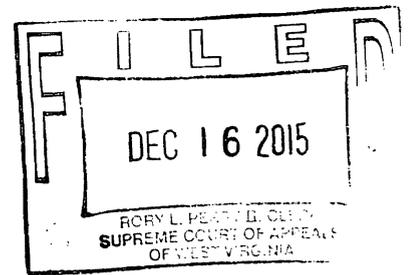


15-1198



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PAMELA JEAN GAMES-NEELY, Prosecuting Attorney,

Petitioner,

v.

DOCKET NO.:
(Berkeley County Case No.: 14-F-220)

HONORABLE JOHN C. YODER,
Circuit Judge, 23rd Judicial Circuit,
and DENNIS E. STREETS,

Respondents.

**PETITION FOR WRIT OF PROHIBITION
AND MEMORANDUM OF LAW**

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I. ASSIGNMENTS OF ERROR

A. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER BY DEPRIVING THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL WHEN THE DEFENDANT FAILED TO OBJECT TO THE ALLEGED ERROR DURING THE TRIAL?

B. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER BY DEPRIVING THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT THE STATE IMPROPERLY ATTACKED THE DEFENDANT'S CHARACTER, WHEN THE DEFENDANT HAD FIRST PLACED HIS CHARACTER IN ISSUE AND INVITED ANY ERROR?

C. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER BY DEPRIVING THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL WHEN THE ALLEGED ERROR WAS HARMLESS?

II. STATEMENT OF THE CASE

1. Respondent Dennis E. Streets, then a 32 year veteran and Captain of the Berkeley County Sheriff's Department, was indicted for one felony count of Embezzlement and one felony count of Fraudulent Schemes. The indictment alleges that between August 2010 and March 2013 the Defendant embezzled thirteen (13) guns from the Berkeley County Sheriff's Department [hereinafter BCSD] and fraudulently sold them at a local gun shop called Glockcop LLC. Eight (8) of these thirteen (13) guns are alleged to have been stolen from the Sheriff's Department's evidence room. [See Indictment, Appendix Record, hereinafter referred to as AR, 5-7.]

2. A jury trial was held on April 14, 15, and 16, 2015. The jury found the defendant not guilty of count 2 of the indictment, perpetrating a fraudulent scheme upon Glockcop, LLC, but hung on count 1, embezzlement from the Sheriff's Department. A mistrial was declared as to count 1. [See Order Declaring Mistrial, AR, 8.]

3. A new trial on count 1, felony Embezzlement, was held on August 25, 26, 27, and 28 of 2015. The State's evidence at trial consisted of testimony from witnesses together with

business records from Glockcop LLC and business records from the BCSD showing that guns from the evidence room and guns from the special response team had been sold¹ for cash at Glockcop, LLC by Dennis Streets.

4. The Defendant's defense to the State's allegations was that he sold these guns by mistake. [See Dennis Streets Cross Examination Transcript, AR, 123.] His defense was that he brought several of his guns to his office at the BCSD to run background checks on the serial numbers. He claimed that he co-mingled his personal guns with other guns from the BCSD while they were lying around his office. [See Dennis Streets Cross Examination Transcript, AR, 146.] He claimed that he took the group of co-mingled guns straight from his office to the gun shop for sale because he was having financial troubles. [See Dennis Streets Direct Examination Transcript, AR, 56, 80-92.]

5. The Defendant also testified that some of the guns listed in the indictment were lawful trades that he made on behalf the BCSD to obtain new ammunition and equipment from Glockcop LLC. There was a lawful procedure by which the BCSD could trade excess firearms to local gun stores in exchange for store credit. [See Dennis Streets Direct Examination Transcript, AR, 80-92; See also Kenny LeMaster Direct Examination Transcript, AR, 388-390.]

6. State's Exhibit 1 is a Glockcop invoice showing the consignment sale of 14 firearms. The invoice is dated July 25th, 2011, and the payee is listed as Dennis Streets at his home address of 1124 Rockcliff Drive, Martinsburg WV. At the bottom of the invoice it states that "These firearms on consignment to Glockcop, LLC from Dennis Streets." Further, State's Exhibit 21, a record of firearms from the BCSD evidence room, demonstrated by matching serial numbers that two of the firearms sold, the Colt Python and the Taurus 357, came from the evidence room. [See State's Exhibit 1, AR, 10; See also State's Exhibit 21, AR, 26-30.]

7. Cliff Vinson, owner of Glockcop LLC, testified on behalf of the State. Mr. Vinson testified that State's Exhibit 1 was a business record of a *cash* transaction between his store and

¹ Some of the guns were sold directly to Glockcop LLC, while others were sold by Glockcop LLC on consignment.

Dennis Streets. [See Cliff Vinson's Direct Examination Transcript, AR, 321, 328, 366.]

8. Dennis Streets testified on his own behalf at trial. He admitted to selling all of the guns listed on State's Exhibit 1. He further admitted that the Colt Python, the Taurus 357, and a third firearm listed on the invoice, the Colt Pony Pocket, had all come from the BCSD. [See Dennis Streets Cross Examination Transcript, AR, 139] However, he claimed that he had sold these firearms to Glockcop LLC by mistake. He testified that his father, a gun collector, had recently passed away and left him numerous firearms as an inheritance. He further testified that he decided to sell these firearms because he was having financial difficulties. [See Dennis Streets Direct Examination Transcript, AR, 56.] He testified that he decided to take several of these firearms to the BCSD to run background checks on the serial numbers in order to make sure that none of them were stolen property. His explanation was that he must have accidentally comingled his firearms with those from the BCSD while they were all in his office. He testified that he mistakenly picked up a few BCSD guns along with his own and took the whole group of firearms listed on State's Exhibit 1 from his office straight to Glockcop LLC for sale. [See Dennis Streets Direct Examination Transcript, AR, 56, 80-92.]

9. State's Exhibit 5 is another consignment invoice from Glockcop LLC to Dennis Streets documenting the sale of 14 firearms on July 30th, 2012. One of these firearms, the Taurus PT22, was proved to have come from the BCSD evidence room my matching a serial number on State's Exhibit 21. Cliff Vinson testified that this also was a *cash* deal between Glockcop LLC and Dennis Streets. [See State's Exhibit 5, AR, 14; See also State's Exhibit 21, AR, 26-30; See also Cliff Vinson's Direct Examination Transcript, AR, 353, 355.]

10. During his testimony Dennis Streets admitted selling this gun as well and that it came from the BCSD. [See Dennis Streets Cross Examination Transcript, AR, 139.] He testified that he made the same mistake twice, and comingled this gun with several of his own as he checked serial numbers before taking the guns to Glockcop. [See Dennis Streets Cross Examination Transcript, AR, 159-160.]

11. State's Exhibit 2 documents the sale of another firearm that came from the BCSD evidence room, a Sig Sauer P229 10th Anniversary Edition. While this particular invoice does not mention Dennis Streets, other evidence shows that this gun was seized in a prior BCSD investigation and now turns up for sale at Glockcop LLC. [See State's Exhibit 2, AR, 11.]

