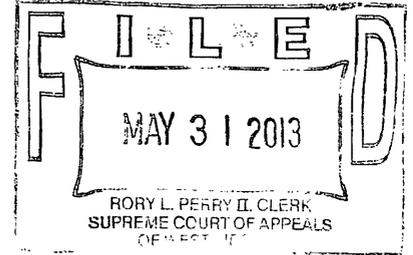


IN THE SUPREME COURT OF APPEALS
OF THE
STATE OF WEST VIRGINIA
NO. 13-0144



FROM THE CIRCUIT COURT OF MASON COUNTY,
WEST VIRGINIA
FIFTH JUDICIAL CIRCUIT
CASE NO. 12-F-20

State of West Virginia, Plaintiff Below,
Respondent

vs.

Curtis Joseph Kimble, Defendant Below
Petitioner

DEFENDANT'S PETITION FOR APPEAL

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United States v. Rusher, 966 F. 2d 868 (1992).

Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407 (1963).

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Petitioner

DEFENDANT'S PETITION FOR APPEAL

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

This was a criminal action brought by the State of West Virginia, charging Curtis Joseph Kimble (hereinafter "Petitioner") with one (1) count of "Wanton Endangerment". Following a

trial by jury, the Defendant was found guilty. He was sentenced to the West Virginia Division of Corrections for a determinate period of five (5) years. The lower court denied the Petitioner's Motion for A New Trial and Motion for Judgment of Acquittal. It is from this trial and subsequent conviction that the Petitioner appeals.

II. STATEMENT OF THE CASE

On November 12, 2011, at 3:39 pm, Mason County 911 received a call that shots had been fired at a vehicle in the are of Poindexter Road and John's Creek Road. (Mason County 911 Call Number Detail). The caller and victim, Daniel Granger, had given a description of the alleged perpetrator in that he was wearing no shirt, a black hat, and jeans. *Id.* No other information was given. Deputies Rhodes and Wilson, of the Mason County Sheriff's Department, immediately went to the home of the Petitioner, who lived near the intersection and to who's home Deputy Wilson had previously responded to regarding incidents with the Petitioner shooting guns near the residence. (Pre-Trial Hearing, June 7, 2012, p. 11). At no point prior to the Deputies arrival at the Petitioner's home, nor during any point while they were on the scene, was the Petitioner's name mentioned by Mason County 911. *Id.* at 11, 13. Upon arrival to the Petitioner's home, Deputy Wilson ordered the Petitioner out of the house at gun point, ordered him to lay on the ground where he was frisked and handcuffed. *Id.* at 7. After handcuffing the Petitioner, Deputy Wilson inquired of the Petitioner where the gun was, without having advised him of his right to remain silent. *Id.* at 14 The Petitioner indicated it is was in the house. While the Petitioner was still handcuffed outside the residence, without the permission of the Petitioner or a search warrant, Deputy Wilson entered the home and retrieved the gun. *Id.* at 14-15. after retrieving the gun, he then went back into the house and retrieved a black hat. *Id.* at

15. The Petitioner was then placed into the rear of the police cruiser and taken to the home of Daniel Granger, where Mr. Granger identified him as the person who had shot at him. (Pre-Trial Hearing, June 7, 2012, p. 9). At no point prior to the Petitioner being taken to the the Granger home did either deputy speak with Mr. Granger, either in person or by phone. No statements were taken from him and no further descriptions of the shooter were asked for prior to the police taking the Petitioner to the Granger home. *Id* at 34-35. The Petitioner was charged with a single count of “Wanton Endangerment”.

The Petitioner was indicted by the Mason County Grand Jury during the January 2012 term of court, for one (1) count of “Wanton Endangerment”. (Indictment, January 4, 2012).

