

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

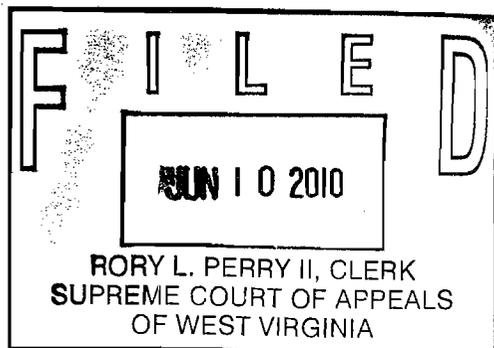
STATE OF WEST VIRGINIA,

v.

**Supreme Court No. 35501
Circuit Court No. 07-F-15-B
(Raleigh)**

**RODNEY JASON BERRY,
Petitioner.**

APPELLANT'S BRIEF



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Introduction

Rodney Berry's trial was so infected with error that we can put no confidence in its outcome. Without a doubt, the facts of this case represent a senseless and tragic loss of two lives. This is a point that no one involved in this case, not even Mr. Berry, has ever denied. No matter how unacceptable Mr. Berry's actions were, he was still entitled to a fair trial. Unfortunately, Mr. Berry's trial can be described as anything but fair.

What happened during Mr. Berry's trial can be described as shocking. His trial was riddled with prosecutorial excess and overreaching. The prosecutor created error in a case most would describe as an open and shut case for the prosecution. Nor were these errors harmless. They were significant constitutional errors, including the denial of the right to present a full and complete defense. Mr. Berry and Ms. Mills were involved in an on again off again relationship for six years. It was a pattern: they would break up and then they would be back together. Counsel had correspondence between Ms. Mills and Mr. Berry that proved this point. However, based on the prosecution's objection as to relevance, the trial court arbitrarily set a timeframe within which the defense could discuss their relationship. The court ruled that the defense could only discuss the last 60 days of the relationship. This prevented the defense from being able to effectively rebut the prosecution's argument that the relationship was over and Mr. Berry just could not take no for an answer.

The trial court, at the urging of the prosecutor, further denied Mr. Berry the right to present mitigation evidence. Before trial, counsel filed a motion to bifurcate. That motion was withdrawn, during pretrial motions. Counsel renewed the motion to bifurcate, during trial, due to other pretrial rulings by the court which severely limited the evidence they were entitled to present. The State objected to the renewed motion arguing the withdrawal of the motion was a

strategic decision the Defense was stuck with. Counsel's motion was denied. The effect of the trial court's pretrial rulings, in essence, denied the defense the right to present evidence on the issue of mercy. At trial when counsel attempted to present any evidence relevant to mercy the prosecutor argued that it was not relevant to guilt and therefore inadmissible. She also argued that counsel was attempting to back-door a diminished capacity defense. Despite defense counsel's adamant argument that he was not attempting to negate intent, the trial court agreed with the prosecution and ruled the evidence was inadmissible.

Further error occurred due to the prosecutor's use of unnecessary, gruesome and cumulative crime scene and medical examiner (herein-after M.E.) photos. Her use of photos was so outrageous and prejudicial that it constituted a denial of due process. In all the State presented 76 photos. There were approximately 57 photos from the crime scene and the M.E.'s office. Just to give this Court an idea of how outrageous the use of these photos was, the prosecutor argued that she was entitled to show two complete sets of photos, from the M.E.'s office, picturing the wounds to Mr. Worthington. The trial court agreed and admitted these photos over counsel's objections. There was nothing different in these two groups of pictures except that one set showed the wound as the M.E. received the body, bloody and unclean, and the second set showed the wound after the M.E. had cleaned the body and in some instances shaved the area surrounding the wound. The jurors saw approximately eight different pictures of just the wounds to Mr. Worthington's right hand.

Mr. Berry was also indicted and the jury was instructed on an alternative theory of murder, lying in wait, that was not supported by a shred of evidence. In fact, the prosecutor misrepresented the evidence before the grand jury just to secure the indictment.¹

¹ All the evidence produced at trial demonstrated that Mr. Berry was standing in the open, on the sidewalk, Ms. Mills parked beside him, and they spoke to each other before the events occurred.

If that were not enough, Mr. Berry was also denied his constitutional right to a fair and impartial tribunal. Mr. Berry was prosecuted by Kristen Keller, an experienced prosecutor who was married to the trial judge, the Honorable Robert Burnside, for twelve years. Their divorce was final for less than one year at the time Mr. Berry's case was assigned to the Judge's docket, on January 10, 2007. The fact that the prosecutor and judge were divorced at the time of the trial does not erase the appearance of impropriety as the marital relationship is the closest relationship two people can have and its effects are long-lasting. This is especially true when dealing with a marriage of twelve years. Furthermore, there are times when the issues involved in a divorce take years to settle and may result in financial and property connections for years.

The requirement of impartiality is a structural requirement. Both sides, the state and the defendant, are entitled to an impartial tribunal. If the prosecutor felt there was any chance of animosity carrying over from their divorce she would have immediately requested the judge's recusal. She did not. Therefore, the obvious assumption of "a reasonable person" knowing all of the facts involved would be that she felt the relationship could benefit her during trial. Whether or not actual bias existed is immaterial. The appearance or possibility of bias is enough to call into question the outcome of Mr. Berry's case and require an automatic reversal.

Proceedings and Rulings Below

Rodney Berry was indicted on two counts of first degree murder by a Raleigh County Grand Jury for the murders of Martha Mills and Zachery Worthington which occurred on December 2, 2006. The prosecutor presented alternative theories of first degree murder: premeditated first degree murder and murder by lying in wait. The grand jury returned indictments under both theories as to each count on January 10, 2007.

Mr. Berry's trial began on May 11, 2009, and ended on May 22, 2009. There was a four day break in the middle of Mr. Berry's trial.² The final day of trial fell on the Friday before the Memorial Day Holiday. According to the transcript, jurors retired to the jury room at 3:31 p.m. to begin deliberations. *Tr. 1830* At 3:40 p.m. jurors requested a break to call their families to tell them they were going to be late and to take a smoke break. That break lasted until 5:08 p.m. *Tr. 1834* Almost immediately after the break ended, the Court was notified the jury had arrived at a verdict. The record reflects the jurors were brought back into the court room to announce their verdict at 5:10 p.m. *Id.* Therefore, in a matter of eleven minutes the jury found Mr. Berry guilty of both counts of first degree murder and did not recommend mercy.

Immediately after the jury announced its verdict, the Judge explained the only consideration he had as to sentencing was whether the sentences would be served concurrently or consecutively. Counsel suggested that a PSI should be ordered because it could assist the court in making that decision. *Tr. 1843* The court declined counsel's request to order a PSI and immediately proceeded to sentencing. *Tr. 1845* The court ordered that Mr. Berry was to serve the two life without mercy sentences consecutively. *Tr. 1846-47*

Statement of Facts

Rodney Berry met Martha Mills in late October of 2000 on the internet. They began dating in November of that same year. Ms. Mills was Mr. Berry's first and only girlfriend. *Tr. 710* He was obsessed with her. They carried on an on again off again relationship until December of 2006. In the months leading up to the incident, Martha regularly called and visited Mr. Berry at his house. *Tr. 1375-76, 1378, 1462* Mr. Berry would also visit Martha at her apartment. *Tr. 1461* He had been there numerous times. The State's witness Angela Canady

² Mr. Berry's trial adjourned on Wednesday May 13, 2009, and resumed on Tuesday May 19, 2009, due to prior scheduling obligations of the court.

verified this when she testified she saw Mr. Berry's vehicle at Martha's apartment before. *Tr.* 808

When this incident occurred, Mr. Berry and Ms. Mills had just started dating again in October. This latest rough patch was nothing new as their entire relationship consisted of on again off again periods for the entire six years they knew each other. *Tr.* 710, 309-11 The defense was prevented from explaining the true nature of their relationship to jurors due to the trial court's ruling limiting the admission of evidence regarding their relationship to 60 days prior to the murders. *Tr.* 313 This ruling was the result of the State arguing that the prior relationship was not relevant to the murders. *Tr.* 299, 1347-49 The court just arbitrarily set a time frame that would apply. *Tr.* 313 The defense was prepared to present a series of emails, cards, and letters that would have put Mr. Berry's and Ms. Mill's relationship into context for the jurors. *Tr.* 303-13 Establishing a pattern of the ups and downs as a normal occurrence. This arbitrary time frame was very detrimental to the defense because, it prevented the defense from refuting the State's argument that the relationship was over and Mr. Berry was refusing to accept it. *Tr.* 303

Mr. Berry had just bought Martha a pool table, in November of 2006. His cousin, Richard Plumb, helped him set it up in her apartment. *Tr.* 1419-20 It took several hours for them to install the table. When asked at trial how Martha and Mr. Berry interacted while they were at her apartment, Mr. Plumb responded "[l]ike a boyfriend and girlfriend would act around one another." *Id.* Mr. Plumb also testified that he was regularly at Mr. Berry's home and he had answered the phone approximately 10 times when Ms. Mills had called for Mr. Berry during November of 2006. *Tr.* 1415

