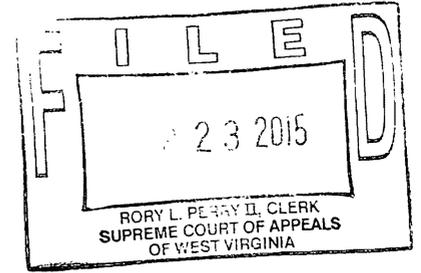


IN THE SUPREME COURT
OF
APPEALS OF WEST VIRGINIA



DOCKET NO. 14-1141

CHRIS WADE FLEMING,
Defendant Below,

PETITIONER

v.

Hampshire County Case No. 13-F-4

STATE OF WEST VIRGINIA,
Plaintiff Below,

RESPONDENT

PETITIONER'S BRIEF

Jonathan G Brill
Jonathan G Brill, PLLC
Attorney at Law
PO Box 932
Romney WV 26757
304-822-7110
fax 304-822-7109
jonathangbrill@gmail.com
WV State Bar ID # 11316

Lary D. Garrett
Garrett & Garrett
Attorneys at Law
PO Box 510
Moorefield WV 26836
304-538-2375
fax 304-538-6807
garrettlaw@hardynet.com
WV State Bar ID # 1343

Co-Counsel for Petitioner, Chris Wade Fleming

TABLE OF CONTENTS

TABLE OF CONTENTS.i

TABLE OF AUTHORITIES.iii

I. ASSIGNMENTS OF ERROR.1

II. STATEMENT OF THE CASE2

 A. STATEMENT OF FACTS.2

 1. The Petitioner.2

 2. The Events of September 3, 20125

 B. PROCEDURAL HISTORY.7

III. SUMMARY OF ARGUMENT9

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.10

V. STANDARD OF REVIEW11

 A. CONCLUSIONS OF LAW AND FINDINGS OF FACT.11

 B. PLAIN ERROR.11

 C. SENTENCING.11

VI. ARGUMENT.12

 A. The Trial Court committed reversible error by actively participating in the plea bargaining process when it *sua sponte* ordered Petitioner to undergo an additional forensic evaluation for criminal responsibility12

 B. The Trial Court erred when it denied Petitioner’s Motion for a Rule 11 Hearing whereby Petitioner and the State could inform the Court that the parties had entered into a valid, written plea agreement.19

 C. The Trial Court erred when it allowed all of the guilty verdicts returned by the jury to stand when the State had failed to prove beyond a reasonable doubt that Petitioner was sane at the time the criminal conduct occurred.21

1.	Proof of Sanity.	21
2.	Dr. Adamski’s Bias.	22
3.	Dr. Adamski’s Testimony.	25
D.	The Trial Court committed plain error when it allowed the jury’s guilty verdict on Petitioner’s attempted murder charge to stand	26
E.	The Trial Court erred when it failed to declare a mistrial following the State’s examinations of Heather Ludwick, Dr. Thomas Adamski and Dr. Barnet Feingold.	28
1.	Heather Ludwick.	28
2.	Dr. Adamski.	29
3.	Dr. Feingold.	31
F.	The Trial Court erred when it allowed the State to introduce improper character evidence about Petitioner and ask questions without a factual and good faith basis when it examined the defense witness Lois Fleming	33
G.	The prosecuting attorney’s misconduct severely prejudiced Petitioner, depriving him of his constitutional right to a fair trial.	38
H.	The Trial Court erred when it denied Petitioner’s Motion for Judgment of Acquittal at the end of the State’s case-in-chief and at the conclusion of the trial.	40
I.	The Trial Court erred when it denied Petitioner’s Motion for New Trial.	41
J.	The Trial Court erred when it sentenced Petitioner to a period of incarceration disproportionate to the underlying criminal conduct.	42
VI.	CONCLUSION.	45
	CERTIFICATE OF SERVICE.	46

