

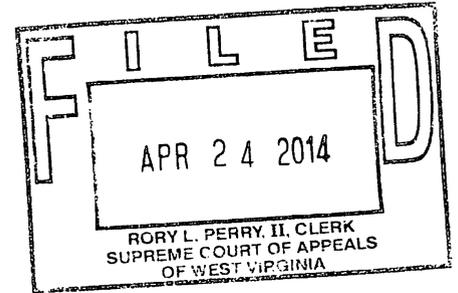
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0173

**Kenneth Seen, Defendant Below,
Petitioner,**

v.

**State of West Virginia, Plaintiff Below,
Respondent.**



PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court's finding of sexual motivation and consequent order that defendant register as a sex offender constitutes plain error and must be vacated because neither the State nor the court gave defendant pretrial notice concerning sex offender status and registration.

2. The trial court's finding of sexual motivation was based on speculation and must be vacated.

3. The trial court's finding that defendant was guilty of battery was not supported by sufficient evidence.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Petitioner appeals the judgment of the Circuit Court of Roane County in which the court found Petitioner guilty of battery, found the offense was sexually motivated, and ordered Petitioner to register as a sex offender.

On the evening of August 31, 2012 John Shafer, 77 years of age and suffering from dementia, Parkinsonism, and other ailments, bit off a portion of the tongue of his physician, Kenneth Seen, M.D. Dr. Seen was charged with violating the State's general battery statute, WV Code § 61-2-9(c), in an Information that alleged he:

. . . did unlawfully and intentionally make physical contact of an insulting or provoking nature with the person of John Shafer when said KENNETH SEEN did place his tongue inside the mouth of said John Shafer. . .

JA -0003.¹ Dr. Seen moved for a bench trial, and so waived his right to a jury. The case was tried before Judge Thomas C. Evans, III, on October 30 and 31, 2013.

At trial, when the Prosecuting Attorney for Roane County called the State's first witness, Judge Evans interjected, stating "I want an opening statement first." Tr. 10/30/2013, p. 9.² The prosecutor then made the State's opening, concluding that following presentation of the evidence, he intended to ask "the Court to find mister--excuse me, Dr. Seen guilty of the crime of battery for the physical conduct of an insulting and provoking nature, and we will also be asking the Court to make a finding of the--the appropriate finding of sexual intent or . . ." sexual motivation. Tr. 10/30/2013, p. 12. The prosecutor's comments were the first and only notice to Dr. Seen that he was exposed to the provisions of the West Virginia Sex Offender Registration Act, W. Va. Code §§ 15-12-1, *et seq.* (the Act).

Following close of the evidence on October 30, 2013, the Court denied defendant's motion for judgment of acquittal. Ruling from the bench the next morning, October 31, 2013, the trial court found beyond a reasonable doubt that Dr. Seen was guilty of battery, and that the battery was sexually motivated. Tr. 10/31/2013, pp. 15-16. The Court entered a Bench Trial Order on November 4, 2013, further setting forth its findings and ordering Dr. Seen to register with the West Virginia State Police as a sex offender, pursuant to the Act.

¹ The parties have provided two joint appendices in this case. The first, numbered JA-_____, includes those pleadings and documents that are a matter of public record. The second, numbered JA-PSR _____, is marked "SEALED" and contains information that is not a matter of public record.

² The trial of this matter was conducted on two days, October 30, 2013 and October 31, 2013. References to the transcripts will be made as "Tr. 10/30/2013, p. ____" and "Tr. 10/31/2013, p. _____," respectively.

JA - 0013.

Defendant filed a motion for a new trial on November 14, 2013, JA - 0023, challenging evidentiary findings and asserting that the sexual motivation finding was erroneous.³ JA - 0024. On December 16, 2013, the trial court denied the new trial motion, and sentenced Dr. Seen to two years probation with 300 hours of community service. Tr. 12/16/2013, p. 19.⁴ A "Misdemeanor Sentencing Order" (the final order) was entered December 23, 2013, JA - 0040, and Dr. Seen timely filed a Notice of Appeal on January 24, 2014. JA - 0049.

