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# Evidence--Presumptions--Application of the Deadly Weapons Presumption in West Virginia

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## Evidence — Presumptions — Application of the Deadly Weapons Presumption in West Virginia

Presumptions, as used by the courts, are among the most basic elements in the guilt-determining process. Presumptions aid the parties in proving their case and the jury in reaching its decision. Unfortunately the deadly weapons presumption as it presently operates in West Virginia is an area of confusion.

When a homicide is committed with a deadly weapon[1] in West Virginia it is presumed to be murder in the second degree. The deadly weapons presumption provides the element of malice necessary for a second degree murder conviction by permitting the inference of malice from the use of a deadly weapon.[2] In the words of the West Virginia Supreme Court of Appeals, "the real intent and purpose of the slayer

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[1] W. VA. CODE ch. 61, art. 7, § 1 (Michie 1966), proscribes the carrying about the person of certain enumerated instruments that are dangerous or deadly weapons per se. In Barboursville v. Taylor, 115 W. Va. 4, 7-8, 174 S.E. 485, 486 (1934), the court considered implements used as weapons that are not enumerated as dangerous or deadly per se:

> Whether an implement used in a homicide or an assault was a dangerous or deadly weapon may be a question of fact for jury determination. . . .
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> . . . .
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> A weapon that has caused death may be regarded as a deadly weapon when employed in the manner in which it was used when the homicide was produced. By the same manner, a weapon which has inflicted serious bodily injury may be deemed dangerous when employed in the manner in which it was used when the injury was inflicted. But though a weapon may be dangerous when used in a certain manner, it may not be dangerous when such manner of use is avoided. (citations omitted).

[2] State v. Hamric, 151 W. Va. 1, 151 S.E.2d 252 (1966), *commented on in* 69 W. VA. L. REV. 361 (1967). *A* shot *B* through the window of *A*'s house. *A* alleged that she thought she was in danger of great bodily harm. At the time of the shooting *B* was on his own property and was not trying to enter *A*'s house. There was evidence from which it could be inferred that *A* knew whom she was shooting. State *ex rel.* Combs v. Boles, 151 W. Va. 194, 151 S.E.2d 115 (1966). *A* shot and killed his uncle, after which he loaded the body with rocks and dumped it into a well. State v. Bowyer, 143 W. Va. 302, 101 S.E.2d 243 (1957). *A* shot *B* during an affray provoked by *B*. State v. Toler, 129 W. Va. 575, 41 S.E.2d 850 (1946). During a quarrel between *A* and *B*, *B* attempted to get *A* out of her house with the aid of *C*. *C* left and returned about thirty minutes later with a gun. *C* met *A* on the porch and after some loud talking and a command to "stand back," *C* shot *A*. *See also* State v. Boggs, 129 W. Va. 603, 42 S.E.2d 1 (1946); State v. Jones, 128 W. Va. 496, 37 S.E.2d 103 (1946); State v. Bowles, 117 W. Va. 217, 185 S.E. 205 (1936); State v. Shelton, 116 W. Va. 75, 178 S.E. 633 (1935); State v. Sauls, 97 W. Va. 184, 124 S.E. 670 (1924); State v. Whitt, 96 W. Va. 268, 122 S.E. 742 (1924); State v. Roush, 95 W. Va. 132, 120 S.E. 304 (1923); State v. Galford, 87 W. Va. 358, 105 S.E. 237 (1920); State v. Panetta, 85 W. Va. 212, 101 S.E. 360 (1919); State v. Clark, 51 W. Va. 457, 41 S.E. 204 (1902).

is established by inference from the means by which, and the circumstances under which, he effected the killing."[3]

The deadly weapons presumption places upon the defendant the burden of going forward with evidence that tends to prove justification or mitigating circumstances, to reduce the homicide to voluntary manslaughter.[4] To raise the homicide to first degree murder the prosecution must prove that the homicide was committed with premeditation and deliberation.[5]

