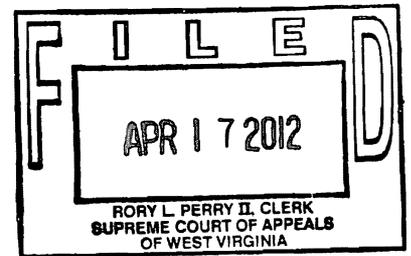


NO. 12-0024

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs.

Criminal Action No: **10-F-129-3**
(James A. Matish, Judge)

JEFFREY K. TAYLOR,

Defendant.

PETITION FOR APPEAL

From the Circuit Court of Harrison County, West Virginia

Counsel for Petitioner,
Jeffrey K. Taylor

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INDEX

	PAGE
AUTHORITIES CITED	3
PROCEEDINGS BELOW AND STATEMENT OF THE FACTS OF THE CASE	4
ASSIGNMENTS OF ERROR AND ARGUMENT	9
PRAYER FOR RELIEF	16
MEMORANDUM OF APPEARANCE	17
CERTIFICATE OF SERVICE	18

AUTHORITIES CITED

STATUTES:	PAGE
West Virginia Code §61-2-1	4, 5, 6, 7
West Virginia Code §61-3-11	5, 6
West Virginia Code §61-10-31	5, 6
West Virginia Code §61-11-6	7
West Virginia Code §62-2-2	8
West Virginia Code §61-3-15	8, 10, 11, 14, 16
West Virginia Code §61-12-1 et Seq.	8

PETITION

TO THE HONORABLE JAMES A. MATISH, JUDGE, HARRISON COUNTY
CIRCUIT COURT:

AN APPEAL FROM THE SENTENCING
OF JEFFREY K. TAYLOR IN THE CIRCUIT COURT
OF HARRISON COUNTY, WEST VIRGINIA

PROCEEDINGS BELOW AND STATEMENT OF FACTS OF THE CASE

On November 19, 2009, Jeffrey Taylor was arraigned before the Harrison County Magistrate on the charges of First Degree Murder. Mr. Taylor waived his right to a preliminary hearing on November 30, 2009 and the matter was bound over to the Harrison County, Circuit Court. The May 2010 term of the Harrison County Grand Jury returned a seven count Indictment, 10-F-129-3, against Mr. Taylor, Alexander Calvin Bosley, and Jeannie Lynn Bosley, A/K/A Jennie Lynne Watham, and Cindy Allman as follows:

INDICTMENT

COUNT ONE

West Virginia Code 61-2-1
Felony - Murder

THE GRAND JURY CHARGES:

That on or about the 25th day of October 2009, in Harrison County, West Virginia, ALEXANDER CALVIN BOSLEY committed the offense of Felony-Murder by unlawfully and feloniously slaying, killing, and murdering Terry K. Lewis, in the commission of, or attempt to commit, a burglary, that being a felony offense, against the peace and dignity of the State.

COUNT TWO

West Virginia Code 61-3-11
West Virginia Code 61-10-31
Conspiracy to Commit Burglary

THE GRAND JURY FURTHER CHARGES:

That on or about the 25th day of October, 2009, in Harrison County, West Virginia, ALEXANDER CALVIN BOSLEY, committed the offense of Conspiracy to Commit Burglary by unlawfully, intentionally and feloniously conspiracy or agreeing with other persons, namely Jeffrey K. Taylor and Cindy Allman, to commit the felony offense of Burglary by, in the nighttime, breaking or entering without breaking the dwelling house belonging to and occupied by Terry K. Lewis and Kim Lewis with the intent to commit a larceny therein, and in furtherance of said conspiracy, Jeffrey K. Taylor and Cindy V. Allman did, in the nighttime, break or enter without breaking the dwelling house belonging the dwelling house belonging to and occupied by Terry K. Lewis and Kim Lewis with the intent to commit a larceny therein, against the peace and dignity of the State.

COUNT THREE

West Virginia Code 61-2-1
Felony-Murder

THE GRAND JURY CHARGES:

That on or about the 25th day of October 2009, in Harrison County, West Virginia, JEFFREY K. TAYLOR, committed the offense of Felony-Murder by unlawfully and feloniously slaying, killing, and murdering Terry K. Lewis, in the commission of, or attempt to commit, a burglary, that being a felony offense, against the peace and dignity of the State.

