

13-0745

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

FELONY NO. 12-F-90-OA

MARCUS PATRELE MCKINLEY

RESENTENCING ORDER TO EXTEND APPEAL PERIOD

CAME the State of West Virginia by Edward J. Kornish, Special Prosecuting Attorney for Mercer County, West Virginia, defendant by video-conferencing from Southern Regional Jail, and defense counsel Paul R. Cassell for resentencing.

Defense counsel moved the Court to resentence the defendant for the purpose of extending the appeal period. The State did not object. After giving the State, defense counsel, and defendant the opportunity to address the Court regarding sentencing, the Court ORDERED defendant sentenced to the penitentiary for life without the possibility of parole, and committed defendant as a State prisoner into the custody of the West Virginia Commissioner of Corrections and the Director of the Southern Regional Jail at Beaver, West Virginia.

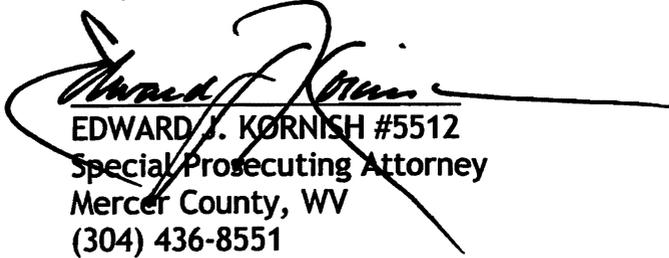
The Court ORDERS and directs the Clerk to provide copies of this order to counsel of record, the West Virginia Commissioner of Corrections, and to the Southern Regional Jail.

ENTER: This the 21st day of June, 2013.



OMAR J. ABOULHOSN, CHIEF JUDGE
9th Judicial Circuit of Mercer County

Prepared by:



EDWARD J. KORNISH #5512
Special Prosecuting Attorney
Mercer County, WV
(304) 436-8551
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IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. FELONY NO. 12-F-90-OA

MARCUS MCKINLEY

JURY TRIAL ORDER

On the 19th day of March, 2013, came the State of West Virginia by Edward J. Kornish, Special Prosecuting Attorney for Mercer County, West Virginia, and also came the defendant, Marcus McKinley, in person and by his attorney, Thomas Czarnik, pursuant to the trial in this matter being scheduled for this day.

Both parties announced ready for trial. Thereupon, came a jury, to-wit: Morris Clyburn, James Dietz, Susan Belcher, Travis Houchins, Jody Jennings, Kevin Tickle, William Knight, Linda Burdette, Jason Odie^{or}, Nora Masters, Jeffrey Sigmon, Brenda Hall, who were duly selected, tried and sworn in manner and form prescribed by law to well and truly try and a true deliverance make between the State of West Virginia and Marcus McKinley, the defendant at the Bar, who they shall have in their charge and true verdicts render according to the evidence. Also selected were two alternate jurors, Jennifer Green and Connie Beavers, who would sit in the courtroom during the course of this trial, and who were

also sworn in manner and form prescribed by law to well and truly try and a true deliverance make between the State of West Virginia and Marcus McKinley, the defendant at the Bar, whom they shall have in their charge and a true verdict render according to the evidence if called upon to do so.

The State made its opening statement and the defense gave its opening statement. The State then began presenting its evidence. Due to the lateness of the hour, the Court then excused the jury and the alternate juror until 9:00 a.m. on Wednesday, March 20, 2013, after cautioning them that they were not to discuss the case between themselves or with any other person and were not to permit anyone to discuss it in their presence. It is **ORDERED** that the defendant be remanded to the Southern Regional Jail, in lieu of bond, until then.

On the 20th day of March, 2013, came the State of West Virginia by Edward J. Kornish, Special Prosecuting Attorney for Mercer County, West Virginia, and also came the defendant, Marcus McKinley, in person and by his attorney, Thomas Czarnik, and also came the jury and the alternate jurors previously selected at the beginning of the trial.

