

IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

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CHARLESTON

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WILLIAM B. MURRAY,  
Petitioner,

No. 14-0321  
Underlying Proceeding  
Criminal No. 12-F-201-1  
Harrison County Circuit Court

STATE OF WEST VIRGINIA,  
Respondent.

BRIEF

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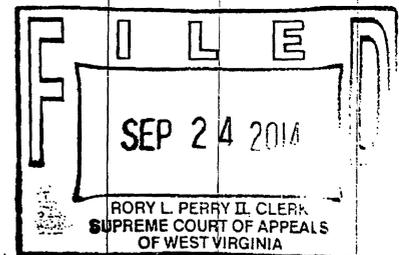


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II. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by refusing to disqualify the Harrison County Prosecuting Attorney’s Office as Traci M. Cook, Assistant Prosecuting Attorney became a witness in this matter during her Trial prep with Crystal Kirkland, a State and defense witness in this matter.

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**3. ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY  
WERE DECIDED**

A. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by denying the Petitioner’s Motion for a Directed Verdict of Acquittal as the State of West Virginia failed to prove premeditation and malice which are required elements of the offense of First Degree Murder.

The Court denied the Motion for Directed Verdict of Acquittal and permitted the jury verdict to stand which was Murder in the First Degree without mercy.

**B. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by refusing to disqualify the Harrison County Prosecuting Attorney's Office as Traci M. Cook, Assistant Prosecuting Attorney became a witness in this matter during her Trial prep with Crystal Kirkland, a State and defense witness in this matter.**

**The Circuit Court denied the Motion to Recuse Traci M. Cook in the Harrison County Prosecuting Attorney's Office and permitted the case to be tried by Traci M. Cook.**

**C. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by failing to conduct an in camera hearing due to jury misconduct that occurred during deliberations and further by failing to order a mis-trial regarding the same.**

**The Circuit Court replaced the juror with an alternate juror but failed to conduct an in camera hearing as to whether improper comments had been made during the jury deliberation process.**

**D. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by permitting the State of West Virginia to play a video recording to the Jury of the Petitioner at the Harrison County Sheriff's Department over the objection of the Petitioner herein.**

**The Trial Court denied Defense Counsel's objection as to the prejudicial nature of the video and allowed the same to be played to the jury.**

**E. Whether the Circuit Court made a reversible error by failure to redact / limit impermissible vouching of the co-defendant's plea agreement.**

**The Circuit Court failed to address this matter nor was it raised by trial counsel.**

#### **4. STATEMENT OF THE CASE**

The Petitioner was indicted in September of 2012 by the Harrison County Grand Jury for First Degree Murder, Conspiracy to Commit Murder, and Concealment of a Deceased Human Body (Appendix pg 8) . The allegations contained in the indictment centered upon the claim that Clayton S. Collins and the Petitioner herein committed the offense of murder by killing Thomas Ray Blankenship, Jr. "aka T.J.". Further, the State of West Virginia contended after the killing of T.J. Blankenship, the Petitioner and his co-defendant transported the body to an adjoining County and buried the same along a river bank. Thus, contending the Petitioner committed the offense of concealment of a deceased human body. Further, the Indictment alleged the Petitioner and Clayton S. Collins conspired to commit these offenses. During the pre-trial proceedings discovery in this matter was exchanged and throughout the time leading up to trial in July 2013 the co-defendant Clayton S. Collins had given statements and contended that he acted alone in killing T.J. Blankenship.

The Petitioner and Clayton S. Collins were residing together in December of 2011 and the decedent T. J. Blankenship resided with them on occasion. Further, the Petitioner's girlfriend Crystal Kirkland resided with them and the co-defendant's girlfriend Melissa Arbogast also resided in the household. The State of West Virginia contended the motive for the murder was that T.J. Blankenship had stolen computers from the Petitioner's father and Clayton S. Collins found the computers in his pick-up truck. A plan was discussed to teach T. J. Blankenship a