TABLE OF AUTHORITIES

CASES

<i>Edwards v. Leverette</i> , 259 S.E.2d 436 (W.Va. 1979).....	21
<i>Huddleston v. U.S.</i> , 485 U.S. 681 (1988).....	34, 35
<i>In re J.S.</i> , 758 S.E.2d 747 (W.Va. 2014).....	11
<i>In re Tiffany Marie S.</i> , 196 W.Va. 223, 470 S.E.2d 177 (1996).....	11
<i>Keller v. Ferguson</i> , 177 W.Va. 616, 355 S.E.2d 405 (1987).....	28
<i>Newman v. U.S.</i> , 382 F.2d 479 (D.C. Cir. 1967).....	17
<i>Myers v. Frazier</i> , 173 W.Va. 658, 319 S.E.2d 782 (1984).....	12
<i>Philip Leon M. V. Greenbrier Co. Bd. of Ed.</i> , 199 W.Va. 400, 484 S.E.2d 909 (1996).....	11
<i>Santobello v. New York</i> , 404 U.S. 257 (1971).....	19
<i>State v. Armstrong</i> , 179 W.Va. 435, 369 S.E.2d 870 (1988).....	28
<i>State v. Banjoman</i> , 178 W.Va. 311, 359 S.E.2d 331 (1987).....	29
<i>State v. Bell</i> , 189 W.Va. 448, 432 S.E.2d 532 (1993).....	33
<i>State v. Buck</i> , 173 W.Va. 243, 314 S.E.2d 406 (1984).....	42
<i>State v. Bowyer</i> , 143 W.Va. 302, 101 S.E.2d 243 (1957).....	26, 27
<i>State v. Boyd</i> , 160 W.Va. 234, 233 S.E.2d 710 (1977).....	38
<i>State v. Burton</i> , 153 W.Va. 40, 254 S.E.2d 129 (1979).....	40
<i>State v. Catlett</i> , 207 W.Va. 747, 536 S.E.2d 728 (2000).....	27
<i>State v. Carey</i> , 210 W.Va. 651, 558 S.E.2d 650 (2001).....	26
<i>State v. Collins</i> , 186 W.Va. 1, 409 S.E.2d 181 (1990).....	38
<i>State v. Cooper</i> , 172 W.Va. 266, 304 S.E.2d 851 (1983).....	42, 43, 44

State v. Crabtree, 198 W.Va. 620, 482 S.E.2d 605 (1996). 12

State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981). 21

State v. Dennis, 216 W.Va. 331, 607 S.E.2d 437 (2004). 34, 35

State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990). 34

State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988). 38, 42

State v. Ferguson, 165 W.Va. 529, 252 S.E.2d 166 (1980). 26, 34

State v. Flournoy, 232 W.Va. 175, 751 S.E.2d 280 (2013). 21

State v. Galford, 87 W.Va. 358, 105 S.E. 237 (1920). 26, 27

State v. Gibson, 181 W.Va. 747, 384 S.E.2d 358 (1989). 28

State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397 (1984). 12, 21, 26, 27, 29, 38, 40

State v. Harris, 2013 W.Va. LEXIS 321, 12 (W. Va. Apr. 11, 2013). 34

State v. Hinchman, 214 W.Va. 624, 591 S.E.2d 182 (2003). 11

State v. Houston, 166 W.Va. 202, 273 S.E.2d 375 (1980). 42

State v. Kennedy, 735 S.E.2d 905, 229 W.Va. 756 (2012). 41

State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983). 26, 35

State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1994). 33

State v. Little, 120 W.Va. 213, 197 S.E. 626 (1938). 28

State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). 11

State v. McDaniel, 211 W.Va. 9, 560 S.E.2d 484 (2001). 34

State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994). 33, 34, 35, 36, 37

State v. Milam, 163 W.Va. 752, 260 S.E.2d 295 (1979). 21

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996). 11, 27

State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976). 21

State v. Newman, 108 W.Va. 642, 152 S.E. 195 (1930). 42

State v. Richardson, 214 W.Va. 410, 589 S.E.2d 552 (2003). 11

State v. Rowe, 168 W.Va. 678, 285 S.E.2d 445 (1981). 21, 22

State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001). 12, 14, 15

State v. Sears, 208 W.Va. 700, 542 S.E.2d 863 (2000). 20

State v. Simmons, 175 W.Va. 656, 337 S.E.2d 314 (1985). 34, 38

State v. Spicer, 162 W.Va. 127, 245 S.E.2d 922 (1978). 35

State v. Sugg, 193 W.Va. 388, 456 S.E.2d 496 (1995). 12, 38, 40

State v. Tapp, 153 W.Va. 759, 172 S.E.2d 583 (1970). 40

State v. Vance, 207 W.Va. 640, 535 S.E.2d 484 (2000). 41

State v. Welch, 229 W.Va. 647, 734 S.E.2d 194 (2012). 12

State v. Whitt, 183 W.Va. 286, 395 S.E.2d 530 (1990). 19

State ex rel. Brewer v. Starcher, 195 W.Va. 185, 465 S.E.2d 185 (1995). 12, 13, 19

State ex rel. Brooks v. Worrell, 156 W.Va. 8 190 S.E.2d 474 (1972). 28

State ex re. Hampstead v. Dostert, 173 W.Va. 133, 313 S.E.2d 409 (1984). 17

State ex rel. Sale v. Goldman, 208 W.Va. 186, 539 S.E.2d 446 (2000). 11

State ex rel. Tinsman v. Hott, 188 W.Va. 349, 424 S.E.2d 584 (1992). 33

Tucker v. Holland, 174 W.Va. 409, 327 S.E.2d 388 (1985). 19

TXO Prod. Corp. v. Alliance Resources, 187 W.Va. 457, 419 S.E.2d 870 (1992). 34, 35