COUNT FOUR

West Virginia Code 61-3-11
West Virginia Code 61-10-31
Conspiracy to Commit Burglary

THE GRAND JURY FURTHER CHARGES:

That on or about the 25th day of October, 2009, in Harrison County, West Virginia, JEFFREY K. TAYLOR, committed the offense of Conspiracy to Commit Burglary by unlawfully,

intentionally and feloniously conspiracy or agreeing with other persons, namely Alexander Calvin Bosley and Cindy V. Allman, to commit the felony offense of Burglary by, in the nighttime, breaking or entering without breaking the dwelling house belonging to and occupied by Terry K. Lewis and Kim Lewis with the intent to commit a larceny therein, and in furtherance of said conspiracy, Jeffrey K. Taylor and Cindy V. Allman did, in the nighttime, break or enter without breaking the dwelling house belonging the dwelling house belonging to and occupied by Terry K. Lewis and Kim Lewis with the intent to commit a larceny therein, against the peace and dignity of the State.

COUNT FIVE

West Virginia Code 61-2-1
Felony-Murder

THE GRAND JURY CHARGES:

That on or about the 25th day of October 2009, in Harrison County, West Virginia, CINDY V. ALLMAN, committed the offense of Felony-Murder by unlawfully and feloniously slaying, killing, and murdering Terry K. Lewis, in the commission of, or attempt to commit, a burglary, that being a felony offense, against the peace and dignity of the State.

COUNT SIX

West Virginia Code 61-3-11
West Virginia Code 61-10-31
Conspiracy to Commit Burglary

THE GRAND JURY FURTHER CHARGES:

That on or about the 25th day of October, 2009, in Harrison County, West Virginia, CINDY ALLMAN, committed the offense of Conspiracy to Commit Burglary by unlawfully, intentionally and feloniously conspiracy or agreeing with other persons, namely Alexander Calvin Bosley and Jeffrey K. Taylor, to commit the felony offense of Burglary by, in the nighttime, breaking or entering without breaking the dwelling house belonging to and occupied by Terry K. Lewis and Kim Lewis with the intent to commit a larceny therein, and in furtherance of said conspiracy, Jeffrey K. Taylor and Cindy V. Allman did, in the nighttime, break or enter without breaking the dwelling house belonging the dwelling house belonging to and occupied by Terry K. Lewis and Kim Lewis with the intent to commit a larceny therein, against the peace and dignity of the State.

COUNT SEVEN

West Virginia Code 61-2-1
West Virginia Code 61-11-6
Accessory After the Fact to
Felony- Murder

THE GRAND JURY FURTHER CHARGES:

That on or about the 25th day of October, 2009, in Harrison County, West Virginia, JENNIE LYNN BOSLEY A/K/A JENNIE LYNN WATHAM, committed the offense of Accessory After the Fact to Felony Murder by unlawfully, intentionally, knowingly, and feloniously giving Cindy V. Allman, and Jeffrey K. Taylor aid and assistance after Cindy V. Allman and Jeffrey K. Taylor, slayed, killed, and murdered Terry K. Lewis in the commission of, or attempt to commit burglary with the intent that Cindy V. Allman and Jeffrey K. Taylor avoid or escape detention, arrest trial, or punishment, and at the time JENNIE LYNN BOSLEY, A/K/A JENNIE LYNN WATHAM, gave said aid and assistance to Cindy V. Allman and Jeffrey K. Taylor, JENNIE LYNN BOSELY, A/K/A JENNIE LYNN WATHAM, knew Cindy V. Allman and Jeffrey K. Taylor slayed, killed, and murdered Terry K. Lewis in the commission of, or attempt to commit burglary but JENNIE LYNN BOSLEY, A/K/A JENNIE LYNN WATHAM, was not present at the time Cindy V. Allman and Jeffrey K. Taylor slayed, killed, and murdered Terry K. Lewis, in the commission of, or attempt to commit, a burglary, against the peace and dignity of the State.

On May 12, 2010, Mr. Taylor was arraigned on these matters and these matters were set for trial. On July 7, 2010, Mr. Taylor pleaded guilty to Felony Murder as contained in Count Three of the Indictment.

The State of West Virginia agreed that upon entry of the Defendant's offered plea of guilty to the felony offense of Felony Murder as contained in Count Three (3) of the indictment in this case, the State of West Virginia would move to dismiss with prejudice, Count Four (4) of the Indictment in this case. The plea agreement contains the following:

1. The Defendant, Jeffrey K. Taylor, will enter a plea of guilty to the felony charge of Felony Murder as contained in Count Three (3) of the indictment in this case.