lesson in which T. J. needed to be beaten up or have his fingers or leg broken (Clayton S. Collins transcript pg. 43&44). On the evening of the alleged murder the co-defendant testified that T.J. Blankenship was mouthing off about the computers and then became agitated and got into a verbal argument with the co-defendant Clayton S. Collins. Then Clayton S. Collins testified that T. J. Blankenship began to physically attack him and Clayton S. Collins hit T.J. Blankenship numerous times with an 18" wrench causing T. J. to collapse on the couch (Clayton S. Collins transcript pg 83,84). Throughout the pretrial proceedings Clayton S. Collins always contended that he was the only one that hit T.J. Blankenship; however, two (2) weeks prior to Trial a plea deal had been offered to Clayton S. Collins in which he would plead guilty to Second Degree Murder; Concealment of the Deceased Human Body and a Second Offense Recidivist Petition (Clayton S. Collins transcript pg 147). Clayton S. Collins was required a part of the plea to provide truthful testimony with respect to the Petitioner herein. The State of West Virginia pointed out this "truthful testimony" during direct and redirect. (Clayton S. Collins transcript pg 148). The pretrial statement of the Petitioner's girlfriend Crystal Kirkland asserted there was no plan to kill T. J. Blankenship. Crystal Kirland and Melissa Arbogast left the residence with a minor child and did not see the altercation occur in this matter. Clayton S. Collins added at trial that the Petitioner picked up the wrench and hit T.J. Blankenship after he had fallen on the couch (Clayton S. Collins Transcript pg 88). During the pretrial preparation between the Assistant Prosecuting Attorney Traci M. Cook and the Petitioner's girlfriend Crystal Kirkland, Crystal Kirland allegedly changed her story to contend that the Petitioner had advised her of a plan to kill T. J. Blankenship. This new statement was timely disclosed to Petitioner's counsel and a continuance was had in the matter. Counsel for the Petitioner filed a Motion to Disqualify Traci

M.Cook and the Harrison County Prosecuting Attorney's Office (appendix pg 48). The contention with respect to said Motion was that the State of West Virginia would need to be a witness to testify to what happened during the trial preparation interview between Traci M. Cook and Crystal Kirland that caused her to change her story. The same would be necessary and material at trial for impeachment purposes. The State of West Virginia filed a response to the same denying any conflict of interest in the matter or necessity to testify (appendix pg 53). The Circuit Court denied the Motion to Disqualify Traci M. Cook in the Harrison County Prosecuting Attorney's Office following a hearing held on June 19, 2013 (appendix pg 74). The Petitioner went to trial in July of 2013. The Court dismissed the Conspiracy charge upon motion of the State at the start of trial. During the trial the State of West Virginia offered into evidence a video that was taken of the Petitioner at the Harrison County Sheriff's Department during his interview by the investigating officers. This video was not the actual interview of the Petitioner, but alleged footage of the Petitioner talking to his girlfriend Crystal Kirkland when she went into the interview room where the Petitioner was sitting (Trial Transcript pg 452). The video was short and the volume was low, basically whispering (Trial Transcript pg 454 ). The investigating officer testified he believed the Petitioner stated something to the effect of "I told you to keep your mouth shut" and then performed a back hand motion with his arm (Trial Transcript pg 454). Counsel objected to this evidence since the same was prejudicial and not probative. The Court reviewed the tape prior to playing the same to the jury and then overruled the objection and allowed the jury to see this video footage. The Petitioner moved for a judgment of acquittal at the end of the State's case in chief on the First Degree Murder charge arguing that the State had failed to establish the elements of premeditation and deliberation. The Petitioner argued that the

maximum charge that could be sought for Count One was Second Degree Murder. The Court held ruling on this motion in abeyance. During jury deliberations the jury sent out a note to the Court with two (2) questions (Trial Transcript pg 868). The first question was whether the Jury could recess for their deliberations for the day and begin in the morning and the second issue raised was one of the jurors namely; Alicia Bailey stated that she knew and worked with the Petitioner's ex-wife Ruby King (Trial Transcript pg 868). The Court weighed the options in this matter as to how to proceed; (1) whether to question the juror in camera or (2) whether to excuse that juror and replace the juror with an alternate. Counsel for the Petitioner moved the Court to excuse the juror and have an alternate sit in place. The Court then replaced the juror but did not conduct an in camera hearing as to whether any prejudicial or improper comments had been made during the deliberations by this juror with respect to the Petitioner or comments that had been made by the Petitioner's ex-wife (Trial Transcript pg 869). The Jury convicted the Petitioner on July 16, 2013 of First Degree Murder without Mercy and Concealment of a Deceased Human Body (Appendix pg 10). The Petitioner filed post-trial motions for a new trial and for a judgment of acquittal as to Count One of the indictment (Appendix pg 29). Upon motion of the Petitioner, the Court continued the hearing on the post-trial motions and sentencing pending completion of a partial transcript of the trial. On February 10, 2014, the Court denied the pending motion for judgment of acquittal on First Degree Murder, the motion for judgment of acquittal as to Count One, and the motion for a new trial (Appendix pg 18). The Court sentenced the Petitioner to Life without Mercy in accordance with the jury verdict as to Count One and sentenced the Petitioner to not less than one nor more than five years as to the conviction for Concealment of a Deceased Human Body. The Court ran the second sentence concurrent to the sentence as to Count One.