12. Lt. Gary Harmison, Chief Deputy at the BCSD, testified that he had seized this Sig Sauer Anniversary Edition gun along with several other guns in a prior investigation because they were in the possession of a prohibited person. Lt. Harmison testified that he made a list of these firearms along with their serials numbers. This list was admitted as evidence as State's Exhibit 20. [See State's Exhibit 20, AR, 25.] Lt. Gary Harmison further testified that he gave this firearm to Dennis Streets since Dennis Streets was the sole custodian of the evidence room. [Transcript of Lt. Harmison's testimony was not available at the time of the filing of this Petition.]

13. BCSD Sheriff Kenny Lemaster testified at trial on behalf of the State. He testified that Dennis Streets was 3rd in seniority at the BCSD and that everyone trusted him. He testified that Dennis Streets, at the times alleged in the indictment, was the sole officer in charge of the BCSD evidence room. Dennis Streets was also in charge of keeping the service weapons inventory for the BCSD. [See Kenny Lemaster's Direct Examination Transcript, AR, 378, 382, 384.]

14. Sheriff Lemaster also testified that Dennis Streets was the only person in charge of the BCSD's program of trading guns for store credit on department use items at local gun shops. He testified that excess firearms from the evidence room could be destroyed or there was a lawful procedure by which they could be converted to department use. If a particular firearm was of no use as a service weapon to the BCSD, it would be lawfully traded to Glockcop LLC for store credit on items such as service weapons or ammunition that the BCSD could use. However, Sheriff Lemaster made it clear that the BCSD was never permitted to trade guns for cash, or to do any sort of cash transaction. Any lawful conversion to department use was for store credit only. [See Kenny Lemaster's Direct Examination Transcript, AR, 388.]

15. State's Exhibits 3 and 4A relate to one of the State's more important pieces of evidence, the sale of the Ruger Mini-14. The Ruger Mini-14 was a semi-automatic assault rifle that was assigned to the BCSD. State's Exhibit 3 shows that Dennis Streets sold this firearm to Glockcop LLC, and states "Cash paid out for consignment sale." State's Exhibit 4A is a quickbooks records from Glockcop LLC showing that \$650 of "petty cash" was paid to Dennis Streets for the Ruger Mini-14 on or about March 29th, 2013. [See State's Exhibit 3, AR, 12; See also State's Exhibit 4a, AR 13.]

16. Dennis Streets admitted in his testimony at trial that this gun did belong to the BCSD and that he did sell it to Glockcop LLC. However, he claimed that he sold it lawfully as directed by Sheriff Kenny LeMaster in order to obtain store credit for department use items. He denied ever being paid cash for this weapon. [See Dennis Streets Direct Examination Transcript, AR, 63 and 162.]

17. Regarding this Ruger Mini-14, Cliff Vinson testified that State's Exhibit 3 and 4A were business records of a cash deal for personal business with Dennis Streets, not a department trade with BCSD. [See Cliff Vinson's Direct Examination Transcript, AR, 341-345, 367.]

18. Sheriff Kenny Lemaster testified that any trades of excess firearms would have been for store credit only, never for cash. [See Kenny LeMaster's Direct Examination transcript, AR, 389.]

19. The State also introduced as evidence State's Exhibits 11 through 19: select pages from Glockcop LLC's ATF (Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives) firearm acquisition logs. These records show that BCSD guns were sold to Cliff Vinson for cash by an unnamed private person. The ATF requires gunshops to keep these logs in order to make a record of from where a shop gets their guns and to whom they sell the guns. State's Exhibits 11 through 19 document the acquisition and sale of the 13 firearms listed in the indictment. Some of these firearms are shown in the acquisition log to have been acquired directly from Dennis Streets. Others are shown in the log to have been acquired from Cliff Vinson himself personally selling the

firearm to his business. [See State's Exhibits 11 through 19, AR 15-24.]

20. Cliff Vinson testified that in the instances where the ATF logs show that he sold a gun to his business, it was because he had purchased the gun personally with cash from a private party. Accordingly, these records show that BCSD guns were sold to Cliff Vinson for cash by an unnamed private person. [See Cliff Vinson's Direct Examination Transcript, AR, 336-337, 368-369.]

21. The jury heard testimony from Captain Scott Richmond and Lt. Willey Johnson, both of the BCSD. They both testified to Dennis Street's mismanagement of the evidence room and that it was generally in disarray. They both testified that he was the only person responsible for keeping track of firearms in the evidence room at the BCSD. Lt. Willey Johnson testified that Sheriff LeMaster had to remove Dennis Streets from supervising the evidence room and instead place Lt. Johnson in charge. Captain Scott Richmond testified that he was the one who first discovered that an important gun was missing from the BCSD: the Sig Sauer 10th Anniversary Edition. [Transcripts of Captain Richmond and Lt. Johnson were unavailable at the time of the filing of this Petition.]

22. Sgt. Brendan Hall and Cpl. Bill Christian, the investigating officers in this matter, both testified about the details of their investigation, which tracked the firearms in the Defendant's possession at the BCSD to Mr. Vinson's gun shop. [See Brendan Hall's Direct Examination Transcript, AR, 400.]

23. The State also introduced 404(b) evidence in this case. It is this evidence that gives rise to the Respondent Judge's Order Granting New Trial.

24. On or about August 4, 2015, the State filed a written Notice of Intent to Use 404(b) Evidence. The notice identified judgment records from 6 different lawsuits against Dennis Streets that were active during the time frame alleged in the indictment. The notice also identified certified records to show that the Defendant's home went into foreclosure during the time frame alleged in the indictment. The State gave notice of its intent to offer these records as evidence to

show that the Defendant's extreme financial pressures gave him ample "Motive" to embezzle and sell guns that belonged to the BCSD. [See State's Notice of Intent to Use 404(b) Evidence, AR, 171-212.]

25. The Court held a McGinnis hearing on or about August 20th 2015, wherein it ruled found that the Defendant did commit these acts, that they were relevant for proving motive, and that their probative value substantially outweighed any danger of unfair prejudice. [See Order Admitting 404(b) Evidence, AR, 213-215.]

26. State's Exhibit 24 is the "Substitute Trustee's Report of Sale" showing that the Defendant's home was foreclosed upon in May of 2009. [See State's Exhibit 24, AR, 216.]

27. The most significant of the judgment records was State's Exhibit 30, an Abstract of Judgment dated 7/26/2010 for \$26,408.15 owed to Monique Milas. Monique Milas was the Defendant's landlord who evicted the Defendant and sued him for unpaid rent. State's Exhibit 31 is a Suggestee Execution showing that Ms. Milas attempted to garnish the Defendant's wages from the BCSD in August 2010. Further, State's Exhibit 32 is an Affidavit of Exemption showing that the Defendant had managed to exempt his income and avoid wage garnishment until March of 2011, only 4 months prior to the sale of BCSD guns documented in the Glockcop Invoice marked as State's Exhibit 1. The State argued that a \$26,000 judgment together with wage garnishment made for a powerful motive to steal. [See State's Exhibits 30, 31, 32, AR, 43-50.]