II. STATEMENT OF THE FACTS

Kenneth Seen grew up in Maryland, where his mother, two brothers and sister still live. JA - PSR 0005. He had a "good childhood". He earned an M. D. degree at the University of Maryland Medical School. He completed a family practice residency in Wheeling, West Virginia and obtained a license to practice in West Virginia. He worked at the Minnie Hamilton Health Care Center in Grantsville, West Virginia from 1989 until 1994.⁵ Id. 0008. Since 1994, he has lived in Spencer, West Virginia, practicing medicine, including employment as a hospitalist at Roane General Hospital from 2003 until October, 2012. Id. 0008.

Dr. Seen was married for 28 years, and with his wife, raised four sons, now in their

³ Defendant also asserted, for the first, time, that he suffered from narcolepsy. Tr. 12/16/2013, pp. 2-4.

⁴ The sentencing hearing was conducted on December 16, 2013. References to the transcript of that hearing will be made as "Tr. 12/16/2013, p. _____."

⁵ Based on the charge in this case, the West Virginia Board of Medicine has suspended Dr. Seen's license. Tr. 12/16/2013, p. 17.

twenties. JA - PSR 0005. He and his wife, Bonnie Seen, were divorced in 2012, and since February 2013, he has lived with Janice Blake in Spencer. Prior to August 31, 2012, Dr. Seen's record was free of criminal charges, and his professional record was without blemish.⁶ Tr. 10/30/2013, pp. 246-247. Dr. Seen was respected in the community and, as shown by Judge Evans' remarks at sentencing, received support from other physicians. Tr. 12/16/2013, pp. 9-10, 18. Notwithstanding the trial court's finding of sexual motivation, Judge Evans sentenced Dr. Seen to probation. Tr. 12/16/2013, pp. 18-19.

On August 31, 2012, John Shafer was age 77 and in very poor health; he suffered from dementia, Parkinsonism, arthritis, depression and anxiety. In 2011 and 2012, Mr. Shafer had been a resident in the Long Term Care (LTC) component of Roane General Hospital (RGH). After a fall in the LTC, he had hip replacement surgery at Cabell-Huntington Hospital in Huntington. He was returned to RGH on August 31, 2012. Mr. Shafer was placed in a "swing bed" in RGH, to be examined and then returned to the LTC facility. Dr. Seen had been Mr. Shafer's physician as an outpatient and, later, in 2011-2012, while he was in the LTC. Tr. 10/30/2013, p. 84. Dr. Seen offered to admit Mr. Shafer to RGH, because Mr. Shafer was his patient, and because the admitting physician who was on call, Dr. Metzger, was a thirty minute drive away from RGH. Tr. 10/30/2013, pp. 83-84, 249-250. Around 8:00 p.m. on August 31, Dr. Seen went to examine Mr. Shafer,

⁶ Dr. Seen was named as a co-defendant in two medical malpractice cases and was dismissed from each. In his 28 years of practice, one complaint was filed against him before the West Virginia Board of Medicine; the allegation related not to patient care, but rather to an administrative matter. The Board of Medicine dismissed the complaint. Tr. 10/30/2013, pp. 246-247.

and advised Ms. Richardson, a nurse, that he did not need assistance in the exam, and did not intend to change the patient's surgical dressing that evening. Tr. 10/30/2013, p. 252.

While Dr. Seen was examining Mr. Shafer, the patient bit off a portion of the doctor's tongue. Dr. Seen reported that Mr. Shafer was trying to tell him something but the doctor could not hear. Dr. Seen leaned in near to Mr. Shafer's face when Mr. Shafer made contact with Petitioner's tongue and bit it. As noted in the record, Dr. Seen reported to others somewhat varied descriptions of precisely how this happened. Dr. Seen left Mr. Shafer's room, walked past the nurse's station, went to his office where he called the ER physician, Dr. Fincham. He asked Dr. Fincham to come to his office, but did not say he was injured. Dr. Fincham said the ER was very busy. Dr. Seen remained in his office. Sometime before 8:30 or 9:00 p.m., Petitioner advised staff that Mr. Shafer had bitten his tongue. Staff contacted Dr. Fincham, who came to the acute care floor, and began treating Petitioner. Dr. Fincham arranged for Petitioner to be transported by ambulance to CAMC in Charleston to be seen by a specialist. Dr. Fincham administered pain and other necessary medications to Dr. Seen. The specialist at CAMC examined and treated Dr. Seen, and released him later that same night.