## STANDARD OF REVIEW

“In reviewing challenges to findings and rulings made by Circuit Court we adopt a two pronged differential standard of review. We review the rulings of the Circuit Court concerning a new trial and its conclusion as to the existence of reversible error under an abusive discretion standard and we review the Circuit Court’s underlining factual findings under a clearly erroneous standard. Questions of law are subject De Novo review.”

*Syllabus Pt. 3 State v Vance, 207 W.Va. 640, 535 S.E. 2d 484 (2000)*

### *Plain Error*

To trigger the application of the plain error doctrine there must be one (1) an error; (2) that its plain; (3) that effects substantial rights; (4) seriously effects the fairness, integrity, or public reputation of the judicial proceedings.

*Syllabus Pt. 7, State v Miller, 194 W.VA. 3, 459 S.E. 2d 114 (1995).*

## 5. STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Petitioner asserts that oral argument in this case is requested pursuant to Rule 19 and/or Rule 20 of the Rules of Appellant Procedure.

## 6. SUMMARY OF ARGUMENT

The Petitioner asserts that his conviction for murder in the First Degree without mercy should be set aside and he should be granted a new trial. The Petitioner asserts five (5) grounds the first being the State of West Virginia failed to prove required elements of the offense, malice

and premeditation. The Petitioner asserts that no evidence was offered by the State of West Virginia to prove this. The co-defendant Clayton S. Collins confessed to the crime and did not implicate the Petitioner. However, he changed his story at trial based upon a plea agreement that was offered by the State of West Virginia. All pre-trial statements and trial testimony offered by Clayton S. Collins contended that he got into a scuffle with T. J. Blankenship and ultimately killed him. There was no testimony offered of pre-meditation or malice on the part of the Petitioner. In fact, the only evidence offered by Clayton S. Collins as to the Petitioner's involvement was the Petitioner allegedly hitting T. J. Blankenship after Clayton S. Collins had inflicted sufficient blows to kill him. Thus, no evidence was offered to support the required elements of the offense of First Degree Murder which would be pre-meditation and further there were no evidence to prove malice which would negate a conviction for First and Second Degree Murder. The Second Ground the Petitioner asserts that would justify reversal in this matter is the Circuit Court's failure to disqualify the Assistant Prosecuting Attorney and Harrison County Prosecuting Attorney's Office as the Assistant Prosecutor would be a material witness in this matter. The Petitioner's ex-girlfriend Crystal Kirkland had provided pretrial statements which were consistent with the Petitioner's innocence up until the Assistant Prosecutor began trial prep with her. At that time the witness then changed her story to say that there was a plan by the Petitioner and Clayton S. Collins to kill the decedent. Thus, Traci M. Cook became a material witness as to why the story had been changed. Further, this affected the Petitioner's ability to prepare for trial and affected his trial defense as he would be unable to call Traci M. Cook to rebut testimony that would be offered by the ex-girlfriend. The Third Ground the Petitioner contends which constitutes reversible error is the Circuit Court's failure to conduct a in camera hearing regarding misconduct by one of the