Mr. Berry was immature for his age. At age 25, he still lived at home with his parents. *Tr. 710, 1456* He was going to school to be a diesel mechanic. *Tr. 1456* His room was full of collectable toys such as model cars, star wars figures and model airplanes. *Tr. 1236-38, 1357, 1457* He also loved guns. Mr. Berry owned numerous guns. He held a concealed weapons permit since 2003. When he was not home he typically had two guns on him. *Tr. 715, 1475* Martha knew that Mr. Berry regularly carried guns. *Tr. 1421*

Martha called Mr. Berry on the afternoon of December 1, 2006, and left a message telling him that she was going to a comedy club in Charleston with her brother and that she would call him when she got home. ³*Tr. 1463* Mr. Berry was asleep when she left this message. He had slept all day and well into the evening, because he did not have power at his home due to a wind storm. *Tr. 1463, 1469* Martha called around 11:30 p.m. to tell Mr. Berry that she was home. *Tr. 1470* She told him not to come over because she was tired and was going to go to bed. She had to work a 12 hour shift the next day. *Tr. 1463-64* Mr. Berry decided to go over to see her anyway because they did not get to see each other much due to their schedules. *Tr. 1464-65, 1470-71* He was bored because the power was still off and there was nothing to do so he decided to drive over there. He tried to call before he left but she did not answer her phone. *Tr. 1471*

Mr. Berry drove to her apartment. When he arrived, the t.v. was on but Ms. Mills did not answer her door and her truck was not there. *Tr. 1473-74* Mr. Berry decided to go drive around.

³ The State relied on an email that Ms. Mills sent to Mr. Berry on November 31, 2006, in which she told him that she did not love him as she used to and that she needed space to advance its theory that the relationship was over; however, on December 1, 2006, the day of the incident, Ms. Mills was acting as if the email was never sent and resuming the relationship. The fact that Ms. Mills called Mr. Berry on December 1, 2006, to explain her whereabouts and continually called to keep him updated as to her whereabouts that day demonstrates how detrimental the trial court's ruling that evidence of the prior ups and downs was not admissible. This was a pattern that Mr. Berry was used to and a pattern that he was prevented from demonstrating at trial.

He thought Martha may have gone out for cigarettes or she could possibly be inside asleep.⁴ Mr. Berry came back to Martha's after driving around and knocked on the door again. Once again, no one answered the door. *Tr. 1473-75*

Mr. Berry was returning to his vehicle when he heard Martha's truck pulling into the parking lot. *Tr. 1475* He stopped on the sidewalk in front of her apartment and waited for her to pull in. Martha parked right beside Mr. Berry's vehicle. She turned the truck off and got out. *Tr. 1476* Mr. Berry noticed there was a guy sitting in the passenger seat and he asked her who was in the truck with her. Martha replied "a friend." *Id.*

According to Mr. Berry, the way that Martha was acting and her response caused him to snap. *Tr. 1477* He began firing at the male in Martha's truck. Mr. Berry began shooting at the windshield of the truck.⁵ He then moved to the passenger side, opened the door and shot two more times. *Id.* Martha attempted to pull Mr. Berry out of the truck. He fired once at her shooting her in the face. Mr. Berry then turned and got into his vehicle and drove to his home in Fayette County. *Id.*

Once he arrived at his home, Mr. Berry woke his parents and told them what he had done. *Tr. 1479* He assured them that they had been good parents and this was not their fault. Immediately after speaking with his parents, Mr. Berry called 911 to confess and requested they send someone to get him. *Tr. 1480* A Fayette County Sheriff's Detective, Glenn Chapman, was the first to arrive at Mr. Berry's house sometime after 1:30 a.m. *Tr. 1198*

⁴ During his testimony, Mr. Berry explained that even though Martha's truck was not in the lot she could have been home because it was possible that her brother had dropped her off at her apartment. *Tr. 1473-74*

⁵ Mr. Berry shot the windshield of the truck eight times.

At the time he arrived at the Berry home, Detective Chapman knew there had been a double shooting in Raleigh County, there was a BOLO⁶ for a yellow and white SUV, and that Mr. Berry had called 911 to confess that he was the one who had shot two people in Raleigh County. *Tr. 1198-99* Detective Chapman instructed the 911 operator to tell Mr. Berry to come out on the porch and to listen to his voice commands once he arrived on the scene. *Tr. 2000* Upon arrival at the scene, Detective Chapman handcuffed Mr. Berry and put him in the back of the cruiser. *Tr. 1200* Mr. Berry was instructed that the handcuffs were for safety purposes. While on scene at the Berry home, Detective Chapman found the yellow and white SUV matching the BOLO in the driveway. Detective Chapman took pictures of the SUV because the vehicle had blood on the drivers' side door, mirror, and grill area. *Tr. 1217-18* Detective Chapman also recovered two 9mm handguns which was known to be the weapon used at the scene. *Tr. 1201, 1221-24* Despite all of this evidence, Mr. Berry was not placed under arrest. *Tr. 1208*

In fact, he was advised that he was not under arrest. He was informed that he could ride with the Raleigh County Deputy who was sent to Fayette County to pick him up or he could drive himself to the Raleigh County Sheriff's Department. *Tr. 1247* Mr. Berry rode with Deputy Kade to the Sheriff's Department. They stayed at the Sheriff's Department until Sergeant Bare, the supervising officer, finished clearing the crime scene in Raleigh County. Mr. Berry waited at the Sheriff's Department for approximately two hours for Sergeant Bare to arrive. *Tr. 83* Based on a mutual agreement of Sergeant Bare and Ms. Keller⁷, Mr. Berry was informed that he was not under arrest, he was given his Miranda warnings and a statement was taken by Sergeant

⁶ Be on the lookout

⁷ Sergeant Bare testified that he was in contact with Ms. Keller on three to four occasions during the night to update her and confer with her. *Tr. 84* Sergeant Bare testified that they both agreed that he did not have enough information, at the time that he cleared the scene, to make an arrest and that he needed to get further information from Mr. Berry. *Id.*

Bare and Deputy Kade. *Tr. 1282-83* Amazingly, Deputy Kade and Sergeant Bare both testified during the suppression hearing that they would have let Mr. Berry go if he had decided to leave the sheriff's department before giving a statement.⁸ *Tr. 66, 68, 93* After giving the statement, Mr. Berry was placed under arrest and taken to the jail until a magistrate came on duty the next morning. *Tr. 95-96*

Numerous errors occurred during Mr. Berry's trial. The most shocking error was Mr. Berry's denial of his right to an impartial tribunal. Mr. Berry's case was tried by Kristen Keller before the Honorable Judge Burnside. Judge Burnside and Ms. Keller were married for twelve years. They married in 1994, and were divorced on January 30, 2006. During their marriage, Judge Burnside did not accept any criminal trials. *See Administrative Order App. A-1* Approximately two and one half months after their divorce was final, on April 10, 2006, an order was entered allowing Judge Burnside to begin accepting criminal cases. *See Administrative Order App. A-2* On January 10, 2007, less than one year after their divorce became final and approximately nine months after Judge Burnside began accepting criminal cases, Mr. Berry's case was assigned to Judge Burnside's docket with Ms. Keller, as the prosecutor, Judge Burnside presided over every hearing that was held, including Mr. Berry's trial. This situation creates an appearance of impropriety that simply cannot be ignored.

Another egregious error was that defense counsel was prohibited from presenting a defense on behalf of Mr. Berry. During pretrial hearings, on the motion of the prosecution, the trial court ruled that defense counsel could not bring up anything more remote regarding Mr.

⁸ Sergeant Bare, the lead officer in Mr. Berry's case, testified that he knew two people were dead, that Mr. Berry had confessed to shooting two people in Bradley to Fayette County 911, that the vehicle described by eye-witnesses was found at Mr. Berry's house with blood on it, and that two 9mm pistols were recovered in Mr. Berry's home; but that was not enough evidence to make an arrest. *Tr. 91* Sergeant Bare also testified that he believed he spoke to Ms. Keller by phone after he had cleared the scene and before he began the interview with Mr. Berry. *Tr. 92-93*

Berry and Ms. Mills relationship than 60 days⁹ prior to the crime. *Tr. 313* The prosecution argued that their six year relationship was not relevant to the murders. *Tr. 299* This kept out a significant portion of evidence the defense planned to present at trial in order to give an accurate picture of the relationship that existed, between Mr. Berry and Ms. Mills, to the jurors. This information was the heart of Mr. Berry's defense.

The defense was also prohibited from presenting any evidence that was relevant to mercy. Based on two separate arguments made by the prosecutor Keller, all efforts by counsel to present evidence relevant to mercy were foreclosed. The court upheld the prosecutor's unbelievable argument that because counsel withdrew their motion for bifurcation they were no longer entitled to present evidence of mitigation on Mr. Berry's behalf. The prosecutor argued that mitigation was not relevant to guilt and the defense was stuck with the strategy decision they made to withdraw the bifurcation motion. *Tr. 302-303, 329-331, 877-880, 1347-1349* As unbelievable as this argument was the trial court did not allow counsel to present evidence that they argued was vitally important to the issue of mercy. *Tr. 327-28, 333-34, 874-77, 1349-51* Another argument the prosecutor advanced when defense counsel attempted to present evidence that was relevant to the issue of mercy was the defense was trying to "back-door a diminished capacity defense" and they could not present the evidence without notice to the State and an expert to testify. *Tr. 331- 333, 877-880, 1347-49* Despite defense counsel's adamant denial of any attempt to negate intent, the court ruled that the evidence went to diminished capacity. The trial court once again agreed with the prosecutor and ruled the evidence could not be presented. *Tr. 334, 887-90* These two rulings deprived defense counsel from presenting any evidence they considered relevant to mercy.