On January 11, 2012, the Petitioner appeared before the Circuit Court and entered a plea of not guilty. (Order Arraignment, January 4, 2012). On May 31, 2012, the Petitioner filed a “Motion to Suppress Statement”, “Motion to Suppress Identification” and “Motion to Suppress Evidence”. On June 7, 2012, a pre-trial hearing was held, whereby the Court denied both of the Petitioner's Motions to Suppress. (Order, June 11, 2012). On Jun 12, Counsel for the Petitioner filed “Defendant’s Objection to the Entry of the Order of Pre-trial Hearing and Suppression”. On June 12, 2012, the petitioner was found guilty, by a jury, of one count of Wanton Endangerment. (Trial Order, June 12, 2012). On June 21, Counsel for the Petitioner filed a “Motion for Judgment of Acquittal” and “Motion for New Trial”, which were both denied on September 7, 2012. (Order Post-Trial, September 7, 2012). On October 1, 2012, the Petitioner was sentenced to five (5) year in prison. (Order Sentencing, October 5, 2012). On January 16, 2013, the Petitioner was re-sentenced to five (5) years in prison. It is from this order that the Petitioner appeals.

III. ASSIGNMENTS OF ERROR

The Petitioner assigns as error the following:

1. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED IN THE UNLAWFUL ARREST OF THE PETITIONER AND ANY EVIDENCE FLOWING THEREFROM.
2. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE UNLAWFUL SEARCH OF THE PETITIONER'S RESIDENCE WHEN HE WAS ALREADY IN CUSTODY, THE POLICE HAD NO WARRANT, AND NO EXTRIGENT CIRCUMSTANCES EXISTED.
3. THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURY TO RECEIVE TESTIMONY OF A TAINTED AND SUGGESTIVE IDENTIFICATION OF THE PETITIONER.

IV. SUMMARY OF ARGUMENT

The lower court erred in failing to suppress the unlawful arrest and questioning of the Petitioner, when the police had absolutely no information that could have reasonably led them to believe that he was involved in the shooting prior to appearing at his residence, and once arrested the police interrogated the Petitioner without advising him of his right to remain silent. In addition, the lower court failed to suppress the illegally obtained shotgun removed from the Petitioner's residence after an illegal search. The police entered the home of the Petitioner, absent a warrant or permission from the Petitioner and retrieved a shot gun they then alleged was used in the commission of the crime. At the time of the entry, there existed no exigent

circumstances such that would allow for their entry without a warrant. Furthermore, any information that the police received as a result of the illegal detention and questioning, including the search of the residence, should have been inadmissible as it flowed from the original illegal detention. Finally, the lower court erred in allowing the overly suggestive identification of the Petitioner by the witness, an identification made only after the police drove the Petitioner to the witness's home, in handcuffs and sitting in the back of a police cruiser.

V. **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to the Revised Rules of Appellate Procedure, Rule 19, the Petitioner requests oral argument in this matter. The Petitioner asserts that this case involves assignment of error in the application of settled law. This case is appropriate for a memorandum decision.

VI. **ARGUMENT**

1. **THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED IN THE UNLAWFUL ARREST OF THE PETITIONER AND ANY EVIDENCE FLOWING THEREFROM.**

In determining whether an unlawful arrest occurred, one must first determine if in fact there was an arrest, or at what point a detention has become an arrest.

The founding fathers of this country believed that the right against unlawful search and seizure was a fundamental right, and incorporated it into our Constitution.

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or

affirmation, and particularly describing the place to be searched, and the person or things to be seized”.

(U.S. Const. Am. 4).

This Court has stated that an “arrest” occurs when a person is detained by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person who is making the arrest. *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987), *overruled on other grounds*, *State v. Honaker*, 193 W.Va. 51, 454 S.E.2d 96 (1994).

In *State v. Jones*, this Court found that there are factors that should be looked at to help determine when a stop becomes an arrest. 193 W.Va. 378, 456 S.E.2d 459 (1985). “The controlling factors are: (1) the length, duration, and purpose of the detention; (2) the extent and nature of the questioning of the suspect; (3) the location of the detention and interrogation; (4) whether the suspect was advised that he was free to leave and was not required to answer questions; and (5) the use of force or other physical restraints during the stop. *Id.* at note 11.

Deputy Rhodes testified that on November 12, 2011, the police came to the Petitioner's home.

