sentence.

(e) Nothing contained in this section makes unlawful the teaching of any technique in self-defense.

(f) Nothing in this section shall be construed so as to make it unlawful nor to prohibit nor, in any manner, to impede or to interfere with any person in conducting labor union or labor union organizing activities.

As noted above, Petitioner was originally charged with twelve (12) felony counts in the indictment lodged in 10-F-35 and three (3) of said counts were dismissed, with prejudice, prior to trial. Of the remaining nine (9) counts for which Petitioner went to trial, Petitioner was acquitted of six (6) of the counts. The three (3) counts for which Petitioner was convicted solely involved the use of racial slurs and/or obscene gestures and did not properly allege any act of “force” or “threat of force”, the same being a necessary element to sustain a conviction under West Virginia Code § 61-6-21(b). For purposes of this brief, Petitioner often refers to the allegations of count 1 and 8 which

focuses on racial slurs, profanities, and obscene gestures, however, in complete candor to the court, along with said bad acts, count 6 does allege, addition to the foregoing, that Petitioner's gestures were also "*hostile, and threatening.*" Despite said vague references to hostile and threatening gestures in one of the counts in which Petitioner was convicted, Petitioner affirmatively states that the six (6) counts of the indictment that Petitioner was acquitted did at least allege some modicum of "force" or "threat of force"; however, Petitioner was acquitted of the same.¹

As such, the following arguments are being raised in this brief:

First, Petitioner Kendra's motion for judgment of acquittal should have been granted as the State clearly lacked sufficient evidence to establish all of the necessary elements for the counts for which Petitioner was convicted. Petitioner respectfully asserts that the State failed to prove by sufficient evidence the following necessary elements of the alleged crimes: that Petitioner actually uttered racial slurs, profanities, or obscene gestures; that Petitioner acted by "force" or "threat of force"; or that Petitioner Kendra Sulick's actions were motivated by a bias against race.

Second, Petitioner's motion to dismiss all counts in the indictment based on the unconstitutionality of West Virginia Code § 61-6-21 should have been granted by the trial court and the State should have been precluded from prosecuting the Petitioner under said code section. West Virginia Code § 61-6-21 should be considered unconstitutional as it is void for vagueness as said criminal statute fails to delineate what conduct is

¹ See Count 2, Petitioner alleged to have driven an automobile at a high rate of speed while victims were in the yard and yelled racial slurs at them; Count 3, Petitioner alleged to have driven an automobile at a high rate of speed in the direction of a child; Count 4, Petitioner alleged to have made noise with an all-terrain vehicle and used racial slurs; Count 5, Petitioner alleged to have harassed the family of Brian Smith and Betty Ann Obiri with noise from a chainsaw at night and used racial slurs; Count 7, Petitioner alleged to have driven an automobile at a high rate of speed towards Betty Ann Obiri and her children while they waited for the school bus; Count 9, Petitioner alleged to have used a racial slur before driving away at a high rate of speed.

prohibited by said statute with “sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. Pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974). Further, said statute should be deemed unconstitutional as it allows for a sentence that is grossly disproportionate to the character and degree of the actual offense.

Third, Petitioner’s motion for arrest of judgment should have been granted as the counts of the indictment for which Petitioner was convicted do not charge an actual offense as the same make no allegations of use of “force” or “threat of force.”

Fourth, Petitioner’s motion for a new trial should have been granted as the following improper errors were committed during Petitioner’s trial: the State made improper and prejudicial remarks to the jury; the State offered improper evidence and committed misconduct; and the jury engaged in potential misconduct.

STATEMENT REGARDING ORAL ARGUMENT

1. Petitioner affirmatively states that the issues raised in assignments of error 1, 2, and 3 of the instant petition are issues of fundamental public importance, issues of first impression, and issues involving constitutional questions regarding the validity of a statute and may be selected for oral argument pursuant to Rule 20 of the West Virginia Revised Rules of Appellate Procedure.
2. Petitioner affirmatively states that the issues raised in assignment of error 4 are issues that have been authoritatively decided and oral argument is not necessary unless the Court determines that other issues raised upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for Rule 19 of the West Virginia Revised Rules of Appellate Procedure argument and disposition by memorandum decision.