⁹ The trial court just arbitrarily selected a time frame within which the defense would be bound. *Tr. 313* This ruling instantly pared a six year relationship down to a 60 day time period.

Additional error occurred when the prosecution offered an unusually large and excessive number of crime scene photos, 76 to be exact, most of which were over defense counsel's objection as to necessity, gruesomeness and cumulative effect. *Tr. 235-38, 940-945, 952-953, 992-95, 998-999, 1090-94* Counsel argued that the prosecutor did not need the photos because she had other sufficient means to establish the evidence such as a crime scene sketch, the medical examiners report and testimony, and the bullet casings and bullet fragments that were recovered. Counsel also argued the true purpose of the photos was to inflame the jury. There was nothing in these photos that was in dispute at trial. These photos were all in color, and they were published to the jury on a 10 x 10 projection screen during testimony. *Post-Trial Motions 6*¹⁰

At least 57 crime scene photos pictured wounds to Mr. Worthington, casings on the ground that were taken at an angle which conveniently pictured the body of Ms. Mills covered in a sheet¹¹, two pictures of Ms. Mills body taken from a distance to capture the long trail of blood running from her body, a picture of the inside of the truck that contained no evidence just a large amount of blood. When defense counsel was alerted to the fact that there was no evidence in the picture, just blood, counsel objected. The prosecutor argued that the jurors were entitled to see the interior of the truck where the murder occurred. *Tr. 1001* Not surprisingly, defense counsel's objection to that photo was also overruled. *Tr. 1003*

The prosecutor also successfully argued that the jurors should be able to view the six photos taken of Mr. Worthington in the ambulance after he was pronounced dead. These photos

¹⁰ The State argued the defense did not object to the display on the 10x10 screen at trial, however, counsel would suggest if the defense objected to the photos themselves it goes without question that the defense objected to them being published in any manner to the jury. *Post-Trial Motions 8*

¹¹ Counsel would like to elaborate on this issue. The photos of the casings could have been taken in some instances to prevent the inclusion of the body in the photo, but were not. Additionally, there were instances where there were numerous pictures of the same evidence, ones that included the body and ones that did not, and the prosecutor submitted all of the photos.

were in vivid color. All but one of the photos in the ambulance showed the exact same wounds only at different angles and differing levels of gore. Defense counsel argued that these photos were being offered for sympathetic reasons not for their probative value. *Tr.238-39, 939, 993*

The prosecutor did not stop there. Each wound to Mr. Worthington was published to the jury at least two times. The prosecutor showed the wound as pictured when the M.E. received the body and then the exact same wound after the M.E. had cleaned the body. An example of how repetitive this became is demonstrated by the fact that jurors were shown at least eight photos of the wounds to Mr. Worthington's right hand. *Tr. 1100-03* That is not an exhaustive list but just an example of the contents of the photos that were allowed to be presented over strenuous objections by counsel. *Tr. 235-38, 940-945, 952-953,992-95, 998-999, 1090-94*

Another serious issue that was raised at every opportunity by defense counsel was the lack of evidence of murder by lying in wait. Counsel filed a challenge to the indictment before trial started. *Tr. 254-55* Counsel argued that the state "has no credible evidence that it can put forth to sustain a lying in wait conviction." *Tr. 255* During arguments on this motion, counsel alluded to the prosecutor's misuse of the phrase "lying in wait and ambush" during the grand jury proceeding. *Tr. 261* The motion to strike lying in wait language from the indictment was denied by the trial court. *See generally Tr. 253-263,*

Counsel filed an additional challenge to the indictment due to grand jury defects. Admittedly, it was filed untimely. The prosecutor objected to the court considering the motion due to its untimeliness. In this motion counsel addressed numerous issues, but the most pertinent one was the misrepresentation of the evidence to secure an indictment for lying in wait. *Tr. 269* Counsel argued that the court should hear the motion because it was outcome determinative and if the court agreed with counsel's argument the prosecution would be required to re-indict

rendering a trial useless. *Id.* Ultimately, the trial court refused to hear argument and stated that counsel could argue the motion during post-trial motions. *Tr.* 271

Counsel again challenged the lying in wait indictment by requesting a directed verdict¹², that the language be stricken from the indictment and not be placed before the jury at the close of the state's case. *Tr.* 1339 Counsel renewed the same motion at the close of all the evidence arguing that there was absolutely no evidence of murder by lying in wait present. *Tr.* 1579 These motions were also denied. *Tr.* 1347, 1580 The jurors were instructed on murder by lying in wait as an alternative theory of first degree murder.

Counsel then requested that in the event the jury returned verdicts of guilt on first degree murder the court poll the jurors as to which theory they convicted on. *Tr.* 1595 Once again this request was refused. *Id.* Counsel renewed his request to poll the jury right before the jury was brought in to deliver the verdict. *Tr.* 1835 The court denied his final request. *Tr.* 1836

ASSIGNMENT OF ERRORS

- I. Mr. Berry was denied his constitutional right to a fair and impartial tribunal due to the previous 12 year marriage of the prosecutor to his trial judge. The parties were divorced for less than one year at the time that Mr. Berry's case was assigned to the judge's docket.
- II. The trial court denied Mr. Berry due process of law when it refused to allow Mr. Berry to present a full and complete defense. The court further erred when it refused to allow Mr. Berry to present mitigation evidence that was crucial to the jury's determination of mercy.
- III. There was absolutely no evidence of murder by lying in wait adduced at trial therefore Mr. Berry's convictions must be reversed as legally insufficient.
- IV. The trial court abused its discretion when it allowed the State to present an unbelievable and overwhelming number of photos, 76 to be exact, both from the

¹² This motion referred to counts 1 and 3 of the indictment.

crime scene and the medical examiners office, that were not necessary to prove any fact in dispute or to refute any argument made by the defense. The photos were gruesome, and unnecessary. The court admitted the photos over strenuous objections to particular photos and an over all cumulative effect objection. The cumulative effect of the photos was so highly prejudicial to Mr. Berry's case that their admission fatally infected Mr. Berry's constitutional right to a fair trial and requires reversal.

V. Mr. Berry's conviction should be reversed for Prosecutorial Misconduct

DISCUSSION OF LAW

I. Mr. Berry was denied his constitutional right to a fair and impartial tribunal due to the previous 12 year marriage of the prosecutor to his trial judge. The parties were divorced for less than one year at the time that Mr. Berry's case was assigned to the judge's docket.

The previous marriage and very recent divorce of the trial judge and the prosecutor in Mr. Berry's case created an appearance of impropriety that cannot be ignored.¹³ Due Process

requires that the appearance of justice be satisfied. The United States Supreme Court stated:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. Interest cannot be defined with precision. *Circumstances and relationships must be considered.* This court has said, however, that "every procedure which would offer a *possible temptation* to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. Such a stringent rule may sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its function in the best way "*justice must satisfy the appearance of justice.*"

In Re. Murchison et. al., 349 U.S. 133,137, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955)(citations omitted)(emphasis added) See also *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

¹³ It is counsel's understanding that this is an ongoing issue.

Further, the United States Supreme Court has explained that due process sets only the outer limit of judicial disqualification and most impartiality issues are addressed and resolved by state law. *Hugh M. Caperton, et. al., v. A.T. Massey Coal Company*, 129 S.Ct. 2252, 173 L.Ed. 2d 1208 (2009) States have an interest in the public having confidence in the courts and their decisions. “Judicial integrity is, in consequence, a state interest of the highest order.” *Republican Party of Minn. v. White*, 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed. 2d 694 (2002)(Kennedy, J., concurring)

West Virginia has both statutes and ethical guidelines that directly address this very issue. They were simply not followed in this case. Mr. Berry’s counsel did not request that the judge recuse himself from this trial and neither did the prosecution. However, appellate counsel argues that not only did the trial judge have a duty to recuse himself, but the prosecutor was also under a duty to either seek the recusal of the trial judge or assign this case to another prosecutor within her office.

At the time of their marriage in April of 1994, an administrative order issued immediately disqualifying Judge Burnside from presiding over any criminal case--not just those Ms. Keller prosecuted. *App. A-1* That order was in effect for twelve years. A second administrative order issued following their divorce on April 10, 2006, allowing him to preside over criminal cases without any other restrictions. *App. A-2* In January of 2007, Mr. Berry’s case was assigned to Judge Burnside’s docket.

In January of 2009, Ms. Keller became the newly elected prosecutor of Raleigh County. This further complicates the situation because this made her professional reputation and livelihood even more dependent on the successful prosecution of major felony cases. This factor would be known and recognized by the judge, because he faces similar pressures and concerns in

the position he holds. It is possible that Mr. Berry's case was the first major case that Ms. Keller tried as the elected prosecutor.

