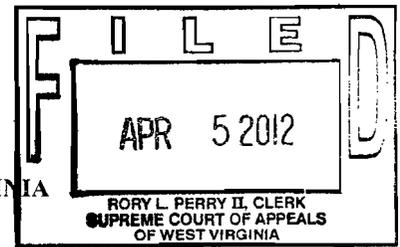


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner,

DOCKET No. 12-0404

v.

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

Respondents.

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**RESPONDENT DAVID WASHINGTON KINNEY'S BRIEF IN  
OPPOSITION TO PETITION FOR WRIT OF PROHIBITION**

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## QUESTION PRESENTED

Whether the Circuit Court acted within its discretionary powers under Rule 16(d)(2) of the *West Virginia Rules of Criminal Procedure* when, as a remedy for the State of West Virginia's discovery violations, it excluded shell casings recovered at the scene of the crime and instructed the State of West Virginia to refrain from mentioning or eliciting testimony at trial regarding the shell casings.

## STATEMENT OF THE CASE

Of primary import during the March 8, 2012 pre-trial hearing before the Circuit Court was Defendant's *Motion to Dismiss/Motion in Limine to Suppress*.<sup>1</sup> This motion was the culmination of almost two years of frustrated attempts by Defendant to examine the evidence central to the indictment filed against him and almost two years of repeated delays of his trial date. Defendant was arrested October 22, 2010 and held without bond. On January 3, 2011, Defendant successfully moved for his release from custody. On March 22, 2011, he was released on a \$250,000 bond with home confinement, and he has remained on home confinement through the present. Also from the start of the case, the parties have been involved in discovery. At Defendant's arraignment on October 27, 2010, his counsel made an oral motion for discovery, and he asserted his right to a speedy trial. The Circuit Court ordered that the State provide the requested discovery within two days of Defendant's motion for discovery. Two additional written motions for discovery were filed on November 3 and November 16, 2010. The State provided no discovery for over a month, finally providing its first round of discovery on December 14, 2010, three weeks from Defendant's original

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<sup>1</sup> Respondent/Defendant David Washington Kinney accepts the recitation of facts as presented in Petitioner's Brief, and refrains from repeating them here. Instead, Respondent relates additional facts from the proceedings below relevant to the Petition before this Court.

trial date of January 4, 2011.

At this point, however, the State did not provide Defendant the opportunity to examine the key physical evidence in this case: the shell casings and the decedent's car. Prior to the arraignment, the State had already released the decedent's car from its custody, but did not initially inform Defendant's counsel or the Circuit Court of that fact. Also prior to the arraignment, Detective J. A. Hunt had taken the shell casings to England for testing by Dr. Bond, and had sent the shell casings to California for additional testing by Mr. McRoberts. The shell casings had been mailed back and returned to Detective Hunt's custody in late October, near the date of Defendant's arraignment. They remained in Detective Hunt's custody until January 18, 2011, when the Charleston Police Department sent the shell casings to the West Virginia State Police Lab for further testing.

As a result of the delay in discovery, the parties moved by joint motion to continue the trial until April 4, 2011. Defendant's counsel continuously requested additional discovery from the State, including repeated requests to inspect physical evidence, throughout 2011. As the April 4, 2011 date approached, Defendant still did not have access to all the material evidence in the case, including the reports completed by Dr. Bond and Mr. McRoberts, and therefore Defendant's counsel moved to continue the trial date. The trial was continued to August 1, 2011 with no objection by the State of West Virginia. On June 7, 2011 the State moved to continue the trial date as a witness was scheduled to be out of town during the August trial date; the motion was granted, and trial was continued until November 14, 2011.

After the repeated attempts to view the physical evidence failed, Defendant filed a specific motion in September 2011 to inspect the shell casings seized by law enforcement at the scene of the July 4, 2010 shooting and the vehicle of the deceased—almost a year after arraignment and

Defendant's first motion for discovery. This motion was granted by the Circuit Court on September 20, 2011. During the September 20 hearing, in order to allow the State adequate time to comply with the order, the Circuit Court also granted the State's oral motion to continue trial, and the trial was again continued, to March 26, 2012.