Outside the presence of the rest of the jurors, juror Morris Clyburn appeared before the Court to advise the Court that he had served on jury duty during the previous twenty-four (24) months. The Court **ORDERED** him excused, and

replaced him with Jennifer Green, who had been the first alternate juror. Second alternate juror, Connie Beavers, became the first alternate juror. The State then continued presenting its evidence and rested, with the exception of calling its witness, Barbara Patton, the mother of the victim. It was agreed upon by the parties that the State would be allowed to call Mrs. Patton on Friday, March 22nd, 2013. Due to the lateness of the hour, the Court then excused the jury and the alternate juror until 9:00 a.m. on Thursday, March 21, 2013, after cautioning them that they were not to discuss the case between themselves or with any other person and were not to permit anyone to discuss it in their presence. It is **ORDERED** that the defendant be remanded to the Southern Regional Jail, in lieu of bond, until then.

On the 21st day of March, 2013, came the State of West Virginia by Edward J. Kornish, Special Prosecuting Attorney for Mercer County, West Virginia, and also came the defendant, Marcus McKinley, in person and by his attorney, Thomas Czarnik, and also came the jury and the alternate juror previously selected.

The parties announced ready. Defendant presented his case through witnesses and his own testimony. Counsel for the defendant then rested. Due to the lateness of the hour, the Court then excused the jury and the alternate juror

until 9:00 a.m. on Friday, March 22, 2013, after cautioning them that they were not to discuss the case between themselves or with any other person and were not to permit anyone to discuss it in their presence. It is **ORDERED** that the defendant be remanded to the Southern Regional Jail, in lieu of bond, until then.

On the 22nd day of March, 2013, came the State of West Virginia by Edward J. Kornish, Special Prosecuting Attorney for Mercer County, West Virginia, and also came the defendant, Marcus McKinley, in person and by his attorney, Thomas Czarnik, and also came the jury and the one alternate juror previously selected.

The State then called its witness, Barbara Patton, the mother of the victim, and rested. Counsel for the defendant then made a motion for a judgment of acquittal, which motion the Court denied. The State then presented rebuttal evidence and rested. The defendant presented no surrebuttal evidence. The defendant then renewed his motion for a judgment of acquittal, which motion the Court again denied.

The Court then instructed the jurors as to the law and the parties presented their closing statements. Alternate juror Connie Beavers was then excused from service. The jury then went into their room to deliberate on their verdicts. After a time, the jury announced that they had

reached their verdicts in the case. The jury was returned to the courtroom and rendered the following verdict:

"We, the jury, upon the issues joined between the State of West Virginia and the defendant, Marcus McKinley, do find the defendant, Marcus McKinley, Guilty of Murder of the First Degree as charged under Count One of the within indictment, without a recommendation of mercy.

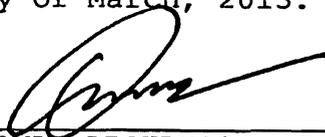
/s/ Jason Odie, Foreperson"

The Court then accepted the jury's verdict, after after having polled each member of the jury, and then discharged the jury.

Counsel for the defendant is directed to file any post-trial motions as soon as possible. The Court proceeded to sentencing. Defendant addressed the Court. The Court **ORDERED** Defendant sentenced to the penitentiary for life without the possibility of parole, and committed Defendant as a State Prisoner into the custody of the West Virginia Division of Corrections and the Director of the Southern Regional Jail at Beaver, WV, or their designated representatives.

The Clerk shall send attested copies of the herein Order to counsel of record, Commissioner of Corrections, Mercer County Sheriff and Southern Regional Jail.

ENTER: This the 28th day of March, 2013.


OMAR ABOULHOSN, JUDGE
9th Judicial Circuit

Presented by:


EDWARD J. KORNISH
Special Prosecuting Attorney
WV State Bar No. 5512

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

V.

CASE NO.: 12-F-90-OA

MARCUS L. MCKINLEY

OPINION ORDER DENYING
DEFENDANT'S MOTION TO SET ASIDE VERDICT OR FOR NEW TRIAL

On April 11, 2013, came the parties all for a hearing on the Defendant's Motion to Set Aside Verdict or for New Trial. There appearing were the State of West Virginia by her Special Prosecuting Attorney, Edward Kornish, Esq. and the Defendant in person and by counsel, R. Thomas Czarnik, Esq. Several grounds were argued by the Defendant in his Motion:

1. The Court erred by admitting the Defendant's statement when he was at the North Carolina police station.
2. The Court erred by admitting evidence of other bad acts as being hearsay and too remote in time to the murder itself.
3. The Court erred by rejecting the plea without following the criteria set forth in *Kennedy v. Frazier*, 178 W. Va. 10 (1987).
4. The Court erred by excluding the opinion of Bobby Miller, M.D. which the Defendant would have offered as non-hearsay statement against interest and would have also been admissible under hearsay exceptions as statements made by the Defendant during a therapeutic setting.
5. The Court erred when it ruled that the State's Facebook exhibit would be admissible.
6. The Court erred by not directing verdict in favor of the Defendant regarding premeditation or deliberation at close of evidence.
7. The jury panel was insufficiently drawn to ensure a racially balanced panel.

