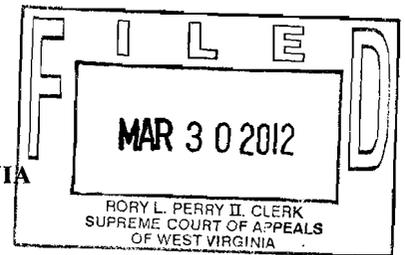


12-0404

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NO.



STATE OF WEST VIRGINIA ex rel.  
MARK PLANTS, Prosecuting Attorney of  
Kanawha County, West Virginia,

Petitioner,

Appeal from order  
of the Circuit Court of Kanawha  
County (10-F-1068)

v.

THE HONORABLE CARRIE WEBSTER, in  
her official capacity as Judge of the Circuit  
Court of Kanawha County, West Virginia, and  
@, Defendant,

Respondents.

Petition for Writ of Prohibition

**Counsel for Petitioner,**

Erica N. Lord, Assistant Prosecuting Attorney (WV Bar #9109)

Benjamin Freeman, Assistant Prosecuting Attorney  
(WV Bar #8875)

Kanawha County Prosecuting Attorney's Office

301 Virginia Street East

Charleston, WV 25301

[elord@kanawhaprosecutor.com](mailto:elord@kanawhaprosecutor.com)

## TABEL OF AUTHORITIES

1. <i>State v. Osakalumi</i> , 194 W.Va. 758; 461 S.E. 2d. 504 (1995)	Page 3
2. Rev. R.A.P. 18(a)	Page 4
3. Rev. R.A.P. 16(a)	Page 4
4. W.Va. Code §58-4-18a (1969)	Page 5
5. W. Va. Code §58-5-30 (1923)	Page 5
6. <i>State v. Lewis</i> , 422 S.E.2d 807 (W.Va. 1992)	Page 5
7. <i>State ex rel. Forbes v. Canady</i> , 475 S.E.2d 37 (W.Va 1996)	Page 5
8. <i>State ex rel. Russen v. Hill</i> , 454 S.E.2d 427 (W.Va. 1994)	Page 6

## QUESTION PRESENTED

The Respondent erred in acting outside her legitimate powers and exceeded her legitimate authority by excluding the shell casings recovered at the scene of the crime and instructing the State of West Virginia to refrain from mentioning or eliciting testimony at trial regarding the shell casings.

## STATEMENT OF THE CASE

The grand jury for the September 2010 Term of the Circuit Court of Kanawha County, returned, among others, indictment number 10-F-1068, charging DAVID WASHINGTON KINNEY, with one count of one count of First Degree Murder. A copy of said indictment is attached hereto. This matter is scheduled for trial to begin on Monday, April 9, 2012.

The allegations against the Defendant are that on July 4, 2010, the Defendant shot the victim at the intersection of Park and Virginia Street, Charleston, West Virginia. When the police arrived at the scene the victim was found shot and slumped over into the passenger side of his vehicle. When the police searched the scene four 10 mm-shell casings were found.

On March 8, 2012, defendant's counsel, J. Timothy DiPiero and Olubunmi T. Kusimo, and the State of West Virginia by counsel, Erica Lord and Benjamin Freeman appeared before Judge Carrie Webster for the purpose of a pretrial hearing regarding Defendant's previously filed *Defendant's Motion to Dismiss/Motion in Limine to Suppress and Motion in Limine to Exclude Evidence Regarding Ammunition, Weapons, and Firearms Seized by Law Enforcement*. Whereupon the Court heard testimony from Detective J.A. Hunt of the Charleston Police Department and arguments of counsel.

Detective Hunt testified that there were four 10 mm shell casings collected at the scene of the crime. The four 10 mm shell casings collected at the scene were first

submitted to the West Virginia State Police Laboratory on July 8, 2010. Detective Hunt then cancelled the testing of the shell casings, and took them back into his custody. In August 2010, he personally transported the shell casings to Dr. John Bond in England for testing.

In September 2010, Detective Hunt sent the shell casings via FedEx to Allen McRoberts of McRoberts Forensic Investigations in Temecula, California. It should be noted that the testing of Dr. Bond and Allen McRoberts did not lend any probative results thus the State does not seek to introduce at all any evidence of either testing. Upon receiving the shell casings back from McRoberts, Detective Hunt secured the shell casings in his office until January 18, 2011. At such time, Detective Hunt requested Detective Kinder to submit said casings to the West Virginia State Police Lab for further testing.

On September 20, 2011, the Respondent granted the Defendant's motion for independent inspection examination and inspection of the shell casings recovered at the scene. In January 2012, the Petitioner through Assistant Prosecuting Attorney, Erica N. Lord, notified defense counsel that the shell casings were missing. On March 5, 2012, Erica N. Lord, Assistant Prosecuting Attorney informed defense counsel that the shell casings had been found.