ARGUMENT

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF AQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE

That State simply did not present sufficient evidence to meet its burden of proof in proving all of the elements necessary to convict Petitioner Kendra Sulick of the three (3) counts for which a verdict of guilty was rendered. The Circuit Court wrongfully denied Petitioner's properly made motions for judgment of acquittal after the close of the State's case-in-chief and again at the close of all the evidence. *See* W. Va. R. Crim. P. 29. Rule 29 of the West Virginia Rules of Criminal Procedure allows for a Court, upon motion of a defendant or on its own motion, to order acquittal of one or more offenses

charged in the indictment if the evidence is “insufficient to sustain a conviction of such offense or offenses.”

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the Petitioner's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.”

Syl. Pt. 1. *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010) quoting *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

A criminal Petitioner challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial in the light most favorable to the prosecution and must credit all inferences and reducibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which a jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

In a criminal case, a verdict of guilty will not be set aside on the ground that it is contrary to the evidence, where the State's evidence is sufficient to convince impartial minds of guilt of the Petitioner beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Syl. Pt. 1 *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1979).

Petitioner recognizes the heavy burden associated with contesting sufficiency of evidence at trial, but Petitioner believes that her burden has been met as the State was unable to present sufficient evidence to establish every statutory element of West

Virginia Code § 61-6-21(b) for each count. Similar to the issues raised in *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010), this case requires focused analysis on the specific elements of West Virginia Code § 61-6-21(b), West Virginia's hate crime law. As previously noted, the applicability of said code section has never been addressed by this Honorable Court since the statute's enactment in 1985.

The jury's verdict must be set aside and judgment of acquittal must be entered on counts 1, 6, and 8 as the evidence submitted to the jury was insufficient to sustain a conviction for such offenses as the State failed to prove beyond a reasonable doubt all of the elements of the offenses for which Petitioner Kendra Sulick was convicted.

- a. The State failed to offer sufficient evidence to prove that Petitioner actually committed the acts that are the basis of the counts for which she was convicted**

Petitioner Kendra Sulick was acquitted of all counts in the indictment which alleged that she committed at least some degree of acts of "force" or "threat of force." The only counts in the indictment for which Petitioner was convicted were limited to counts which alleged that she had used racial slurs, profanities, and/or hostile, threatening, obscene gestures. For purposes of analysis, the language of the counts contained in the indictment for which Petitioner Kendra Sulick was convicted state as follows:

Count 1. Civil Rights Violation. That Kendra N. Sulick between the ___ day of December 2007 and the ___ day of June 2008, in the County of Berkeley, State of West Virginia, did unlawfully, intentionally, willfully and feloniously, by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, to wit: *did harass and attempt to*

intimidate Brian Smith and Betty Ann Obiri's and their six year old child, I.S., while they walked to, or waited for, the school bus, by the use of racial slurs, profanities and obscene gestures, because of Mr. Smith's and Ms. Obiri's race or color, in violation of Chapter 61, Article 6, Section 21(b) of the Code of West Virginia, as amended, against the peace and dignity of the State.

Count 6. Civil Rights Violation. That Kendra N. Sulick on or about the ___ day of September, 2008, in the County of Berkeley , State of West Virginia, did unlawfully, intentionally, willfully and feloniously, by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, to wit: *called Betty Ann Obiri a racial slur and made obscene, hostile and threatening gestures toward Ms. Obiri as she sat on the steps of her home with her children, because of Ms. Obiri's race or color,* in violation of Chapter 61, Article 6, Section 21(b) of the Code of West Virginia, as amended, against the peace and dignity of the State.

Count 8. Civil Rights Violation. That Kendra N. Sulick on or about the ___ day of October 2008, in the County of Berkeley, State of West Virginia, did unlawfully, intentionally, willfully and feloniously, by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, to wit: *called Betty Ann Obiri a racial slur as Ms. Obiri walked to her mailbox, because of Ms. Obiri's race or color,* in violation of Chapter 61, Article 6, Section 21(b) of the Code of West Virginia, as amended, against the peace and dignity of the State.