jurors in this matter. The Juror had failed to disclose during Voir Dire and throughout the trial that she knew the Petitioner's ex-wife from work and finally disclosed the same after the jury deliberations began. The Court replaced this juror with an alternate but failed to conduct an in camera hearing to determine if improper and prejudicial statements had been made by this juror during deliberations. The replacement of this juror with an alternate did not remedy the issue of whether improper comments had been made during the deliberation process. The Fourth Ground the Petitioner asserts and constitutes reversible error is the Circuit Court permitting a prejudicial video to be played to the jury. In this video the State of West Virginia contended the Petitioner had made violent and aggressive motions to the aforesaid ex-girlfriend while at the sheriff's department when the Petitioner and ex-girlfriend were being interviewed by the investigating officers. This improper prejudicial video was presented to show that the Petitioner was violent and had potentially threatened the ex-girlfriend, thus, improperly prejudicing the jury in this matter. The Final Ground that the Petitioner asserts which would constitute reversible error is that the Circuit Court's failure to redact or limit testimony by the co-defendant involving his plea agreement which the co-defendant would provide give truthful testimony against the Petitioner. The Petitioner contends that this was improper and impermissible vouching of the co-defendant's testimony and his veracity for truthfulness and the same should have been redacted and the Court should have limited the State of West Virginia from raising this issue before the jury. The State of West Virginia improperly vouched the co-defendant's credibility before the jury during the co-defendant's direct testimony and redirect testimony. Thus, improperly prejudicing the Petitioner by impermissibly vouching for the co-defendant credibility.

## 7. ARGUMENT

**I. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by denying the Petitioner's Motion for a Directed Verdict of Acquittal or the State of West Virginia's failure to prove premeditation and malice which are required elements of the offense of First Degree Murder.**

The Petitioner asserts that the State of West Virginia failed to prove the required elements of the offense of Murder in the First Degree and Murder in the Second Degree by failing to prove malice and premeditation. Malice is defined as either expressed or implied and includes not only anger, hatred and revenge, but other unjustifiable motives and it may be inferred or implied from all of the evidence. Malice is not confined to ill will toward anyone or more particular persons, but malice is every evil design in general; and by it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved, and malignant spirit, and carry with them the plain intentions of a heart, regardless of social duty, fatally bent upon mischief. It is not necessary that malice must have existed for particular length of time and may first come into existence at the time of the act or at any previous time." State v. Carey, 558 S.E. 2<sup>nd</sup> 650 210 W.Va 651 (2001)

The Petitioner contends that the State of West Virginia failed to offer sufficient evidence in this matter and relied solely upon the testimony of the co-defendant to establish the Petitioner's involvement in this matter. The testimony offered by the co-defendant showed primarily that all actions involving the death of T.J. Blankenship occurred at the hands of Clayton S. Collins. The Petitioner was only added to the killing of T.J. Blankenship by the co-defendant Clayton S. Collins two (2) weeks prior to trial when the State of West Virginia had made a plea offer to Clayton S. Collins to plead to a lesser included offense (Clayton S. Collins transcript pg 149 & 166). Clayton

S. Collins had given statements to the police and stated that the Petitioner herein had not done anything to T. J. Blankenship ( Clayton S. Collins transcript 149 & 150) and thus up until the plea offer was made to Clayton S. Collins the only person Clayton S. Collins contended was involved in the killing of T.J. Blankenship was Clayton S. Collins. (The Petitioner only assisted in hiding the body after the fact). The testimony offered by Clayton S. Collins which was consistent with his police statement would be accurate up until the point that he added the Petitioner picked up the wrench and hit T. J. Blankenship. The Petitioner's contention is this was an element that was added by Clayton S. Collins solely to comply with his plea agreement which was to provide testimony against the Petitioner and the Petitioner asserts that had he not provided incriminating testimony against the Petitioner, the State of West Virginia would have withdrawn the plea offer.

Clayton S. Collins stated that there was never an intent to kill T. J. Blankenship that discussions were had to retaliate against T. J. Blankenship for stealing computers from the Petitioner's father. Those plans included options of breaking fingers, knees, legs, etc. (Clayton S. Collins transcript pgs 44, 50, 52, & 53). Ultimately, no plan was agreed to by the parties (Clayton S. Collins transcript pg 58). It is important to note the State of West Virginia dismissed the conspiracy count prior to trial which shows no plan to kill was made. Further, the testimony was that Clayton S. Collins was personally upset that T. J. Blankenship was accusing Clayton S. Collins of stealing the computers (Clayton S. Collins transcript pg 65). Further, that T.J. Blankenship was pissed off and became irrate quickly when he was confronted about the computer (Clayton S. Collins transcript pg 78). Clayton S. Collins further testified that he did the majority of the talking and that Clayton S. Collins was upset to the point that he was cursing significantly (Clayton S. Collins transcript pg 80). Clayton S. Collins then testified that T. J. Blankenship