During the pre-trial hearing, Detective Hunt testified to the chain of custody of the shell casings. Detective Hunt stated that he checked his filing cabinet, the Charleston Police Department Record room, and phoned the West Virginia State Police Lab in an attempt to recover the casings, but was unable to find them. When he called the State Police Lab, he asked for the shell casings by referencing Defendant's name. Because the

shell casings were stored under the decedent's name, the State Police Lab informed Detective Hunt the shell casings were not in their custody. On January 25, 2012, the shell casings were retrieved by the Charleston Police Department and secured. However, the State of West Virginia was not notified of such until March 5, 2012.

On July 5, 2010, officers from the Charleston Police Department conducted a search of the home of Carol Bridges (Defendant's mother). The evidence seized at her home included numerous firearms and ammunition. Subsequently, on July 12, 2010 officers from the Charleston Police Department executed a search warrant upon the Defendant's residence at 930 Central Avenue, Charleston, West Virginia. During such search officers recovered a large amount of ammunition, including 10 mm rounds, a desert eagle .50 caliber firearm, and a 10 mm glock magazine.

The Respondent, relying on *State v. Osakalumi*, 194 W.Va. 758, 461 S.E. 2d. 504 (1995) made the following findings: (1) the shell casings were subject to disclosure under *West Virginia Rule of Criminal Procedure 16*, (2) the State had a duty to preserve the material; (3) and the State breached that duty. More specifically, the Court found, "that the delay and absence of opportunity of the Defendant to examine the shell casings deprives Defendant of his right to examine evidence introduced against him."

At the conclusion of said pretrial hearing, the Respondent excluded casings recovered at the scene of the murder and has instructed the State of West Virginia to refrain from mentioning or eliciting testimony at trial regarding the shell casings. Furthermore, the Court excluded all ammunition and firearms seized during the search warrants executed on July 5, 2010 and July 12, 2010.

## SUMMARY OF ARGUMENT

The State of West Virginia asserts respondent Judge acted outside her legitimate powers and exceeded her legitimate authority by excluding the shell casings and instructing the State of West to refrain from mentioning or eliciting testimony at trial regarding the shell casings. Further, the State of West Virginia asserts by the Respondent Judge excluding said shell casings she has in essence ruled a *de facto* dismissal of the State of West Virginia's case. The shell casings are the essential evidence linking the defendant to the murder. As previously stated, the shell casings at the scene of the crime are the same type of shell casings found in the home of the defendant.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument, oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

## ARGUMENT

- I. **The Circuit Court erred acting outside her legitimate powers and exceeded her legitimate authority by excluding the shell casings recovered at the scene of the crime and instructing the State of West Virginia to refrain from mentioning or eliciting testimony at trial regarding the shell casings.**

Your Petitioner asserts original jurisdiction in this matter pursuant to the provisions of Rule 16(a) of the West Virginia Rules of Appellate Procedure as a Petition for Writ of Prohibition. Your Petitioner asserts original jurisdiction in this matter pursuant to the provisions of Chapter 53, Article 1 of the West Virginia Code of 1931, as amended, since

your Petitioner believes that respondent Judge has exceeded its legitimate powers and has acted outside its legitimate authority, as discussed within this Petition and the attached memorandum in support of this Petition. This Court may hear this matter since the act complained of occurred in the Circuit Court of Kanawha County, West Virginia, and was undertaken by respondent Judge, and this Court is a court of superior authority to Respondent Judge and the Circuit Court of Kanawha County, West Virginia.

Your Petitioner believes that prohibition is a proper remedy in this action for the following reasons:

1. Your Petitioner has no adequate remedy at law to allow your relator to press an appeal. West Virginia law permits appeal by the State of West Virginia only in cases of a “bad” or “insufficient” indictment. See, W. Va. Code §58-4-18a (1969) and W. Va. Code §58-5-30 (1923).

2. The State of West Virginia is permitted to seek prohibition in this Court where the trial court has exceeded or acted outside its jurisdiction in criminal cases. See, e.g., Syllabus Point 5, State v. Lewis, 188 W. Va. 85, 422 S.E.2d 807 (1992); see also, State ex rel. Forbes v. Camady, 197 W. Va. 37, 475 S.E.2d 37 (1996).

Factors to be weighed in determining whether circuit court’s exercise of discretion in response to noncompliance with discovery order in criminal matter is appropriate include, but are not limited to, importance and materiality of undisclosed information, ability of party to try case without information or nature of prejudice claimed by failure to comply with discovery order, extent to which continuance or other lesser relief would delay trial or otherwise adversely impact administration of justice, degree of negligence involved and explanation of party’s failure to comply with discovery request, effort made by party to comply with order, number of times circuit

court ordered party to comply with order, and in some cases, severity of offense. See *State ex rel. Russen v. Hill*, 454 S.E.2d 427 (W.Va. 1994).

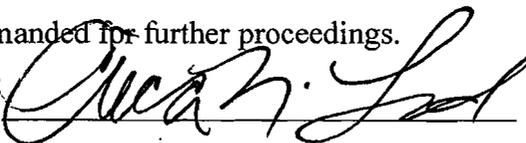
The Respondent judge ignored other and more proper remedies that could have been made to remedy the lapse in time that the Defendant did not have access to said shell casings. The State of West Virginia submits that the Respondent judge should have either granted the Defendant a continuance so to give the defendant time to do testing on said casings or preclude the State of West Virginia from introducing evidence and testimony of the testing performed at the West Virginia State Police Laboratory.