It is unrealistic to think that the entry of a divorce order was all it took to remove the impropriety of the judge presiding over criminal cases involving Ms. Keller. The issues that made the administrative order necessary, upon their marriage, did not simply vanish at the time of their divorce. They were married for a long period of time and with that comes a very strong, close relationship. Married couples share the most intimate details of their lives with their spouses. They know their spouses like no one else. This relationship could easily cause the judge to instinctively give Ms. Keller's word or argument more credit than those made by opposing counsel, without even being cognizant of it. Ms. Keller would also have an advantage because she is going to know the Judge and know what works and what does not in a situation where she is trying to persuade him: knowledge she holds due to their marriage.

Another factor that must be considered is that individuals can still have very strong feelings for each other, even when a marriage is not successful. We do not know whether this was a mutual agreement to divorce or whether there was one party who moved for the divorce. We also have to keep in mind that many people who are divorced still carry on a relationship after the divorce. There are many reasons why people divorce, and the privacy that surrounds something so intimate only adds to the appearance of impropriety.

Furthermore, with any divorce there are numerous issues that can take years to resolve. There can be long-lasting financial connections. Couples accumulate property together that will have to be divided.¹⁴ Depending on the length of marriage the spouses could acquire an interest in retirement accounts. A divorce can end in one spouse being obligated to pay spousal support

¹⁴ This can require the sale of property and then the distribution of the proceeds after the sale, which can be a lengthy process.

or child support. Therefore even though they are divorced the parties can still be very closely connected in many different ways. Mr. Berry is not required to demonstrate that any of these situations existed. It is enough that there was the possibility.

The United States Supreme Court clearly stated proof of actual bias is not required because “[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is a private one, simply underscore the need for objective rules... In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge’s determination respecting actual bias, the *Due Process Clause* has been implemented by objective standards that do not require proof of actual bias.” *Hugh M. Caperton, et. al., v. A.T. Massey Coal Company*, 129 S.Ct. 2252, 2263, 173 L.Ed. 2d 1208, 1222, 27 (2009) Mr. Berry is not required to prove specific instances of conduct on behalf of the judge. The *appearance alone* created by the relationship is the violation of his due process rights. However, counsel would point out that the other assignments of error in this brief call into question the judge’s impartiality. The judge’s rulings were against the clear weight of the evidence, were in violation of deeply rooted constitutional rights, and were all in favor of the State.¹⁵

¹⁵ There was an additional connection between the judge and Ms. Keller that was not revealed to defense counsel until after the trial had commenced even though it was a matter that could have easily been revealed prior to trial. Defense counsel was informed that the Judge’s law clerk had been hired by Ms. Keller as an assistant prosecutor and was working out his notice period. Counsel objected to the clerk working on the case arguing that he would be doing research when issues arose and it would only be human nature to want to please your future employer. The judge noted counsel’s objection explained that he had not discussed the case with his clerk that much and from here on out would only allow him to do clerical tasks. While current counsel is not suggesting that anything improper occurred, counsel submits that because the standard is “the appearance of impropriety” this is another connection between the judge and Ms. Keller. Also this situation could easily be interpreted as Ms. Keller doing the judge a favor by hiring his law clerk at the end of his clerkship. Counsel is fully aware that the clerk just as easily could have been the best qualified candidate that applied and interviewed for the position. *Tr.* 352-57.

W.Va. Code § 51-2-8 (1923) (2005 Rep.Vol.),¹⁶ is the judicial disqualification statute. Judicial disqualification is also specifically addressed by Judicial Canon 3E(1) which states that “[a] judge *shall* disqualify himself in a proceeding in which his impartiality might reasonably be questioned.” Counsel would note this language is a directive and mandates that the judge remove himself if there is any reason his impartiality can be questioned. The canon does not require a specific request for recusal by a party. The plain language of the canon requires the judge to assess the situation and remove himself if “his impartiality might reasonably be questioned.”

The Canon then lists numerous situations that will require recusal *but explains that the list is not exhaustive*. Section 3(E)(1)(d) deals with particular relationships that require recusal. While former spouse is not specifically listed, it goes without saying that if a business partner, former business partner or a relative within the third degree, requires recusal that a former intimate partner of twelve years, an even closer and more involved relationship, would also require recusal, even though it is not specifically listed in the canon.¹⁷

This Court has addressed judicial disqualification in *Syl. Pt. 14, Louk v. Haynes, 159 W.Va. 482, 223 S.E.2d 780 (1976)*:

¹⁶ W.Va. Code § 51-2-8 states: Each circuit, criminal or intermediate judge, during his continuance in office, shall reside in the circuit or county for which he was elected. When such judge is a party to a suit, or is interested in the result thereof otherwise than as a resident or taxpayer of the district or county, or is related to either of the parties, as grandfather, father, father-in-law, son, son-in-law, brother, brother-in-law, nephew, uncle, first cousin or guardian, or if, at the time of the institution of the suit, or at any time before its final termination, he, his wife, or any party or parties related to him in the degree hereinbefore specified, is a stockholder, or officer, in any stock company or corporation which is a necessary party to the proceedings, or if he is a material witness for either party, he shall not take cognizance thereof unless all parties to the suit consent thereto in writing: Provided, that no judgment or decree rendered or pronounced by any such judge shall be invalidated by reason of such relationship unless the same appear of record in such suite or proceeding: Provided further, that nothing herein contained shall disqualify a judge who comes within the provisions of this section to enter a formal order designed merely to advance the cause towards a final hearing and not requiring judicial action involving the merits of the case.

¹⁷ It appears that only California specifically lists former spouse in a disqualification statute. *See Cal. Civ. Proc. Code §170.1(a)(5)*.

Where a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself.

When discussing the requirements and application of the Judicial Canon this Court explained:

[t]he question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly. The objective standard appears to require disqualification not only when there is in fact impropriety. Indeed it has been stated that avoiding the latter is 'as important to developing public confidence in the judiciary as avoiding impropriety itself.'

State ex. Rel. Brown v. Dietrick, 191 W.Va. 169, 174 n. 9, 444 S.e.2d 47, 52 n. 9 (1994).

(Citations omitted)

The West Virginia Judicial investigation commission regularly applies the above mentioned opinions to ethical issues that surface throughout the state and issues opinions.^{18 19} A

few examples include:

- Judge could not hear cases handled by his/ her daughter's fiancé. 1-20-95
- Judge could not preside over a case in which one of the parties had a consultation with the judge while he/she was in private practice but failed to retain him/ her.

¹⁸ Counsel called both the West Virginia Bar Association and the West Virginia Judicial Ethics commission to inquire whether any written ethic opinions have been issued regarding this particular situation and was advised there had been no formal opinions issued.

¹⁹ Counsel also surveyed ethics opinions from other states and found numerous situations in which judges were required to recuse themselves in situations that were far less involved than that of former spouse including: social friend was a lawyer, Florida 2004-01 January 16, 2004; ex-fiancé as a CPA forensic expert, Florida 2008-03 February 13, 2008; Fiance' as district attorney- must recuse in cases that involve fiance' additionally should be mindful of obligations should fiance' take an administrative or supervisory position as recusal obligations would change, Massachusetts 2002-17; Judge dating public defender should recuse from cases involving that particular attorney. **Noted that a social relationship alone can require recusal even when no romantic involvement, Nebraska 03-01; Incumbent judges are required to recuse themselves from cases filed by their announced opponents in a judicial election, Arizona 04-02; Judge cannot hear a case involving a business co-owned by a friend of the judge and the chairman of the judge's campaign, Arizona 05-01; Judge who has hired a lawyer to represent him in a civil action must recuse himself in all cases involving that firm even though he is the only sitting probate and guardianship judge, Florida 2005-15 October 19, 2005; Judge required to recuse himself from all matters handled by his former campaign manager for a reasonable period of time., Wisconsin 03-1 March 22, 2004; Judge has a duty to recuse when a former partner is before the court for a period of three years and has an indefinite duty to disclose. Illinois 93-10; Judge is required to recuse in all cases involving a firm that his/her spouse practices where there is only one other lawyer. Kansas JE 167 March 2009.; appearance of impropriety exists where a judge of a drug court sentences participants to a day report program that is supervised by someone the judge resides with and is in a committed relationship with. New York 04-101.

The judge did not recall the case or any of the details but was required to recuse himself/ herself. 3-6-09

- Judge whose homeowners association was filing a suit against a neighbor was not allowed to entertain any case by the lawyer who was representing the association during the pendency of the case. The judge was then required to recuse himself/herself for an additional six months after the case was resolved. Then for six months after the recusal period the judge was required to disclose on the record that the lawyer represented his homeowners association and allow the parties to lodge any objections that they may have to his /her continued participation. 6-5-03
- A magistrate could not preside over any case in which the husband of his/her assistant, a police officer, was involved. 8-27-07
- Judge who has a personal relationship with an attorney and vacationed with that attorney is required to disclose this relationship anytime that attorney appears before the court. 6-12-08

Counsel was unable to find any case law exactly on point dealing with former spouses practicing as judge and prosecutor. However, as the United States Supreme Court stated in *Massey* most of these issues are taken care of by the proper use of state recusal statutes and ethical canons and codes. A specific example of the use of the recusal statute, in practice here in West Virginia today, is by members of this Honorable Court. Individual justices regularly and routinely recuse themselves when a member of their former firm, a former business partner, appears before this court. This is an act designed to protect the integrity of our judicial system and an act that is in compliance with the basic principles of due process.