The verbal statements Dr. Seen made to hospital personnel, which the trial court found inconsistent, are described in the Bench Trial Order, JA - 0010-0011, and in the testimony of witnesses. These inconsistencies relate only to the exact mechanism by which Mr. Shafer bit Dr. Seen's tongue: whether Mr. Shafer 'grabbed his tongue,' or pulled him down, or whether Petitioner has a habit of sticking his tongue out.

Earlier on the same day, nursing staff removed T.E.D. hose⁷ from Mr. Shafer's legs, leaving them on a bedside table. Later, staff discovered Mr. Shafer had balled up the T.E.D hose, which he was holding in his hand and mouth. Tr. 10/30/2013, p. 220-221, 224. When an aide tried to remove the hose from Mr. Shafer's mouth, he clenched down on the hose and resisted the aide's attempts to remove the object from his mouth and hand. The aide fetched a nurse, who was able to convince Mr. Shafer to let go of the hose. Tr. 10/30/2013, p. 224-225. Mr. Shafer's actions were noted in the patient chart. Defendant's Exhibit 6, JA - 0022, at about 6:30 p.m., August 31.

SUMMARY OF ARGUMENT

The State charged Petitioner with battery in violation of W. Va. Code § 61-2-9(c), a misdemeanor offense of general application. The statute prohibits a person from unlawfully and intentionally making "physical contact of an insulting or provoking nature" with another person. *Id.* Battery is not listed as a qualifying offense in the Sex Offender Registration Act, W. Va. Code § 15-12-2(b). The Information in this case alleged Petitioner committed battery by placing his tongue inside Mr. Shafer's mouth. Petitioner, therefore, had notice that he was charged with making that specific insulting or provoking contact and, if convicted, faced a maximum punishment of not more than twelve months in jail and a fine not more than \$500.00. Petitioner and his counsel prepared to defend the battery alleged in the Information.

The Act also provides that if a person is "convicted of a criminal offense," and if the sentencing judge makes a written finding of fact that the "offense was sexually motivated,"

⁷ T.E.D. hose are support hose that are worn to constrict the legs so as to prevent clotting and help circulation. Tr. 10/30/2013, p. 221.

then the defendant must register as a sex offender. W. Va. Code § 15-12-2(c). If the State intends to seek a sexual motivation finding, it should provide notice to the defendant before the trial. Where a defendant pleads guilty to a generic offense, the court must advise him or her of the possible application of the Act. Defendant must be advised of the potential to be classified a sex offender, and to have to register as such. In State v. Whalen, 214 W.Va. 299, 588 S.E.2d 677 (2003), this Court held: (1) that a defendant charged with or pleading guilty to an offense not specifically identified in the Act must be given pretrial notice concerning the possibility that the court may find the offense was sexually motivated, resulting in registration as a sex offender; and (2) that the standard of proof for a finding of sexual motivation is beyond a reasonable doubt. The State did not provide notice to Petitioner in accord with the requirements of Whalen, and neither did the trial court. Dr. Seen and his counsel were not provided notice concerning the Act until the prosecuting attorney stated in opening statement that the State intended to ask the court for a sexual motivation finding. Tr. 10/30/2013, p. 12.

The State and trial court, therefore, failed to comply with the Act, as interpreted and applied by this Court. Petitioner was denied meaningful notice and the opportunity to defend himself, in violation of the due process guarantee of W. Va. Const. art. III, § 10.⁸ This Court recognized the due process concerns inherent in the interplay of the Sex Offender Registration Act and crimes of general application. The trial court's finding that Dr. Seen was "sexually motivated" in committing battery must be vacated because of the

⁸ For the same reasons, Petitioner's rights to due process under the Fourteenth Amendment of the United States Constitution were violated. See also, W. Va. Constitution, Article III, § 14: in all criminal trials: ". . . the accused shall be fully and plainly informed of the character and cause of the accusation against him."

lack of notice.

In finding Petitioner guilty of battery, the trial court emphasized that Mr. Shafer was not physically capable of grabbing Dr. Seen's tongue and/or pulling Dr. Seen close to him; and therefore, Dr. Seen must have placed his tongue into his patient's mouth. The trial court noted that Mr. Shafer was unable to communicate. The trial court also found Dr. Seen had been impeached, had told several inconsistent versions of the event. and that Dr. Seen had engaged in a "cover up." Tr. 10/31/2013, pp.5-15; JA -0013. However, recognizing the standard of review on this issue, Petitioner points out inaccuracies and flaws in the trial court's findings that call into question the sufficiency of the evidence to support the finding that Petitioner was guilty of battery.