Subsequent to the September 20, 2011 hearing, Defendant again made repeated requests of the State to make arrangements to view the evidence and to have the evidence tested. Again, the State did not comply. Unbeknownst to Defendant and the Circuit Court, at that time the decedent's car had been released and was unavailable for testing, and the shell casings were missing.

On December 6, 2011 the West Virginia State Police Lab completed the testing of the shell casings, and copied its report to the Charleston Police Department. In late December 2011/early January 2012, counsel for the State of West Virginia informed Defendant's counsel that the shell casings were missing, well over a year after Defendant first requested to inspect them. On January 25, 2012, Detective Kinder of the Charleston Police Department picked up the shell casings from the West Virginia State Police and secured them in his office. On January 26, 2012, the State of West Virginia formally notified Defendant by Notice of Lost Evidence that the State was unable to locate the shell casings. The Circuit Court was informed that the shell casings were missing and that the decedent's vehicle was no longer in the State's possession during a status conference held February 24, 2012—six months after the court's order directing the State to allow Defendant access to this evidence. At that time, the Court briefly continued the matter to April 9, 2012. On March 5, 2012, three days prior to the March 8, 2012 pre-trial hearing and one month before trial, the State informed Defendant's counsel that the shell casings were found. The court was informed of this during the March 8 hearing.

During the March 8, 2012 pre-trial hearing, Detective Hunt testified as to the whereabouts of the shell casings from the July 4, 2010 shooting through the date of the pre-trial. His testimony detailed the travels of the shell casings from West Virginia, to England, to California, and back, as well as the Charleston Police Department's efforts to locate the shell casings. During the March 8 hearing, Defendant's counsel requested the opportunity to see the now-found shell casings and, following a brief recess, the evidence was brought into the courtroom. However, before the shell casings could be presented to Defendant's counsel, and before either counsel made extensive argument, counsel for the State of West Virginia moved the Circuit Court to make a ruling based on the evidence and Detective Hunt's testimony. The Circuit Court accordingly made a ruling on the basis of the evidence before it and, within its discretion, concluded: (1) the shell casings were subject to disclosure under Rule 16 of the *West Virginia Rules of Criminal Procedure*, (2) the State had a duty to preserve the material; (3) the State was negligent and failed to account for the evidence within its custody; and (4) the State breached its duty. In light of the State's negligence, the Circuit Court's unwillingness to further delay the trial, and the prejudice to Defendant, the court excluded the shell casings. Relying on *State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1992), the Circuit Court also ruled that any evidence regarding firearms, ammunition, or other weapons seized by law enforcement which are not directly related to, or matching evidence found at the scene also be excluded.

#### **SUMMARY OF ARGUMENT**

The Circuit Court acted within its discretionary power to sanction for discovery violations, pursuant to Rule 16(d)(2) of the *West Virginia Rules of Criminal Procedure*. Rule 16(d)(2) provides a broad array of remedies available to a circuit court judge, within its discretion, seeking to sanction

a party for discovery violations. Examining the State of West Virginia's discovery violations under the factors identified in *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994), the Circuit Court's decision to exclude certain evidence was within its discretionary power "to fashion a remedy for noncompliance that encompasses a fair balancing of the interests of the courts, the public, and the parties . . . ." *Hill*, 193 W. Va. at 140, 454 S.E.2d at 434 (citation omitted). The State's discovery violations prejudiced Defendant's ability to prepare for trial, the delay resulting from the discovery violations have prejudiced Defendant, and further delay of the case would have further prejudiced Defendant. Accordingly, the exclusion of the shell casings was the proper remedy under Rule 16(d)(2) and within the Circuit Court's legitimate discretionary powers. The Circuit Court's exclusion of all firearms and ammunition evidence is within the West Virginia Supreme Court of Appeals case law. *See State v. Walker*, 188 W. Va. 661, 668, 425 S.E.2d 616, 623 (1992).

#### **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 is appropriate for a Rule 19 argument and disposition by memorandum decision.