“Q. What happened when you got there:

A. Deputy Wilson actually ordered him out of the trailer onto the ground.

Q. What do you mean ordered him out?

A. Mr. Kimble was inside the trailer.

Q. I understand that. What was said?

A. Mr. Kimble, come out of the trailer, this is the sheriff's department. Once he came out--

Q. In response to deputy Wilson asking--

A. Mr. Kimble did come out.

...

Q. What happened when Mr. Kimble exited the trailer?

A. Deputy Wilson then ordered him to get on the ground, which he did and then after he did lay on the ground, I then cuffed him just to secure the scene until we could figure out exactly what was going on.”

(Pre-Trial Hearing, June 7, 2012, p. 7).

In reading *Jones, supra*, coupled with this Court's definition of “arrest” in *Muegge, supra*, the question then becomes when was the Petitioner under arrest and at that point did the police, upon arrival at the Petitioner's home, have enough information to obtain an arrest warrant?

In comparing the facts of this case to the factors outlined in *Jones*, the Petitioner's detention from the beginning was an arrest. Upon arrival at the Petitioner's home, law enforcement ordered him out of his house at gunpoint. He was handcuffed and did not feel as if he could leave. He was not advised of his Fifth Amendment right to remain silent. While the questioning by Deputy Wilson could in no way be inferred as long, existing of only one question, it is not the quantity of the questions but rather the content. Deputy Wilson asked him where was the firearm “that he fired”. (Pre-Trial Hearing, June 7, 2012, p. 14).

Having determined that an arrest occurred, one must then look at whether the State had probably cause to effectuate such an arrest. The United States Supreme Court, in *Wong Sun v. U.S.*, stated that “[I]t is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, . . . though the arresting officer need not have in hand evidence

which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would ‘warrant a man of reasonable caution in the belief’ that a felony has been committed, . . . must be measured by the facts of the particular case.” 371 U.S. 471, 83 S.Ct. 407 (1963). Furthermore, they found that “[W]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.” *Id* at 480, 413.

Prior to law enforcement arriving at his home, there was no indication that the Petitioner's name had been mentioned in connection with this crime. Rather, the police merely showed up on his doorstep and arrested him. According to the 911 call sheet, no suspect was named when the initial call was placed by Mr. Granger. (Mason County 911 Call Number Detail). Furthermore, in his initial statement to police, Mr. Granger indicated that he had never before seen the man whom he alleged shot at him, making it impossible for him to identify the shooter when the 911 call was placed. (Statement of Daniel Granger, November 12, 2011). Deputy Rhodes testified that prior to going to the Petitioner's home, neither he nor Deputy Wilson had been given any information that would indicate that the Petitioner was a suspect in the shooting. (Pre-Trial Hearing, June 7, 2012, pp. 11-13). Rather, they went to that house because Deputy Wilson had “...prior incidents with Mr. Kimble of shooting guns near the residence . . .” *Id* at 11. Testimony by the Mr. Granger indicated that there are at least three (3) other houses within the same general area that the crime occurred. *Id.* at 24. Based on the testimony of Deputy Rhodes, none of the residents in these houses were questioned as to the events on November 12, 2011.

Police did not show up at these residences and order the occupants out at gunpoint.

Certainly the proximity of the Petitioner's home to the incident would have been sufficient for the police to question the Petitioner. The Petitioner would go so far as to agree that since the initial call had indicated that a gun was involved, law enforcement were justified in ordering him out of the home for their own safety. Furthermore, pursuant to *Terry v. Ohio*, law enforcement would have been justified in ensuring that the Petitioner was not armed when he initially came out of the house, and could have detained him to ensure their safety. 392 U.S. 1, 88 S.Ct. 1868 (1968). Rather than these reasonable actions, law enforcement chose to handcuff and interrogate the Petitioner on the front law. Because he was wearing blue jeans and because Deputy Wilson had prior dealings with him, which is not probable cause to obtain and arrest warrant.