The trial court based its finding of sexual motivation on the same facts that it found to convict Petitioner of battery. Recognizing there was no direct evidence of sexual motivation, Tr. 10/31/2013, p. 15, the trial court speculated: "I'm satisfied it was for sexual purposes because there is no other reason for committing an act like this that comes to my mind." Tr. 10/31/2013, p. 16.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court should set this case for oral argument because: Petitioner has not waived oral argument, the appeal is not frivolous, the dispositive legal issues have not been authoritatively decided in this jurisdiction, and the decisional process likely will be aided by oral argument. Petitioner believes the case should be set for a Rule 20 argument, rather than a Rule 19 argument, because the case involves an issue of first impression and fundamental public importance.

ARGUMENT

I. STANDARDS OF REVIEW

The first assignment of error – failure of the State and the trial court to provide Petitioner pretrial notice of the possibility of a finding of sexual motivation and consequent sexual offender registration – involves an issue of law and is subject to *de novo* review. State v. Judge, 228 W.Va. 787, 789, 724 S.E.2d 758, 760 (2012). The second and third assignments of error – the sufficiency of the evidence to support the “sexual motivation” finding and finding that Petitioner was guilty of battery, respectively, are subject to the following: whether, after reviewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. State v. Cline, 206 W.Va. 445, 525 S.E.2d 326 (1999); State v. Guthrie, 194 W.Va. 657, 670, 461 S.E.2d 163, 176 (1995).

II. THE TRIAL COURT’S FINDING OF SEXUAL MOTIVATION AND CONSEQUENT ORDER THAT DEFENDANT REGISTER AS A SEX OFFENDER CONSTITUTES PLAIN ERROR AND MUST BE VACATED BECAUSE NEITHER THE STATE NOR THE COURT GAVE DEFENDANT PRETRIAL NOTICE CONCERNING SEX OFFENDER STATUS AND REGISTRATION

The failure of the State and the trial court to advise Petitioner about the intended and/or potential application of the Act constitutes clear and plain error. The issue is wholly resolved by Whalen, *supra*, where at Syl. Pt. 1, this Court held:

1. In order for a sentencing judge to make a finding pursuant to W.Va. Code, 15-12-2(c) [2001] that a defendant who has been convicted of a criminal offense that is not specifically identified in the Sex Offender [sic] Registration Act at W.Va. Code, 15-12-2(b) [2001]— after a trial or by means of a plea of guilty or nolo contendere—was “sexually motivated” in the commission of that offense, the defendant must have been advised prior to trial or the entry of a plea of the possibility of

such a finding.

In Whalen, the defendant was charged with burglary, petit larceny and indecent exposure. He pled guilty to burglary. At sentencing the circuit court *sua sponte* found the burglary was sexually motivated. Whalen, 214 W.Va. at 30, 588 S.E.2d at 678. Defendant appealed, asserting neither he nor his counsel knew the circuit court could or intended to make such a finding; this despite the fact that defendant's counsel advised the court that defendant "needed treatment for his sexual compulsions," and that defendant admitted he broke and entered a house to "take photos of a girl." Whalen, 214 W.Va. at 302, 588 S.E.2d at 680, and at note 4. The Court recognized the distinction between the offenses listed in W.Va. Code § 15-12-2(b), each of which contains an essential element "that is explicitly sexual," i.e., sex offenses, as contrasted to the vast variety of all other crimes that do not contain an essential element that is "explicitly sexual," but for which, upon conviction and with a "sexual motivation" finding, the defendant is labeled a "sex offender" and must register. Id. This Court ruled that the defendant be allowed to withdraw his guilty plea, despite the "overwhelming" evidence that he acted with "a substantial, dangerous, and illicit sexual motivation."

This Court's holding was based in part on concerns about the waivers of constitutional rights occasioned by guilty pleas, and concerns that the pleas be knowing and voluntary. Whalen, 214 W.Va. at 303, 588 S.E.2d at 681. The Court also acknowledged due process concerns. Id., at notes 1 and 8, and accompanying text. The Whalen rule clearly requires pretrial notice for a defendant who does not plead guilty. Therefore, the trial court's finding of sexual motivation and order that Dr. Seen register as a sex offender must be vacated.