8. The Court erred by admitting the victim's statements made to Sandra Dorsey.
9. The Court erred by admitting the victim's wounds several months prior to her murder via rebuttal testimony by the victim's friends.
10. The Court erred by admitting Trooper Ellison's testimony concerning ballistics without having any scientific or expert background for same.
11. The Court erred by admitting the victim's statements to her mother as hearsay.

Based upon the consideration of the arguments of the parties and the pertinent legal authorities and the specific facts in the case *sub judice*, the Court does hereby issue this separate opinion order for the benefit of the parties and does hereby conclude that the Defendant's Motion should be **DENIED**. In support thereof, the Court **FINDS** and **CONCLUDES** as follows:

Admission of Defendant's Statement at North Carolina Police Station

The Court notes from the pre-trial motions hearing that this statement was previously ruled inadmissible by its Order entered on October 11, 2012. During the pre-trial motions hearing, it appeared that the Defendant made certain statements to Sgt. Myers. After reviewing Sgt. Myers's trial testimony, it is apparent that the Defendant was outside of the North Carolina police station, accompanied by North Carolina police officers while waiting on a transport vehicle. At this point, Sgt. Myers testified that he asked the Defendant if he would talk to him; Sgt. Myers testified that the Defendant replied, "I did it, I'll talk to you." No objection was made during this testimony, and further, during the cross examination of Sgt. Myers, the Defense elicited further that the Defendant also said that he was not trying to run and was agreeable to being returned to West Virginia. Nevertheless, the Defendant does not contend in his Motion that such previously ruled inadmissible statements came in during the trial, but only readdresses

his objections made during the suppression hearing that other statements made to police officers ruled admissible were in error.

Other Bad Acts Evidence

Although the Defendant does not specify which other bad acts were admitted under *res gestae*, the Court notes that it previously ruled two other bad acts evidence concerning domestic violence between the Defendant and the victim admissible as intrinsic/*res gestae* by its Order entered on August 20, 2012. The Court's findings therein are incorporated by reference in this Order, however, the trial record also indicates that the Defendant testified about other bad acts and had even painted himself as the victim in those situations. The Defendant did not object to several of the State's rebuttal witnesses who testified about other bad acts, such as the stabbing of the victim's arm several months prior to her murder. This Court finds that this ground lacks merit.

Rejection of Plea

The Court recalls that the plea offer that had previously been tendered to the Defendant was primarily based on this Court's denial of the previous prosecuting attorney's motion to withdraw as counsel for the State. Mr. Scott A. Ash, Esq. contacted the Court over a weekend and the parties had a discussion concerning Mr. Ash's belief that he had a conflict of interest where he would be unable to put on evidence of the Defendant's other prior bad acts based on his prior experience working at the Public Defender's Office. Nevertheless, the Defendant moved to disqualify Mr. Ash as prosecutor in this matter, and with the appointment of Special Prosecutor Edward Kornish, Esq., another plea offer had not been tendered for this Court's consideration. Additionally, and more importantly, the family of the victim was not considered in making that initial plea offer, and the family was hostile to the notion of a plea offer. Moreover, the Court is

mindful of the Supreme Court of Appeals holding in syllabus points 4, 5, and 6 in *Myers v. Frazier*, 173 W.Va. 658 (1984):

4. A court's ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice.

5. As to what is meant by a plea bargain being in the public interest in the fair administration of justice, there is the initial consideration that the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant and that there is a factual basis for his guilty plea. Rule 11(d) and (f). In addition to these factors, which inure to the defendant's benefit, we believe that consideration must be given not only to the general public's perception that crimes should be prosecuted but to the interests of the victim as well.