U.S. v. Chin, 83 F.3d 83 (4th Cir. 1996). 34

U.S. v. Masters, 622 F.2d 83 (4th Cir. 1980). 34

<i>U.S. v. Williams</i> , 900 F.2d 823 (5th Cir. 1990).....	34
<i>Walker v. W. Va. Ethics Comm'n</i> , 201 W.Va. 108, 492 S.E.2d 167 (1997).....	11
<i>Wanstreet v. Bordenkircher</i> , 166 W.Va. 523, 276 S.E.2d 205 (1981).....	42, 43
<i>W. Va. Jud'l Inquiry Comm. v. Dostert</i> , 165 W.Va. 233, 271 S.E.2d 427 (1980).....	17

STATUTES

<i>Me. Rev. Stat.</i> 15 § 101-D.....	16
<i>Mo. Rev. Stat</i> § 552.020.1.....	16
<i>Okla. Stat.</i> 22 § 1161.....	16
<i>Va. Code</i> § 19.2-169.1.....	16
<i>Wash. Rev. Code</i> § 10.77.060.....	16
<i>W. Va. Code</i> § 27-6A-1.....	15
<i>W. Va. Code</i> § 27-6A-2.....	14, 16
<i>W. Va. Code</i> § 27-6A-3.....	14, 16
<i>W. Va. Code</i> § 27-6A-5.....	18
<i>W. Va. Code</i> § 61-2-1.....	26
<i>W. Va. Code</i> § 61-11-8.....	26
<i>W. Va. Code</i> § 62-3-7.....	22

RULES

<i>W. Va. Rules of Criminal Procedure</i> , Rule 11.....	9, 12, 13, 14, 18, 19, 45
<i>W. Va. Rules of Criminal Procedure</i> , Rule 29.....	40
<i>W. Va. Rules of Evidence</i> , Rule 103(d).....	10
<i>W. Va. Rules of Evidence</i> , Rule 104.....	35, 36

W. Va. Rules of Evidence, Rule 401. 35

W. Va. Rules of Evidence, Rule 402. 35

W. Va. Rules of Evidence, Rule 403. 33, 37

W. Va. Rules of Evidence, Rule 404(b). 33, 34, 35, 37

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V. 40

U.S. Constitution, Amendment VI. 40

U.S. Constitution, Amendment XIV. 40

W. Va. Constitution, Art. III, § 5. 40

W. Va. Constitution, Art. III, § 10. 40

W. Va. Constitution, Art. III, § 14. 40

I. ASSIGNMENTS OF ERROR.

- A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ACTIVELY PARTICIPATING IN THE PLEA BARGAINING PROCESS WHEN IT *SUA SPONTE* ORDERED PETITIONER TO UNDERGO AN ADDITIONAL FORENSIC EVALUATION FOR COMPETENCY AND CRIMINAL RESPONSIBILITY .
- B. THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER'S MOTION FOR A RULE 11 HEARING WHEREBY PETITIONER AND THE STATE COULD INFORM THE COURT THE PARTIES HAD ENTERED INTO A VALID , WRITTEN PLEA AGREEMENT .
- C. THE TRIAL COURT ERRED WHEN IT ALLOWED ALL THE GUILTY VERDICTS RETURNED BY THE JURY TO STAND WHEN THE STATE HAD FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT PETITIONER WAS SANE AT THE TIME THE CRIMINAL CONDUCT OCCURRED .
- D. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED THE JURY 'S GUILTY VERDICT ON PETITIONER'S ATTEMPTED MURDER CHARGE TO STAND .
- E. THE TRIAL COURT ERRED WHEN IT FAILED TO DECLARE A MISTRIAL FOLLOWING THE STATE'S EXAMINATIONS OF HEATHER LUDWICK, DR. THOMAS ADAMSKI , AND DR. BARNET FEINGOLD.
- F. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO INTRODUCE IMPROPER CHARACTER EVIDENCE AND ASK QUESTIONS WITHOUT A FACTUAL AND GOOD FAITH BASIS WHEN IT EXAMINED DEFENSE WITNESS LOIS FLEMING.
- G. THE PROSECUTING ATTORNEY' MISCONDUCT SEVERELY PREJUDICED PETITIONER, DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL .
- H. THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AT THE CONCLUSION OF THE TRIAL .
- I. THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER'S MOTION FOR NEW TRIAL.
- J. THE TRIAL COURT ERRED WHEN IT SENTENCED PETITIONER TO A PERIOD OF INCARCERATION DISPROPORTIONATE TO THE UNDERLYING CRIMINAL CONDUCT.