The Defendant has known that since the initial discovery was filed that there were 10 mm shell casings found at the scene of the murder and that there were 10mm rounds found in the home of the Defendant. The Defendant was also provided pictures of said casings and rounds. Although the Petitioner concedes that the Defendant was prejudiced by not having access to said casings, the Petitioner asserts that it is unduly prejudiced by now having said casings excluded. As previously stated, by excluding the shell casings and precluding the State of West Virginia from eliciting testimony regarding said casings the Respondent judge exceeded her legitimate authority and in essence has issued a *de facto* dismissal of the State of West Virginia's case.

#### CONCLUSION

The Circuit Court's order excluding the shell casings and precluding the State of West Virginia from eliciting testimony regarding said casings should be reversed, and this matter should be remanded for further proceedings.

Signed:



Erica N. Lord (WV Bar #9109 )  
Counsel of Record for Petitioner

**STATE OF WEST VIRGINIA, KANAWHA COUNTY, ss:**

**IN THE CIRCUIT COURT OF SAID COUNTY:**

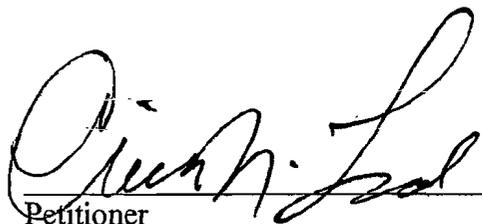
**The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present that DAVID WASHINGTON KINNEY, on the \_\_\_\_ day of July, 2010, and prior to the date of the finding of this Indictment, in the said County of Kanawha, feloniously, willfully, maliciously, deliberately, premeditatedly and unlawfully did slay, kill and murder one Jeremy Jean-Courtney Parsons, by the use of a firearm, to-wit: a handgun, in violation of Chapter 61, Article 2, Section 1, West Virginia Code, 1931, as amended, against the peace and dignity of the State.**

**Found at the SEPTEMBER Term of said Court, 2010, upon the information of DETECTIVE J.A. HUNT, CHARLESTON POLICE DEPARTMENT, sworn in open Court and sent before the Grand Jury to give evidence to that body.**

**MARK PLANTS  
PROSECUTING ATTORNEY**

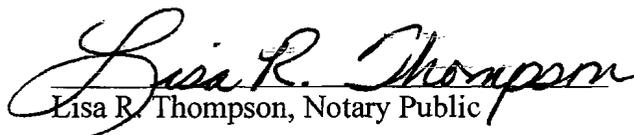
**VERIFICATION**

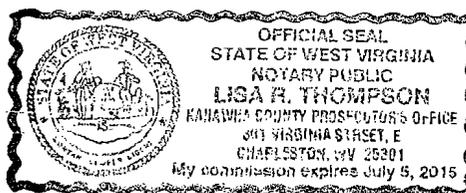
I, Erica N. Lord, the Petitioner in the foregoing Petition for Writ of Prohibition, after being duly sworn, says that the facts and allegations contained in the Petition are true, except insofar as they are therein stated to be upon information and belief, and that insofar as they are therein stated, they are believed to be true.

  
Petitioner

Taken, subscribed, and sworn to before me this 30<sup>th</sup> day of March, 2012.

My commission expires: July 5, 2015

  
Lisa R. Thompson, Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NO.

STATE OF WEST VIRGINIA ex rel.  
MARK PLANTS, Prosecuting Attorney of  
Kanawha County, West Virginia,

Petitioner,-

Appeal from order  
of the Circuit-Court of Kanawha  
County (10-F-1068)

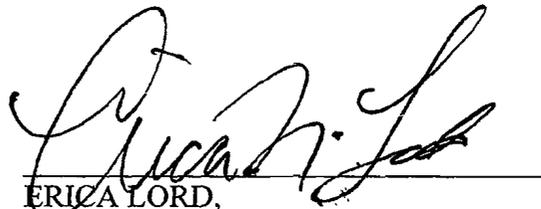
v.

THE HONORABLE CARRIE WEBSTER, in  
her official capacity as Judge of the Circuit  
Court of Kanawha County, West Virginia, and  
@, Defendant,

Respondents.

**CERTIFICATE OF SERVICE**

I, Erica N. Lord, Assistant Prosecuting Attorney for Kanawha County, do hereby certify that a true and exact copy of the foregoing *Petitioner's Brief* was served upon the attorneys of record, J. Timothy DiPiero and Olubunmi Kusimo, Attorneys at Law, 604 Virginia Street, East, Charleston, WV 25301, the same being their last known address, by enclosing the same in an envelope, with postage fully paid, and depositing said envelope in the regular United States mail on the 30<sup>th</sup> day of March, 2012.

  
ERICA LORD,  
Assistant Prosecuting Attorney