6. A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant's prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.

Prosecutor Ash clearly expressed that the victim's family was opposed to the plea offer. As a result, the offer was not in the public interest and unduly denigrated the seriousness of the offense. The Court finds that this ground lacks merit.

Exclusion of Bobby Miller, M.D. Opinion

This Court previously rejected the Defendant's notice of diminished capacity defense based on his expert's opinion that he may not have had the requisite intent to premeditate or deliberate. The Court ruled that the expert opinion of Dr. Miller was inadmissible by Order entered on March 13, 2013 due to both Dr. Miller and Dr. Clayman having opined that the Defendant did not suffer from any mental disease or defect. The reasons for excluding Dr. Miller's trial testimony provided in the aforementioned Order are incorporated herein by reference, accordingly, the Court finds that this ground lacks merit.

State Facebook Exhibit

The Defendant references State Exhibit #41, which had been Facebook postings made by the Defendant, that the State had determined it would not introduce unless the Defendant opened the door to same. The Defendant, for the first time during the Motion hearing, contends that the victim's Facebook postings do not correlate to the Defendant's Facebook postings.¹ Although counsel for the Defendant complained that he had just received that discovery during the trial, the Defendant himself insisted that the Facebook material was important for his defense. Despite the conflict of trial strategy between counsel for the Defendant and the Defendant, the Exhibit was not introduced or referenced during the trial. The Court finds that this ground lacks merit, as it had not made any ruling upon the Exhibit because it had never been introduced as an Exhibit to go to the jury.

No Directed Verdict

Next, the Defendant argues that the Court erred by not directing verdict after close of the State's case in chief due to lack of evidence to support any finding of the elements premeditation and deliberation. The State argues there was ample factual evidence to support findings of premeditation and deliberation: The position of the shell casings, the position of the victim's final resting place, the logical inference made by the investigating officers and the findings by the medical examiner indicated that the Defendant shot the victim five times and that he shot her when she was still moving, thus alive. These facts supported a *prima facie* case for First Degree Murder, and enough facts to be sent to the jury after close of all the evidence. Indeed, this Court

¹ During a lengthy sidebar, the parties advised the Court that the Defendant and victim Facebook pages had been made part of the record during proceedings in the Family Court and were known by Child Protective Services during their investigations into the alleged abuse and neglect of the Defendant's and victim's infant son. During the Defendant's direct examination of Sgt. Myers, Defendant attempted to set the foundation for testimony concerning Facebook postings by the victim, the Defendant and several of their "friends" which had been collectively marked as Defendant's Exhibits #1 through 12 for identification purposes. During the sidebar, it became evident that the Defendant's Facebook Exhibits would potentially open the door to numerous other domestic violence matters that occurred between the Defendant and the victim as well as other matters, as a result, the Defense declined to pursue the Facebook matter any further for fear of what doors it potentially could open.

previously ruled that a *prima facie* case had been made to in order to go to the jury for its determination. Accordingly, the Court finds that this ground lacks merit.

Racially Imbalanced Jury Panel

The Defendant provides no law regarding this ground in support of his Motion, however, this Court recognizes that the test for determining if a defendant's Sixth Amendment rights to a "fair cross section of the community" was violated with respect to the jury pool, the controlling case law in *Duren v. Missouri*, 439 U.S. 357, 364 (1979) provides:

(T)he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Once the defendant has made a *prima facie* case, the burden shifts to the State to rebut the showing of an impermissible exclusion. *See also, State v. Hobbs*, 168 W. Va. 13 (1981). The Defendant has not alleged any "systematic exclusion" in the jury selection process. The record shows that the Defendant himself dismissed the remaining African American potential juror for cause, which had been pointed out by the State during *voir dire*. Most importantly, the Defendant failed to prove his burden that his constitutional right to a fair and impartial jury espoused by *Hobbs* had been violated. There was no evidence presented indicating that the Court, the system used for jury selection, the State or any other entity "systematically excluded" African Americans or any other distinct or identifiable group from jury selection in Mercer County. Accordingly, the Court finds that this ground lacks merit.