II. STATEMENT OF THE CASE.

A. STATEMENT OF FACTS.

Petitioner Chris W. Fleming was indicted by the Hampshire County Grand Jury on January 3, 2013, for 12 counts of wanton endangerment, two (2) counts of attempted murder, one (1) count of fleeing in reckless indifference for the safety of others, and one (1) count of domestic assault, for the events of September 3, 2012. *App. Vol. IV*, pp. 1-8. Petitioner Fleming filed a Notice of Mental Defense on January 16, 2013, based on post-traumatic stress disorder (“PTSD”) after having served in the Iraq war. *App. Vol. IV*, p. 13.

1. The Petitioner.

Petitioner Fleming was adopted as an infant and raised in the Fairmont area by Fred and Lois Fleming. *App. Vol. IV*, p. 104. He graduated from Fairmont State University with a bachelor degree in criminal justice and a minor in sociology. *App. Vol. IV*, p. 105. At Fairmont State, Petitioner was in the Reserve Officer Training Candidate Program. *App. Vol. III*, p. 6. After graduation he joined the National Guard, married, and moved to North Carolina. Petitioner Fleming served as an officer in the National Guard for approximately 10 years, until 1994, when he became a police officer for the Charlotte-Mecklenburg Police Department in Charlotte, North Carolina. *App. Vol. III*, pp. 6-7.

Petitioner served as an officer in the Charlotte-Mecklenburg Police Department from July 7, 1994, until March 19, 2005. *App. Vol. IV*, pp. 74-87. Fleming had no major blemishes on his police service record, although he did fail to appear in court a couple of times, and had a disagreement with a co-worker at the department. *App. Vol. IV*, pp. 74-87. Petitioner’s Report of Separation indicates the Charlotte-Mecklenburg Police Department would consider him for reappointment. *App. Vol. IV*, p. 87. Petitioner resigned from this police force to reenlist for active duty and volunteered to serve in Iraq.

In Iraq, Petitioner Fleming was a team leader in a striker patrol unit. Striker units are quick-response units, which respond to attacks on U.S. troops. *App. Vol. III*, p. 99. The striker unit’s primary responsibility is to prevent further harm to fellow soldiers under attack, and to repel enemy combatants from the scene of an attack. *Id.* As a team leader, Fleming was

responsible for spotting improvised explosive devices (“IED”s”) along roadsides. *Id.* Spotting IED’s is a tremendous responsibility and a challenging task. There were instances when Petitioner failed to identify some well-hidden IED’s, and others were killed or injured as a result.

Petitioner Fleming was deployed to Iraq for one (1) year and faced a significant amount of combat. Often his striker team arrived too late to provide meaningful help. On several occasions the attacks were ongoing. *App. Vol. III*, p. 104. Petitioner witnessed some catastrophic injuries during his deployment, such as a soldier who had a hole burned through him by an anti-tank grenade, another who had his legs burned off, as well as injuries to civilian men, women, and children from car bombs, and countless gunshot wounds and dead bodies. *Id.* As a striker team member, Fleming had to try to save the lives of others while taking enemy fire and navigating chaos and carnage. Dr. Barnet Feingold, an expert in the field of PTSD, testified he has treated many veterans who suffer from PTSD but who have experienced only a fraction of the combat and trauma Petitioner faced during his time in Iraq. *App. Vol. III*, p. 103.

Petitioner Fleming was placed in several situations where he had to shoot enemy combatants in self-defense. *App. Vol. III*, p. 105. Petitioner’s unit was ambushed on Easter, when due to the holiday it took a very long time for air support to arrive. The helicopter then mistook his team for insurgent forces and fired on their position with its mini-gun. *Id.* The mini-gun has six (6) barrels and fires from 33 to 100 rounds a second. Fleming’s unit was unable to communicate with the helicopter because there was too much chatter on the radio. *Id.*

Petitioner received numerous honors and awards for his service in Iraq. They include the 28th Infantry Division Shoulder Sleeve Insignia - Former Wartime Service (SSI-FWTS); Overseas Service Bar; Armed Forces Reserves Medal With M Device; National Defense Service Medal; Iraq Campaign Medal; Overseas Service Ribbon; Army Commendation Medal; Army Achievement Medal; Army Good Conduct Medal; National Defense Service Medal; Global War On Terrorism Service Medal; Iraq Campaign Medal with Campaign Star; Army Service Ribbon; Armed Forces Reserve Medal; and a Combat Infantry Badge. *App. Vol. IV*, p. 144.