28. Another significant record is State's Exhibit 27, showing a judgment dated 8/30/2012 in the amount of \$4,944.00 owed to David Pittsnogle. This too was a wrongful occupation lawsuit wherein Mr. Pittsnogle evicted Dennis Streets and sued for unpaid rent. [See State's Exhibit 27, AR, 40.]

29. State's Exhibit 25 is a record of a lawsuit resulting in a judgment owed by Dennis Streets to Martinsburg City Hospital in the amount of \$2,728.53, dated 5/13/2013. [See State's Exhibit 25, AR, 38.]

30. State's Exhibit 26 is a record of a lawsuit resulting in a judgment owed by Dennis

Streets to Potomac Housing dated 5/20/2014 in the amount of \$3,234.35. [See State's Exhibit 26, AR, 39.]

31. State's Exhibit 28 is a record of a lawsuit resulting in a judgment owed by Dennis Streets to Schewels Furniture dated 6/17/2010 in the amount of \$409.33. [See State's Exhibit 28, AR, 41.]

32. State's Exhibit 29 is a record of a lawsuit resulting in a judgment owed by Dennis Streets to Winchester Medical Center dated 10/7/2010 in the amount of \$324.47. [See State's Exhibit 29, AR, 42.]

33. All of the State's 404(b) evidence was admitted as evidence in the form of certified public records under seal from the Berkeley County Clerk, Circuit Clerk, and Magistrate Clerk's Office. The State presented all of these records and showed them to the jury during its case-in-chief while Sgt. Brendan Hall testified. The records were showed to the jury, but no further comment was made about the circumstances surrounding the foreclosure, lawsuits, and evictions. No inquiry was made nor was testimony heard from the State regarding the circumstances giving rise to any of this litigation. The State rested its case at the conclusion of Sgt. Brendan Hall's testimony. [See Brendan Hall's Direct Examination Transcript, AR, 413-419.]

34. The Defendant presented 4 witnesses of his own and also testified himself. During the Defendant's direct examination by his own attorney, he chose to offer explanations for several of the judgments and the foreclosure. He never offered any testimony that these judgments were untrue or did not exist; he offered no testimony to show that motive didn't exist. Rather, he offered details on the circumstances giving rise to the judgments as explanations for why he was still a good guy despite the fact that these judgments exist. [See Dennis Streets Direct Examination Transcript, AR, 105-114.]

35. The trial court denied each of the Defendant's motions for acquittal.

36. The Court allotted each side 45 minutes of closing argument. Because the

Defendant had placed his character in issue, the State made brief references to the Defendant's character in closing argument. The State's comments, received at trial without objection, are as follows:

"The motive. You know, we talked about his motive that he was in debt. Not just in debt. He was in debt up to his neck with \$38,000, six different judgments. He'd been foreclosed on, evicted. I believe three times we have records of three different evictions and his wages were being garnished. You know, everybody has financial problems at one point and I wouldn't hold that against him but it is a motive and could cause somebody under extreme financial pressure to do something you would normally expect of them. Ladies and gentlemen, I would argue that when he got up there and started explaining some of these records if he was asked about his home foreclosure and he just said, you know, I'm sorry it's tough financial times I couldn't afford the payments it went into foreclosure you know what I can't fault the guy for that. That happens to good people and I'd have probably just left it at that. But do you recall his explanation of the home foreclosure? That didn't sound right to me he said he just walked away from it he said he walked away from it because of the neighbors across the street. It was a drug house across the street and he felt justified walking away, and further he said that he had been approved for another home. I can't recall if it was building or purchasing some other home in Back Creek. He had gotten loan approval for it to go there. So his testimony was he walked away from his house because he didn't like what was going on across the street and he had a better situation somewhere else. Is that really believable? And then the other situation didn't work out so he has to rent instead. He doesn't just go back to the house he's at. Well, I think ladies and gentlemen, he wasn't being completely honest about that. But let's assume that he was being honest about that *don't you think that gives a little bit of insight about his character? If the story is as he described that he just walked away from it because he didn't like the situation he felt justified in doing that what else might he feel justified in doing.*" [Transcript Page 67, Line 12 - Page 68, Line 23 (emphasis added).]

"And again I don't hold that against him it happens to a lot of honest people but he was dishonest about this when he testified. But consider this - - all right, let's give him the benefit of the doubt that when he says he walked away from all three of those situations and he says he just walked away and you want to believe well that means that your then going to trust the testimony of somebody who entered into a contract and decided he was justified in walking away from it and defaulting on his obligations just because he felt justified not because of his financial troubles. He said it was because he didn't like the neighbors across the street. It was because Pittsnogle was a slumlord. And remember his testimony of Monique Milas he said oh we could afford the payment it just kind of made things tough so we left. All

right. *He feels justified in doing that. What else might he feel justified in doing?*"
[Transcript Page 81, Lines 1 – 16 (emphasis added).]

37. The jury deliberated and returned a verdict of guilty on count 1 of the indictment, Embezzlement of \$1,000.00 or more.

38. The Defendant filed post trial motions and sought a new trial on the grounds that the State's comments regarding character were improper and unfairly prejudicial.

39. The Circuit Court agreed with the Defendant and entered an order on November 24th, 2015, granting the Defendant's motion for a new trial based solely on the State's comments in closing argument. [See Order Granting Defendant's Motion for New Trial, AR, 302.]

40. The Petitioner seeks this writ based on this Order.

III. SUMMARY OF THE ARGUMENT

The Respondent Circuit Court exceeded its legitimate power and deprived the State of a valid conviction by granting the Defendant a new trial on the grounds that the State improperly attacked the Defendant's character during closing argument.

The Respondent Circuit Court exceeded its legitimate power by granting the motion for a new trial. The State's comments regarding character were received without objection at trial. Further, the comments represented approximately 2 minutes out of an entire 45 minute closing argument². Syl. pt. 6 Yuncke v. Welker, 128 W.Va. 299, 36 S.E.2d 410 (1945).

The State's comments regarding character were permissible because the Defendant had

² Each side was given 45 minutes for closing argument. The State opted to split its time 38 minutes for argument and 7 minutes for rebuttal.

placed his character in issue and invited the argument of which he now complains. State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999),

In this matter, the Court allowed the State to introduce as *W.V.R.E.* 404(b) evidence various court records of a home foreclosure, judgments, evictions, and wage garnishments as evidence of the Defendant's motive to steal. The Defendant was entitled to put on evidence of his own to show that the State's evidence did not prove that he had such a motive. Examples of that sort of evidence may have included evidence showing that the judgments were false or did not exist, or that he had paid them off prior to the alleged offense, or that his wages were not being garnished and that his home not foreclosed upon.