charged at Clayton and began choking Clayton (Clayton S. Collins transcript pg 81). At this point, Clayton S. Collins stated that he grabbed wrench and hit T.J. Blankenship in the head three (3) times and that T.J. Blankenship slumped on the couch (Clayton S. Collins transcript pg 83, 84, 85 & 86). Thus, Clayton S. Collins testimony was consistent that there was no intent to kill to T.J. Blankenship and that all of the arguing and the issues leading up to the physical attack involved Clayton S. Collins and T. J. Blankenship. The Petitioner was added into the mix by Clayton S. Collins after the plea agreement and under the premise that once T. J. Blankenship slumped into the couch the Petitioner then picked up the wrench and hit T. J. Blankenship while he was laying on the couch. The same would not make sense in this matte as the confrontation in this matter was between Clayton S. Collins and T. J. Blankenship not the Petitioner. Further, the same does not show premeditation or malice.

Even if, for argument purposes, the Court assumes the Petitioner did pick up the wrench and hit T.J. Blankenship after the physical attack between T.J. Blankenship and Clayton S. Collins, there would not be sufficient evidence in this matter to prove that the Petitioner committed an act that would have caused the death of T.J. Blankenship. The testimony offered by the medical examiner in this matter provided that T. J. Blankenship had approximately four (4) to five (5) wounds (Trial Transcript 330). Further, the medical examiner stated that any of the injuries that T. J. Blankenship received could have been fatal. Specifically, the medical examiner testified that “any of those blows, not just the one on the forehead, any of those blows or all of them could have killed T. J. Blankenship” (Trial Transcript pg 641). Thus, the uncorroborated testimony offered by the State of West Virginia was that Clayton S. Collins hit T. J. Blankenship three (3) times in the head before he contends that the Petitioner did anything.. Any of the blows caused by Clayton S.

Collins would have killed T. J. Blankenship and thus any action on the part of the Petitioner thereafter would have no significance in this matter.

This Court has held “a criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An Appellant Court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be consistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an Appellant Court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. *Syllabus Pt. 7, State v Miller, 194 W.VA. 3, 459 S.E. 2d 114 (1995)*. Even analyzing the evidence in this case in the light most favorable to the State of West Virginia, the only evidence offered that the Petitioner was involved in this killing was basically a footnote added by co-defendant Clayton S. Collins after he was granted a plea agreement to testify against the Petitioner. All evidence offered by the State of West Virginia showed the altercation was between decedent and Clayton S. Collins. Thus, the State of West Virginia’s failure to prove malice in this matter would negate a necessary element of the offense of Murder in the First Degree and Murder in the Second Degree and make this matter subject to a voluntary manslaughter conviction at worse. There was no testimony to show any intent on the part of the Petitioner that would justify pre-meditation or show the evil heart or evil intent to support the element of malice. At best, the State of West Virginia showed a heat of passion situation during this altercation. Accordingly, the verdict in this matter should be set aside as the State of West Virginia failed to

prove the requisite element of the offenses for which the Petitioner was convicted.

**II. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by refusing to disqualify the Harrison County Prosecuting Attorney's Office as Traci M. Cook, Assistant Prosecuting Attorney became a witness in this matter during her Trial prep with Crystal Kirkland, a State and defense witness in this matter.**

The Petitioner contends that the Circuit Court committed reversible error by refusing to disqualify the Assistant Prosecuting Attorney Traci M. Cook in this matter and the Harrison County Prosecuting Attorney's Office. The Petitioner's girlfriend Crystal Kirkland was living in the residence at the time the incident occurred in this matter. During the evening Clayton S. Collins had his girlfriend and Crystal Kirkland and the infant child staying at the house leave for a brief period (Clayton S. Collins transcript pgs 70 & 71) as it appeared there was going to be a confrontation in this matter. Crystal Kirkland had previously given a statement that the intent of the parties in this matter was to beat up T.J. Blankenship for his stealing of the Petitioner's Father's computers. During trial prep Crystal Kirkland was meeting with the Assistant Prosecuting Attorney Traci M. Cook and changed her story to there being an intent by the parties to kill T. J. Blankenship (June 19, 2013 Motion Transcript pg 3). Traci M. Cook further stated that she had confronted Crystal Kirkland on issues regarding her testimony and at that point Crystal Kirkland changed her story (June 19, 2013 Motion Transcript pg 4). During that interview that the Petitioner and Clayton S. Collins indicated there was an intent to kill T. J. Blankenship (June 19, 2013 Motion Transcript pg 12). This matter was brought before the Court by a Pre-trial Motion to Disqualify (appendix pg 48) filed by trial counsel. During the June 19, 2013 appearing on the same the Circuit Court took the position that it was premature to disqualify the Prosecuting Attorney's Office, that the Court would wait and resolve the issues of whether Crystal Kirkland