During his time in Iraq, Petitioner began struggling to understand the goals of the military’s involvement in the region. He had problems understanding the Iraqis, who would

smile at soldiers during the day and try to kill them at night. *App. Vol. III*, p. 107; *App. Vol. IV*, p. 27. When Fleming returned from Iraq, he was treated at the V.A. hospital for his PTSD symptoms, and prescribed paxil to control his anxiety. However, Petitioner also began using alcohol as a form of self medication. *App. Vol. III*, pp. 101-103.

Prior to his arrest, Petitioner worked at the Rubbermaid plant in Winchester, Virginia, for six (6) or seven (7) months as a forklift operator. He tended to work by himself loading trucks, and did not interact much with others. From 2010 to 2011, Fleming was on active duty in the Army stateside, training soldiers to identify IED's. Prior to his deployment in Iraq, he worked at Gander Mountain in Salisbury, Maryland, in the shipping department. *App. Vol. IV*, p. 107.

At some point, the Army suspended Petitioner's ability to have access to firearms because of his PTSD. When the V.A. felt Petitioner's symptoms were sufficiently severe to put him on "a weapons profile," he was not allowed to carry weapons, and was required to see a counselor at a combat stress clinic. Petitioner Fleming was not receptive to this PTSD diagnosis because he felt labeled as weak and "nuts." Petitioner wanted to have his weapons privileges reinstated and to be treated like a "normal" soldier. *App. Vol. III*, pp. 117-118.

Petitioner's overall IQ was determined by an examining psychologist to be in the bottom 23% of individuals. Petitioner's strong scores were perceptual reasoning, with a score of 102, and verbal comprehension, with a score of 100. Weak scores were in working memory, where he received a 74, and processing speed, where he received an 81. *App. Vol. III*, pp. 70-73.

Petitioner Fleming was 45 years old with no prior criminal history at the time of the charged offenses. *App. Vol. IV*, p. 104. After his arrest, he voluntarily gave a 30-minute statement to investigating officers. Petitioner did not recall much of what happened. *App. Vol. II*, pp. 154-156; *App. Vol. III*, p. 144. He recalled arguing with his wife, simply wanting to be alone, and that people kept confronting him. According to Dr. Feingold, such episodes are not uncommon in people who suffer PTSD. Moreover, it is not uncommon for these episodes to be triggered by an argument like the one Petitioner had with his wife, and PTSD patients often cannot recall what happened during such an episode. In addition, alcohol consumption exacerbates the effects of PTSD. *App. Vol. III*, pp. 109-13.

2. The Events of September 3, 2012.

On the evening of September 3, 2012, beginning at approximately 9:35 p.m., Petitioner engaged in a series of events that lasted approximately 30 minutes. These events led to his indictment for 12 counts of wanton endangerment, two (2) counts of attempted murder, one (1) count of feloniously fleeing with reckless indifference to the safety of others, and one (1) misdemeanor count of domestic assault. *App. Vol. IV*, pp. 1-8. But basically these offenses involved victims Petitioner did not know prior to the night in question.

The evidence showed Petitioner, his wife, and stepdaughter had been driving around, drinking, and arguing. *App. Vol. II*, pp. 164-165, 168-169; *App. Vol. III*, p. 212. At some point, Petitioner Fleming drove away from the family home and through the yard of Jason Ludwick, a resident of Capon Bridge, West Virginia. *App. Vol. II*, p. 171. Ludwick was offended Fleming drove across his road, and got in his vehicle and pursued him. *Id.* Petitioner stopped his vehicle along a creek. When Ludwick found Petitioner parked along the creek, a confrontation ensued. *App. Vol. II*, p. 208.

Ludwick testified Petitioner told him if he did not want to get shot, he should leave. Ludwick said Petitioner stuck the barrel of a gun out his car window, and he heard the gun cock. According to Ludwick, it looked like a long gun. *App. Vol. II*, p. 210. As Ludwick drove away he believed he heard Petitioner fire a shot. *Id.* Ludwick drove about a mile and pulled into Brian Slade's driveway. There, Ludwick asked Slade to call 911 because someone had threatened to shoot him. *App. Vol. II*, p. 182. Slade made the call and told 911 what was happening.

Ludwick believed he should get home to his family. On his way home, Ludwick drove by Petitioner again. Ludwick did not stop, but as he was passing Petitioner, Ludwick heard the sound of gunshots being fired. *App. Vol. II*, pp. 211-212.