A former business partner is a much further removed relationship that has no intimacy and does not involve the deep emotional connection of a former spouse. It makes no sense to require recusal of a justice, in our highest court, when a former business partner appears before the court, finding that relationship creates an appearance of impropriety that cannot be ignored, only to hold that the appearance of a former spouse, of twelve years, before a circuit court judge does not require recusal because there is no appearance of impropriety.

Additionally, during this term of court this Court reversed a circuit court decision based on the appearance of impropriety that was present. *Rissler v. The Jefferson City Bd. Of Zoning Appeals*, Based on the interests of three separate board members, this Court held that the parties did not receive a fair hearing in a fair tribunal which was a denial of due process. The interests involved in *Rissler* pale in comparison to that of a former intimate partner of twelve years. Counsel acknowledges that the interests in *Rissler* fall within the listed disqualifications in the canon. However, it goes without saying that if monetary interests, attorney-client relationship, and former business partner lead to an appearance of impropriety, a former spouse would also require recusal under the general disqualification section. If not an automatic recusal, the judge should be required at the very least to disclose this past relationship between him and Ms. Keller on the record and allow the parties to lodge objections they may have on the record.^{20 21}

Counsel found the exact situation that was present in Mr. Berry's case in Indiana. The Indiana Supreme Court remedied the situation by issuing an order amending the local rules so that a special judge would be appointed whenever a case involving the former spouse (lawyer) was assigned to the judge's docket.²² *See App. B* The court stated that the amendment was necessary due to the large amount of recusals that will be required by the filing of an appearance by the former spouse of the regular judge of the lower court.

²⁰ The previous marriage between the Judge and the Prosecutor was not disclosed on the record in Mr. Berry's case. Mr. Berry did not find out about this relationship until after he was convicted and sentenced. He was informed of their marriage by another inmate at the jail. Compliance with the disclosure requirement of the canon regarding the previous marriage between the judge and Ms. Keller would have prevented the situation that occurred in Mr. Berry's case.

²¹ Our judicial commission required recusal for six months and disclosure for an additional six months based on a judge's homeowners association hiring a lawyer to bring suit against a homeowner that was in violation of the homeowners regulations. 6-5-03

²² This amendment of the local rules by the Indiana Supreme Court and the California Recusal Statute that counsel referenced earlier in this brief demonstrate both legislative and judicial action in two separate states to remedy the very situation that is present and on-going in Raleigh County. This is persuasive authority that the status of former spouse does create the appearance of impropriety. Therefore, considering the integrity of our judicial system is what is at stake in this situation this issue must be carefully and thoroughly considered.

According to this Court's precedent, Ms. Keller as the prosecutor also had a duty to request the judge's recusal or allow another prosecutor within her office to try the case. "The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, [s]he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality..." *Syl. Pt. 3, in part, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977)*

It is the prosecutor's responsibility to protect the integrity of their office. This is crucial to keeping the public's confidence in our system. This Court, quoting from the ABA Standards of Criminal Justice, stated the prosecutor is under a duty "to avoid the appearance or reality of a conflict of interest with respect to official duties." *State v. Knight 168 W.Va. 615,625, 285 S.E.2d 401, 407 (1981)* "[F]ailure to do so will constitute unprofessional conduct." *Id.* It would only seem fair to assume that Ms. Keller, being the elected prosecutor, would be under a greater obligation to ensure the appearance of fairness and impartiality. Additionally, the fact that Ms. Keller did not request the judge's recusal speaks volumes, as an experienced prosecutor if she for a second thought that any residual feelings were going to impact her case in way that would harm her case, she would have immediately moved for his recusal. She did not.

The failure of trial counsel to request the recusal of the judge, while not defensible by current counsel, did not constitute waiver of this issue. Prejudice is presumed when the error is "a structural defect affecting the framework within which the trial proceeds," resulting in a criminal trial that "cannot reliably serve its function as a vehicle for the determination of guilt or innocence." *Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed. 302, 331 (1991)* "Errors of this type are so intrinsically harmful as to require automatic

reversal...without regard to their effect on the outcome.” *Neder v. United States*, 527 U.S. 1,8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35, 46, (1999)

The denial of a fair and impartial tribunal, a right guaranteed to all criminal defendants, infected Mr. Berry’s entire trial and rendered it fundamentally unfair. The trial court made several rulings, all in favor of the prosecution, which were legally incorrect and assigned as errors in this brief. These rulings denied Mr. Berry basic constitutional rights, severely impacted his ability to defend against the State’s allegations, and clearly call into question the Judge’s impartiality. Every ruling made by the judge in Mr. Berry’s case is subject to question due to the relationship between him and Ms. Keller. Therefore, Mr. Berry’s conviction is not reliable and must be reversed.

II. The trial court denied Mr. Berry due process of law when it refused to allow Mr. Berry to present a full and complete defense. The court further erred when it refused to allow Mr. Berry to present mitigation evidence that was crucial to the jury’s determination of mercy.

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed. 2d 297, 308 (1973) Justice Black identified “[a] persons right to reasonable notice of the charges against him and an opportunity to be heard in his defense – a right to his day in court--...” as the minimum essentials to the right to a fair trial in *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L. Ed 2d 682, 694 (1948) This Court has also stated that “[w]hile ordinary rulings on the admissibility of evidence are largely within a trial court’s sound discretion, a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the

Constitution of the United States and article III § 14 of the West Virginia Constitution.”

(emphasis added) *Syl. Pt. 3, State v. Jenkins, 195 W.Va. 620, 466 S.e.2d 471 (1995)*

a. **Mr. Berry was prevented from discussing the full scope of the relationship that he and Ms. Mills had carried on during his trial.**

During pretrial motions, the prosecution made a motion to preclude evidence of the six year relationship that existed between Mr. Berry and Ms. Mills. Specifically, the prosecutor requested that the court preclude evidence consisting of correspondence in various forms, “love letters and other communications from the deceased, Martha Mills, dating back six years before the murder.” *Tr. 299* The prosecutor argued that six years made them irrelevant to the relationship of the parties at the time of the murder. *Id.* She further argued even if relevant they would constitute an enormous waste of time and confuse the issues. *Id.* The prosecutor even objected to emails the defense had which dated back nine months before the murders.

Counsel argued that the letters, cards, and emails were relevant to show that the relationship was not over. This was crucial evidence for the defense. It allowed them to rebut the State’s argument that the relationship was over. The correspondence demonstrated the relationship commonly had high points and low points over six years. Defense counsel also argued that the evidence was not being used to demonstrate character, it was demonstrating conduct. Counsel explained that the emails were important to demonstrate what’s been going on and they provide evidence to refute the state’s assertion that the relationship was over. *Tr. 304* Counsel argued to the court that letters, emails and cards were key to the defense case. *Tr. 305* What was going on in the relationship affected his state of mind as these events were unfolding.

Counsel argued that the older stuff was necessary to demonstrate that there had been tough times in the relationship before just like what they were going through at the time of the murders. *Tr. 308* They went through tough times before and worked it out. *Tr. 309* Counsel

explained that what was going on in the last two to three months is the most crucial but, it needs to be placed into the context of what's gone on over the last six years with these two. *Tr. 311*

The trial court ruled that Mr. Berry would not be able to discuss any part of his relationship with Ms. Mills that occurred more than 60 days prior to the murders. The court then removed the 60 day time frame but stated "I will take it up bit by bit ...but...I'm not going to go back very far..." *Tr. 318*

This evidence was crucial to Mr. Berry's case. The State was claiming that the relationship was over and Mr. Berry would not accept it. Without the previous letters to demonstrate the full context of the relationship, essential to establishing a pattern, the State was able to present Mr. Berry as a crazed stalker not willing to take no for an answer, when in fact the situation was much different. Mr. Berry was use to their relationship having ups and downs. Mixed signals were nothing new. For example, Ms. Mills's last email to Mr. Berry stated that she did not love him as she used to and that she needed space. Then two days later she calls Mr. Berry detailing her whereabouts and discussing a plan to meet him for lunch, essentially operating as if the email was never sent. This was a common occurrence during their six year relationship. The defense had the evidence to prove it and could have proved that by introducing prior love letters, cards and emails. The content of the correspondence was crucial to Mr. Berry's ability to present a defense at trial. The trial court's ruling that evidence of their prior relationship was not relevant to the murders severely impacted Mr. Berry's defense and in doing so denied him due process of law.

b. The trial court's refusal to allow Mr. Berry to present evidence relevant to the issue of mercy during his unitary trial also denied Mr. Berry due process.