The Defendant offered no such rebuttal testimony. Instead, the Defendant offered explanations to the jury about why he was *justified* for each and every judgment against him. He gave testimony that he had a *good excuse* for having the foreclosure and lawsuits. He never denied the issue of motive, and admitted that all of the records were true. His testimony was that he was *not at fault* for any of these financial woes. In other words, he was saying that despite the fact that these records are true, he was still a "good guy" because he had a good reason for each and every one of them. This is character testimony. The Defendant took the stand and provided evidence about his good character against the backdrop of the State's motive evidence. The Defendant gave testimony to show that, despite all of the judgments against him, the evictions, and the foreclosures, he had good reason for what he did. The Defendant wanted the jury to know that he was still a person of good character.

When a defendant offers evidence that he is a "good guy" or a person of good character, *W.V.R.E.* 404(a)(2)(A) allows the State to offer evidence to rebut it. Syl. pt. 2, State v. McAboy,

160 W.Va. 497, 236 S.E.2d 431 (1977), *overruled on other grounds by State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Further, the State's comments in closing argument were harmless in light of the great weight of the evidence against the Defendant. The jury considered overwhelming evidence against the Defendant in the form of business records from the gun shop, business records from the Sheriff's department, and testimony from multiple witnesses. The business records from Glockcop, LLC, offered as evidence clearly showed that the Defendant was selling BCSD guns. Further, Cliff Vinson, owner of Glockcop, LLC, provided clear testimony that the Defendant sold these guns as personal business for cash. The Defendant himself testified and admitted that he sold BCSD guns to Glockcop LLC, but claimed that he did it by mistake. The State's brief argument regarding the Defendant's character pales in comparison to this evidence and did not result in clear prejudice or a manifest injustice.

The Petitioner asks this Court to issue a writ of prohibition to prevent the Circuit Court from enforcing this Order depriving the State of a valid conviction, and remanding the matter to the Respondent Judge to proceed to sentencing on the conviction obtained.

IV. STATEMENT REGARDING ORAL ARGUMENT

If this Court were to accept this case, Rule 19 argument is appropriate.

V. ARGUMENT

A. **THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER BY DEPRIVING THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL WHEN THE DEFENDANT FAILED TO OBJECT TO THE ALLEGED ERROR DURING THE TRIAL.**

1. The Legal Standard.

The standard followed by this Court in determining whether to exercise its discretion to grant the extraordinary remedy of a writ of prohibition is

to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. Pt. 3, in part, State ex rel. Caton v. Sanders, 215 W. Va. 755, 601 S.E.2d 75 (2004), *citing* Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

This Court applies five factors when determining whether to entertain and issue a writ:

[i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996). See also: State ex rel. Games-Neely v. Sanders, 220 W.Va. 230, 232-233, 641 S.E.2d 153, 155-156 (2006).

The extraordinary writ of prohibition is exercised under the following circumstances:

“Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.’ Syllabus Point 1, Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370 (1953).” Syl. Pt. 1, SER Bosley v. Willett, 204 W. Va. 662, 515 S.E.2d 825 (1999).

Prohibition does not lie to prevent a simple abuse of discretion:

‘A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1.’ Syl. pt. 2, State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977).

Syl. Pt. 1, State ex rel. Caton v. Sanders, *supra*; Syl. Pt. 2, State ex rel. Kees v. Sanders, 192 W. Va. 602, 453 S.E.2d 436 (1994).

In State ex rel Forbes v. Canady, 197 W.Va. 37 at 42, 475 S.E.2d 37 at 42 (1996) this Court noted:

If a trial court improperly interferes with a State's right to prosecute, the court, in effect, exceeds its jurisdiction. In State v. Lewis, 188 W.Va. 85, 422 S.E.2d 807 (1992) we stated in Syllabus Point 5 as follows:

The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, 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. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the

defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be properly presented.

Id.

2. Discussion.

The case *sub judice* is clearly appropriate for a writ of prohibition because the Respondent Judge's Order Granting Defendant's Motion for New Trial has deprived the State of a valid conviction.

Further, this case presents four of the five factors from State ex rel. Hoover v. Berger, *supra*, to determine whether to entertain and issue a writ of prohibition: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. Id. This Court is respectfully requested to grant the Petition.

Factor Three, a clear error as a matter of law, demonstrated by the Respondent Circuit Court Judge's order Granting the Defendant a New Trial, is given substantial weight by this Court. See Hoover, *supra*. The Respondent Judge's order is a clear error of law.

Case law in West Virginia is abundantly clear that defense counsel is required to object during the State's closing argument. "Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syl. pt. 6 Yuncke

v. Welker, 128 W.Va. 299, 36 S.E.2d 410 (1945).

It is undisputed in the case at hand case that the defendant did not object at all during the State's closing argument.

State v. Adkins, 209 W.Va. 212, 544 S.E.2d 914 (2001), holds:

The rule in West Virginia has long been that if either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks. This Court has also long held that failure to make a timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.

Id., 209 W.Va. 212, 215, 544 S.E.2d 914, 917.

In Adkins³, the appellant raised an issue that the prosecutor improperly argued in his closing that the Defendant and one of his witnesses were liars. The prosecutor was reported to have said: "Innocent recollection, that sort of thing. That's one thing. If it's an out and out lie, it's another. Ladies and gentlemen, I submit to you that the only two witnesses in this case who have been show to be liars is the Defendant and his witness..." *Id.*

The Adkins Court did not address the alleged error but held the issue waived because there was no objection during closing argument. The Court stated: "Because of these well-settled legal principles, we deem this issue waived for appellate review purposes." *Id.*

Similarly, an appeal of allegedly improper remarks by the prosecutor during closing argument was rejected due to failure to object in the case of State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999).

³ It should be noted that there are three different cases cited in this brief with the name "Adkins" or "Atkins." They are unrelated.

The Davis Court could not have made it any clearer when it stated:

“It is argued by the defendant that the prosecutor made improper remarks to the jury during the State's opening statement and closing argument. The rule in this State has long been that if either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks...A review of the record shows that defense counsel made no objections to any remarks by the prosecutor during the State's opening statement and closing argument...In view of our precedent, the defendant cannot argue for the first time on appeal that the prosecutor made improper remarks during the State's opening statement and closing argument.

Id., 519 S.E.2d 852, 869, *citing* Syl. Pt. 5, in part, State v. Grubbs, 178 W.Va. 811, 364 S.E.2d 824 (1987).

There is no dispute that the Defendant did not object during the State's cross-examination of him or during the State's closing argument. The Defendant preserved his objection pre-trial to the Court's allowance of the State's introduction in its case-in-chief of *W.V.R.E.* 404(b) evidence to show the Defendant's motive to steal. But the Defendant never once objected at trial that he believed the State exceeded the scope of the Court's ruling or improperly attacked the Defendant's character. This distinction is significant because these are two separate grounds for objection.