(A.R. 354-360) *emphasis added.*

The State presented absolutely no evidence at trial which proved that Petitioner Kendra Sulick actually committed the acts that formed the basis of counts 1, 6, and 8. The State only called three witnesses that had direct evidence of the alleged bad acts: Brian Smith, Bettyanne Obiri-Smith, and Constance Smith. After reviewing all of the

testimony presented, it is clear that no evidence of the acts alleged in counts 1, 6, and 8, was offered at trial and Petitioner challenges the State in its response to cite to the portions of the record wherein evidence of these specific acts were entered. To the extent that any of these acts were indirectly testified to, Petitioner respectfully contends that the testimony of the State's three (3) primary witnesses should be considered to lack credibility as they had their own motives for seeking conviction.

The State did use an inordinate amount of racial slurs and vulgar language, unsupported by direct evidence, during its opening argument and closing arguments. Most likely, the State improperly influenced the jury into concluding that Petitioner Kendra Sulick actually uttered the same racial slurs and vulgarities at members of the Smith family. However, no evidence was presented at trial to back up the assertions made during the State's opening argument and closing argument. It is possible that other persons besides Petitioner Kendra Sulick may have actually yelled racial slurs and obscenities at the Smith family but this fact has no bearing on the guilt or innocence of Petitioner.

b. The State failed to offer sufficient evidence to prove that Petitioner's acts constituted actual "force" or "threat of force"

If this Honorable Court determines that sufficient evidence exists to prove Petitioner actually committed the acts for which she was convicted, an entry of judgment of acquittal should nevertheless be entered as absolutely no evidence was presented at trial which proved that Petitioner Kendra Sulick acted with "force" or "threat of force" in regards to the acts alleged in counts 1, 6, and 8 of the indictment.

As asserted at trial, racial slurs, profanities, and obscene gestures, while horrible, in and of themselves are not hate crimes in violation of West Virginia Code § 61-6-21(b) if the State fails to prove the act involves the use of “force” or “threat of force.”

In its opening argument and closing argument, the State referenced a Texas hate crime wherein an individual was dragged behind a truck and severely beaten because of his race. (A.R. 881, 1209). Unlike the acts for which Petitioner Kendra Sulick was convicted, the act of beating a person based upon said person’s race is undoubtedly a hate crime under West Virginia Code § 61-6-21(b) as said act involves the use of “force” or “threat of force.” The State is simply wrong when it contends that the use of racial slurs and obscenities set forth in counts 1, 6, and 8 of the indictment are acts which should sustain a conviction under West Virginia Code § 61-6-21(b).

In a strained preemptory attempt to find constitutionality for any conviction to be sustained under counts 1, 6, and 8 of the indictment, in its opening argument and closing argument, the State likened the use of a racial slur to acts such as painting a swastika on a Synagogue or burning a cross. (A.R. 879-880). Although there are no allegations that Petitioner Kendra Sulick either painted a swastika or burned a cross, the State chose to make this comparison despite the fact that said comparison was improper and meant to inflame the jury. First, West Virginia Code § 61-6-21(b) is not a hate speech statute similar to the Virginia statute which criminally prohibited cross burning in the case of *Virginia v. Black*, 123 S.Ct. 1536, 155 L.E. 2d 535 (U.S. 2003). West Virginia Code § 61-6-21(b) requires that “force” or “threat of force” be proven beyond a reasonable doubt before a conviction can be sustained under said code section. As such, any claim that using a racial slur or obscene gesture is similar to burning a cross or painting a swastika

is misplaced as there is no legal basis to make said comparison under West Virginia law. Second, the acts of burning a cross or painting a swastika on a Jewish Synagogue require certain additional criminal actions in contrast to using a racial slur or making an obscene gesture during an argument. For instance, the act of painting a swastika on a Jewish Synagogue requires that an individual premeditatedly obtain paint, travel to a Synagogue, trespass onto the Synagogue's property, and physically paint a swastika on the property. The act of making a racial slur or an obscene gesture simply requires a person to utter or gesture during an argument.