The element provided by the deadly weapons presumption, which raises a homicide to murder, is malice.[6] Although a precise definition of "malice" may be impossible, it has been described as an attitude of reckless disregard for human life,[7] and "an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain implications of a heart regardless of social duty and fatally bent on mischief."[8] As a legal term of art, "malice" is used to indicate the required criminal intent necessary to sustain a charge of murder, and it represents the intentional commission of a wrongful act without provocation or justification.[9]

The use of the term "malice" is the source of much confusion because of the difficulty that arises in separating the legal from the non-legal meanings of the word.[10] To the jury, "malice" tends to indi-

[3] State v. Gravely, 66 W. Va. 375, 383, 66 S.E. 503, 507 (1909) (Poffenbarger, J. dissenting in part).

[4] State v. Hamric, 151 W. Va. 1, 151 S.E.2d 252 (1966).

[5] *Id.* In State v. Cain, 20 W. Va. 679, 709-10 (1882), the court held that from the use of a deadly weapon premeditation and deliberation may be presumed. Whether it is proper to instruct the jury that it may find premeditation and deliberation from the use of a deadly weapon is now held to depend on the facts and circumstances of each case. State v. Bowles, 117 W. Va. 217, 221, 185 S.E. 205, 208 (1936).

W. VA. CODE ch. 61, art. 2, § 1 (Michie 1966) provides: "Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree." This statute does not displace the common law elements of murder, it merely defines the degrees of murder.

[6] State v. Boles, 151 W. Va. 194, 151 S.E.2d 115 (1966); State v. Lewis, 133 W. Va. 584, 57 S.E.2d 513 (1949); State v. Thornhill, 111 W. Va. 258, 161 S.E. 431 (1931); State v. Laura, 93 W. Va. 250, 116 S.E. 251 (1923); State v. Galford, 87 W. Va. 358, 105 S.E. 237 (1920); State v. Weisengoff, 85 W. Va. 271, 101 S.E. 450 (1919).

[7] State v. Saunders, 108 W. Va. 148, 150 S.E. 519 (1929).

[8] State v. Douglass, 28 W. Va. 297, 299 (1886).

[9] State v. Gunter, 123 W. Va. 569, 17 S.E.2d 46 (1941). *See also* Note, *The Language of Murder*, 14 U.C.L.A.L. REV. 1306 (1967).

[10] WEBSTER'S NEW INTERNATIONAL DICTIONARY 1489 (2d ed. 1955), defines malice as badness, harmfulness, enmity of heart, malevolence, and ill will.

cate that there must have existed some ill-will or evil feeling within the mind of the accused;[11] but, "malice," as an element of murder, may exist without the presence of ill-will or evil feeling within the mind of the accused.[12] Much of the confusion generated by the use of this term may be eliminated by the deadly weapons presumption.

In general, a presumption is a "legal mechanism, which, unless sufficient evidence is introduced to render the presumption inoperative, deems one fact to be true when the truth of another fact has been established."[13] The deadly weapons presumption establishes the existence of malice by inference when the evidence indicates the homicide was committed with a deadly weapon. Although the operation of this presumption appears simple in the abstract, its application raises serious practical questions. The most important is the function it serves within the normal guilt-determining process.[14]

The Thayerian view of presumptions declares that if sufficient evidence is introduced that would justify a finding of fact contrary to the fact assumed by operation of the presumption, the case must be decided by the trier of fact as if the presumption never existed. The presumption is considered to be rebutted.[15] The effect of the presumption is to place upon the defendant the burden of producing evidence that would justify a finding contrary to the fact assumed.[16] It should be noted that the jury learns of the presumption only through the court's instruction given at the conclusion of the evidence. Under the Thayerian view the jury receives such instructions only if the defendant has failed to rebut the presumption. If found insufficient to rebut the presumption, the evidence introduced for that purpose will still be considered, as will the presumption, by the jury in determining the ultimate issue — that of the defendant's guilt or innocence.