State v. Mann, 205 W.Va. 303, 518 S.E.2d 60 (1999), provides another recent example of how this Court denied a criminal convict's allegation that the State's closing argument improperly attacked the defendant's character due to the defendant's failure to object during closing argument. (The Mann case is factually analogous to the case at hand, and is argued more fully in part 3 of this brief.)

Making timely objections to allegedly improper remarks to a jury is important because, had

defense counsel made a timely objection, the Court would have had the opportunity to cure any perceived problem by instructing the jury to disregard the remarks or by giving a curative instruction. This Court holds

[T]he doctrine of plain error with regard to objectionable closing remarks is sparingly applied. This rule requires counsel to make timely objections *so that the matter can be corrected at the trial court level*. There is obviously a considerable tactical advantage to be gained if counsel can remain silent and then press the point on appeal through the plain error doctrine.

State v. Grubbs, 178 W.Va. 811 at 818, 364 S.E.2d 824 at 832 (1987) (emphasis added).

In the case at hand, the Defendant did not object to the State's remarks during cross-examination or closing argument. Had a proper and timely objection been made, the Court could have cured any potential problem with an instruction to the jury.

The Defendant's general objection during the State's case-in-chief to the allowed admission of *W.V.R.E.* 404(b) evidence is insufficient to have preserved the Defendant's objection to the State's closing remarks. The issue has been waived.

Accordingly, the Petitioner respectfully moves this Honorable Court to grant this Petition and issue a writ prohibiting the Respondent Judge from enforcing his order granting a new trial, and remanding the matter to the Respondent Judge to proceed to sentencing on the conviction obtained.

B. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER BY DEPRIVING THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT THE STATE IMPROPERLY ATTACKED THE DEFENDANT’S CHARACTER, WHEN THE DEFENDANT HAD FIRST PLACED HIS CHARACTER IN ISSUE AND INVITED ANY ERROR.

1. The Legal Standard.

The standard followed by this Court in determining whether to exercise its discretion to grant the extraordinary remedy of a writ of prohibition is the same noted in Argument A, *supra*.

2. Discussion.

The Respondent Judge is clearly erroneous and exceeded his legitimate power when he deprived the State of a valid conviction solely on the grounds that the State improperly attacked the Defendant’s character. Rather, the State’s brief remarks in closing argument were permissible because the Defendant first placed his character in issue and therefore invited any error.

Addressing character evidence, *W.V.R.E.* Rule 404(a)(2)(A) reads: “A defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.”

Prior to the development of the Rules of Evidence, case law well establishes that “The State cannot introduce evidence not connected with the crime for which the accused is being tried, for the purpose of showing his bad character, until the accused has first put his own character in issue by attempting to prove a previous good character.” State v. Seckman, 124 W.Va. 740, 22 S.E.2d 374 (1942).

Further, “Where a defendant elects to place his good character and reputation in issue at a criminal trial, prior convictions may then be introduced to impeach character and reputation.” Syl. pt. 2, State v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977), *overruled on other grounds by*

State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Clearly, it is permissible for the State to attack a criminal defendant's character once the defendant has placed his character in issue.

In this matter, the Respondent Court allowed the State to introduce as *W.V.R.E.* 404(b) evidence various court records of judgments, evictions, and wage garnishments as evidence of the Defendant's motive to steal. The Defendant was entitled to put on evidence of his own to rebut the State's intended use of the evidence. In other words, the Defendant could introduce evidence to show that the State's evidence did not prove that he had such a motive. Examples of that sort of evidence may have included evidence showing that the judgments were false or did not exist, or that he had paid them off prior to the alleged offense, or that his wages were not being garnished and that his home not foreclosed upon. The Defendant did not offer any rebuttal evidence, however.

Instead, the Defendant chose to testify to explanations to the jury about why he was *justified* for each and every judgment against him. He gave testimony that he had a *good excuse* for having the foreclosure and lawsuits. He never denied the issue of motive, and admitted that all of the records were true. His testimony was that he was *not at fault* for any of these financial woes. In other words, he was saying that despite the fact that these records are true, he was still a "good guy" because he had a good reason for each and every one of them. This is character testimony. The Defendant took the stand and provided evidence about his good character against the backdrop of the State's motive evidence. The Defendant gave testimony to show that, despite all of the judgments against him, the evictions, and the foreclosures, he had good reason for what he did. The Defendant wanted the jury to know that he was still a person of good character.

When a defendant offers evidence that he is a “good guy” or a person of good character, *W.V.R.E.* 404(a)(2)(A) allows the State to offer evidence to rebut it.

Further, the “curative admissibility rule” allows the prosecution to admit evidence once the Defendant has opened the door:

The curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has “opened the door” by introducing similarly inadmissible evidence on the same point. Under this rule, in order to be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) The original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence.

Syl. pt. 10, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Defendant did not deny the financial straits he was in during his direct examination by his counsel regarding the 404(b) evidence. He testified that the judgments occurred because “My wife was working at the Internal Revenue Service, for medical reasons she had to resign after about 15 years of being there.” [See Dennis Streets Direct Examination Transcript, AR, 105.] He went on: “Due to her medical condition we went from a two income family to a one income family.” [See Dennis Streets Direct Examination Transcript, AR, 106.]

The Defendant testified to a moral justification for the home foreclosure. His counsel asked: “Okay. We know you lost the house. What happened?” The Defendant replied “*We didn’t really lose – well we gave up the house.*” [See Dennis Streets Direct Examination Transcript, AR, 106.] His testimony as to why he “gave up” the house was:

I had a lot of trouble in the neighborhood. There was a house directly across the street from us that was a drug house and had been raided actually twice by the task force. I had vandalism done to my property because there was a cruiser always sitting in the

driveway. Had an above ground pool, the liner was slit. I mean there was a lot of problems going on in my neighborhood. I couldn't take it anymore...due to the problems in the neighborhood we wanted out of there. There was no other way of doing it. Just could not take living there any longer...we were unable to sell our house. We left the house go. We moved and just let the bank have the house back.

[See Dennis Streets Direct Examination Transcript, AR, 106, 107.] This testimony did not deny the foreclosure or rebut the State's motive evidence of the financial pressures bearing down upon the Defendant. Instead, the Defendant used the opportunity to explain to the jury that he had a moral justification for being foreclosed upon—he was a good cop in a neighborhood of criminals, and he had to move for the sake of his family.

The Defendant next explained a \$2,700.00 judgment from City Hospital. His testimony did not contest the existence of the judgment or its demonstration of his financial problems, which the State alleged were his motive to steal. Instead, the Defendant presented himself as an honest man, one who would not deny and fight debts known to be owed, a man of good character: "...I knew I owed the money. There was no use trying to hire an attorney and fighting it when it was something I knew that I owed." He explained that he did not pay this judgment because "I didn't have the money to pay it at the time." [See Dennis Streets Direct Examination Transcript, AR, 108.]