Having been arrested, prior to any questioning by law enforcement, the Petitioner was entitled to be informed of his constitutional rights under the Fifth Amendment of the United States Constitution. At no time, either before or after his arrest, did law enforcement did not inform the Petitioner of his rights. The United States Supreme Court, in *Miranda v. Arizona* has held that the prosecution can not use statements that flow from a custodial interrogation of the defendant, unless they can show that they used safeguards to ensure the defendant was aware of his constitutional right against self-incrimination. 384 U.S. 436, 86 S.Ct. 1602 (1966). "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id* at 1612.

While the Courts have modified the holding in *Miranda* over time, the basic principle

remains the same. If the police intend to interrogate or question individuals who are in custody, they must first inform them of their right to remain silent. While the Petitioner was handcuffed and lying on the ground in front of his home, having been asked out of said home at gunpoint, Deputy Wilson asked him one question. Deputy Wilson asked him where was the firearm "that he fired". (Pre-Trial Hearing, June 7, 2012, p. 14). This single question led the police to obtaining the gun located in the Petitioner's house, which was later used as evidence against the Petitioner.

The West Virginia Supreme Court of Appeals, in *State v. Thomas* stated that "[E]vidence obtained as a result of a search incident to an unlawful arrest cannot be introduced against the accused upon his trial." 157 W.Va. 640, 203 S.E.2d 445 (1974), Syl. Pt. 6. The police, having no more than mere suspicion that the Petitioner was somehow involved in this crime, had no probable cause to arrest him. Any information gained after this illegal arrest and illegal interrogation of the Petitioner, should be suppressed, including any statements by the Petitioner that he had a gun and that it was inside his home.

The trial court erred in failing to suppress evidence obtained in the unlawful detention of the Petitioner and any evidence flowing there from.

2. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE UNLAWFUL SEARCH OF THE PETITIONER'S RESIDENCE WHEN HE WAS ALREADY IN CUSTODY, THE POLICE HAD NO WARRANT, AND NO EXTRIGENT CIRCUMSTANCES EXISTED.

Most individuals view their home is a sanctuary; the one place that you can escape to with a reasonable degree of security, knowing that only those you invite in can enter. It is obvious that in some limited situations it is necessary for law enforcement to enter a person's home without a

warrant and without permission, as failure to do so could create a dangerous situation for them or the public at large. This necessity however is the exception, not the general rule. The Petitioner asserts that without a warrant, without permission, or without exigent circumstances, the police had no right to enter his home. In doing so they violated the Petitioner's Fourth Amendment right to be free from illegal searches and seizures.

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized”.

(U.S. Const. Am. 4).

Both the United States Supreme Court and this Court have found that individuals have an expectation of privacy in their homes and as a general rule, the warrantless search of an individual's home by governmental authorities is prohibited. A search without a warrant is considered to be *per se* unreasonable. See *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed. 576 (1967); *United States v. Rusher*, 966 F. 2d 868 (Fourth Circuit, 1992); *State v. Peacher*, 167 W.Va. 540, 280 S.E. 2d 559 (1981).

As is oft the case, over time exception have been carved out of the general rule involving warrantless searches. In syllabus point twenty of *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001), this Court explained as follows:

“Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution—subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek

exemption that the exigencies of the situation made that course imperative.”

Citing *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980), *overruled in part on other grounds by State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

This Court, in *State v. Buzzard*, has outlined several exceptions to the warrant requirement. 461 S.E.2d 50, 55 (1995). The Court has said that exigent circumstances may exist in many situations but noted three well recognized situations. These include when police reasonably believe (1) their safety or the safety of others may be threatened, (2) quick action is necessary to prevent the destruction of any potential evidence, or (3) immediate action is necessary to prevent the suspect from fleeing. *Id* at note 11. Furthermore, In *State v. Lacy*, the West Virginia Supreme Court of Appeals noted that “[R]ecognized situations in which exigent circumstances exist include: danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and hot pursuit of a fleeing suspect. 196 W.Va. 104, 468 S.E.2d 719 (1996), note 7.