would testify and whether or not she could be impeached through other means rather than calling Traci M. Cook to testify (June 19, 2013 Motion Transcript pg 32). The Petitioner asserts that this created prejudicial error as it would interfere with his trial strategy in this matter and interfered with the ability to effectively call Crystal Kirkland as a witness in this matter. Crystal Kirkland's statement change caused to be given Court appointed counsel as she was a co-defendant in this matter. Crystal Kirkland was unable to be interviewed due to her Fifth Amendment rights and therefore trial counsel had to way to ascertain what version of her story she would testify to at trial if anything (June 19, 2013 Motion Transcript pg 4). Crystal Kirkland's testimony was helpful to the Petitioner in that her prior testimony corroborated that there was no intent to kill and therefore no evidence to support the murder in the first degree conviction.

The State of West Virginia did not call Crystal Kirland at the trial of this case. The Petitioner was placed in a position where he was unable to call her as a witness as well due to the aforesaid. Further, Crystal Kirkland could have provided testimony regarding a video recorded while Crystal Kirkland and the Petitioner were being interviewed by the Harrison County Sheriff's Department *see infra*. The State of West Virginia offered this video to show that the Petitioner had acted in a violent and/or aggressive manner towards Crystal Kirkland regarding her cooperation in this matter. Crystal Kirkland's testimony could have rebutted the same.

This Court has held in *State vs Smith, 226, W.Va. 487, 702 S.E. 2d 619 (2010)* that when an attorney is sought to be disqualified from representing his client because an opposing party desires to call the attorney as a witness, the Motion for Disqualification should not be granted unless the following factors can be met: First, it must be shown that the attorney will give evidence material to the determination of issues being litigated; Second, the evidence can not be

obtained elsewhere; Third, the testimony is prejudicial or maybe potentially prejudicial to the testifying attorney's client. Syllabus Pt. 3 *Smithson vs. U.S. Fidelity and Guarantee Company*, 186, W.Va., 195, 411 S.E. 2d 850 (1991). Further, pursuant to Rule 3.7 of the West Virginia Rules of Professional Conduct there is guidance provided for lawyers as witnesses.

a. A lawyer shall not act as advocate at a trial in which a lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; (3) disqualification of the lawyer would work substantial hardship on the client. The testimony offered by Traci M. Cook in this matter would require her and the Harrison County Prosecuting Attorney's Office to be disqualified. The testimony offered would have been a material element in this matter as it would involve the elements of the offense charged, could not be obtained elsewhere and further the same would be prejudicial to the State's case in chief. Thus, it would have been appropriate for the Court to grant the Petitioner's Motion to Disqualify.

In this matter, the testimony to be provided by Crystal Kirkland would be material to the Petitioner as her original testimony was exculpatory as there was no intent by the parties to kill the decedent. The subsequent change in her testimony while in the presence of the Harrison County Prosecuting Attorney's Office created a material change in that testimony and by not allowing the Harrison County Prosecuting Attorney to provide testimony as to the circumstances regarding the change in her testimony created a prejudicial impact upon the Petitioner that denied him a critical witness for his defense. The Circuit Court's ruling to defer this matter and determine whether a mistrial would be an appropriate resolution to this matter during trial was a interference with the Petitioner's ability to prepare for trial and consequently the Circuit Court committed reversible

error.

**III. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by failing to conduct an in camera hearing due to jury misconduct that occurred during deliberations and further by failing to order a mis-trial regarding the same.**

The Petitioner should be entitled to a new trial in this matter due to juror misconduct. During the trial of the case, juror Alicia Bailey engaged in improper actions in the jury selection and jury deliberation process.

During the deliberation process of the jury on day six (6) of the Trial, the jury sent two (2) questions to the Court with one of them asking the Court to recess deliberations that day and resume in the morning. The second question brought to the attention of the Court was one of the jurors namely; Alicia Bailey stated that she knew and worked the Petitioner's ex-wife Ruby King (Trial Transcript pg 868). The Court addressed the matter outside the presence of the jury and gave Counsel two (2) options; (1) they could question the juror or (2) they could excuse the juror and replace the juror with an alternate juror. Petitioner's counsel requested the Court to excuse the juror and replace the same with an alternate without questioning the juror or having in camera proceedings (Trial Transcript pg 869).