While Jason Ludwick was talking with Brian Slade and the 911 operator, his wife, Heather Ludwick, went looking for him. As she was driving, she observed the same Jeep she saw go through her yard, parked on the side of the road. *App. Vol. II*, p. 173. As she slowed down, Petitioner told her that her husband was in the river. *Id.* She told Petitioner she was just looking for her husband and did not want any trouble. *App. Vol. II*, p. 174. She testified

Petitioner threatened to shoot her, pointed a rifle in her direction, and told her he would shoot her in the face. *Id.* But Petitioner did not discharge any shots at this time. Heather Ludwick then left and headed home to call 911, thinking her husband might be shot and lying in the river. *Id.*

Brian Slade verified Jason Ludwick's testimony. Slade testified he encountered Jason Ludwick, and at his request called 911 and said a man in a Jeep drove through Ludwick's yard, the man had a gun, and the man told Ludwick to mind his own business. *App. Vol. II*, pp. 182-183. Slade gave 911 the location where the incident occurred and gave both his and Ludwick's names. He verified Ludwick then drove south on Cold Stream Road back towards his home. *Id.*

Slade also testified that after Ludwick left, he heard shots fired from the direction where Ludwick had reported his second encounter with Petitioner. *Id.* He called 911 again, and reported he heard multiple gun shots in the same general area as he had described previously. *Id.*

When Slade hung up the phone, he looked out his kitchen window and saw a gold Ford Explorer, with a Jeep behind it, traveling north on Cold Stream Road. *App. Vol. II*, pp. 183-184. Slade decided to drive north on Cold Stream Road to get the license plate number. *App. Vol. II*, p. 184. He followed the Jeep on Cold Stream Road until it intersected Rubenstein Road. The Jeep turned left on Rubenstein Road and stopped at Richie Moreland's old abandoned house. *Id.*

Slade pulled behind the Jeep, attempting to get its license plate number. *App. Vol. II*, pp. 184-185. Petitioner exited the Jeep with what looked to Slade like an AR-15 or an AK-47. *App. Vol. II*, p. 185. Slade put his car in reverse, backed up, turned around, and noticed Petitioner pointing the gun toward his car. While driving away, Slade heard shots and the sound of bullets striking his vehicle. He called 911 for a third time and reported what had transpired. *Id.*

About this time, Hampshire Country Sheriff Deputies arrived on the scene. They followed Petitioner's Jeep in a high speed chase for some distance. *App. Vol. II*, p. 193. At one point, Petitioner Fleming made a sudden aggressive and precise turn, which the officers characterized as something you would expect from a police officer or military-trained person, because Petitioner's vehicle suddenly was pointed at them. *App. Vol. II*, p. 218. Petitioner then exited his vehicle with his weapon and started toward the officers. *App. Vol. II*, pp. 218-221.

The deputies took a defensive position, yelling for Petitioner to throw down his rifle. Petitioner Fleming approached the officers in a zig-zagging and tactical manner. *App. Vol. II*, p.153; *App. Vol. III*, p. 73. Fleming did fire his weapon during this encounter. At some point, a deputy fired a shotgun slug at Petitioner, which hit the ammunition bag Petitioner was carrying. *App. Vol. III*, p. 81. Petitioner then threw down his gun and surrendered. *App. Vol. II*, p. 221.

The entire incident, from the time Petitioner drove through Ludwick's yard until he threw down his firearm, lasted less than 30 minutes. Immediately following the incident, Petitioner Fleming was interviewed by Hampshire County's Captain John Eckerson, which interview was recorded on video. This video interview contrasts sharply to the chain of events listed here, as Petitioner only remembered fragments of what happened. *App. Vol. II*, pp. 154-156; *App. Vol. III*, p. 144. Petitioner's demeanor in the interview is a sober, cooperative, soft-spoken citizen. At trial, no evidence was presented that Petitioner's behavior indicated he was acting like someone under the influence of alcohol.

B. PROCEDURAL HISTORY.

Petitioner's case took a long and winding road to arrive at trial on July 15, 2014. During the course of the case, there was a 10-month span where four (4) different judges presided over the case. *App. Vol. I*, p. 13. Petitioner was indicted by a Hampshire County, West Virginia, Grand Jury on January 3, 2013, on 12 counts of wanton endangerment, two (2) counts of attempted murder, one (1) count of fleeing with reckless indifference for the safety of others, and one (1) count of domestic assault for events occurring on September 3, 2012. *App. Vol. IV*, pp. 1-8. Petitioner Fleming filed a Notice of Mental Defense on January 16, 2013, based on post-traumatic stress disorder from his service in Iraq. *App. Vol. IV*, p. 13.

On January 28, 2013, the trial court ordered Petitioner's competency to stand trial and criminal responsibility be evaluated by a court-appointed psychological expert. *App. Vol. I*, p. 14. The trial court then appointed Gregory Trainor to conduct the evaluation after Petitioner waived his right to a speedy trial during the January 2013 term of court. *App. Vol. I*, pp. 1-2, 14.