In comparing the exception outlined in *Buzzard* and *Lacy*, *supra*, to the facts of the instant case, none of the exceptions to the warrant requirements existed at the time law enforcement entered the Petitioner's home and removed the shotgun. Law enforcement was not in “hot pursuit” of the Petitioner nor was there any danger that he would escape, as he was handcuffed at the time Deputy Wilson entered the home. At the time of his arrested, he was patted down and no weapons were found on his person. At no time while law enforcement was at the residence was there any indication that other people may be on the property or that there existed any danger to the police or others. The evidence, a shotgun, was not easily disposed of nor something one is likely to easily part with. Deputy Wilson entered the Petitioner's home

because he wanted to, not because it was necessary. Law enforcement would have been at no disadvantage had they simply waited for a search warrant that would have allowed them entry.

The trial Court erred when they failed to suppress the search of the residence and subsequent taking of the shot gun when the Petitioner was already detained, they had not search warrant, and no exigent circumstances existed.

3. THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURY TO RECEIVE TESTIMONY OF A TAINTED AND SUGGESTIVE IDENTIFICATION OF THE PETITIONER.

Show-up identifications when the witness has no knowledge, or even very limited knowledge, of the alleged perpetrator taint an identification to such a degree as to render it useless.

Courts have generally found that one-on-one confrontation between a victim of crime and an individual that the police present to the victim as a possible suspect conveys the message that the police believe the man to be guilty. Allowing this particular type of identification creates a significant risk of miss-identification. See Generally *State v. Rummer*, 189 W.Va. 369, 432 S.E.2d 39 (1993). *United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 403 (7th Cir.), *cert. denied*, 421 U.S. 1016, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975).

This Court, in *State v. Foddrell*, stated:

“[I]n determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time

of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.”

165 W.Va. 540, 269 S.E.2d 854 (1980), Citing *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976) *overruled in part on other grounds by State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

At the pre-trial hearing, Mr Granger testified as to his prior dealings with the Petitioner.

Q. Did you recognize the man running behind you with the shotgun?

A. I recognized him. I didn't know him.

Q. Recognized his as being whom?

A. The gentlemen sitting here.

Q. Had you seen him earlier. Is that the first time you saw him that day?

A. Yeah, that's the very first time I seen him.

Q. When was the first time you saw him?

A. When I took a right onto John's Creek he was standing there flipping me off.

Q. Okay.

A. I drive, I look up, I see him in the rear view mirror with a shotgun.

Q. Same guy?

A. Same guy, had the same outfit on, unless somebody trick like that, I don't know, . .

(Pre-Trial Hearing, June 7, 2012, pp. 25-26).

During the same hearing, Mr. Granger later testified:

Q. **Had you seen him before that day?**

A. **Not that I recall. No.** I couldn't say 100 percent yes or no. I mean, I don't make it a point to look for people not being rude.

Q. Do you think you had seen that same--

A. I mean, that particular trailer there's always been somebody out there, you know, feeding chickens or, you know, just doing odd stuff in the lawn, messing around outside tinkering with a truck, hanging signs up, nailing signs to a telephone poll. I didn't make it a point to see if that's their property.

Q. Did the person you had seen, the person you had seen out there before hanging signs, tinkering with a truck--

A. Right.

Q. --that person appear to be consistent with the person you saw November the 12th?

A. Much so.

...

Q. **Did you have an occasion to previously before that day to come in contact with the individual?**

A. **I believe, yes, I did for a brief second.**

...

Q. Fellow you saw a couple years ago when you took Mrs. Kimble to that trailer appear to be the same person that you've seen from time to time on our way back and forth to work?

...

A. Minus the facial hair, yes.

...

Q. **Do you know how many times when you traveled back and forth you'd see that fellow over the last couple of years?**

A. **Four. Not very often.** I mean, I don't know if - - he's not always there, but I don't see him, you know. Like I said, I don't make it a point to look. . . .

(Pre-Trial Hearing June 7, 2012, pp. 28-33). (Emphasis Added).

