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RORY L. PERRY II, CLERK
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OF WEST VIRGINIA

Benjamin, J., concurring:

While I concur with the Majority's Memorandum Decision, I write separately to highlight certain undisputed facts (which I believe compelled a dismissal of the charge below) and to underscore the circuit court's finding that Mr. Hedrick ". . . did not become physically aggressive to anyone during this incident and conformed himself to appropriate behavior."

From an appellate standpoint, this case is by no means an easy one. Justice McHugh's dissent, joined in by Justice Davis, is an excellent recitation of the standards of review present in cases such as this. While I ultimately disagree with their conclusions, I do appreciate their view of this case.

Here, though a close call, reversal is appropriate. The facts demonstrate a dispute between individuals over the possession of wildlife, i.e., trout. As the circuit court concluded, it was Mr. Hedrick who "conformed himself to appropriate behavior" in this matter. Under the circumstances which were present at the stream, one cannot say that it was inappropriate for Mr. Hedrick to question Mr. Reid about the trout on his stringer – so long

as he did so in an appropriate manner. It was Mr. Reid who ran away when Mr. Hedrick attempted this. It was Mr. Reid who threw down the stringer and fish while running away. It was Mr. Reid who spit on Mr. Hedrick. It was Mr. Reid who threw large rocks at the tubs in an attempt to kill or injure the trout still within the tubs.

Whether Mr. Reid's retreat was caused by fear that Mr. Hedrick might "become" aggressive or out of some other recognition regarding his own personal conduct (or misconduct), the undisputed fact is that Mr. Hedrick did not act inappropriately in questioning whether Mr. Reid had taken his trout. To read the "impeding lawful fishing" statute in a way to deny Mr. Hedrick the ability to appropriately question Mr. Reid's possession of the trout in question would be nonsensical. Mr. Hedrick was lawfully entitled to do so, so long as he did so without becoming aggressive and so long as he conformed himself to appropriate behavior. The circuit court found that he did so. Under these circumstances, Mr. Reid's decision to stop fishing was clearly his own.