[11] R. PERKINS, CRIMINAL LAW 49 (2d ed. 1969). *See also* Pike, *What Is Second Degree Murder in California*, 9 S. CAL. L. REV. 112 (1936); Note, *The Language of Murder*, 14 U.C.L.A.L. REV. 1306 (1967).

[12] Note, *Degrees of Murder and Manslaughter*, 44 W. VA. L.Q. 194 (1938).

[13] Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969). An accepted and more classical definition can be found in 9 J. WIGMORE, EVIDENCE § 2491 (3d ed. 1940), and C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 806 (2d ed. E. Cleary 1972).

[14] Application of the same presumption can produce quite different results when different interpretations are employed. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 337 (1898), and E. MORGAN, BASIC PROBLEMS OF EVIDENCE 33-35 (1954), present the two most widely known views.

[15] J. Thayer, *supra* note 14, at 337.

[16] The burden of producing evidence is the burden on a party to produce evidence that would justify the trier of fact in finding the existence of the fact or issue. C. MCCORMICK, *supra* note 13, at 783-85.

Regardless if the defendant produces evidence in rebuttal, the burden of persuasion[17] should remain with the party who initially asserts the truth of the fact or issue.[18] In a murder trial, both the burden of persuasion and the burden of producing evidence initially rest on the prosecution. By using the presumption, the burden of producing evidence to rebut the presumption of malice shifts to the defendant while, ideally, the burden of persuasion remains on the prosecution.[19]

If the defendant meets his burden of producing evidence, sufficient to warrant a jury finding of no malice,[20] the presumption drops out of the case. As one jurist described this operation in metaphor, "[p]resumptions may be looked on as bats of the law flitting in the twilight, but disappearing in the sunshine of actual fact."[21] No instruction concerning the presumption is given to the jury. The jury is never aware that a presumption once existed, because the court has determined that the defendant has met his burden of going forward with the evidence. The jury carries out its traditional function of weighing the sufficiency of the evidence presented without the aid of the presumption, and no specific comment is made concerning the weight to be given the use of the deadly weapon. If the court has determined that defendant did not introduce sufficient evidence to rebut the presumption, the jury is instructed that from the use of a deadly weapon it may infer malice.[22]

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[17] The burden of persuasion is the duty to convince the trier of fact of the truth of the facts or issues as alleged from the evidence submitted. C. MCCORMICK, *supra* note 13, at 783-85.

[18] E. MORGAN, BASIC PROBLEMS OF EVIDENCE 33-35 (1954). Unlike Thayer, Morgan asserts that both the burden of producing evidence and the burden of persuasion should shift to the opponent of the presumption once evidence is introduced to support the presumption.

[19] *See generally* C. MCCORMICK, *supra* note 13, at 783-835; 9 J. WIGMORE, *supra* note 13, §§ 2483-98; MODEL CODE OF EVIDENCE, rule 1(2), (3) (1942).

[20] Payne v. Ace House Movers, Inc., 145 W. Va. 86, 112 S.E.2d 449 (1960); State v. Freeport Coal Co., 144 W. Va. 178, 107 S.E.2d 503 (1959); Ritz v. Kingdon, 139 W. Va. 189, 79 S.E.2d 123 (1953); Lambert v. Metropolitan Life Ins. Co., 123 W. Va. 547, 17 S.E.2d 628 (1941).

[21] Mockowik v. Kansas City, St. J. & C.B.R.R., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906) (Lamm, J.).

[22] Although a presumption is mandatory in the classical sense, it is inappropriate to bind the jury by a mandatory presumption concerning the use of a deadly weapon. The result would be to restrict the jury in its traditionally uninhibited function of fact finding in criminal cases. In civil cases the court may direct a verdict on the basis of an unrebutted presumption because the presumption is mandatory; but no one would argue that the court should direct a verdict against the defendant in a criminal case. Likewise, the court should not bind the jury by a mandatory instruction.