Absolutely *no* evidence at trial was offered which claimed that Petitioner Kendra Sulick committed any acts of "force" or "threat[s] of force" regarding counts 1, 6, and 8 of the indictment. As noted above, Petitioner Kendra Sulick was acquitted of all counts containing allegations of use of "force" or "threat of force." Further, Bettyanne Obiri-Smith testified that she only felt threatened when Petitioner was "in her vehicle weaving her vehicle towards myself or towards my kids." (A.R. 929). Brian Smith testified to no use of "force" or "threats of force" perpetrated by Petitioner Kendra Sulick. (A.R. 951-1003).

Lastly, as set forth in the trial court's charge to the jury, in order to sustain a conviction for counts 1, 6, and 8 of the indictment, the State had to prove beyond a reasonable doubt that Petitioner Kendra Sulick has attempted to interfere with the victims' right to be free from "violence against one's person." (A.R. 620-644). As noted throughout, absolutely no evidence was offered which established that Petitioner Kendra Sulick attempted to interfere with the victim's right to be free from violence as no acts of violence were alleged against the victims in counts 1, 6, and 8 of the indictment.

c. The State failed to offer sufficient evidence to prove that Petitioner's acts were motivated by racial bias

In the opinion of Petitioner, the most intellectually challenging theory in support of an entry of judgment of acquittal for counts 1, 6, and 8 of the indictment is also the strongest.

If this Honorable Court does find that sufficient evidence exists to prove Petitioner Kendra Sulick actually committed the acts alleged in Counts 1, 6, and 8 of the indictment and that said actions constituted "force" or "threat[s] of force," Petitioner respectfully contends that insufficient evidence was presented at trial to sustain a conviction for the offenses set forth in counts 1, 6, and 8 of the indictment as insufficient evidence was offered to prove that Petitioner's use of racial slurs was motivated by a bias against the victims' race.

West Virginia Code § 61-6-21(b) requires that a Petitioner's motive of bias be proven beyond a reasonable doubt before a conviction under said code section can be sustained; specifically, all acts of "force" or "threat of force" must have been caused by some enumerated bias. In this case, it was alleged that the acts set forth in counts 1, 6, and 8 of the indictment were motivated by a bias against race.

It is improper to assume that the act of using a racial slur in itself is conclusive evidence that said acts were motivated by a bias against persons of another race. The difficulty with comprehending this anomaly can be evidenced by the jury's verdict in this case. Clearly, the jury most likely believed that Petitioner Kendra Sulick used racial slurs and that because she was on trial for using the same she must simply be guilty of counts 1, 6, and 8 of the indictment.

Although an issue of first impression in this Court, Courts from other jurisdictions have addressed this issue when seeking hate crime convictions for acts of ethnic intimidation. In *Dobbins v. State of Florida*, 605 So. 2d 922, 923 (1992), Defendant Michael Dobbins was convicted of an offense that was enhanced pursuant to Florida's hate crime law for beating a Jewish youth. As part of the basis for enhancing Defendant Michael Dobbins' offense, evidence was offered that, during the beating, Defendant Michael Dobbins and other skinheads uttered such statements as "Jew boy" and "Die Jew boy." *Dobbins v. State of Florida*, 605 So. 2d 922, 923. The Court in *Dobbins v. State of Florida*, in *dicta*, addressed the theory that racial slurs alone are not evidence of bias motivation even when uttered during the commission of another crime:

In the present case the jury was required to find that the beating, based on the background and relationship between the participants and the statements made during the beating, evidenced that Daly was the chosen victim because he was Jewish. *Had the fight occurred for some other reason (over a woman, because of an unpaid debt, etc.), the mere fact that Daly might have been called a "Jew boy" could not enhance the offense.*

Id. at 923. (*emphasis added*).