The Defendant's testimony explaining the \$4,900 judgment owed to David Pittsnogle was telling. He admitted the judgment. He did not rebut the State's financial troubles motive evidence, but offered a reason for the judgment that portrayed himself as the "good guy." The Defendant testified:

Yes sir. That is money that is owed. For lack of a better term I considered that to be a slumlord. There was a lot of problems

with the house. The basement would flood. The garage door came off shortly after we moved in. He would not make any repairs to the property. *So even though it wasn't the right thing to do we moved out. I wasn't going to stay in a house that I felt wasn't habitable.*

[See Dennis Streets Direct Examination Transcript, AR, 110, 111 (emphasis added).]

Later, in re-direct, his counsel asked: "Do you think Mr. Pittsnogle breached his contract with you by not fixing the house for you to live in?" The Defendant replied: "I do." [See Dennis Streets Direct Examination Transcript, AR, 119.] The Defendant clearly interjected his character. He offered testimony that he was morally justified over Mr. Pittsnogle due to Mr. Pittsnogle's breach of contract. He did not testify that motive didn't exist or that the judgment didn't exist.

Even more powerful was the testimony regarding the \$26,408.15 judgment owed to Monique Milas. The Defendant's testimony was clearly aimed at showing that he was a "good guy" and that Monique Milas was the bad guy. When the Defendant's counsel asked him about this judgment, the Defendant began his explanation with: "That was the house that we moved into after we gave up the house that we owned or were buying. We had four dogs at the time. No one wanted to take us with our four dogs." [See Dennis Streets Direct Examination Transcript, AR 111.]

After a break given because the Defendant began crying, the jury was brought in and he resumed his explanation of the Monique Milas judgment. He testified:

We initially tried to talk them into doing a one-year lease because \$1400 was more than what our mortgage was but like I said it was the only place we could find to take us and our dogs. They would not budge on the two-year lease so we signed it anyway hoping that finances would change and find some way of getting more money and be able to pay it. As the first year – the end of the first year approached our finances hadn't changed. I made contact

with them to try to let us out of the lease and they refused to let us out of the lease so we went and moved out of the house.

[See Dennis Streets Direct Examination Transcript, AR, 113, 114.]

His counsel then asked: “Okay. Did they sue you for the remainder of the lease? The Defendant replied “They wanted the full amount of the lease.” Counsel then asked question: “Do you know after they sued you did they rent to somebody else and make double the profit on it? The Defendant replied: “I rode by there I don’t remember exactly when after that but there was cars in the driveway so I assume that they had rented it.” [See Dennis Streets Direct Examination Transcript, AR, 114.]

This only possible inference the jury could take from this line of questioning was that the Defendant was a decent, honest man that had been done wrong by an unsympathetic landlord. Good Defendant—Bad Landlord. The Defendant’s testimony did not dispel the existence of the debt or of the State’s evidence of motive to commit the alleged crime.

In this respect, the Defendant has opened the door and invited the State’s remarks addressing his character in closing argument.

“A judgment will not be reversed for any error in the record introduced by or invited by the party asking for reversal.” Syl. Pt. 1, State v. Bosley, 159 W.Va. 67, 218 S.E.2d 894 (1975),

The case of State v. Mann, *supra*, 205 W.Va. 303, 518 S.E.2d 60 (1999), is directly on point and factually analogous to the case at hand. Mann is on point for both its allegation of the State’s improper cross-examination of the defendant on character evidence, and its allegation of the State’s improper remarks regarding character in closing. There, as here, the defendant did not object during the closing argument. The Supreme Court of Appeals denied both allegations.

The Court found that the evidence of the defendant's drug use was prior bad acts and did go to his character. However, the Court found that, similar to our case, the prosecutor made no mention of this character evidence during his opening statement or case-in-chief. *Id.* It was only after the defendant chose to testify that the prosecutor cross-examined him about the details of his drug use. The Court found that this was proper because the defendant had "opened the door" and had invited this error because the defendant had offered some testimony during his direct examination that he had used drugs but that he had never robbed anyone or committed any other crime to get money for drugs. *Id.* (See also footnotes 12 and 13 of the opinion for the actual testimony.) Although the Court found that the State's cross-examination about drug use clearly involved prior bad acts, the Court found that the Defendant had "opened the door" by testifying on direct examination that although he had a prior cocaine addiction, he made enough money from social security to support this addiction.⁴ The Court held "Consequently, he cannot now complain of error in the State's cross-examination of those matters he brought out on direct examination." *Id.*, 205 W.Va. 303, 313, 518 S.E.2d 60, 70.

Similar to the case at hand, the Defendant Streets cannot now complain of error in the State's cross-examination of those matters that the Defendant brought out on his own direct examination. The Defendant offered the testimony of the reasons why he walked away from his mortgage and lease agreements—reasons that spoke only to his character—and it was entirely proper for the State to briefly argue that this called his character into question.

The Mann court also made the following observation regarding invited error:

⁴ It can be inferred from this testimony that the defendant was arguing that he did not have "motive" to commit the crime.

“Invited error” is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error is not to make the evidence admissible but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.

Id., 205 W.Va. 303, 312, 518 S.E.2d 60, 69, *citing* State v. Crabtree, 198 W.Va. 620 at 627, 482 S.E.2d 605 at 612 (1996).

Finally, it is important to note that the Mann Court did not even consider the defendant’s argument about the prosecutor’s improper prejudicial remarks during closing argument because defense counsel made *no objections during closing argument*. *Id.*, 205 W.Va. 303, 313, 518 S.E.2d 60, 70.

The case of State v. Bosley, *supra*, 159 W.Va. 67, 218 S.E.2d 894 (1975), is another case that examined invited error over the defendant’s character. In Bosley, the defendant was charged with Driving Under the Influence. Counsel for the defendant during cross-examination of the arresting officer asked “How many times did you stop him?” (The Court noted that defense counsel was “pursuing an obvious plan to show police harassment of the defendant.”) Accordingly, on re-direct the prosecuting attorney asked what the “other time” was that the defendant was stopped. The officer testified that the defendant was previously stopped and charged with DUI. Counsel for the defendant *immediately objected* and moved for a mistrial, arguing that the State introduced impermissible character evidence. Defense counsel’s concern was that the jury would convict the defendant because he had a previous DUI arrest and was obviously a bad guy.

The Supreme Court of Appeals rejected this assignment of error and held that the error was invited. The Bosley Court stated that “The line of interrogation which the defendant alleges improperly brings his character in issue was instigated by the defendant’s counsel.” *Id.*, 159 W.Va. 67, 71, 218 S.E.2d 894, 897. Also, “Though it is error to attack the character of the defendant before he has placed his character in issue, if such error was invited by the defendant, he cannot rely thereon for a reversal of a judgment of conviction. *Id.* at 72, 897.