#### **ARGUMENT**

- I. The Circuit Court acted within its legitimate discretionary power to sanction for discovery abuses in 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.**

The Circuit Court's ruling excluding the shell casings from trial in this matter was a proper

remedy in light of the State of West Virginia's discovery violations and was fully within the court's discretionary powers and authority under Rule 16(d)(2) of the *West Virginia Rules of Criminal Procedure*. In *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 140, 454 S.E.2d 427, 434 (1994), this Court observed that a circuit court has a range of remedies available in the case of a Rule 16 violation:

Rule 16(d)(2) provides that where there has been noncompliance with legitimate discovery requests, a circuit court, in addition to ordering immediate disclosure, granting a continuance, and excluding evidence, "may enter such other order as it deems just under the circumstances." This broad language justifies the adding of several other remedies or sanctions to the list such as (a) advising the jury to assume the existence of facts that might have been established by the missing information, (b) holding the violator in contempt of court, (c) granting a mistrial, and (d) dismissing the charges. We specifically hold that one of the permissible sanctions under Rule 16(d)(2) for a discovery violation is a dismissal with prejudice.

The decision of "[w]hich remedy is preferable is best left to the discretion of the trial court. . . . The circuit court must have discretion to fashion a remedy for noncompliance that encompasses 'a fair balancing of the interests of the courts, the public, and the parties[.]' . . . ." *Id.* (quoting *People v. Taylor*, 159 Mich. App. 468, 487, 406 N.W.2d 859, 869 (1987)).

In *Hill*, the trial court granted a motion to dismiss the indictment charging the defendant with embezzlement, with prejudice, following a delay in discovery over a period of eight months and the continuance of two scheduled trial dates. *Id.* at 141, 435. In upholding the circuit court's dismissal with prejudice and denying the writ of prohibition, this Court observed: "the extent and scope of pretrial discovery is within the circuit court's discretion, and we will not disturb a circuit court's ruling unless there is a clear abuse of discretion." *Id.* at 142, 436. To prove an abuse of discretion, "the State must demonstrate that the court's action was so flagrant that it was deprived of its right

to prosecute the case or deprived of a valid conviction before the State's motion for a writ of prohibition will be granted." *Id.* (citation omitted). In *Hill*, this Court concluded that the discovery violations affected the defendant's ability to prepare for trial, and also that the delay caused by the State's discovery violations prejudiced defendant. *Id.* at 143, 437. Here, as in *Hill*, Defendant's ability to prepare for trial has been hampered and Defendant has been prejudiced by the multiple continuances of trial and the 1.5 year delay in this case resulting from the State's discovery violations. Unlike in *Hill*, however, the Circuit Court opted not to dismiss the indictment, but instead chose a lesser sanction and excluded evidence from this case. This Court upheld the trial court's dismissal with prejudice in *Hill*, and Respondent respectfully submits that it should uphold the Circuit Court's exclusion of evidence in this action.

In determining whether a circuit court has abused its discretion, the following factors are considered relevant: "the importance and materiality of the information that was not disclosed; the ability of the party to try the case without the information or the nature of the prejudice claimed by the failure to comply with the discovery order; the extent to which a continuance or other lesser relief would delay the trial or otherwise impact adversely the administration of justice; the degree of negligence involved and the explanation of the party's failure to comply with a discovery request; the effort made by the party to comply with the discovery order; the number of times the circuit court ordered the party to comply with the discovery order; and in some cases, the severity of the offense." *Id.*

An analysis of the facts of the pre-trial discovery period, examined under the *Hill* factors, yields a conclusion in favor of finding that the Circuit Court acted within its discretionary authority.

a. *Importance and Materiality of the Information*

The shell casings are material to the case, and the State had a duty under Rule 16 of the *West Virginia Rules of Criminal Procedure* to preserve them and produce them to Defendant for his independent inspection. *See generally Defendant's Motion to Dismiss/Motion in Limine* (attached as Exhibit 1). The State had months to submit the shell casings to various tests, two of which were completed before Defendant was arraigned. The third test, by the West Virginia State Police Lab, took almost one year to complete, and during that time the State completely lost track of the location of the shell casings. All of the search warrants submitted by the Charleston Police Department contain a reference to the shell casings recovered at the scene. Detective Hunt cited these shell casings in the grand jury report as evidence implicating the Defendant. Detective Hunt also testified to the importance of these shell casings to the Kanawha County Grand Jury. Likewise, the decedent's vehicle is also material to the case, and should have been preserved pursuant to Rule 16. *See generally Defendant's Motion to Dismiss/Motion in Limine* (attached as Exhibit 1).