For an interesting discussion on the constitutionality of presumptions, see

For instance, if the prosecution shows that the defendant shot the deceased during an argument, the burden of producing evidence shifts to the defendant. To rebut the presumption of malice, the defendant must present evidence tending to show mitigation or justification. Thus, if the defendant presents sufficient evidence tending to show that he shot the deceased in self defense, the presumption is rebutted. No instruction is given that permits the jury to infer malice from the use of the deadly weapon, and the jury is never aware of the shifting burden. Without the aid of a presumption, the jury must determine the existence or non-existence of malice solely from the evidence presented. Conversely, if the defendant's evidence is insufficient to warrant a finding of self defense or other justification or mitigation, the presumption is not rebutted, and the jury is instructed that it may infer malice from the use of the deadly weapon. In either case, during the presentation of the evidence the jury is unaware that the burden of going forward with the evidence has shifted.

In accordance with the general law of presumptions, the right of the court in West Virginia to instruct the jury that it may infer malice from the use of a deadly weapon is not unbridled. All homicides with a deadly weapon are not murder.[23] Even if no provocation or justification is shown, the facts and circumstances of a case may indicate that the presumption of malice is unwarranted. The act, the means, and the circumstances of each case must be considered before a presumption of malice is warranted from the use of a deadly weapon. Consequently, the West Virginia Supreme Court of Appeals has indicated that even if there is no adequate provocation in the eyes of the law,

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Ashford & Risinger, *supra* note 13. The authors suggest that constitutional arguments can be made on the following grounds:

> 1. As to the element which is presumed from the elements proved, the defendant no longer enjoys any benefits from the "presumption" (more properly "assumption") of innocence. In practical effect, although not technically, he is no longer assumed innocent . . . .
> 2. The defendant is no longer provided a jury trial upon the element presumed, inasmuch as he is deprived of the untrammeled response of the jury as to that element.
> 3. Since the determination of the presumed element is automatic, the defendant is denied a trial altogether on that element: the trial as to that element was conducted in the hearing rooms and floors of the legislatures, or was effected by case-law development to which he was not a party.
> 4. As a corollary to (3), the defendant was not allowed to confront his "accusors."
> 5. The defendant may be punished, not as a result of all elements of the crime having been proved beyond a reasonable doubt, but for not having risen to his own defense, which, of course, is no crime.

*Id.* at 176. *See also* note 35, *infra.*

[23] State v. Sauls, 97 W. Va. 184, 194-95, 124 S.E. 670, 674 (1924).

the mental capacity[24] or chronological age[25] of the defendant should weigh heavily in any consideration of the application of the deadly weapons presumption.

In West Virginia, the court's treatment of "rebuttal" evidence introduced by the defendant differs from the Thayer view. The court does not speak in terms of rebuttal evidence presented by the defendant. Instead, the court has stated that when the prosecution proves the use of the deadly weapon, the jury should receive an instruction as to the presumption of malice, unless the court determines that the circumstances of the case do not warrant the insertion of the presumption.[26] Such circumstances have been held to be present where it appears that the homicide was accidental,[27] was committed by one without criminal capacity,[28] or was adequately provoked.[29] As a practical matter such evidence will be introduced by the defendant only after the prosecution has presented its case, and if the defendant introduces evidence of this type, the court must determine whether it is sufficient to render the presumption "inapplicable." If the presumption is rendered "inapplicable," the result is the same as "rebuttal" under the Thayer approach, *i.e.*, the presumption vanishes, and the instruction is not given. The operation of the deadly weapons presumption in West Virginia appears to operate in essentially the same manner as the Thayer view but through the use of differing concepts and terms.

[24] State v. Coleman, 96 W. Va. 544, 123 S.E. 580 (1924). *A* stabbed *B* after *B* twice called *A* a "vile and opprobrious epithet calculated to inflame the human passion." There was strong evidence introduced raising the issue of defendant's mental irresponsibility.

[25] State v. Vineyard, 81 W. Va. 98, 93 S.E. 1034 (1917). *A*, approximately eleven years of age struck *B* in the stomach with a knife. *B* later died from the wound. The court stated that, "when under age malice cannot lawfully be inferred from the bare fact of cutting with a deadly weapon." *Id.* at 103, 93 S.E. at 1036.