At Petitioner Kendra Sulick's trial, evidence was offered of several other distinct acts committed by different parties which could have caused Petitioner Kendra Sulick to utter racial slurs and make obscene gestures. Clearly, upon reviewing these outside circumstances, it cannot be determined that sufficient evidence exists to sustain a conviction under counts 1, 6, and 8 of the indictment because there is simply no proof that any of the racial slurs or obscene gestures allegedly made by Petitioner Kendra Sulick were motivated by a racial bias. At trial, an enormous amount of evidence was offered which proved that even if Petitioner Kendra Sulick uttered racial slurs or made obscene gestures toward members of the Smith family that said actions were not

motivated by a bias against race but were motivated by general and justified dislike for the Smith family. By reviewing the testimony of the parties, several other motivating factors could have lead to her uttering said racial slurs, profanities, or obscene gestures, including, but not limited to the constant fighting between Bruce Poole and Brian Smith; the continued intimidation and harassment dealt by Brian Smith; the continued threats and insults made by the Smith Family; the continued, unjustified complaints made to the Berkeley County Planning Commission by the Smith family; the fact that Bruce Poole shot the Smith family's dogs and the Smith family did not agree with the same; or the 26 calls to the authorities made by the Smith family after their dogs were shot.

At trial, all of the witnesses testified that the parties got along from July, 2005 until December 8, 2007, when two dogs owned by the Smith family were shot by Bruce Poole. The State's witnesses further testified that there were not incidents of racial animosity until after the dogs were shot. However, at trial, the State inexplicably claimed that all of Petitioner Kendra Sulick's actions had to have been motivated by race and were not motivated by other factors. If Petitioner Kendra Sulick had substituted another insult in place of the racial slur alleged to have been stated in counts 1, 6, and 8 of the indictment, Kendra Sulick would not have been charged with said violations of West Virginia Code § 61-6-21(b). Although it may not be self evident, the use of a racial slur, although despicable, is not itself a hate crime. As noted several times above, the jury acquitted Petitioner Kendra Sulick of all counts which alleged Petitioner had committed acts containing some degree of "force" or "threat of force" but convicted her of using racial slurs, profanities, and obscene gestures. Clearly, the jury did not understand that

the use of racial slurs alone were not enough to sustain a conviction under West Virginia Code § 61-6-21(b); an intellectually challenging exercise for anyone.

For all of the foregoing reasons, Petitioner respectfully requests that the jury's verdict of guilty be set aside based on the insufficiency of evidence, as the evidence presented "was manifestly inadequate" and "consequent injustice has been done." Syl. Pt.

1. *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1979).

2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED PETITIONER'S MOTION TO DISMISS THE PROCEEDING BASED ON THE UNCONSTITUTIONALITY OF WEST VIRGINIA CODE § 61-6-21

a. West Virginia Code § 61-6-21 is unconstitutional because it violates Article III, § 10 of the West Virginia Constitution and the Fourteenth Amendment of the United States Constitution as said statute is void for vagueness

Petitioner three (3) convictions for violating West Virginia Code § 61-6-21(b) should be dismissed as said statute is unconstitutional as its language should be considered void for vagueness.

A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication. Syl. Pt. 1, *State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998) (*quoting* Syl. Pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974))

Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute. Syl. Pt. 2, *State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998) (*quoting* Syl. Pt. 2, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)).

Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied. Syl. Pt. 3, *State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998) (*quoting* Syl. Pt. 3, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)).

When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment. Syl. Pt. 4, *State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998) (*quoting* Syl. Pt. 4, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)).

A simple reading of West Virginia Code § 61-6-21 makes it clear that said criminal statute fails to delineate what conduct is prohibited by said statute with “sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. Pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974). A review of the charges for which Petitioner was convicted further illustrates this point as Petitioner was convicted of crimes that no person of ordinary intelligence could contemplate to be violations of the West Virginia Hate Crime statute.

West Virginia Code § 61-6-21 should be considered unconstitutionally vague because said statute makes absolutely no reference or any attempt to describe what bias-motivated predicate criminal conduct must be committed by a person in order to violate said statute. The ambiguous language of West Virginia Code § 61-6-21(b) makes it impossible to even determine whether a predicate criminal act is necessary or whether simple racism is enough to meet the threshold requirement for a *criminal* violation of said statute.

To clarify this point, Petitioner respectfully seeks to compare the language of a similar hate crime statute from an outside jurisdiction to the language of West Virginia Code § 61-6-21(b). West Virginia Code § 61-6-21(b) is not a penalty enhancement statute, but rather a statute which attempts to create an independent, substantive criminal

offense based on criminal conduct motivated by bias. A constitutionally permissible hate crime statute which creates an independent, substantive criminal offense based on criminal conduct motivated by bias is the Delaware hate crime statute, Delaware Code Annotated, Title 11, § 1304. Said statute, states as follows:

§ 1304. Hate crimes; class A misdemeanor, class G felony, class F felony, class E felony, class D felony, class C felony, class B felony, class A felony.