Counsel did not request a mis-trial in this matter nor did trial counsel request in camera proceedings regarding this juror. The Petitioner herein contends that this would be plain error in this matter and would be subject for review by this Court despite that issue not being raised by the Trial Court. This Court has held that to trigger the application of the "Plain Error doctrine", there must be (1) "an error;" (2) "that is plain;" (3) "that affects substantial rights;" (4) "seriously affects the fairness, integrity, or the public reputation of the judicial proceeds."

*Syllabus Pt. 7 State v. Miller, 194 W.Va. 3, 459 S.E. 2d 114 (1995).*

The failure of the trial court to conduct an in camera hearing as to juror misconduct issues during deliberations in this matter rises to the level of plain error as supported by this Court's ruling in *State v. Christopher Shane Dellenger, 225 W.Va. 736, 696 S.E. 2d 38 (2010)*. During the jury selection process, juror Bailey did not disclose to the Court or Counsel that she had worked with the Petitioner's ex-wife. Given the animosity that develops between participants to a divorce proceeding, the Petitioner contends that it would be incumbent upon the Court to explore whether any negative comments about the Petitioner were made by his ex-wife Ruby King to this juror during their employment situation. This issue had not been brought to the attention of the Court or the parties until the jury deliberations had already begun.

In *State v. Christopher Shane Dellenger, 225 W.Va. 736, 696 S.E. 2d 38 (2010)* this Court held that the right to a trial by an impartial objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution in Article 3 Section 14 of the West Virginia Constitution. In *State v. Christopher Shane Dellenger*, a juror engaged in misconduct by failing to answer all Voir Dire questions and by maintaining a my-space account with the appellant. This Court remanded the case for a new trial based upon the juror misconduct. Further, the Court has held "upon a clear and satisfactory showing of misconduct by juror induced or participated in by an interested party. No proof is required that the misconduct resulted in prejudice to the complaining party. Prejudice is presumed unless rebutted by a proof the verdict would be set aside." *Flesher v. Hale, 22 W.Va. 44 (1883)*.

Thus, based upon the misconduct of the juror the Petitioner contends that plain error has been met in this matter. Under the test as set forth in *State v. Miller* above the juror failure to

disclose her knowledge of her substantial relationship with the Petitioner's ex-wife is error as the same was not brought to the Court's attention during the voir dire process and the Court failed to conduct an in camera hearing as to explore the nature of this relationship; (2) that based upon the late disclosure of this information and the Court's failure to explore the same that error is plain; (3) the same affected the substantial rights of the Petitioner by not addressing whether improper comments had been made during the jury deliberation process by conducting an in camera hearing and further by denying the Petitioner the ability to have juror removed during the voir dire process; (4) the same seriously affected the fairness, integrity, and public reputation of the judicial proceedings as the failure to conduct the in camera interview as to this issue affects the trust in the deliberations and verdict process in this matter. Accordingly, the Petitioner believes that he should be granted a new trial based upon the juror misconduct in this matter.

**IV. Whether the Circuit Court of Harrison County, West Virginia committed reversible error by permitting the State of West Virginia to play a video recording to the Jury of the Petitioner at the Harrison County Sheriff's Department over the objection of the Petitioner herein.**

The Petitioner contends that the Circuit Court committed reversible error by allowing the State of West Virginia to play to the jury a video of the Petitioner and his girlfriend Crystal Kirkland at the Harrison County Sheriff's Department. This video was obtained after the investigating officers had spoken to both the Petitioner and his girlfriend and then recessed to formulate what they intended to do in the matter (Trial transcript pg 449). The Petitioner's girlfriend Crystal Kirkland then went to the interview room that the Petitioner was in and allegedly spoke to the Petitioner (Trial transcript pg 452). The video was not clearly audible, the talking was low and whispering of the Petitioner and his girlfriend (Trial transcript pg 454). The arresting

officer testified that he believed the video showed the Petitioner saying “I told you to keep your mouth shut” and then the Petitioner performed some type of a back hand motion towards the girlfriend (Trial transcript pg 454). Trial counsel objected to playing this video (Trial transcript pg 456). The Circuit Court then recessed the matter, reviewed the video and then allowed it to be played over the objection of the Petitioner.