*b. Ability to Try the Case Without the Information/Nature of Prejudice Claimed by Failure to Comply with the Discovery Order*

Defendant has been prejudiced by the State of West Virginia's failure to comply with the Circuit Court's discovery orders. Both the shell casings and the decedent's vehicle contained potentially exculpatory evidence, and Defendant had a right to examine these items under *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995). The State had the shell casings in its possession for 1.5 years, and decedent's vehicle in its possession for a short period of time before releasing it from its custody. The State had an opportunity to examine the decedent's vehicle, which Defendant has not had. The decedent's vehicle has been released from the State's custody, and is permanently unavailable for testing by Defendant. The State conducted a trajectory analysis on the

vehicle while it was in the State's custody. Defendant has had no opportunity to examine the evidence on which the trajectory analysis was based. Defendant's experts cannot examine the car to make its own determination of the trajectory of the bullets, nor can they examine the vehicle for any evidence that the decedent had a gun or fired one.

Similarly, the State had months to conduct three different tests on the shell casings: a test to determine if fingerprint detail was present on the shell casings; a test to determine if the fingerprint detail was sufficient to make a fingerprint identification; and a ballistics test. Detective Hunt took the shells to England for testing, and sent them to California for further testing, all before Defendant was even arraigned in this case. The shell casings then were in Detective Hunt's custody for over two months, before they were transported to the West Virginia State Police Lab, where the shell casings remained for over a year while additional testing was conducted. To allow the shell casings in now, when the trial is scheduled for April 9, 2012, would prejudice Defendant as he would have no time to independently examine the shell casings. Further, allowing the shell casings in but excluding the tests completed by the State would still prejudice Defendant as he would be denied his right to independently examine the shell casings for potentially exculpatory evidence.

Moreover, for Defendant to be able to conduct comparable testing of his own could take weeks or months, which would further delay this trial. Part of the delay would be identifying experts to use; because Defendant believed the shell casings were lost, Defendant at this stage has retained no experts on fingerprints or ballistics testing. In fact, for several months, Defendant's counsel prepared for trial believing the shell casings were missing. This changed only three days before the March 8, 2012 pre-trial hearing and approximately one month before the April 9, 2012 trial date. Defendant's counsel has been forced to switch gears multiple times as a result of the State's

negligence in managing the evidence in this case. This is prejudicial to Defendant, and has “surprise[d] the defendant on a material fact” and “hamper[ed] the preparation and presentation of the defendant’s case.” Syllabus Point 2, *Hill*, 193 W. Va. 133, 454 S.E.2d 427.

“In exercising discretion pursuant to Rule 16(d)(2) of the *West Virginia Rules of Criminal Procedure*, a circuit court is not required to find actual prejudice to be justified in sanctioning a party for pretrial discovery violations. Prejudice may be presumed from repeated discovery violations necessitating numerous continuances and delays.” *Id.* at Syllabus Point 4. This case has already been delayed numerous times: in January 2011; in April 2011; in June 2011 twice; in September 2011; and in February 2012. Several of these continuances have been granted as a result of the State’s failure to timely provide requested discovery. Granting another continuance at this stage in the case would further prejudice Defendant, and the requisite delay would be significant in light of the length of time needed to examine the shell casings. *Id.* at 143-44; 437-38 (“Continuance or delay ‘compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.’ *Doggett v. United States*, 505 U.S. 647, 655, 112 S. Ct. 2686, 2693 (1992).”).

*c. Applicability of Lesser Relief*

The only evidence excluded is the shell casings and other ammunition and firearms; however, this decision was reached in light of the entirety of the State’s delay in its execution of its discovery obligations and in light of the 1.5 year delay of this case. Since the date of Defendant’s arraignment in October 2010, the State of West Virginia has failed to comply with several of the Circuit Court’s orders granting discovery requests by Defendant. During the arraignment hearing, the court ordered the State to provide discovery within days after Defendant’s motion for discovery. It took the State over a month to comply with that order. As a result of the delay in the production of discovery, the

first trial date of January 4, 2011 was continued, and Defendant lost his right to a speedy trial. Defendant moved for another continuance on March 7, 2011, because, *inter alia*, the State had failed to provide the reports done by Dr. Bond and Mr. McRoberts, reports which were completed in September and October 2010, respectively. On September 20, 2011, the Circuit Court again ordered the State to provide discovery to Defendant—this time specifically the decedent’s car and the shell casings. Again, the State failed to comply with this order in a timely manner. The State also failed to communicate to Defendant’s counsel or the Circuit Court that the decedent’s car was no longer in the State’s custody and that the shell casings were missing.