(a) Any person who commits, or attempts to commit, any crime as defined by the laws of this State, and who intentionally:

(1) Commits said crime for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or commits said crime because the victim has exercised or enjoyed said rights; or

(2) Selects the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry, shall be guilty of a hate crime. For purposes of this section, the term "sexual orientation" means heterosexuality, bisexuality, or homosexuality.

(b) Hate crimes shall be punished as follows:

(1) If the underlying offense is a violation or unclassified misdemeanor, the hate crime shall be a class A misdemeanor;

(2) If the underlying offense is a class A, B, or C misdemeanor, the hate crime shall be a class G felony;

(3) If the underlying offense is a class C, D, E, F, or G felony, the hate crime shall be one grade higher than the underlying offense;

(4) If the underlying offense is a class A or B felony, the hate crime shall be the same grade as the underlying offense, and the minimum sentence of imprisonment required for the underlying offense shall be doubled.

70 Del. Laws, c. 138, § 1; 70 Del. Laws c. 186, § 1; 71 Del. Laws, c. 175, §§ 1, 2.

Delaware's hate crime law clearly specifies that *underlying criminal conduct motivated by bias* must be committed by a person for a person to be convicted under said

statute; specifically, said statute mandates that a person commit or attempt to commit “any crime as defined by the laws of this State.” West Virginia Code § 61-6-21(b) makes no reference to any criminal act or violation of any criminal statute, but instead vaguely references certain “actions” which could be interpreted as either criminal or non-criminal conduct.

Other statutes which create a substantive, independent criminal offense based on criminal conduct motivated by bias require that the necessary predicate actions of a defendant be criminal in nature. In preparing for this case, counsel did research all hate crime statutes from outside jurisdiction. Petitioner Kendra Sulick has found only one statute which mirrors the language set forth in West Virginia Code § 61-6-21(b) and does not specifically reference a criminal act is Maine Revised Statute Annotated, Title 17, § 2931. However, the Maine hate crime statute is distinguishable from West Virginia Code § 61-6-21(b) as it is structured as a misdemeanor prohibition against discrimination wherein a person “may not” discriminate. Further, Maine’s prohibition against discrimination statute is further distinguishable as it carries a maximum penalty of up to one (1) year in the county jail and is a misdemeanor.

West Virginia Code § 61-6-21(b) seems to intentionally and unconstitutionally avoid reference to any predicate criminal conduct in order to criminalize conduct that is not criminal in nature. Again, West Virginia Code § 61-6-21(b) does not *recriminalize* conduct based on improper motivation but attempts to criminalize conduct that would not otherwise be considered criminal.

It must be noted that none of the predicate “actions” set forth in said code section are properly defined in order to place persons of ordinary intelligence on notice of the

prohibited criminal conduct. Petitioner affirmatively states that all of the terms setting forth prohibited actions that are to be committed by a Petitioner in order to sustain a conviction under West Virginia Code § 61-6-21(b) are not appropriately defined *anywhere* in the entire West Virginia Code. Specifically, the following terms setting forth the necessary actions of a defendant are not properly defined and further make West Virginia Code § 61-6-21(b) unconstitutionally vague: “force”; “threat of force”; “injure”; “intimidate”; “interfere with”; “oppress”; and “threaten.”

For example, the term “oppress” is not defined anywhere in the entire West Virginia Code. Certainly, the term “oppress” cannot be considered a term which encompasses strictly criminal conduct. Without a proper definition of said term, despicable, but lawful, racist actions could become an independent criminal act under West Virginia Code § 61-6-21(b); thus making West Virginia’s hate crime statute unconstitutionally void as said criminal statute would fail to set forth with sufficient definiteness the prohibited conduct.