In his statement to police, immediately following the incident, Mr. Granger was asked if he had ever had any problems with the Petitioner, to which he responded “never seen him before”. (Statement of Daniel Granger). At the beginning of his testimony at the Pre-Trial Hearing, Mr. Granger stated that he had never seen the Petitioner before the shooting incident, which later became “contact for a brief second”, and by the end of same testimony he had seen the Petitioner at least **four** times over the years. (Pre-Trial Hearing June 7, 2012, pp. 28-33).

To determine if in fact the show-up identification process utilized by police influenced the witness's identification, we must compare the facts of this case to the factors outlined in *Foddrell, supra*. Mr. Granger testified that when he made the turn he saw the Petitioner giving him the bird. He continued to drive away until he heard the first shot, at which point he looked in his rear-view mirror and floored it. (Pre-trial Hearing, June 7, 2012, p. 26). While Mr. Granger does not say how long he looked at the person shooting at him, based on his testimony it does not appear to be for that long or with any degree of attention. This is evidenced by his statement to police that he had never seen the shooter before, despite having drove past the Petitioner's home almost every day traveling back and forth to work. *Id* at 32. Mr. Granger was

unable to describe the individual shoot at him with any degree of detail. When he called Mason County 911 on November 12, 2011, he identified the individual who had just shot at him as “a guy . . .wearing jeans, black hat no shirt. . .” (Mason County 911 call detail). This is when the incident was occurring and Mr. Granger’s senses should have been most heightened. The man shooting at him was supposed to be the same person who lived up the road from him, whose house he drove past almost every day and saw messing around in the yard. Finally, the police did in fact present the Petitioner to the witness for identification with about thirty (30) minutes, which is very quick when asking an individual to remember someone. The Petitioner was presented to Mr. Granger exactly as the person who had been described to 911, a man in jeans. The only difference was that this time when the witness saw “a man in jeans”, the man was sitting in the back of a police car in handcuffs.

The State does not contest that a “show up” is unduly prejudicial. (Pre-Trial Hearing June 7, 2012, p. 43). Likewise, the lower court found that the “show up” was overly suggestive, but that Mr. Granger had “sufficient independent knowledge of Mr. Kimble to make an identification of Mr. Kimble outside the suggested, overly suggestive, identification process utilized by the officer in this matter.” *Id.* at 51-52. Mr. Granger had so much independent knowledge, that he was unable to say that his neighbor was shooting at him until the police brought the neighbor to his house. Had the police not shown up at the Granger house, with the Petitioner in the cruiser, Mr. Granger very well may NEVER have identified him as the culprit.

For these reasons, the trial court erred when it permitted the jury to receive testimony of a tainted and suggestive identification of the Petitioner.

VII. CONCLUSION

WHEREFORE, the Petitioner prays that the West Virginia Supreme Court of Appeals REVERSE the Circuit Court of Mason County as to its Order denying the Petitioner's Motion to Suppress Statement, Motion to Suppress Identification, and Motion to Suppress Evidence, and Motion for New Trial. That the Circuit Court enter an Order granting said Motions and releasing the Petitioner from jail pending a new trial, and for such other and further relief as the Supreme Court of Appeals deems appropriate.

Respectfully submitted this 31st day of May 2013.

CURTIS JOSEPH KIMBLE

By Counsel



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IN THE SUPREME COURT OF APPEALS

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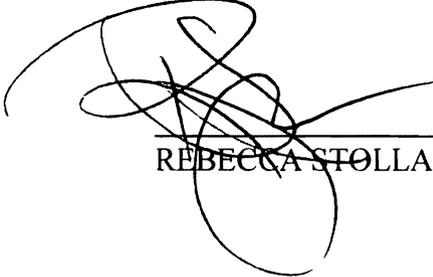
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CERTIFICATE OF SERVICE

I, **Rebecca Stollar Johnson**, counsel of record for the Respondent, **Curtis Joseph Kimble**, do hereby certify that on the 31st day of May 2013, I served a copy of the forgoing **“Defendant's Petition for Appeal”** upon all counsel in this case, as listed below, by delivering a true copy thereof via U.S. Mail..

Rob Goldberg, Esq., via U.S. Mail



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