2. Upon entry of the plea of guilty by the Defendant, Jeffrey K. Taylor, as set forth in Paragraph No. 1, herein, the State will move to dismiss, with prejudice, County Four (4) of the Indictment in this case.

3. The Defendant retains his right to request that a presentence report and a diagnostic evaluation be conducted.

4. The State of West Virginia and the Defendant shall join in recommending to the Court with regard to his plea of guilty to the felony charge of Felony Murder as contained in County Three (3) of the Indictment in this case, that the Defendant, Jeffrey K. Taylor, be committed to the custody of the Commissioner of the West Virginia Department of Corrections for a term of life, pursuant to West Virginia Code §61-2-2.

5. The State of West Virginia and the Defendant shall further joint in recommending to the Court with regard to his plea of guilty to the felony charge of Felony Murder as contained in Count Three (3) of the Indictment in this case, that the Court make a finding that the Defendant be parole eligible to West Virginia Code §62-3-15 and 62-12-1, et Seq.

At a Sentencing Hearing on October 28, 2010, the Circuit Court Judge, without any evidence being produced, sentenced Mr. Taylor to life in prison, without the possibility of parole, despite the joint recommendations of the State of West Virginia and the Defense for Mr. Taylor. It is the determination from which the Defendant, Jeffrey Taylor appeals.

ASSIGNMENT OF ERROR AND ARGUMENT

The Court abused its discretion by falling to asseses and determine the individual actions of the Defendant, Jeffrey Taylor

In the sentencing hearing on October 28, 2010, the court made statements that clearly disclosed that the Court had not considered the actions of the Defendants, Jeffrey Taylor, individually.

THE COURT: Some people may think that the Defendants Taylor and Allman, who each stabbed the victim, should be punished more severely than Bosley, who waited outside, Others may say that Bosley should be punished more severely because without Bosley the other two would have never known about the Lewis residence. And one can find evidence to find that Taylor and Allman in going to that house that evening armed themselves with knives, disabled the phone system., and didn't accomplish the purpose of what they went in there for, to steal anything, but the homeowner, who confronted them, ended up losing his life.

In the eyes of the law, I don't believe there's any question that all three are equally guilty of the felony murder charge, and their sentences should be the same.

(Sentencing Hearing Transcript of October 28, 2010, Pages 50, Line 21 through 51, Line 9)

Rather, the Court chose to make a generalized decision regarding the sentence of the Defendant, Jeffrey Taylor and Co-Defendants, Alexander Calvin Bosley, and Cindy Allman. The Court made this determination despite the only argument made by the prosecuting attorney during the sentencing hearing was that Mr. Taylor had been forthcoming and honest in his statements to the authorities and that the other Defendants had been less than honest.

ASSISTANT PROSECUTING ATTORNEY COOK: I would state of the presentence investigation reports and the diagnostic

evaluations, I would say that Jeffrey Taylor has been the most honest.

He wanted to commit a robbery. (Sentencing Hearing Transcript of
October 28, 2010, Page 15, Lines 21 through 17)

The Court imposed sentence jointly, not individually. It is clear that the actions of the Defendants, their history, and their proclivity towards rehabilitation, should have been considered by the Court on an individual basis.

West Virginia Code Section 62-3-15 clearly provides:

Section 62-3-15 Verdict and sentence in murder cases
If a person indicated for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicated for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person indicated for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole: Provided, that the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years: Provided, however, That if the accused pleads guilty of murder of the first degree, the court may, in its discretion, provide that such person shall be eligible for parole in accordance with the provisions of said article twelve, and, if the court so provides, such person shall be eligible for parole in accordance with the provisions of said article twelve in the same manner and with like effect as if such person had been found guilty by the verdict of a jury and the jury had recommended mercy, except that, notwithstanding any provision of said article twelve or any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years.

By failing to individually consider these factors, the Court denied Mr. Taylor his due process

rights as well as the intent of the West Virginia Code Section 62-3-15 to allow a jury to weigh and determine a recommendation of mercy.

The Court made a determination without the benefit of any evidence presented upon which a trier of fact may have considered to impose sentencing.

In the sentencing hearing on October 28, 2010, the Court held a hearing in which no evidence was presented, at which time, both the State of West Virginia and Counsel for the Defendant, Jeffrey Taylor recommended a sentence of life with mercy. Prior to imposing sentence, the Court stated that if was going to treat all Defendants the same in sentencing and refused the joint recommendation of mercy as to the Defendant, Jeffrey Taylor.