Counsel filed a motion for bifurcation prior to trial, however, during pretrial motions counsel withdrew this motion. *Tr. 219* Counsel planned to present evidence of mitigation by showing

that Mr. Berry had been treated in the past for anxiety disorder, that his school records contained evidence that he did not do well in a group setting which ultimately led to him being home schooled, that he was immature for his age, and that his father was diagnosed with post-traumatic stress disorder. *Tr.* 322-26 The State challenged counsel's presentation of mitigation in two ways: (1) The prosecutor argued that because the defense withdrew their motion for bifurcation that evidence of mitigation was not relevant and therefore not admissible; (2) The prosecutor also challenged counsel's evidence of mitigation by arguing that the defense was essentially trying to back-door a diminished capacity defense without complying with notice to the State and the requirement of having the information be presented by an expert.

In response to the State's argument that they were trying to argue diminished capacity, counsel argued that they were not attempting to negate intent with the evidence, they were just trying to present Mr. Berry's state of mind at the time of the incident. *Tr.* 322

The State also argued that this evidence was not relevant to guilt. Counsel argued that the evidence that they were trying to present "goes to the issue of mercy that the jury has to consider in this case..." *Tr.* 327 The court held that bifurcation could have solved the problem. *Tr.* 328 In response to the court's comment, counsel argued that the jury would be making a mercy decision at the same time that they are deciding guilt. *Tr.* 329 Counsel further argued if the only basis for exclusion is to relevance to guilt...if that is the only basis...we are also trying the issue of mercy and that makes it relevant. *Tr.* 333 Ultimately, the court ruled that the evidence would not come in. *Tr.* 334

Based on these unfavorable rulings, counsel renewed their motion for bifurcation. They argued that the State would not be prejudiced. Counsel further argued that " the Court is very much limiting the admissibility of the elements we feel are very important for the jury to be able

to determine mercy and holding as to evidence that is relevant to his guilt. *That would mean that we are being closed down altogether on issues that would be very, very important to mercy.*” *Tr.* 874 (emphasis added) Counsel argued that the pretrial motion for bifurcation placed the State on notice and that the State had not presented anything that would hinder them from proceeding in a bifurcated trial. *Id.* The prosecutor objected claiming that defense counsel had made a tactical decision to withdraw the motion and they were essentially stuck with that decision. The Court refused the motion to bifurcate. *Tr.* 890

This issue was revisited again prior to the presentation of Mr. Berry’s case. The prosecutor made a motion in limine to prevent “inadmissible evidence from being suggested to the jury by any means....immaturity is not a pertinent character trait. His social history, his psychological history, the relationship between him and Martha Mills going beyond one month before the killing, which was the time frame settled upon, and any general character remarks, such as that he was such a good boy or these kind of things, those are not pertinent character traits in a murder trial and the Defendant, again, had chose to withdraw their bifurcation motion.” *Tr.* 1347-48

Defense counsel responded with the following argument: “...the issue of mercy is of such importance that the law allows its bifurcation as separate argument, I mean the fact that it is allowable altogether means that mercy is a very, very important issue in a murder case where the Defendant may be subject to life without ever having a chance at parole. It’s a key issue. Its as key as the guilt issue. ...when the Court has ruled that we can’t separate after a motion on it, then it’s still an issue in the case and we should be able to put evidence of that issue in front of...the jury.” *Tr.* 1349

The court ruled that its earlier rulings stand and the issues---“evidence of the Defendant’s psychological status or history, and I think that might include sub-issues of the level of his social and emotional maturity, the evidence of his degree of development of his ability to interact socially and the evidence of the –the long term- evidence of the nature of the relationship all has been excluded by the court previously and it remains excluded.” *Tr. 1354* This final ruling by the trial court was legally incorrect and it stripped Mr. Berry of the right to present a meaningful defense and to address the issue of mercy in any meaningful manner.

This Court has addressed the presentation of mitigation during a first degree murder trial in several contexts. In *State ex. Rel. Leach*, 280 S.E.2d 62, 65 (1980), this Court in discussing the differences between an unitary and bifurcated trial stated:

We cannot envision a murder defense, however, that would not require introduction of all possible evidence toward reduction of a jury’s view of the severity of defendant’s acts. Even when alibi is a defense, good character evidence would be appropriate. *And so we cannot conceive of any fact that defendant could not introduce to convince a jury that he deserves mercy at a separate sentencing stage, that should not be introduced by him at the main trial...*”

Here this Court stated that the issue was so important that even when it would cause the defendant to present inconsistent theories, alibi and the request for mercy, the defendant should present evidence relevant to the mercy decision.

This Court further stated that “factors that a jury might consider in granting mercy – defendant’s age, mental state, defenses, family responsibilities, the nature of the offense and circumstances surrounding the crime—will be made available to a jury in the guilt-or-innocence trial.” *Id.* The Leach Court stated exactly what defense counsel argued to the court: that a unitary trial provides the defendant the same opportunity to present evidence relevant to the issue of mercy. The only difference between the two is when the evidence is presented: before or after the guilt determination. Mr. Berry was prepared to present evidence that went to age, mental

state, i.e., his immaturity, and evidence to explain the circumstances surrounding the crime but he was denied that opportunity. The State's argument that because counsel withdrew the bifurcation motion Mr. Berry was prohibited from presenting evidence relevant to mercy, because it was no longer relevant, is simply wrong.

This Court has also addressed the issue of mitigation or the lack thereof, during a first degree murder case, in the context of ineffective assistance of counsel. *Schofield v. West Virginia Department of Corrections*, 185 W.Va. 199, 406 S.E.2d 425 (1991) This Court reversed Ms. Schofield's conviction holding that the "mercy issue never received the attention at trial it constitutionally should have." *Id. at 202-03, 406 S.E.2d at 428-29*. "With respect solely to the question of effectiveness of representation addressing the issue of the potential recommendation of mercy: the lack of witnesses, the lack of argument,...taken together, clearly and convincingly combined to create a condition that caused the defendant not to receive effective assistance relative to the question of mercy in this case." *Id.* "This Court believes, however, that the constitutional deficiencies contributed to the jury's decision not to recommend mercy." *Id. at 203, 429*

Mr. Berry's counsel had evidence relevant to the issue of mercy and they argued relentlessly in an attempt to present it. The trial court's rulings prevented counsel from presenting any evidence that the jury could consider in making their decision regarding mercy. Therefore, the only evidence the jury had to consider when making the mercy decision was aggravating evidence that the State presented.

The overall impact of the trial court's rulings prohibited Mr. Berry from presenting a full and complete defense at trial and, addressing the issue of mercy. The application of the trial court's evidentiary rulings allowed counsel to discuss the month of November 2006 and the

commission of the crimes, and nothing more when presenting Mr. Berry's case. This clearly denied Mr. Berry his constitutional right to due process as guaranteed by both the United States and West Virginia Constitutions and requires reversal.

III. There was absolutely no evidence of murder by lying in wait adduced at trial. Therefore, Mr. Berry's convictions must be reversed as legally insufficient.

The State failed to present any evidence at trial that Mr. Berry committed murder by lying in wait. "In order to sustain a conviction for first degree murder for first degree murder by lying in wait pursuant to W.Va. Code, 61-2-1[1987], the prosecution must prove that the accused was waiting and watching with concealment or secrecy for the purpose of or with the intent to kill or inflict bodily harm upon a person." *Syl. Pt. 2 in part, State v. Harper, 179 W.Va. 24, 365 S.E. 2d 69 (1987)* In *State . Walker, 181 W.Va. 162, 166, 381 S.E.2d 277, 281 (1989)*, this Court stated, "Due to this definition of lying in wait which in essence, requires the state to prove rather attenuated premeditation we noted '*murder perpetrated by lying in wait is a difficult crime to prove.*'" (citation omitted) (emphasis added)

The State failed to present any evidence to establish waiting and watching with secrecy or concealment during Mr. Berry's trial. There was no testimony that Mr. Berry hid in concealment. There is no testimony that Mr. Berry knew Ms. Mills was with Mr. Worthington and intentionally showed up while they were gone and waited for his chance to attack them. In fact, all of the evidence pointed to the exact opposite.

Mr. Berry had just spoken to his girlfriend, Ms. Mills, on the phone. *Tr. 1470* She told him she was tired and she was going to bed. *Tr. 1463-64* He decided to go to her apartment anyway. *Tr. 1464-65* He had every reason to think that she would be at her apartment and would let him in. Mr. Berry had no way of knowing, nor any reason to suspect that Ms. Mill's

would be with Mr. Worthington when he arrived. Therefore, there was no opportunity to plan to lie in wait or secretly hide in order to carry out an ambush.

All the testimony at trial, including testimony from the state's only eyewitness, supports the contention that Mr. Berry was standing in the open, on a sidewalk, in front of Ms. Mill's apartment. *Tr. 1475-76* Ms. Canady, who lived in the apartment across the street, testified that she saw Mr. Berry standing on the sidewalk in front of Ms. Mill's apartment, from inside her apartment. *Tr. 791* His bright yellow SUV was parked directly in front of Ms. Mill's apartment. A vehicle described by Angela Canady, the State's eyewitness as, "a big yellow vehicle" when asked if it was easy to see.²³ *Tr. 808* A vehicle Ms. Mills knew Mr. Berry drove. *Tr. 1377* In fact, she had ridden in it with him before. *Id.* Ms. Mills pulled in right beside Mr. Berry's vehicle and turned off her truck. *Tr. 1476* She then got out of the vehicle and Mr. Berry asked her who was in the truck with her. To which she responded "a friend." *Id.* It was after this conversation on the sidewalk, in front of her apartment, in plain view that Mr. Berry pulled a gun and began firing at Mr. Worthington.