Similar to the case at hand, the Defendant Streets invited inquiry and argument regarding his character by his repeated testimony about his own good character in response to the State’s motive evidence of court judgments and bank foreclosures. If there were error, it was invited by the Defendant’s character testimony showing himself to be a “good guy.”

Accordingly, the State’s remarks in closing argument, received without objection, were entirely proper pursuant to *W.V.R.E.* 404(a)(2)(A). The Defendant first placed his character in issue by testifying multiple times before the jury of his good character. The Defendant offered evidence of a pertinent trait of character. The State is allowed to offer evidence to rebut it.

Seckman, *supra*.

The Petitioner respectfully moves this Honorable Court to grant this Petition and issue a writ prohibiting the Respondent Judge from enforcing his order granting a new trial, and remanding the matter to the Respondent Judge to proceed to sentencing on the conviction obtained.

C. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER BY DEPRIVING THE STATE OF A VALID CONVICTION BY GRANTING A NEW TRIAL WHEN THE ALLEGED ERROR WAS HARMLESS.

1. The Legal Standard.

The standard followed by this Court in determining whether to exercise its discretion to grant the extraordinary remedy of a writ of prohibition is the same noted in Argument A, *supra*.

2. Discussion.

The Respondent Judge is clearly erroneous and exceeded his legitimate power when he deprived the State of a valid conviction when any error regarding the State's remarks during closing argument was harmless error.

Despite the law to the contrary if the Court were to find error, it was harmless error. In the case at hand, the jury considered overwhelming evidence against the Defendant in the form of business records from the gun shop, business records from the Sheriff's department, and testimony from multiple witnesses. The Defendant is not arguing that evidence was improperly admitted by the Court.

The Defendant's argument is only that the State made improper remarks during closing argument attacking the Defendant's character. The Defendant's allegation is one of a nonconstitutional nature, in that it does not deal with a specific constitutional right such as the right to remain silent at trial. The alleged error is based on the application of the West Virginia Rules of Evidence. This distinction is important because it dictates the appropriate standard of review.

Constitutional error, because it involves a more fundamental right, carries greater potential for harm than does a nonconstitutional error. State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55

(1979).

State v. Guthrie, *supra*, 194 W.Va. 657, 461 S.E.2d 163 (1995), explains the standard as follows:

The harmless error doctrine requires this Court to consider the error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or nonconstitutional. It is also necessary for us to distinguish between an error resulting from the admission of evidence and other trial error. As to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment.

Id., 194 W.Va. 657, 684, 461 S.E.2d 163, 190.

This Court very recently examined the issue of whether improper remarks by the prosecuting attorney in closing argument constituted reversible error. Two different memorandum decisions have recently been issued, one in 2013 and one in 2014. Both were unanimous decisions in favor of the State.

In State v. Fitzwater, Memorandum Op. No. 12-1487 (decided 4/23/14), 2014 WL 1645468, the defendant sought a new trial based on his assertion that the prosecutor made improper, prejudicial comments to the jury in closing argument that denied him a fair trial and violated his right to due process of law. *Id.*, at 1. The defendant proceeded to trial on an indictment for Possession with Intent to Deliver a Controlled Substance. The prosecuting attorney made an impassioned plea in his closing argument about drugs killing people in the community. The defendant properly objected during the closing argument. This Court found the remarks harmless because they did not prejudice the accused.

In State v. Adkins, Memorandum Op. No. 12-1543 (decided 11/26/13), 2013 WL 6183991,

the defendant also alleged the State's improper remarks during closing argument. At trial, the prosecutor made argument that the defendant did not call a certain witness to testify in support of the Defendant's alibi defense. The prosecutor was clearly commenting on the defendant's failure to produce a witness. And this Court denied the request for a new trial because the prosecutor's remarks did not result in clear prejudice or manifest injustice.

Both memorandum opinions referenced State v. Guthrie, *supra*, that "The rule in West Virginia since time immemorial has been that a conviction will not be set aside because of improper remarks and conduct of the prosecution in the presence of a jury which do not clearly prejudice a defendant or result in manifest injustice." *Id.*, 194 W.Va. 657, 684, 461 S.E.2d 163, 190.

In the case at hand, the State's brief usage of the word "character" in closing argument, if error at all, does not create any clear prejudice or manifest injustice.

Furthermore, both memorandum decisions cite the test for determining whether prosecutorial comments rise to the level of misconduct necessitating a reversal:

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. pt. 6, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995).

Applying this test to the case at hand, the Defendant cannot prove that the State's comments rose to the level to meet each of these four elements.

As to factor two, the remark was clearly isolated. The word “character” was only used once. The State’s entire closing argument and rebuttal lasted approximately 45 minutes. The argument regarding character occupied only about 30 seconds of that time.

As to factors one and four, the State’s remarks did not have a tendency to mislead the jury to the defendant’s prejudice, or deliberately divert attention to extraneous matters. The brief remarks were directed to the Defendant’s own explanations for how he came to the financial troubles the State was permitted to introduce as evidence of the Defendant’s motive to embezzle. The State had good reason to believe that the Defendant made his character an issue in this case. That the Defendant did not object further demonstrates the accuracy of the State’s perception.

Perhaps most importantly, as to factor three, absent the remark there was still overwhelming evidence introduced to establish the Defendant’s guilt.

The State introduced several business records from Glockcop, LLC, that documented the cash sale of firearms to Dennis Streets. State’s Exhibit 1 reads “These firearms on consignment to Glockcop, LLC, from Dennis Streets.” Testimony was heard from Cliff Vinson, owner of Glockcop, LLC, that State’s Exhibit 1 was a record of a cash deal, personal business with the Defendant. Testimony was heard from Sheriff Kenny LeMaster that the Defendant was never allowed to trade department firearms for cash; it was for store credit only to be applied to department use items.

The State introduced records from the Sheriff’s Department to prove that a Ruger Mini-14 had come from the Sherriff’s Department Special Response Team.

State’s Exhibit 3, the Glockcop invoice for the Ruger Mini-14, clearly states “Cash paid out for consignment sale.” That exhibit clearly lists the Defendant’s name and home address.

State's Exhibit 4A was the Quickbooks record documenting that petty cash was paid out for the sale of that firearm.

State's Exhibit 5 showed that a Taurus PT22 firearm was sold by the Defendant to Glockcop LLC. Mr. Vinson testified that this was a cash deal. State's Exhibit 21, the record from the Sheriff's Department evidence room, showed that this Taurus PT22 with matching serial number had been seized as evidence and was at one point in Sheriff's Department custody.

The State also presented the jury with numerous exhibits from Glockcop's ATF Firearms Acquisition Log. The ATF requires all gun shops to keep this log. This log records the name and address of each and every person or business from which the gun shop acquires a firearm. Several of the entries in this log showed Berkeley County Sheriff's Department firearms, identified by their serial numbers, as personally sold by the Defendant.