At trial, Petitioner's counsel did not object when the prosecuting attorney informed the court, during opening statement, that the State would request a sexual motivation finding. Likewise, Petitioner did not assert the lack of notice as error in Petitioner's motions for judgment of acquittal, at trial, or in his new trial motion. Nevertheless, the lack of notice constitutes plain error, and so this Court may consider the issue in this appeal. In a criminal case, "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995); Syl. Pt. 2, State v. White, 231 W.Va. 270, 744 S.E.2d 668 (2013). All four factors are present in this case.

Petitioner did not knowingly and intentionally give up his right to notice of that which he was required to defend at trial. Logic compels the conclusion that a defendant cannot knowingly and intentionally relinquish a right – here, the right to pretrial notice – when the defendant has no knowledge that the right applies to his case. By the time the prosecuting attorney gave notice, trial had started. Pretrial notice was not possible after the trial commenced. Petitioner, therefore, did not waive the pretrial notice requirement.

The error was plain. There is no factual dispute that pretrial notice was not provided. The failure of notice affected Petitioner's substantial rights; his right to notice of the nature of the case, the elements the prosecution had to prove, and what he needed to defend. He needed to know so he could prepare to defend himself. Dr. Seen defended the battery case involving an alleged insulting or provocative physical contact. The crime of battery, however, does not encompass an essential element that is "explicitly sexual."

Review of the trial transcript demonstrates that the defense did not plan to, and did not offer at trial, evidence calculated to counter a claim of sexual motivation. For example, had the State provided pretrial notice as required by Whalen, Petitioner could have considered developing qualified expert evidence to prove he was not attracted to men, or to elderly or ill men, and that he would not get sexual gratification from kissing such a person. Petitioner could have presented witnesses to testify about his relevant personal characteristics and conduct. The fact that Petitioner and his counsel did not offer any evidence to rebut a claim of sexual gratification and sexual motivation proved Petitioner was denied notice.⁹ Petitioner, therefore, was profoundly prejudiced by the lack of notice. The fairness of the trial was affected and the Court and public cannot be assured the result was valid or reliable.¹⁰

⁹ This point is especially manifested because the trial was to the court, and it would have been nonsensical for Petitioner and his counsel to not address sexual motivation as a deliberate trial strategy.

¹⁰ The Legislature stated its intent and purposes in enacting the WV Sex Offender Act: Article 12 of Chapter 15 “is intended to be regulatory in nature and not penal” and the registry of information is not to “be used to inflict retribution or additional punishment.” § 15-12-1a(a); rather the law is a public safety measure. § 15-12-1a(b) and (c). So, for example, the Act is not subject to *ex post facto* limitations. Hensler v. Cross, 210 W.Va. 530, 558 S.E.2d 330 (2001). On the other hand, the Act has meaning and effect only in conjunction with criminal offenses, and a finding of sexual motivation must be supported by proof beyond a reasonable doubt, Whalen, based on evidence presented at a criminal trial. Further, this Court has encouraged circuit courts to make sexual motivation and sexual predator findings at sentencing, and the findings are to be included in criminal judgments. Even if, however, the Act is not *per se* a criminal law, but rather a civil, regulatory, or some hybrid law, the plain error analysis is the same as described in State v. Miller. See, e.g., Syl. Pt. 4, Voelker v. Frederick Business Properties Co., 195 W.Va. 246, 465 S.E.2d 246 (1995) (same as State v. Miller); Syl. Pt. 3, Maples v. West Virginia Dept. of Commerce, Div. of Parks and Recreation, 197 W.Va. 318, 475 S.E.2d 410 (1996) (same).