The state did not present a shred of testimony to support a conviction of murder by lying in wait. In *State v. Guthrie*, 194 W.Va. 657,667, 461 S.E.2d 163, 173, (1995), this Court adopted the United States Supreme Court's standard for reviewing a sufficiency of the evidence claim it announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "[A]n appellate court, while reviewing the record in the light most favorable to the prosecution must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The prosecutor played on words such as "surprise" and "ambush" to attempt to prove a theory of first degree murder that simply did not exist. It was not necessary

²³ Canady also testified that she had seen the vehicle there before. *Tr. 808*

for the State to pursue this alternative theory of murder on the facts of Mr. Berry's case. The State failed to produce sufficient evidence of murder by lying in wait to support Mr. Berry's convictions.

Defense Counsel repeatedly challenged the presentment of the alternative theory of lying in wait. Counsel filed a motion to dismiss and argued pretrial that there was no evidence to support this alternative theory. *Tr.* 253 That motion was denied. *Tr.* 263 At the close of the State's case, counsel made a motion for a directed verdict as to both counts of lying in wait based on lack of evidence. *Tr.* 1345-47 That motion was also denied. *Tr.* 1347 Finally, at the end of trial counsel again renewed his motion and it was denied. 579-80

The United States Supreme Court has noted that when a jury returns a general verdict of guilty but was instructed on alternative theories of guilt, that verdict *must be reversed* if one of the alternative theories was legally invalid. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064 (1957); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931) Because we do not know what theory of murder the jurors convicted on, Mr. Berry's convictions must be reversed.

IV. The trial court abused its discretion when it allowed the State to present an unbelievable and overwhelming amount of photos, both from the crime scene and the medical examiners office, that were not necessary to prove any fact in dispute or to refute any argument made by the defense. The photos were gruesome, and unnecessary. The court admitted the photos over strenuous objections to particular photos and an overall cumulative effect objection. The cumulative effect of the photos was so highly prejudicial to Mr. Berry's case that their admission fatally infected Mr. Berry's constitutional right to a fair trial and requires reversal.

In *State v. Derr*, 192 W.Va. 165, 451 S.E. 2d 731 (1994), this Honorable Court established that the admission of gruesome photos must be evaluated in the light of whether the photo is logically and legally relevant to the fact in issue in the case, and whether the probative value of the photo is outweighed by unfair prejudice, confusion or undue delay. In *Derr* this

court warned that the change in the method of evaluating photos was not a signal to prosecutors and courts that there is a “ ‘lesser’ admissibility standard” In fact, Justice Cleckley stated:

...factors such as whether the photograph was black and white, whether there was blood and gore, or whether there was a mangled and distorted face or body are still to be considered under Rule 403. When gruesome photographs are offered with only slight probative value and because of their prejudicial nature are likely to arouse passion and anger, they should be excluded by the trial judge. ***Otherwise, on appeal, this Court will not hesitate to reverse.*** (emphasis added).

In support of using an excessive amount of duplicative and gruesome photos the prosecutor in Mr. Berry’s case asserted the following arguments : “There is no more gruesomeness rule after *State v. Derr, 451 S.E. 2d 731.*” *Tr. 239, 942* She further argued that the State was not required to substitute cleaned up copies.” *Tr. 240* “The State is not required to have deceased people all washed up before the jury sees a photograph.” *Tr. 241* In all, the State was allowed to present 76 photos during Rodney Berry’s trial. Fifty- seven of those photos were from the crime scene and the M.E.’s office. All the photos were presented in vivid color on a 10x10 projection screen with no effort to minimize unnecessary gore. In fact, one could argue that in several situations the photos were presented to accentuate the gore.

Over defense counsels repeated objections²⁴ to necessity, cumulateness and unnecessary gore, the prosecutor was allowed to publish at least two photos of each wound Mr. Worthington sustained to the jury.²⁵ Counsel argued the photos of the wounds prior to the body being cleaned, by the M.E., added nothing more than unnecessary gore. Counsel suggested that the State should be limited to using the photo that displayed the clean version of each wound.

²⁴ Defense counsel lodged numerous objections to the photos used in Mr. Berry’s case. They argued a motion to suppress the photos, during pretrial motions. They objected to the photos again at trial prior to the photos being published. Each time counsel would object to particular photos and then make a cumulative effect argument. Each time the trial court overruled the objections and allowed the prosecutor to publish the pictures.

²⁵ It is important for this Court to note that each wound to Mr. Worthington was shown a minimum of two times by the prosecutor.

Ultimately, the court ruled that based on what he had seen in the photos the probative value of the photos was not outweighed by the prejudicial effect or danger thereof. *Tr.* 250-51 The court further ruled that the cumulativeness will be addressed during trial. *Id.*

Counsel lodged an objection to the photos of Mr. Worthington taken in the ambulance. *Tr.* 247, 990 Defense counsel argued that the photos were being offered for sympathetic reasons and were not probative of anything that the State could not prove without them. *Id.* Again the court allowed the prosecutor to present these photos. There were approximately six photos of Mr. Worthington in the ambulance. The photos in the ambulance were highly prejudicial. Five of the photos showed the exact same wounds. The only difference was that they were taken at different angles to demonstrate differing levels of gore.

When the court revisited the cumulative objection to the prosecution's use of both the unclean and clean photo of each wound taken at the M.E.'s office of Mr. Worthington, the court ruled that the photos were not duplicative to an objectionable degree of the other photos or testimony. *Tr.* 1095 The prosecutor presented both: a photo of the wound as the M.E. received Mr. Worthington's body; and a second photo of the same wound after the M.E. had cleaned his body.

The prosecutor went overboard with the crime scene photos just as she did with the photos of Mr. Worthington. The prosecutor introduced multiple photos of the same evidence. For example, there were several pictures of the bullet holes in the windshield of the truck. *Tr.* 952-53 There was one close-up photo that only pictured the windshield and was therefore, the only photo that would be necessary to demonstrate this evidence. However, the prosecutor introduced other photos of the windshield that also included Ms. Mills' body covered by a

sheet.²⁶ In all, the prosecutor introduced at least ten photos that included Ms. Mills' sheet-covered body from the crime scene.

The prosecutor argued that photos of the crime scene were necessary to demonstrate the location of the bullet casings on the scene. She argued that a photo showing a bullet casing beside Ms. Mills' sheet-covered body was crucial evidence²⁷ despite the fact that the officer who took the photos had just testified both the body and the casings had been moved before the picture was taken by residents who were attempting to help Ms. Mills and Mr. Worthington. *Tr. 935-36, 942*

The most extreme example of the prosecutor's conduct concerning the photos came during the testimony of the M. E. The prosecutor published State's exhibit 13 and asked what the photo contained. The M.E. could not identify it. When he offered to refer to his report so that he could in fact identify what the photo showed, the prosecutor did not require him to do so. She simply moved on to the next photo. *Tr. 1101* This clearly demonstrates the photos were not being used to demonstrate key facts in Mr. Berry's case. Instead the photos were being used as a parade of horrors, by the prosecutor, in an attempt to inflame the jury.

In *State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001)*, the use of crime scene photos was upheld. However, the Court pointed out that the prosecution had "carefully selected photographs which were not gruesome or cropped out the head shots in an effort to not unduly prejudice the jury" *Id. at 657, 558 S.E.2d at 656* In Mr. Berry's case we have the exact opposite. The prosecutor submitted an excessive amount of photos. The photos were not carefully selected or cropped. The State was allowed to time and time again present numerous

²⁶ Counsel objected specifically to these photos arguing to the court that the only thing that was different was the angle of the photo. The court overruled these objections. *Tr. 953*

²⁷ *Tr. 939*

photos of the same evidence over counsel's objections. *See also State v. Copen*, 211 W.Va. 501, 566 S.E.2d 638 (2002)

Most recently in *State v. Mongold*, 220 W.Va. 259, 647 S.E.2d 539 (2007), the Court affirmed the use of autopsy photos of a young child. *Mongold* differs from Mr. Berry's case in several distinct ways: the photos were necessary because the cause of death was in dispute; the photos were purposely cropped to minimize the gore; and the photos were presented in black and white format. Furthermore, the State used a minimal number of photos in *Mongold* compared to the unusually large number used in Mr. Berry's case.

The dissent in *Copen* is directly on point and advances the exact argument that defense counsel unsuccessfully made on behalf of Mr. Berry. In *Copen*, Justice Starcher explained that the photos were unnecessary to the presentation of the State's case. He also stated that the photos had no independent evidentiary value, "because there was no dispute whatsoever as to the location, number and nature of the wounds on the victim's body." *Copen*, 211 W.Va. at 508, 566 S.E.2d at 645 (Starcher, J. with Albright, C. J., dissenting). Justice Starcher went on to explain that "[b]ecause the gruesome photos could have tilted the jury on the mercy/no mercy issue, their admission was error and not harmless beyond a reasonable doubt." *Id.* Justice Starcher described the use of the photos in *Copen* as "prosecutorial overkill" that leads to tainted verdicts. *See also State v. Waldron*, 218 W.Va. 450,461, 624 S.E.2d 887,898(2005) (Albright, C.J., joined by Starcher, J, dissenting)

In Mr. Berry's case there was no question that two murders occurred and there was no dispute as to who shot them, where they were shot, how many times they were shot, or where they were found. Mr. Berry did not advance any theory of defense that required the State's use of the photos. Further, the State had other sources of evidence that could have covered

everything pictured in the photos. The prosecutor had a crime scene sketch created by one of the officers. The sketch pictured the bodies and all of the casings found. She had the M.E.'s report and testimony. She introduced all of the bullet fragments and casings recovered and provided testimony to explain where each one was recovered.