On April 29, 2013, Mr. Trainor submitted his report which found Petitioner competent to stand trial. The trial court then made a finding based on this report that Fleming was competent to stand trial. *App. Vol. IV*, p. 147. But Trainor also found Petitioner was unable to comprehend the nature or quality of his criminal behavior due to his PTSD on September 3, 2012, and that his capacity to appreciate the wrongfulness of his behavior and to control his reactions to the people approaching him that night was moderately to severely diminished. *App. Vol. I*, p. 36. Neither Petitioner nor the State took issue with Mr. Trainor's report.

On July 1, 2013, Petitioner appeared for a pre-trial conference, where counsel for both parties informed the court they were close to a plea agreement. The parties informed the court Petitioner would plead not guilty by reason of insanity, with the only contention being whether the plea would be to three (3) or seven (7) counts. *App. Vol. I*, pp. 115-116. The trial court then stated it was unsure if there could be a plea to that effect and ordered the matter continued for a week so the parties could finalize the plea agreement. In the meantime, the trial court advised it needed to familiarize itself with the law. *App. Vol. I*, pp. 116-120. At that July 1, 2013, hearing, the prosecuting attorney also informed the court that if the case proceeded to trial, he did not believe the State could rebut Petitioner's insanity defense. *App. Vol. I*, p. 118.

Petitioner Fleming appeared on July 9, 2013, when the court was to consider the plea agreement. However, before the plea hearing began, Judge Keadle informed counsel he had already prepared an order, which ordered Petitioner to undergo another evaluation for both competency and criminal responsibility. *App. Vol. I*, p. 124, *App. Vol. IV*, pp. 61-63. The court also ordered this evaluation to be conducted by Dr. Thomas Adamski on July 16, 2013, after personally making these arrangements. *App. Vol. I*, p. 124, *App. Vol. IV*, p. 40. At the time the trial court entered this order, Fleming had signed the State's plea offer and was prepared to tender it to the court that day. *App. Vol. IV*, p. 39.

On September 4, 2013, Dr. Adamski submitted his psychological evaluation to the trial court, which far exceeded the time requirements of *W. Va. Code* § 27-6A-4(c). Dr. Adamski found Petitioner Fleming competent to stand trial and criminally responsible for the events of September 3, 2012. *App. Vol. I*, pp. 30-32. It was later determined that Dr. Adamski completed

his report without verifying critical information about Fleming's military service, namely, that he had been in active combat operations in Iraq. *App. Vol. III*, pp. 178-183, *App. Vol. IV*, p. 88.

Dr. Adamski's report set off a chain reaction, which led to Petitioner electing to go to trial. The State rescinded its plea offer based on Adamski's finding of criminal responsibility. The trial court, by the Honorable H. Charles Carl, III, ratified the State's conduct when it denied Petitioner's motions, including a Motion for a Rule 11 Hearing, which argued Judge Keadle had abandoned his impartial role and impermissibly participated in the plea bargaining process. *App. Vol. IV*, pp. 57-64.

On December 12, 2013, the State wanted to continue the jury trial set for late December to allow Adamski to prepare a supplemental report. Petitioner's bond was reduced, with the condition that he receive in-patient PTSD treatment at the Martinsburg Veteran's Administration ("V.A.") Hospital. Fleming remained there from December 17, 2013, until his trial began on July 15, 2014. *App. Vol. IV*, pp. 89-92.

Petitioner's jury trial lasted two (2) days. The jury's verdict found Petitioner guilty of all but one of the charges. *App. Vol. IV*, pp. 97-98. The trial court denied Petitioner's Motion for New Trial and sentenced him to the penitentiary on September 17, 2014. *App. Vol. IV*, p. 117.

III. SUMMARY OF ARGUMENT.

On appeal, Petitioner Fleming raises errors committed both in the months before his trial began on July 15, 2014, and during the course of his two-day trial before the Circuit Court of Hampshire County, West Virginia. In the months leading up to trial, Fleming was offered a plea by the State to plead not guilty by reason of insanity to seven (7) counts of the Indictment. That offer was signed and accepted by Petitioner on July 8, 2014. The trial court then engaged in impermissible participation in the plea bargaining process by failing to make a definitive ruling on Petitioner's plea, abandoning its impartial role, and ordering Petitioner to undergo an additional evaluation for both competency and criminal responsibility. The trial court further erred when it denied Petitioner Fleming an opportunity to present the signed plea agreement when it denied his Motion for a Rule 11 Hearing, in violation of Rule 11, *W. Va. R. Cr. P.*