III. THE TRIAL COURT'S FINDING OF SEXUAL MOTIVATION WAS BASED ON SPECULATION AND MUST BE VACATED

In deciding this case, Judge Evans engaged in a thorough review and analysis of the evidence. Tr. 10/31/2013, pp. 6-14; JA - 0009-0013. It is apparent that the trial court worked diligently to achieve a correct result. The trial court's efforts, however, were confined by the prosecutor's actions in two respects: first, the lack of notice denied Petitioner the opportunity to directly present relevant evidence to rebut sexual gratification and sexual motivation, which the trial court could have considered. Second, the prosecutor presented evidence of battery that only raised a possibility the offense was sexually motivated. By finding Petitioner guilty of battery, in the absence of other evidence proving sexual gratification and motivation, the trial court concluded "I'm satisfied it was for sexual purposes because there is no other reason for committing an act like this that comes to my mind." Tr. 10/31/2013, p. 16. The trial court's written findings in the Bench Trial Order, JA - 0005-0013, while detailed, add no further findings or analysis that support the sexual motivation finding. Once again, State v. Whalen is instructive. Recognizing the potential for problems, such as an overly expansive application of W.Va. Code § 15-12-2(c), this Court wrote, in Syl. Pt. 3:

The statutory language defining "sexual motivation" at W.Va. Code 15-12-2(j) [2001] must be read and applied strictly and narrowly to assure that an offense's gravity, dangerousness, and sexually illicit nature is comparable to that of the specific offenses that are identified in W.Va. Code, 15-12-2(b) [2001].

The trial court did not "strictly and narrowly" interpret and apply § 15-12-2(j). There was no consideration, analysis or finding concerning "sexual motivation" other than the trial court's inability to comprehend "[a]nother reason." Additionally, the trial court did not

evaluate the offence's gravity, dangerousness and sexually explicit nature, *in this case*, in comparison with the explicitly sexual offenses listed in § 15-12-2(b). Those offenses do not include mouth to mouth touching, or kissing, as a sex crime. Sexual abuse and assault, sexually explicit filming of minors, and sex offences by a parent, guardian or custodian, are defined very specifically: the offenses involve physical contact, of varying levels, between the genitals, anus, breasts, mouth, hand, etc. of one person with the genitals, anus or breasts of another person. In the case of minors, sex crimes also include looking at, and/or filming, the child's private parts. The definitions are very specific and are set forth in those crimes listed in § 15-12-2(b), for example: Chapter 61, W.Va. Code, Article 8a (regarding making, distributing or showing obscene matters to minors); Article 8b (sexual assault and sexual abuse); Article 8c (filming minors in sexually explicit conduct); Article 8d, Section 5 - (sexual abuse of a minor by parent, guardian, person in a position of trust); and Article 8d, Section 6 - (child pornography).

The gravity of the sex crimes listed in § 15-12-2(b) is extremely severe, because the potential for physical, emotional and psychological damage to the victim is very great. On the other hand, while inserting one's tongue into another's mouth is extremely offensive and obnoxious, such conduct is not explicitly a sex crime; rather, the intentional and offensive nature, as well as the potential physical and emotional harm to the victim, are not comparable to defined sex crimes. The harms caused by intentionally inserting one's tongue into another's mouth are appropriately encompassed in the battery statute, as they apply to insulting, provocative and offensive touching.

The trial court did not follow the third rule of State v. Whalen. The trial court

speculated as to motivation. The trial court did not follow the teachings in Whalen. Petitioner therefore requests the Court vacate the sexual motivation finding on grounds of insufficient evidence.

IV. THE TRIAL COURT'S FINDING THAT DEFENDANT WAS GUILTY OF BATTERY WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE

Petitioner acknowledges his "heavy burden" in challenging the sufficiency of the evidence supporting the battery charge. See, e.g., Syl. Pt. 3, State v. White, 231, W.Va. 270, 744 S.E.2d 668 (2013). There are, however, good reasons to challenge the conviction in this case. The trial court either ignored or wrongly discredited critical evidence favorable to Petitioner.

The trial court's findings of fact generally relate to, and can be described by, the following points: (1) that Mr. Shafer's hands were impaired, he had no grip; (2) that Mr. Shafer suffered dementia and could not communicate; (3) that Petitioner's statements to others were materially inconsistent and so Petitioner was "impeached"; (4) that Petitioner's actions following the encounter with Mr. Shafer constituted evidence that Petitioner was trying to cover-up, and therefore he committed battery; (5) that evidence that Mr. Shafer had, from time to time, been agitated, aggressive, made verbal threats and sexual comments, and that he touched a staff member's breast, were too remote in time from August 31, 2012, and therefore not relevant; (6) that evidence that Mr. Shafer's oral hygiene was not good, and his oral cavity appeared especially unattractive on his return to RGH, on August 31, 2012, was disregarded.