The Petitioner contends that the video was prejudicial to the Petitioner as the same presented the Petitioner to the jury in some type of alleged violent scenario. By permitting the jury to hear and see a supposed violent act by the Petitioner, the same would create a unfair prejudice in this matter.

Pursuant to Rule 403 of the Rules of Evidence relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This Court has held that the trial Court enjoys broad discretion with respect to the balancing required under Rule 403 that would provide for the exclusion of relevant evidence if its probative value is substantially out weighed by the danger of unfair prejudice. *State v Waldren, 218 W.Va. 450, 624 S.E. 2d 887 (2005)*. It is common throughout of Rules of Evidence that other acts of violence by the Petitioner create a prejudicial impact with the jury and the same are not favored. In this matter, the Petitioner allegedly threatening his girlfriend Crystal Kirkland presented the Petitioner in a light that was unfavorable to the jury and created an improper view that if the Petitioner did something aggressive to her he would have been violent to T. J. Blankenship. Further, the Petitioner was prejudiced by the fact that the Petitioner’s girlfriend changed her testimony as set forth above and the Petitioner was

unable to call her as a witness to rebut the allegations contained in this video and provide testimony as to what was actually said or the context of any communications between the parties. Thus, the Circuit Court permitting the video to be played to the jury was prejudicial and should cause this matter to be reversed and a new awarded.

**V. Whether the Circuit Court made a reversible error by failure to redact/limit impermissible vouching of the co-defendant's plea agreement.**

The Petitioner contends that the Circuit Court committed reversible error by failing to redact the plea agreement in this matter of the co-defendant and failed to limit the testimony regarding the same as it applies to impermissible vouching for the truthfulness of the co-defendant. The plea agreement of the co-defendant in the matter provided that the co-defendant would provide "truthful" testimony regarding the Petitioner herein. During trial under direct examination by the State of West Virginia the co-defendant questioned the Petitioner as follows; "ok. and part of that plea agreement is you offer truthful testimony? answer, yes" (Clayton S. Collins transcript pg 148). Further, on redirect, the Prosecuting Attorney as follows "Ok. in fact, your plea is dependent upon truthful testimony, correct? answer correct" (Clayton S. Collins transcript pg 207). *In State v. Swims, 212 W.Va.263, 569 S.E. 2d 784 (2012)* this Court held that was reversible error and failing to redact vouching language from a plea agreement. A trial Judge considering whether, or to the extent to which a plea agreement may be used by the prosecution must endeavor to protect the Petitioner from impermissible uses of the plea agreement, such as using the plea agreement; (1) as evidence of a Petitioner's guilt; (2) to bolster the testimony of a co-defendant, or (3) to directly or indirectly vouch for veracity of a co-defendant who has pleaded guilty and then testified against the Petitioner. To carry out this duty, the Trial Judge must study the plea agreement with care and

redact all prejudicial and irrelevant provisions. In this case, the State of West Virginia used the plea agreement on two (2) separate occasions during direct examination of the co-defendant and redirect examination of the Petitioner following cross-examination to bolster testimony of the co-defendant and impermissibly use the same to enhance the co-defendant's veracity for truthfulness. Trial counsel did not object during this testimony, however, as set forth above the Petitioner contends that the plain error doctrine would be applicable and thus this Court should review the matter as this error would raise to the level of plain error. This Court should reverse the conviction in this matter and order a new trial based upon use of the co-defendant's plea agreement to enhance his credibility before the jury.

#### 8. CONCLUSION

The Petitioner prays that this Court grant his Appeal and set aside the verdict in this matter and grant such other relief as the Court deems appropriate and just.

William B. Murray, Petitioner  
By Counsel

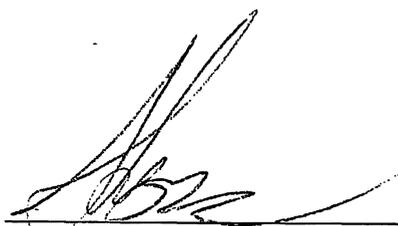


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**CERTIFICATE OF SERVICE**

I, Steven B. Nanners, do hereby certify that on this the 23<sup>rd</sup> day of September 2014, the foregoing Petitioner's Brief was duly served by depositing true copies thereof in an envelope, in the United States Mail, with sufficient postage attached thereto, addressed as follows:

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