Victim's Statements to Sandra Dorsey

The Defendant does not specify which statements made by the victim to Sandra Dorsey, however, many of the statements made by the victim admitted at trial concerned the victim's

'fear' of the Defendant and the victim's desire to get out of the relationship were initially objected to as hearsay by the Defendant, which objections were SUSTAINED by this Court. However, to counter the Defendant's claims that the victim was suicidal, the victim's statements to Ms. Dorsey were admitted under the hearsay exception as present sense impression to show that she was not suicidal. Further, the 'therapy' type statements were admitted as present sense impressions (fear that the Defendant would kill her that the State argued would prove premeditation and deliberation pursuant to West Virginia Rules of Evidence Rule 803(3)). Moreover, the Court gave a limiting instruction, agreed upon by both the State and the Defendant, regarding these statements to the jury.

Ms. Dorsey testified about her own observations of the victim and of the Defendant during the time she was employed as a domestic violence advocate for the victim. A Defense objection was sustained (and the jury was so instructed to disregard) Ms. Dorsey's 'opinion' testimony as to the generalities concerning domestic violence victims and their partners (in this case, concerning the dynamics of such partners going out to dinner, etc., despite the issuance of a domestic violence protective order and CPS intervention with these parties).

During the cross examination, the Defendant also opened the door to a letter that Ms. Dorsey had sent to Scott Ash, Prosecuting Attorney, and other parties that she believed someone was going to get killed in this case due to the levels of domestic violence. Further, the Defendant cross examined Ms. Dorsey about the victim's statements, and through his own witnesses (including Jami Nunley, DHHR Child Protective Services worker) established that the victim was NOT afraid of the Defendant and discussed through his cross examination of Ms. Dorsey and through his own testimony, the events surrounding the domestic violence protective order (that neither the Defendant nor the victim were supposed to be around each other, however, they continued to see each other socially). This Court finds that this ground lacks merit.

Friends of Victim's Testimonies Concerning Victim's Wounds

The Defendant argues that the victim's wounds that had been observed by her friends months before her murder was inadmissible. The State called several rebuttal witnesses after the Defendant had rested. During the rebuttal witnesses' testimonies, the Court had previously overruled an objection by the Defendant concerning the victim's friend (Stephanie Wright) testimony concerning a stab wound on her arm caused by the Defendant approximately five months before her murder. The friend had taken a picture of herself with the victim when they went to the prom months after the stabbing; the photograph clearly showed a wound on the victim's arm that was still healing. The exhibit had been admitted over the Defendant's objection. The Defendant cross examined the rebuttal witness at length about the stab wound and the friend's recollection as to whether it was the same wound.

The Court notes that the Defendant raised no objections to other rebuttal witness who were friends of the victim (Chalissa Richards, Bobbi Tynes) who testified about the victim's statements that the Defendant had stabbed her and threatened her not to tell anyone or he would kill her, and that the victim was afraid of the Defendant. The Defendant cross examined the witnesses and elicited testimony concerning the stab wound, its appearance, and why no authorities at the school were notified of it. Based on the trial testimonies elicited from the Defendant of these rebuttal witnesses concerning the Defendant's stabbing the victim several months before her murder, the Court finds this ground has no merit.

Trooper Ellison's Testimony Concerning Ballistics on Shots Fired

The Defendant argues that Trooper Ellison had no scientific background or expertise to permit his testimony concerning how the shots were fired from the gun that killed the victim. The State argues that the Defendant himself provided the testimony explaining how the shots were fired, and where he was standing in the room when he shot the victim five times. Although

Trooper Ellison was not tendered as an expert witness, and he specifically testified that he WAS NOT a firearms expert, he provided his opinion based on his experience as a lay person as to where the gun may have been positioned at the time of the shooting and did provide testimony that all guns vary with respect to how they eject shell casings and the manner in which a gun is held also affected the positioning of ejected shell casings. The Defendant cross examined Trooper Ellison about his findings of the shell casings, the position of where the gun had been during the shooting as well as the location of the victim's body with regard to same. This Court finds no merit in this ground raised by the Defendant.

Victim's Statements to her Mother

During the trial, this Court ruled many of the victim's statements to her mother as present mental, physical, and medical condition at the time pursuant to West Virginia Rules of Evidence Rules 803(3) and 804(3). This case was unusual insofar as the victim's mother, who was a State witness, testified AFTER the Defendant's case in chief, AFTER the Defendant put on evidence of the victim's suicidal tendencies, the victim's abuse of the Defendant, and the Defendant's description of the shooting of the victim and calling the victim's mother after he shot the victim to death. The victim's mother was unable to testify during the regularly scheduled State's case in chief due to her attending an out of State funeral for a family member, and the Defendant did not object to her testimony following his case in chief. Further, the victim's mother testimony was also employed to rebut the Defendant's own testimony, thus opening the door to most, if not all, of the victim's statements made to her at the time. Accordingly, the Court finds that this ground lacks merit.