In arriving at this determination, the Court questioned the Assistant Prosecuting Attorney at length regarding details of the events that led to that hearing:

THE COURT: There's been at least some evidence presented by way of allocution through the various versions that the defendants had provided to either the person that was doing the diagnostic evaluation or their respective probation officers that there may have been some motivation for the killing of Mr. Lewis that was at least one of the defendants puts on the Calvin - - or Alexander Calvin Bosley in this matter.

MS. COOK: Yes, Your Honor, and that is how these three ended up at Terry Lewis' house. That is Alexander Bosley lived at Terry Lewis' house. His mother dated Mr. Lewis when he was, and I apologize, I believe he was approximately nine years old, something in there.

What I find most interesting about his grudge is that it keeps changing and evolving into something different. First there was certain allegations made against Mr. Lewis, and now that's been moved away from, actually, in the PSI and the diagnostic evaluation. Now it's there was physical abuse or emotional abuse, oh, but it was other abuse by other individuals that Mr. Lewis knew.

My concern with the allegation is - -addressing that the allegation is, first, I don't think any of it's true to be honest with you. There was an investigation way back when and it was deemed not true at that point in time, and given in this short amount of time that the story keeps changing, again, I think it affirms my belief that none of it's true.

As to that there was an instruction to go into the - -

THE COURT: I guess the point the Court was trying to make - -

MS COOK: - - to go into the house and kill?

THE COURT: Yes.

MS. COOK: Okay. In addressing that I'd have to say the State is unsure as to whether to believe that or not. The first time that allegation came up was actually in Cindy Allman's statement. As the Court is aware in the various documents that have been presented, that statement keeps changing, and I hate to say it changes with the times, but I believe it just changes because it's not true, and that's my biggest concern. Her statement keeps changing. First it's I went along with it, and then it's oh, I was threatened. Oh, well, we were going to - - we were there to kill somebody. I believe, to be honest with you, in looking at all the statements and the evidence and what actually occurred that evening, Jeff Taylor has probably been the most honest of them all, to be honest. He was told that Alex didn't like him - - didn't like this Terry Lewis and if something happened to him that would be fine. I'm not sure that was an instruction to kill. I think it was if something happens so be it. I believe that Mr. Bosley chose the house, so if something was going to happen it would happen to Mr. Lewis.

I'm not sure there was a you go in there and kill him instruction by the way the evidence plays out and looking at all the statements. I have to again say, though, I don't know. I wasn't there. But putting all of these statement together what I do know is Alexander Bosley chose this house for a particular reason, and it was Mr. Lewis, albeit, I don't believe the reason he states is true. However, the State is making a recommendation of mercy.

THE COURT: In other words, the State doesn't feel that if this matter went to trial that would be evidence that would be able to be presented and found to be true by a trier of fact?

MS. COOK: Correct. And I would state that is one of the choices that was made in charging felony murder and not first degree murder by way of premeditation and deliberation. That was a factor that was considered by myself, by Mr. Walker, and by the lieutenant who investigated the case, and that is the why is was presented as felony murder.

THE COURT: Was it also a factor in deciding to offer the plea agreement and recommendation that the State is making here today?

MS. COOK: I would say that an intentional killing was not a consideration and offered mercy. That is, it was not a factor that was considered. We looked at the case by the way that we presented it. That being, by felony murder, and based on the facts that we had to prove felony murder, and what we believed would happen if we went to trial. And again, it's based on the age of these three defendants, and their actions, obviously.

(Sentencing Hearing Transcript of October 28, 2010, Pages 15, Line 10 through 18, Line 15)

Clearly, the Court took into consideration information that was not presented as evidence.

In making this determination, the Court cited several factors upon which it based its opinion that were not in evidence, nor would have been considered by a trier of fact. Further, no opportunity was

given to the Defendant, Jeffrey Taylor to rebut such evidence, as this evidence was not presented in open court and no indication was given that it would be considered prior to the imposition of sentencing.

The consideration of this evidence by the Court and the failure of the Court to disclose the consideration of this evidence prior to the imposition of sentence exceeds the authority that the Court had to act as a trier of fact under West Virginia Code Section 62-3-15.

**The Court abused its discretion by failing to follow the recommendation of the parties
without just cause, in the imposition of sentence of Jeffrey Taylor.**

The Court, in acting a trier of fact, failed to present any cause to deviate from the recommendation of the State of the West Virginia and the Defense for Mr. Taylor.