[26] State v. Cassim, 112 W. Va. 92, 163 S.E. 769 (1932); State v. Thornhill, 111 W. Va. 258, 161 S.E. 431 (1931); State v. Laura, 93 W. Va. 250, 116 S.E. 251 (1923); State v. Hurst, 93 W. Va. 222, 116 S.E. 248 (1923); State v. Galford, 87 W. Va. 358, 105 S.E. 237 (1920).

[27] State v. Cross, 42 W. Va. 253, 24 S.E. 996 (1896). *A*, who had been drinking, went to his sister's house carrying a pistol. While *A* was toying with the pistol, *B* told him to put it up, and during the process of putting the pistol back in his pocket the gun discharged, killing *B*.

[28] State v. Vineyard, 81 W. Va. 98, 93 S.E. 1034 (1917).

[29] State v. Clifford, 59 W. Va. 1, 52 S.E. 981 (1906). The court stated, "a grievous provocation immediately resented with violence, resulting in death reduces the offense from murder to manslaughter, is a rule of law, seems to be asserted by all books." *Id.* at 3, 52 S.E. at 991. *Accord*, State v. Bowyer, 143 W. Va. 302, 101 S.E.2d 243 (1957); State v. Morris, 142 W. Va. 303, 95 S.E.2d 401 (1956); State v. Cassim, 112 W. Va. 92, 163 S.E. 769 (1932); State v. Thornhill, 111 W. Va. 258, 161 S.E. 431 (1931); State v. Coleman, 96 W. Va. 544, 123 S.E. 580 (1924); State v. Laura, 93 W. Va. 250, 116 S.E. 251 (1923); State v. Hurst, 93 W. Va. 222, 116 S.E. 248 (1923); State v. Galford, 87 W. Va. 358, 105 S.E. 237 (1920).

Under West Virginia law the jury is instructed that it *may* infer malice from the use of a deadly weapon[30] instead of being instructed that it *must* infer malice, as the strict classical presumption would require. This construction is similar to the California approach to presumptions. Under this approach the jury is instructed that if it believes certain facts to be true, the law permits them to find that the presumed fact has also been proved, unless there is contrary evidence that raises in their minds a reasonable doubt as to the truth or existence of the fact assumed.[31] The jury will naturally look to the defendant to produce evidence tending to show the non-existence of malice. If no evidence is presented by the defendant, the natural and almost inevitable tendency is toward a finding of malice and a second degree murder conviction.

It is for this reason that the West Virginia court requires the instruction on the use of the presumption to refer to the facts presented by either the defense or the prosecution from which the jury could find the presumption inapplicable.[32] It is difficult to frame this instruction so that the defendant is not prejudiced. Under the law of West Virginia it would be proper for the court to give the following hypothetical instruction:[33]

> The court instructs the jury that if you believe from all the evidence beyond all reasonable doubt that the defendant with a deadly weapon, without any or upon slight provocation, gave to the deceased a mortal wound, then the jury may infer malice from the use of the deadly weapon, and unless the defendant proves extenuating or mitigating cir-

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[30] State v. Hamric, 151 W. Va. 1, 151 S.E.2d 252 (1967); State *ex rel.* Combs v. Boles, 151 W. Va. 194, 151 S.E.2d 115 (1966); State v. Toler, 129 W. Va. 575, 41 S.E.2d 85 (1946).

[31] CALIFORNIA LAW REVISION COMMISSION, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 1140 (1964). California has by statute recognized the existence of both the Thayer and Morgan views on presumptions. CAL. EVID. CODE 600-68 (West 1966). By these statutes it has classified twenty-seven presumptions as (1) irrebuttable, (2) transferring the burden of introducing evidence, or (3) transferring the burden of persuasion. Comment, *The California Evidence Code: Presumptions*, 53 CALIF. L. REV. 1439 (1965), presents an analysis of this approach to the area of presumptions.