The Circuit Court of Berkeley County, West Virginia, by denying Petitioner’s motion to dismiss based on the unconstitutionality of said code section, improperly determined that said statute is not unconstitutionally vague as the terms “force” and “threat of force” are “terms of common usage that persons of ordinary intelligence understand.” (A.R. 438-442). As noted above, these terms are not defined anywhere in the West Virginia Code.

If West Virginia Code § 61-6-21(b) simply mandated that the actions of a person must violate an existing criminal code section in a manner similar to Delaware’s hate

crime statute, said statute would be constitutional. However, the standard currently in place should be considered unconstitutionally vague.

The convictions had against Petitioner Kendra Sulick should be dismissed, with prejudice, as West Virginia Code § 61-6-21 is unconstitutionally vague as said criminal statute fails to delineate what conduct is prohibited by said statute with “sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. Pt. 1, *State v. Bull*, 204 W.Va. 255, 512 S.E.2d 177 (1998) (*quoting* Syl. Pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)).

- b. West Virginia Code § 61-6-21 is unconstitutional because it violates Article III § 8 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution as it allows for a sentence that is grossly disproportionate to the character and degree of offenses sought to be prosecuted under said statute**

West Virginia Code § 61-6-21 is unconstitutional as it violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution as said statute allows for a sentence to be imposed against a defendant that is grossly disproportionate to the character and degree of the actual offense.

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offense. Syl. Pt. 2, *State v. Tyler*, 211 W.Va. 246, 565 S.E.2d 368 (2002), *quoting* Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Petitioner Kendra Sulick affirmatively states that West Virginia West Virginia Code § 61-6-21(b) calls for an extremely strict sentence in comparison to other state hate

crime statutes which create substantive, independent criminal offenses for violating an individual's civil rights based on bias. Pursuant to West Virginia Code § 61-6-21(b), a defendant convicted under said code section could receive a sentence of up to ten (10) years in the state penitentiary; a far severer sentence than any sentence Petitioner would receive by simply committing the acts at issue if said acts were considered to be criminal.

For example, the actions alleged to have occurred in Count 1 of Petitioner's indictment would, if proven, at most, would constitute criminal harassment pursuant to West Virginia Code § 61-2-9a(b).

Pursuant to West Virginia code § 61-2-9a(b), if Petitioner Kendra Sulick were convicted of criminal without a finding of a motivation based on bias, the maximum sentence Petitioner would receive would be up to six (6) months in jail. By contrast, by adding a finding that said assault was motivated by a certain delineated bias toward the victim, the maximum exposure at sentencing increases from up to six (6) months in the county jail to up to ten (10) years in the state penitentiary. This great disparity in potential sentences violates Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment of the United States Constitution.

3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR ARREST OF JUDGMENT AS THE COUNTS FOR WHICH PETITIONER WAS CONVICTED SIMPLY FAILED TO CHARGE AN OFFENSE AS THE SOLE USE OF RACIAL SLURS AND/OR OBSCENE GESTURES CANNOT BE CONSIDERED A VIOLATION OF WEST VIRGINIA CODE § 61-6-21(b)

Petitioner's motion for arrest of judgment should have been granted as the Counts in the indictment for which she was convicted fail to charge an offense as the acts of using racial slurs and obscene gestures, in and of themselves, are not violations of West Virginia Code § 61-6-21(b).

Rule 34 of the West Virginia Rules of Criminal Procedure states as follows:

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within ten days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the ten-day period.

A motion for arrest of judgment may be made in a criminal case after verdict, in order to test the sufficiency of the material allegations of the indictment, even though the alleged defect in the indictment might have been reached by demurrer.

Syl. Pt. 4, *State v. Stone*, 127 W.Va. 429, 33 S.E.2d 144 (1945).

Generally, the sufficiency of an indictment is reviewed *de novo*. *State v. Bull*, 204 W.Va. 255, 263, 512 S.E.2d 177, 185 (1998).