Before imposing sentence, the Court provided explanation of its basis for its opinion:

THE COURT: Now there seems to be some talk of mercy in this particular case, and as this Court reads that statutes we're not at a point in time where this Court determines whether or not anyone is entitled to mercy.

The sentence that's prescribed by statute for each of these defendants and sentence that the Court must be impose in this case is imprisonment in the penitentiary for life.

The Court is always mindful of the terms of plea agreements. That the plea agreement in this case calls for the State to recommend that the defendants be eligible for parole after having served fifteen years. I think there's somewhat of a difference in the terms that are used as to - - the results is ultimately the same, but the determination the Court has to make is whether or not they're eligible for parole. It's not a question as to whether or not they're entitled to mercy.

.....

Some people need to be removed from society because their actions say that they do not belong in the civilized world. However, for the Court to make its determination in this case to make the defendants eligible for parole after having served fifteen years of their life sentence the Court has the discretion to make the determination. And I think part of what the law envisions is the Court being presented some evidence that a jury would be presented that the defendant's character, including evidence for their past, present and future, as well as the evidence surrounding the nature of the crime would warrant a jury in finding that the defendants were entitled to mercy by a jury or, by the same token, whether or not this Court should make them eligible for parole. And making the defendants eligible for parole after fifteen years only means that they're eligible for parole consideration, not that they would receive it.

And in a case such as this the Court needs to look at the young age of the defendants, the lack of any previous or significant criminal record, the agreement to cooperate with the prosecution of the co-defendants and acceptance of responsibility. And there's no question that the Court has in front of it three young adults. Three young adults whose lives, according to them, have all been subject to physical and/or sexual abuse, alcohol or substance abuse or addiction, and from the reports that were done in this particular case with respect to the diagnostic evaluations, three individuals who had a total lack of parental supervision while growing up.

The court doesn't know whether any of this that's been presented to the Court is true with respect to the physical and sexual - - alleged sexual abuse of each of them, alcohol or substance abuse addictions as to how early those started in each of their lives.

.....

Some people may think that the defendants Taylor and Allman, who each stabbed the victim,

should be punished more severely than Bosley, who waited outside. Otherwise may say that Bosley should be punished more severely because without Bosley the other two would have never known about the Lewis residence. And one can find evidence to find that Taylor and Allman in going to that house that evening armed themselves with knives, disabled the phone system, and didn't accomplish the purpose of what they went in there for, to steal anything, but the homeowner, who confronted them, ended up losing his life.

In the eyes of the law, I don't believe there's any question that all three are equally guilty of the felony murder charge, and their sentences should be the same.

.....

The Court has considered their young age. The Court has considered the facts of this particular case. The Court has three individuals who are sitting before it that have not shown anything in their lives that would indicate that they are going to be able to be productive members of society at any point in time. None of them has had regular jobs. They've spent their lives trying to go from one fix to the next, and at some point in time it need to stop.

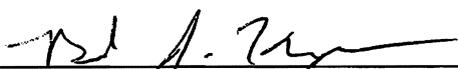
(Sentencing Hearing Transcript of October, 28, 2010, Pages 47, Line 47, Line 2 through Line 16; Page 48, Line 2 through Page 49, Line 9; Page 50, Line 21 through Page 51, Line 18 through Page 52, Line 1)

As the Court is acting as trier of fact, pursuant to West Virginia Code Section 62-3-15, it is the responsibility of the Court to properly consider the matter at hand and exercise discretion pursuant to the Code. The Court failed to provide justification for its decision to deviate from the recommendation of the parties.

RELIEF PRAYED FOR

The Petitioner would request that this Court set aside the conviction and sentence of the Petitioner on one or all of the above stated arguments and Order that this matter be remanded to Circuit Court and a new trial be ordered.

Respectfully Submitted,
Jeffrey K. Taylor
By Counsel



BRANDON J. KUPEC, COUNSEL FOR PETITIONER
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MEMORANDUM OF APPEARANCE

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

STATE OF WEST VIRGINIA,

vs.

No: 12-0024

JEFFREY K. TAYLOR, Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2012, I served the foregoing **PETITION FOR APPEAL** upon the following, by depositing a true copy hereof, in the United States Mail, postage prepaid, or by hand delivering, in an envelope addressed to them at:

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**The Honorable James A. Matish
Harrison County Circuit Court Judge
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