Several other entries in the log showed firearms, traced by their serial numbers to the Berkeley County Sheriff's Department, that were mysteriously acquired by Cliff Vinson as "cash deals" from an unknown private party purchase. Lt. Gary Harmison of the Berkeley County Sheriff's Department testified about seizing a "Sig Sauer Anniversary Edition" firearm as evidence. Lt. Harmison testified that this firearm was turned over to Defendant, who was in charge of the evidence room, after it was seized. Cliff Vinson's business records show that this firearm was sold to his shop. The sale was confirmed by a matching serial number on State's Exhibit 9, a page from Vinson's ATF log showing Vinson bought this gun as cash deal from an unknown private party.

The Court also heard testimony from three different witnesses, Sheriff Kenny Lemaster, Capt. Scott Richmond, and Lt. Willey Johnson, that the Defendant was the only person in charge

of the evidence room *and* of the service weapons inventory for the Berkeley County Sheriff's Department. They testified that the Defendant was the only person in charge of trading "surplus" firearms for store credit. They further testified that no one checked up on his work.

Sgt. Brendan Hall and Cpl. Bill Christian both testified about the details of their investigation, which tracked the firearms in the Defendant's possession at the Berkeley County Sheriff's Department to Mr. Vinson's gun shop.

Very significantly, the Defendant testified on his own behalf, admitting to selling each of the thirteen firearms listed in the Indictment that he was charged with embezzling. He also admitted that all of them belonged to the Sheriff's Department. His explanation that some of the guns were sold as official Sheriff's department business, and that other guns were sold by mistake was plainly rejected by the jury.

The record makes clear that there was more than sufficient evidence presented at trial by which the jury would have convicted the Defendant notwithstanding any alleged error about the State's unobjected-to closing argument. Remove the State's unobjected-to remarks, and the jury's verdict of the Defendant's guilt is found to be based on overwhelming evidence. "A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, State v. Sugg, *supra*.

State v. Guthrie, *supra*, provides additional guidance about harmless error and actual prejudice:

In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceedings, the ameliorative effect of *any curative instruction*

given or that could have been given but was not asked for, and the strength of the evidence supporting the defendant's conviction. As the United States Supreme Court explained “a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments [or conduct] standing alone, for the statements or conduct must be viewed in context.

State v. Guthrie, *supra*, 194 W.Va. 657, 684, 461 S.E.2d 163, 190 (emphasis added). 5

Guthrie also discusses the test for determining prejudice: “Only where there is a high probability that an error did not contribute to the criminal conviction will we affirm. ‘High probability’ requires that this Court possess a ‘sure conviction that the error did not prejudice the defendant.” However, if the Court has ‘grave doubt’ regarding the harmlessness of errors affecting substantial rights, reversal is required.” *Id* at 685, 191. This test is the same test as the standard for harmless error: “As to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment.” *Id* at 684, 190.

In the case at hand there is more than a “high probability” that the remarks did not contribute to the criminal conviction. There should be no doubt at all. The jury’s verdict was based on the evidence, not on the isolated remark about character. There is no clear prejudice in this case shown by the Defendant.

“The United States Supreme Court has acknowledged that, given the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.” Guthrie, *supra*. “Thus, the Supreme Court has held

⁵ Again, the Supreme Court reiterates the importance of requiring defense counsel to object during closing argument. In both the Fitzwater and Atkins memorandum decisions, objections were made, giving the trial court an opportunity to offer a curative instruction to correct any problem.

that an appellate court should not exercise its supervisory power to reverse a conviction...when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.” *Id.*

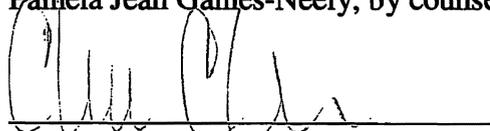
In the case at hand, the conviction was obtained based on the evidence and not upon the alleged error. The Defendant fails to show that the State’s brief comment regarding “character”, if error, had any bearing on the jury’s decision. There is no actual prejudice or manifest injustice shown by the Defendant.

Accordingly, the Petitioner respectfully moves this Honorable Court to grant this Petition and issue a writ prohibiting the Respondent Judge from enforcing his order granting a new trial, and remanding the matter to the Respondent Judge to proceed to sentencing on the conviction obtained.

VI. CONCLUSION

WHEREFORE, your Petitioner prays that this Honorable Court issue a writ prohibiting the Respondent Judge from enforcing his order granting a new trial, and remanding the matter to the Respondent Judge to proceed to sentencing on the conviction obtained.

Respectfully submitted,
Pamela Jean Games-Neely, by counsel,



Christopher Quasebarth, Esq.
Chief Deputy Prosecuting Attorney
State Bar No.: 4676



Timothy D. Helman, Esq.
Assistant Prosecuting Attorney
State Bar No.: 9669

380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971

MEMORANDUM OF ADDRESSES FOR RULE TO SHOW CAUSE SERVICE

Respondent Judge:

Honorable John C. Yoder, Judge
Berkeley County Circuit Court
380 W. South Street, Ste. 4403
Martinsburg, West Virginia 25401

Respondent Streets:

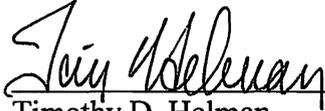
B. Craig Manford, Esq.
Counsel for Dennis E. Streets
P.O. Box 3021
Martinsburg, West Virginia 25402

Petitioner:

State of West Virginia
Christopher Quasebarth, Esq.
Chief Deputy Prosecuting Attorney
Timothy D. Helman, Esq.
Assistant Prosecuting Attorney
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401

VERIFICATION

I, the undersigned, hereby state that the facts alleged in the foregoing petition are true to the best of my knowledge, or if upon information and belief, are believed to be true.



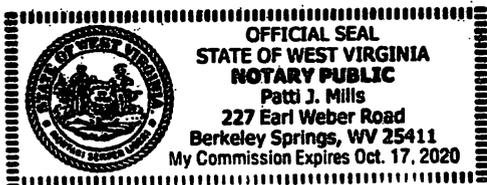
Timothy D. Helman

Taken, sworn and subscribed to before me this 15th day of December, 2015.



NOTARY PUBLIC

My commission expires October 17, 2020



CERTIFICATE OF SERVICE

I, Timothy D. Helman, hereby certify that on Monday, December 15th, 2015, I served a true and correct copy of the “**Petition for Writ of Prohibition and Memorandum of Law**” upon the following by first class United States Mail, postage prepaid, addressed as follows:

Respondent Judge:

Honorable John C. Yoder, Judge
Berkeley County Circuit Court
380 W. South Street, Ste. 4403
Martinsburg, West Virginia 25401

Respondent Bowers:

B. Craig Manford, Esq.
Counsel for Dennis E. Streets
P.O. Box 3021
Martinsburg, West Virginia 25402

STATE OF WEST VIRGINIA, by Counsel



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WV Bar ID No. 9669
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