To grant yet another continuance in this case would further delay this case and needlessly prejudice Defendant. Syllabus Point 4, *Hill*, 193 W. Va. 133, 454 S.E.2d 427; *see also supra* Part I.b. The Circuit Court was accordingly unwilling to delay the trial any further. *March 8, 2012 Pre-Trial Order* at 7 (attached as Exhibit 2).<sup>2</sup> In light of the State’s negligence in accounting for the shell casings in this trial and the court’s unwillingness to further delay trial, the only other option was to exclude the shell casings. Otherwise Defendant would have been impermissibly prejudiced by the admission of evidence that he had no time to independently examine. *Id.*; *see also supra* Part I.b. The State’s other proffered alternative—excluding evidence and testimony of the testing performed at the West Virginia State Police Laboratory—is also insufficient to protect Defendant from further prejudice. The State tested the shell casings for fingerprints and ran a ballistics test. Not allowing Defendant to do the same denies Defendant his right to examine the shell casings for potentially exculpatory evidence. Faced with these facts, the Circuit Court did the fairest thing it could do. The

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<sup>2</sup> The Circuit Court communicated to counsel that its final order would be completed after the deadline for this Respondent’s brief. The court instructed Respondent to attach the draft order to our brief.

alternative remedies available to the Circuit Court would have prejudiced Defendant.

The Circuit Court did not issue the harshest sanction of dismissal of the indictment, a remedy saved for “only in the most egregious cases.” *Hill*, 193 W. Va. at 140, 454 S.E.2d at 434. The State attempts to redefine the Circuit Court’s exclusion of evidence by arguing that the exclusion of the shell casings is a “*de facto*” dismissal of the State’s case. This is false. The shell casings, like the remainder of the State’s evidence, is circumstantial; their exclusion does not create a “*de facto*” dismissal of the State’s case. This is an incredible admission of the weakness of the State’s case. At the bond hearing on January 3, 2011, the State was arguing to deny Defendant’s bond, when defense counsel argued that the State’s case was weak as the evidence in this case is circumstantial, the gun used in the shooting has not been found, and there is no identification of the shooter. In response, the State argued that in addition to the shell casings, it has video showing Defendant near the scene within minutes of the shooting, eyewitnesses identifying a car similar to Defendant’s in the area, and witnesses that can attest to the relationship between Defendant and the decedent. As the State argued at the bond hearing, it still has evidence to put on in trial. Moreover, Rule 16 of the *West Virginia Rules of Criminal Procedure* anticipates the use of a number of remedies by circuit courts, including dismissal of the indictment and exclusion of evidence; the Circuit Court purposefully selected to exclude the shell casings, and did not select the remedy of dismissal.

*d. Degree of Negligence/Explanation for Failure to Comply*

The State was negligent in its failure to preserve the evidence, and in its failure to account for the shell casings when Defendant requested them. *March 8, 2012 Pre-Trial Order* at 7. Defendant requested access to the shell casings and the decedent’s car from the beginning of discovery. Yet the State of West Virginia never gave Defendant the opportunity. In *State v.*

*Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), this Court determined the proper course of action when discoverable evidence is properly sought by the defendant, but the evidence is unavailable at the time defendant makes his request. Syllabus Point 2 of *Osakalumi*, holds:

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists **when the defendant seeks its production**, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either *West Virginia Rule of Criminal Procedure* 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction. (Emphasis added)

Following the April 2011 continuance of the trial date, Defendant began making specific requests of the State to view the physical evidence the State intended to introduce at trial. Opportunities to view the evidence in June and August were cancelled by the State of West Virginia, due to the unavailability of Detective Hunt. In September 2011, Defendant's counsel was finally given the opportunity to view the physical evidence, and counsel for Defendant specifically requested the opportunity to view the shell casings. The State, however, was unable to produce them for inspection. Following this failed inspection, Defendant filed his specific motion to inspect the shell casings and decedent's vehicle, which the Circuit Court granted on September 20, 2011. The State provided no indication that there would be any difficulty in producing these items for Defendant's inspection. Yet in late December 2011/early January 2012, the State orally informed

Defendant's counsel that the decedent's vehicle was no longer in custody and that the shell casings were missing.