Counts 1, 6, and 8 of the indictment simply fail to charge an offense as the use of racial slurs and/or obscene gestures cannot be considered a violation of West Virginia Code § 61-6-21(b). Further, none of the evidence presented at trial can cure the substantial defects in the indictment for these counts. See West Virginia Code § 62-2-11. As mentioned above, count 6 of the indictment does include the phrase “hostile and threatening” gestures in addition to obscene gestures, and although Petitioner affirmatively states that said phrase itself does not properly charge a violation of West Virginia Code § 61-6-21(b), Petitioner does concede that said count at least references the word threat in its language. As such, at the very minimum, counts 1 and counts 8 should be reversed based on their inability to charge an offense.

4. **THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL**

Petitioner Kendra Sulick respectfully requests that Circuit Court committed reversible error when it failed to grant Petitioner a new trial on counts 1, 6, and 8 of the indictment as the interest of justice requires the same.

Rule 33 of the West Virginia Rules of Criminal Procedure states as follows:

The Court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period.

In support of Petitioner's request for a new trial, Petitioner offers the following arguments:

STATE MADE IMPROPER REMARKS TO JURY

The State's overuse of inflammatory racial slurs and vulgarities during its opening argument and closing argument require that a new trial be had as said remarks clearly prejudiced the accused and resulted in manifest injustice. *See State v. Bell*, 189 W.Va. 448, 432 S.E.2d 532 (1993). Although instructed to not consider opening arguments and closing arguments of the parties as evidence, it appears the jury improperly relied on the racial slurs and vulgarities repeatedly recited by the State during said arguments as it returned a verdict of guilty against Petitioner Kendra Sulick while no actual or credible evidence was presented at trial which supported the racial slurs and vulgarities uttered by the State during said arguments.

STATE OFFERED IMPROPER EVIDENCE AND ENGAGED IN MISCONDUCT

During its opening argument and during the questioning of its first witness, the State improperly sought to present evidence of bad acts of other persons and prior bad acts of Petitioner Kendra Sulick that were not properly noticed prior to trial. At the beginning of said trial, Petitioner's counsel did strenuously object to the State's attempt to enter evidence that was not proper or relevant and the Court did agree that the same was highly improper and almost dismissed the case based on the State's misconduct (A.R. 896-915). At one point, the Court was forced to excuse the jury based on the improper entry of evidence that was not relevant to the State's case. (A.R. 898).

Although the Court did its best to prevent the State from suborning improper and unduly prejudicial evidence, the jury still heard several prior bad acts not properly noticed by the State and several bad acts not committed by Petitioner Kendra Sulick. By the State arguing and soliciting improper evidence, justice requires that Petitioner Kendra Sulick be given a new trial on counts 1, 6, and 8 of the indictment.

POTENTIAL JUROR MISCONDUCT

Potential juror misconduct may require that a new trial be had or that an evidentiary hearing be conducted to determine whether juror misconduct occurred. Petitioner Kendra Sulick recognizes that Rule 606(b) of the West Virginia Rules of Evidence precludes inquiry into matters of intrinsic juror deliberations; however, it appears that either an outside influence or an improper compromise verdict was reached in this case. Petitioner further recognizes that issues of improper juror compromise may fall outside the scope of improper juror misconduct requiring a new trial. *See State v. Ex*

Rel. Neill v. Nutter, 99 W.Va. 146, 128 S.E.2d 142 (1925) (Finality of verdict not affected by juror statement upon poll that “it is my verdict on a compromise.”). However, the case at issue is unique. First, it is the first recorded trial prosecution of West Virginia Code § 61-6-21(b) and an inquiry into potential juror misconduct may be warranted to assure that the Court’s instructions were both proper and followed. Second, West Virginia Code § 61-6-21(b) is unique because it requires that motive based on an enumerated bias be established as an element of the crime. As such, the extremely sensitive subject matter required to be considered by the jury may have, in itself, caused juror misconduct to occur. Third, improper coercion from political or other beliefs may have improperly influenced the jury.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted; that the judgment of the Circuit Court of Berkeley County be reversed, set aside, or a new trial be granted on counts 1, 6, and 8 and that Petitioner be immediately released from incarceration.

Respectfully submitted,
Kendra Sulick,

/s/Christopher J. Prezioso
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
Respondent,

Vs.

No. 101413

KENDRA SULICK,
Petitioner

CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Brief of Petitioner and Appendix of Record upon the following persons, by hand delivery, on this 18th day of April, 2011:

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