[32] State v. Sauls, 97 W. Va. 184, 195-96, 124 S.E. 670, 674 (1924). *See also* State v. Garner, 97 W. Va. 222, 124 S.E. 681 (1924); State v. Coleman, 96 W. Va. 544, 123 S.E. 580 (1924).

[33] This hypothetical instruction is based on an instruction in State v. Dean, 134 W. Va. 257, 58 S.E.2d 860 (1950). *See* Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940); McCormick, *What Shall the Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185 (1938); Morgan, *Instructing the Jury Upon Presumptions and the Burden of Proof*, 47 HARV. L. REV. 59 (1933).

> cumstances or such circumstances appear from the case made by the State, then the defendant is guilty of second degree murder.

By use of the above instruction the court specifically points out the use of a deadly weapon while only generally commenting on any mitigating facts or circumstances. The question arises whether the court must point out each fact that may be used to mitigate or justify the homicide, since it has specifically mentioned the use of a deadly weapon and the inference of malice that may arise therefrom. To require the court to determine and state each fact that might be used as a mitigating fact, however, would be to carry the function of the court beyond its limits and into the realm of the jury.[34] Therefore, the specific reference to the use of a deadly weapon, while only referring generally to the mitigating facts or circumstances, should not be considered prejudicial to the defendant.

Since malice refers to the defendant's state of mind, the most logical method of proving the non-existence of malice would seem to be by the testimony of the defendant himself. In fact this is often the only way in which the non-existence of malice can be shown. It is true that the defendant is "entirely free to testify or not as he chooses;"[35] but if the defendant has had prior criminal convictions, taking the stand could jeopardize his chances of acquittal. Thus it may be proper for the court to limit cross-examination where the presumption forces the defendant to prove the non-existence of malice by his own testimony.[36] However, a limitation on the scope of cross-examination may be only idealistic, since it appears next to impossible to develop any standard to be used as a limitation when talking about such a nebulous term as malice.

The practical effect of the deadly weapons presumption is to place upon the defendant the burden of persuading the jury that

[34] State v. Pietranton, 137 W. Va. 477, 72 S.E.2d 617 (1952). The court stated: "In the trial of a criminal case the jurors, not the court, are the triers of the facts, and the court should be extremely cautious not to intimate in any manner, by word, tone, or demeanor, his opinion upon any fact in issue." *Id.* at 491, 72 S.E.2d at 624. *See also* State v. Peterson, 132 W. Va. 99, 51 S.E.2d 78 (1948); State v. Perkins, 130 W. Va. 708, 45 S.E.2d 17 (1947); State v. Price, 113 W. Va. 326, 167 S.E. 862 (1933); State v. Hively, 103 W. Va. 237, 136 S.E. 862 (1927); State v. Austin, 93 W. Va. 704, 117 S.E. 607 (1923).

[35] Yee Hem v. United States, 268 U.S. 178, 185 (1925).

[36] Gainey v. United States, 380 U.S. 63, 87-88 (1965) (dissenting opinion). Mr. Justice Black determined that the effect of forcing one to testify against himself is sufficient to render the operation of some presumptions unconstitutional. Although Mr. Justice Black's discussion is about statutory presumptions, the rationale can be applied to court created presumptions.

malice is non-existent. The defendant is aided, however, by the requirement that the instruction on the presumption includes a reference to extenuating facts or circumstances which tend to justify or mitigate the use of a deadly weapon. The jury remains the final arbiter on the existence of malice.[37] It may choose to disregard the use of the deadly weapon or infer malice from the use of the deadly weapon, depending upon its reaction to all the evidence offered at the trial. Properly applied, the defendant should not be prejudiced by the use of the deadly weapons presumption, but its validity and effectiveness depend ultimately upon each individual court and its discretion in applying the presumption in each case.

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[37] For a general discussion of "permissible" presumptions and the freedom that is allowed the jury see C. MCCORMICK, *supra* note 13, at 802-05.