Both the vehicle and the shell casings are highly relevant physical evidence in this case. The State's failure to preserve the decedent's vehicle precludes Defendant's opportunity to examine the vehicle for potentially exculpatory evidence, such as evidence that the decedent fired a gun. Syllabus Point 2, *Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504. The more egregious handling of evidence, however, is the State's failure to maintain control over the shell casings and account for their whereabouts when Defendant requested to view them. *Id.* The chain of custody was mostly established from the time period dating from the scene of the shooting until the day Detective Kinder transported the shell casings to the West Virginia State Police Lab on January 18, 2011.<sup>3</sup>

Defendant asked to inspect the shell casings throughout 2011. Each time Defendant asked, the State never informed Defendant that the shell casings were missing. When Defendant filed his September 20, 2011 motion regarding the shell casings, the State did not inform Defendant or the court that the shell casings were missing. On December 6, 2011, the State Police Lab completed its report on the shell casings, and copied the report to the Charleston Police Department. Yet, several weeks later, the State informed Defendant the shell casings were lost. Almost a month after this oral notification, the State filed its formal Notice of Lost Evidence on January 26, 2012. The day before this motion was filed, Detective Kinder picked up the shell casings from the State Police Lab, and secured them in Detective Hunt's office. Only on March 5, 2012, did the State inform defense counsel that the shell casings had been found.

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<sup>3</sup> Defendant asserts that a proper chain of custody has yet to be provided for the time period the shell casings were in California with Mr. McRoberts.

The only reason the State provided for its failure to comply with the Court's order was the shell casings were stored under the decedent's name at the State Police Lab, and Detective Hunt asked for them under Defendant's name. However, Detective Hunt testified that he did not ask under the decedent's name or the agency identification number associated with all of the evidence in the case, including the shell casings. As the draft March 8, 2012 Pre-Trial Order states: "the State [was] negligent in their failure to preserve the evidence and their failure to account for the shell casings when Defendant requested them. Moreover, the State of West Virginia provided no substantive reasons for its failure to allow Defendant the opportunity to examine the evidence; instead, there seems to be a lack of accountability for the custody of the shell casings and when custody shifted to the State Police." *March 8, 2012 Pre-Trial Order* at 7.

*e. Effort Made to Comply with the Discovery Order*

The State of West Virginia delayed the production of discovery throughout the discovery period of this case. From the date of the first request for discovery in October 2010, the State failed to comply in a timely manner. Defendant made three motions for discovery before the State made its first discovery production: an oral motion October 27, 2010; a written motion November 3, 2010; and a written motion November 16, 2010. The State made its first production on December 14, 2010, a month and a half after Defendant's first request. However, even when the State started to produce discovery, production was still delayed. For instance, on March 7, 2011, Defendant moved to continue trial because, among other reasons, the State had yet to produce Dr. Bond's and Mr. McRobert's reports, which had been completed in September and October of 2010, respectively.

Defendant's counsel had to make repeated requests to view the evidence, and eventually filed a motion on September 20, 2011 to specifically force the State to grant Defendant the opportunity

to examine the shell casings and vehicle. The State discovered the vehicle was no longer in its custody shortly after the Court ordered its inspection. And it took the State until late December 2011/early January 2012 to inform Defendant's counsel that it had lost the shell casings, only to inform Defendant's counsel two months later that the shell casings had been in its custody the entire time.

The State of West Virginia's efforts to comply with the Circuit Court's discovery orders were untimely, often came as a result of significant effort on Defendant's part, and did not include the level of candor that would have decreased the prejudice caused to Defendant's efforts to prepare for trial.

*f. Number of Times the Circuit Court Ordered the Party to Comply*

The Circuit Court ordered the State to comply with its discovery orders two times, spanning over the course of almost a full year: in October 2010, and in September 2011. Both times, the State failed to comply in a timely manner. The State did not provide discovery to Defendant for over a month following the first request for discovery. Following the September 20, 2011 Order, the State again failed to comply and, further, failed to communicate in a timely manner the fact that the decedent's vehicle was unavailable for inspection and that the shell casings were missing. In fact, the State's negligence in accounting for the custody of the shell casings nearly resulted in its inability to comply with this order at all; the State went so far as to file a formal Notice of Lost Evidence on January 26, 2012.