A parade of horrors is an accurate description of the State's use of photos in Mr. Berry's case. The prosecutor used these photos in Mr. Berry's case to inflame the jurors and tip the scale in her favor. The sheer number of photos alone is enough to require reversal. The probative value of the photos was clearly outweighed by the prejudicial effect. Counsel could not envision a more appropriate set of facts for this Court to use in order to demonstrate its willingness to reverse based on the misuse of minimally relevant and highly prejudicial photos.

V. Mr. Berry's conviction should be reversed for Prosecutorial Misconduct

There were numerous instances of prosecutorial misconduct in Mr. Berry's trial that should be addressed by this Honorable Court. A prosecutor holds a special position in our judicial system. It is a very powerful and important position that should not be misused.

The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, [s]he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as other participants in the trial. It is a prosecutor's duty to set a tone of fairness and impartiality, and while [s]he may and should vigorously pursue the State's case, in so doing [s]he must not abandon the quasi-judicial role with which [s]he is cloaked under the law.

Syl. Pt. 3, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The prosecutor engaged in the following misconduct as detailed in the previous assignments of error within this petition:

- She advanced outrageous and legally incorrect arguments to deny Mr. Berry his fundamental right to present a defense and to present evidence of mitigation,
- She tried Mr. Berry in front of the Honorable Judge Burnside, her former spouse of twelve years, and

- She denied Mr. Berry due process by using an unnecessary number of gruesome photographs in an obvious attempt to tip the scales in the State's favor, especially as to the question of mercy.

There are two additional instances of misconduct that were not alleged as error within the petition this Court should also consider.

a. The prosecutor's argument that Mr. Berry was not under arrest when he gave his voluntary statement at the Raleigh County Sheriff's Department.

On December 2, 2006, Mr. Berry drove from the scene of the incident to his house. *Tr.*

1477 He woke his parents and told them what he had done. *Tr. 1382* Immediately after informing his parents, Mr. Berry called 911, identified himself, confessed to shooting two people. *Tr. 1383* He stated that he thought they both were dead. This was a situation that 911, in both counties, were aware of and responding to. During that call, he verified he was driving the vehicle described by eyewitnesses and for which a BOLO had been issued. Detective Chapman, a Fayette County Sheriff, was dispatched to Mr. Berry's home.²⁸ *Tr. 1198*

Mr. Berry was informed that he was *not* under arrest and was transported by Deputy Kade to the Raleigh County Sheriff's Office.²⁹ *Tr. 1208, 1247* Sergeant Bare cleared the scene, returned to the sheriff's department, and advised Mr. Berry of his Miranda Rights and took his statement. *Tr. 79-83* At the motion to suppress Mr. Berry's statement, the prosecutor argued

²⁸ Upon his arrival, he secured Mr. Berry in handcuffs and placed him in the cruiser. When Detective Chapman arrived on the scene he knew Mr. Berry had confessed, he was aware of the BOLO, and he observed that vehicle in the driveway with blood on the drivers side and front grill area. He knew that two people had been shot where Mr. Berry confessed to shooting two people. In fact, the reports from EOC was that it was a double homicide. *Tr. 38-40, 48* And, he recovered two 9mm handguns from Mr. Berry's room, one of which Mr. Berry indicated was the murder weapon.

²⁹ Sergeant Bare was notified by EMS of Mr. Berry's confession to 911 while he was on the scene in Raleigh County. Sergeant Bare sent Deputy Kade, who was also on the scene, to "transport" Mr. Berry to the Sheriff's Department so he could give a statement. This decision not to arrest Mr. Berry was a combined decision made by the prosecutor and Sergeant Bare. Sergeant Bare stated that he conferred with the prosecutor 3 to 4 times while on the scene that night. Despite all of the evidence that was known to them at the time the scene was cleared, they concluded there was not enough evidence to arrest Mr. Berry. *Tr. 84*

that Detective Chapman had no reason to arrest Mr. Berry. *Tr. 105* She further allowed both Sergeant Bare and Deputy Kade to testify that if Mr. Berry got up to leave before he had given his statement they would have let him walk out. *Tr. 66, 68, 93* Ms. Keller stated that Detective Bare had an obligation to make sure that Mr. Berry was not some crazy person claiming to be the shooter. *Tr. 1279* Counsel would argue that this “fear” was relieved long before Mr. Berry’s statement was taken.

Mr. Berry should have been arrested at the moment Detective Chapman, the Fayette County Sheriff, arrived at Mr. Berry’s home to find a SUV matching eyewitness descriptions with a significant amount of blood on it. *Tr. 1217-18* Even if that were not enough evidence, at the time two 9 millimeter pistols were recovered from Mr. Berry’s room³⁰, probable cause for his arrest existed. *Tr. 1221-24* Counsel understands that allowing Mr. Berry’s statement into evidence was harmless due to the fact that Mr. Berry had already confessed to the 911 operator. Further, the fact that Mr. Berry was given his Miranda Warnings before he gave his statement at the Raleigh County Sheriff’s Department also weakens the violation. However, the prosecutor’s actions are insulting. Not only did the prosecutor abuse her power, she also used the power and authority of two different Sheriff Departments to further this charade.³¹

b. The prosecutor misrepresented the evidence before the grand jury in order to secure an indictment for lying in wait.

Another instance in which the prosecutor failed to abide by the requirements to be fair and impartial was during the grand jury. While presenting Mr. Berry’s case to the grand jury, the prosecutor misrepresented the evidence and fails to give the jurors sufficient facts regarding the

³⁰ 9mm was the known murder weapon at the time Detective Chapman was at Mr. Berry’s residence.

³¹ Counsel would point out that the statement taken at the Raleigh County Sheriff’s Department, while it added significant detail to the events, did not change in anyway from Mr. Berry’s underlying confession to 911.

situation. In order to secure an indictment for lying in wait, the prosecutor questioned Detective Bare in the following manner:

Keller: As a law enforcement officer, not as an attorney or a judge, is..in order as a law enforcement officer to find lying in wait, do you essentially need to find that the killer waited secretly unknown to the victims ___spot and took the victims by surprise and used the element of surprise in the killing?

Bare: That's correct

Keller: Would ambush be a good word?

Bare: Certainly

Keller: Ok in your investigation of this case, did you find that Mr. Berry committed the murder of these two young people by both means?

Bare: Yes he did.

The prosecutor had Sergeant Bare to testify that in his professional opinion, Mr. Berry carried out the murders by lying in wait. It was not until after prosecutor Keller prompted him to make this statement that the jurors were given the details of how the events unfolded. She stated "took the victims by surprise" then described it as "an ambush", which is not an accurate description of the evidence.

The prosecutor also made it seem as though Mr. Berry armed himself for the specific purpose of carrying out these murders, when in fact she knew from his statement that he always carried a gun, when he was not at home, and that he almost always carried two guns:

Keller: What did Berry have to say about how he armed himself before he killed these two people?

Bare: Well he said he had his nine millimeter Taurus which is what he used to shoot both parties with. Plus he said he had a backup weapon which was another nine millimeter Taurus that he carried with him.

This was clearly a misrepresentation of the evidence before the grand jury. In his statement to Detective Bare, Mr. Berry made the following statements regarding his guns:

Bare: Do you make it a habit to carry a gun in a holster with you?

Berry: Yeah. If I'm going out this late by myself, yes I do.

Bare: And you said that you had a backup, why would you have a backup gun in your jacket?

Berry: I carry it concealed –I've got a concealed carry permit and I been carrying since '03, I always carry a backup.

Once again, counsel understands that this issue was technically cured at trial by offering testimony to refute these accusations. But, this is a situation that never should have happened in the first place. The prosecutor had a case that she could have presented without misrepresenting the evidence or attempting to secure an indictment for an alternative theory that was not supported by the evidence.

As stated earlier by counsel, Mr. Berry's trial was riddled with prosecutorial excess and overreaching and this is not an exhaustive list of the misconduct present in this case. The prosecutor's actions denied Mr. Berry the right to a fair trial.

Relief Requested

Mr. Berry respectfully requests that this Honorable Court reverse his case and remand it back to the Circuit Court of Raleigh County for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 10th day of June, 2010, I mailed a copy of the foregoing *Appellant's Brief* to Kristen Keller, Prosecuting Attorney for Raleigh County, 112 N. Heber Street, Beckley, West Virginia 25801.

A handwritten signature in black ink, appearing to read 'C. Walden', written in a cursive style.

Crystal L. Walden
Deputy Public Defender

EXHIBITS

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CLERK'S OFFICE