Evidence about Mr. Shafer's hands was contradicted by the undisputed evidence that only hours before he bit Petitioner's tongue, Mr. Shafer grasped the T.E.D. hose,

stuffed them in his mouth, and would not let go. JA - 0022 (RGH medical record - this event occurred at approximately 6:30 p.m.). That same exhibit describes Mr. Shafer's mouth as needing cleaning. The internal investigation by RGH Nursing Director Julie Carr, JA - 0014-0022, proves that Mr. Shafer, while in the LTC, exhibited verbal and physical agitation, vivid sexual hallucinations, made "sexual comments and verbal threats" to the staff, told a dietary staff woman she looked like one of his five ex-wives and asked her for a gun, and that he touched a staff member's breast. JA - 0014-0015. Ms. Carr's report condenses and repeats contemporaneous entries in RGH records made by staff, and so is reliable. The trial court did not discredit this information, but disregarded it because more recently (i.e., the records indicate since May 2012) Mr. Shafer had not engaged in such conduct. Tr. 10/31/2013, p. 7; JA - 0009-0010.

The trial court found Mr. Shafer could not communicate. Tr. 10/31/2013, p. 13. However, Dr. Metzger testified that when he examined Mr. Shafer on September 1, 2012, he asked Mr. Shafer whether he had seen Dr. Seen last night, and whether something had happened. Mr. Shafer answered yes to both questions. When Dr. Metzger asked Mr. Shafer "What happened?" Mr. Shafer refused to answer, saying "I really don't want to dwell on it." Tr. 10/30/2013, p. 96. This statement could be read to imply guilt or innocence.

It appears that Mr. Shafer's abilities - to grasp an object, put something in his mouth, to understand and answer questions if he chose to - came and went. The same appears true for his sexual comments, touching and hallucinations. The trial court simply ignored or explained away these facts. Review of the inconsistencies undermines the trial court's

finding of guilt.

The trial court's conclusion that Dr. Seen engaged in a cover-up following the incident ignores the equally likely possibility that Dr. Seen – as he testified – was “humiliated,” an emotion that would appear to naturally follow from a physician's loss of control in a patient encounter; particularly one ending in a painful physical injury. It is just as likely Dr. Seen was considering possible professional consequences of having his tongue bitten, as he was attempting to cover-up a sexually motivated battery. This same point applies to the varying statements Petitioner made. The trial court focused very finely on the precise words Petitioner spoke, and found inconsistencies. It is equally likely that Petitioner, over the course of time, and in different physical and emotional states (*e.g.*, just injured; later medicated) simply tried to accurately relate events but did, in fact, vary in his choice of words. The above evidence, pushed aside by the trial court, establishes evidence of innocence.

Petitioner requests the Court vacate the battery conviction on grounds of insufficient evidence due to the lack of evidence and the trial court's flawed findings, as discussed above.

CONCLUSION

Petitioner was denied due process by the State's and trial court's failure to provide pretrial notice as required by this Court in State v. Whalen, and so the sexual motivation finding and order to register as a sex offender must be vacated. That finding must be vacated on the additional and separate ground that the finding was speculative and not supported by sufficient evidence. The battery conviction is not supported by sufficient

evidence. Therefore, Petitioner prays the Court vacate the judgment below.

Respectfully Submitted,

KENNETH SEEN

By Counsel,

A handwritten signature in black ink, appearing to read "S. Benjamin Bryant", with a long horizontal flourish extending to the right.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0173

Kenneth Seen, Defendant Below,

Petitioner,

v.

State of West Virginia, Plaintiff Below,

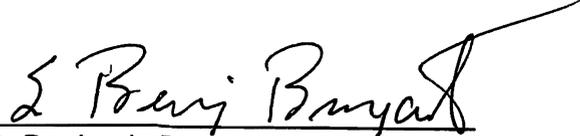
Respondent.

CERTIFICATE OF SERVICE

I, S. Benjamin Bryant, do hereby certify that on the 24th day of April, 2014, I have served the foregoing **“Opening Brief of Appellant”** and **“Joint Appendix”** upon the parties to this action, via hand delivery as follows:

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