In order to succeed on a writ of prohibition, "the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction." Syllabus Point 1, *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994)

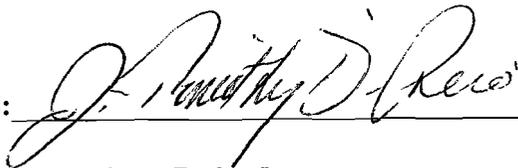
(quoting Syllabus Point 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992)). The State has failed to meet this burden. The Circuit Court's ruling was properly within its discretionary authority under Rule 16(d)(2) of the *West Virginia Rules of Criminal Procedure*.

Last, the Petitioner also challenges the Circuit Court's ruling prohibiting the State from any mention of all ammunition and firearms seized during search warrants executed on July 5, 2010 and July 12, 2010. The majority of the ammunition and firearms seized have no relation to the shell casings found at the scene of the shooting. Accordingly, even without the exclusion of the shell casings, this evidence would have been inadmissible under *State v. Walker*, 188 W. Va. 661, 668, 425 S.E.2d 616, 623 (1992) (finding that the "only purpose of [testimony regarding defendant's firearms] was to create the impermissible inference that [the defendant] must be a dangerous person solely because he possessed guns and ammunition, notwithstanding that the right to keep and use arms is guaranteed to every citizen by *W. Va. Const. Art. III, § 22.*"). With the exclusion of the shell casings, under *Walker*, none of the seized firearms and ammunition have any relevance to the shooting and, therefore, are properly excluded on this ground. In fact, as a result of the exclusion of the shell casings, the State of West Virginia has conceded there is no evidence that any of the ammunition, firearms or weapons seized by law enforcement are directly related to or match evidence found at the scene of the crime. *March 8, 2012 Pre-Trial Order* at 8.

### CONCLUSION

The Circuit Court's order excluding the shell casings and precluding the State of West Virginia from eliciting testimony regarding the casings, other firearms, and other ammunition was within the court's discretionary authority under Rule 16(d)(2) of the *West Virginia Rules of Criminal Procedure* and is pursuant to this Court's holding in *State v. Walker*, 188 W. Va. 661, 668, 425

S.E.2d 616, 623 (1992). The State has failed to meet its heavy burden under *Hill*, and therefore this Writ of Prohibition should be denied.

Signed: 

**Counsel for Defendant,**

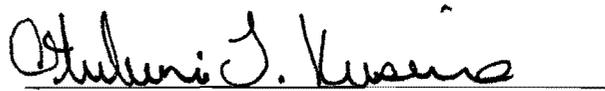
J. Timothy DiPiero (WVSB # 1021)

Olubunmi T. Kusimo (WVSB # 10030)

Katherine R. Snow (WVSB # 11730)

**VERIFICATION**

I, Olubunmi T. Kusimo, counsel for Respondent, after being duly sworn, says that the facts and allegations contained in this Brief in Opposition are true, except insofar as they are therein stated to be upon information and belief, and that as they are therein stated, they are believed to be true.



Petitioner

Taken, subscribed, and sworn to before me this \_\_\_\_ day of April, 2012.

My commission expires: \_\_\_\_\_

\_\_\_\_\_

Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

DOCKET NO. 12-0404

v.

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

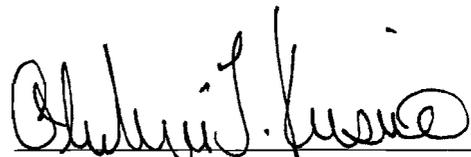
Respondents.

**CERTIFICATE OF SERVICE**

I, Olubunmi T. Kusimo, counsel for Defendant, do hereby certify that a true and exact copy of the foregoing *Respondent David Washington Kinney's Brief in Opposition to Petitioner for Writ of Prohibition* was served upon the following counsel of record by hand-delivering the same on the 5th day of April, 2012, to the following:

Erica Lord  
Assistant Prosecuting Attorney  
Office of the Prosecuting Attorney  
301 Virginia Street East  
Charleston, WV 25301

Honorable Carrie Webster  
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Olubunmi T. Kusimo (WVSB #10030)