Summation

This Court FINDS and CONCLUDES that the Defendant received a fair trial and was convicted of his crimes by an impartial jury by a substantial showing of the evidence. This Court

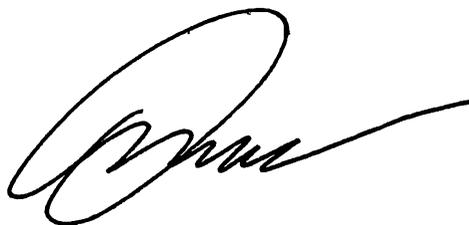
finds that the Defendant provided the most damaging testimony in this case, and agrees with the State that the Defendant himself provided the jury with the factual evidence of where he stood during the shooting death of his girlfriend, that he unloaded his weapon the evening before he spent the night with his girlfriend, then had to reload it again in order to shoot her five times. Further, the evidence was overwhelming that the victim was alive during the shooting because she was trying to get away from the Defendant when he continued to shoot her. Any errors complained of by the Defendant appear harmless upon examination of the testimonial evidence provided by the Defendant himself.

Ruling

WHEREFORE, on the basis of all the above, the Court does hereby **ORDER**, **ADJUDGE**, and **DECREE**, as follows:

- (1) The Defendant's Motion for New Trial is **DENIED**.
- (2) The Defendant's conviction is **AFFIRMED**.
- (3) The Court notes the objections and exceptions of the parties to the above rulings.
- (4) The Court directs the Circuit Clerk to forward copies of this Order to counsel for the Defendant, R. Thomas Czarnik, Esq., and to the Special Prosecuting Attorney, Edward Kornish, Esq.

ENTER: This 12th day of April, 2013.



OMAR J. ABOULHOSN, JUDGE
9th Judicial Circuit of Mercer County

THE FOREGOING IS A TRUE COPY OF A DOCUMENT
ENTERED IN THIS OFFICE ON THE 15 DAY
OF April 2013
DATED THIS 22nd DAY OF April
2013

JULIE BALL, CLERK OF THE
CIRCUIT COURT OF MERCER COUNTY WV

BY Pam Israeli
HER DEPUTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

FELONY NO.: 12-F-90-OA

MARCUS PATRELE MCKINLEY

POST-TRIAL MOTIONS ORDER

On the 11th day of April, 2013 came the State of West Virginia by Edward J. Kornish, Special Prosecuting Attorney for Mercer County, West Virginia, and Defendant, Marcus Patrele McKinley, in person and with his counsel, Thomas Czarnik, pursuant to a Post-Trial Motions Hearing scheduled for today.

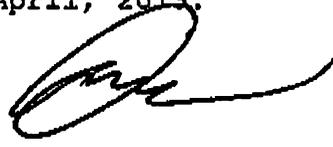
The Defendant, by counsel, argued in support of his post-trial motion, which the State opposed. Defendant's counsel, Thomas Czarnik, moved the Court to appoint other counsel to handle Defendant's appeal, and the Court **ORDERED** Paul Cassell be appointed to handle Defendant's appeal, should the Court deny Defendant's post-trial motion.

The Court further **ORDERED** that the Defendant's post-trial motion be taken under advisement, and the Court will rule on this motion on a later date.

The Defendant is remanded as a State prisoner back to Southern Regional Jail.

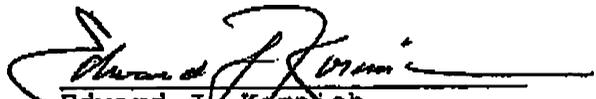
The Clerk of this Court is hereby directed to provide copies of this Order to all counsel of record, West Virginia Division of Corrections and to Southern Regional Jail.

ENTER: This 10th day of April, 2013.



OMAR J. ABOULHOSN, CHIEF JUDGE
9th Judicial Circuit of
Mercer County

Presented By:



Edward J. Kornish
Special Prosecuting Attorney
For Mercer County
WV State Bar No. 5512