During Petitioner's trial, several times the trial court should have declared a mistrial. In the State's direct examination of its witnesses Heather Ludwick and Dr. Adamski, the prosecutor asked questions for which there was no factual or good faith basis. Those questions were designed solely to inflame the jury, to place improper matters before the jury, and to prejudice the jury against Petitioner Fleming. During the State's voir dire of defense expert Dr. Feingold, and its cross-examination of Petitioner's mother Lois Fleming, the prosecutor again asked questions for which it had no good faith or factual basis, and which were asked solely to inflame and prejudice the jury against Petitioner. Each incident warranted the granting of a mistrial. The prosecuting attorney also introduced improper character evidence during its examination of Mrs. Fleming, which created an unfair risk that Petitioner would be wrongfully convicted. Throughout the trial, the prosecuting attorney's misconduct deprived Fleming of his constitutional right to a fair trial.

Several grounds exist for the trial court to have set aside the jury's verdicts of guilty. On all the charges, the State failed to prove beyond a reasonable doubt that Petitioner Fleming was sane at the time he committed the offenses. On the attempted murder conviction, the State failed to prove beyond a reasonable doubt that Petitioner acted with malice or deliberation, and failed to present any evidence that the actions were premeditated.

The trial court erred when it denied Petitioner's Motion for New Trial and his Motions for Judgment of Acquittal. Last, the trial court abused its discretion when it sentenced Petitioner Fleming. His sentence violates the West Virginia and federal constitutional protections against cruel and unusual punishment and for proportionate sentencing. Petitioner's sentence is unjust, fails to achieve the objective of retributory justice, and hampers his ability to continue treatment for his PTSD.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

Petitioner believes this case should be scheduled for oral argument. It appears to be appropriate for Rule 20 argument, as it involves at least one issue of first impression and involves issues of fundamental public importance.

V. STANDARD OF REVIEW.

A. Conclusions of Law and Findings of Fact.

When reviewing the findings and conclusions of the trial court, this Court applies a two-prong deferential standard of review. The final order and the ultimate disposition are reviewed under an abuse of discretion standard. The trial court's underlying factual findings are reviewed under a clearly erroneous standard. "Questions of law are subject to a *de novo* review." Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997); Syl. Pt. 2, *State v. Hinchman*, 214 W.Va. 624, 626, 591 S.E.2d 182, 184 (2003).

B. Plain Error.

On appeal, this Court may review an unpreserved error if the error is "plain." *In re Tiffany Marie S.*, 196 W.Va. 223, 234, 470 S.E.2d 177, 188 (1996), *citing W. Va. R. E.*, Rule 103(d). Plain error review is "reserved for the most egregious circumstances." *In re Tiffany Marie S.*, 196 W.Va. at 234, 470 S.E.2d at 188, *citing State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). "Under a plain error analysis 'the alleged error must have seriously affected the fairness or integrity of the trial.'" *In re J.S.*, 758 S.E.2d 747, 758 (W.Va. 2014), *quoting In re Tiffany Marie S.*, 196 W.Va. at 234, 470 S.E.2d at 188 (1996).

C. Sentencing.

This Court reviews "sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, **unless the order violates statutory or constitutional commands.**" [Emphasis added.] Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997); Syl. Pt. 1, *State v. Richardson*, 214 W.Va. 410, 413, 589 S.E.2d 552, 555 (2003). "[I]nterpretations of the *West Virginia Constitution*, along with interpretations of statutes and rules, are primarily questions of law," therefore, they are analyzed under a *de novo* standard of review. *Sale v. Goldman*, 208 W.Va. 186, 191, 539 S.E.2d 446, 451 (2000), *quoting Phillip Leon M. v. Greenbrier County Board of Education*, 199 W.Va. 400, 404, 484 S.E.2d 909, 913 (1996).

VI. ARGUMENT.

A. **The Trial Court committed reversible error by actively participating in the plea bargaining process when it *sua sponte* ordered Petitioner to undergo an additional forensic evaluation for competency and criminal responsibility.**

Rule 11 of *West Virginia Rules of Criminal Procedure* governs plea discussions and the plea agreement process in criminal cases. Rule 11(e)(1) provides, in pertinent part, that the trial court “shall not participate in any such discussion.” Rule 11, *W. Va. R. Crim. P.* This prohibition on judicial participation or interference in plea negotiations is absolute. *State v. Sugg*, 193 W.Va. 388, 406, 456 S.E.2d 496, 488 (1995); *State v. Sanders*, 209 W.Va. 367, 382, 549 S.E.2d 40, 55 (2001); *State v. Welch*, 229 W.Va. 647, 651, 734 S.E.2d 194, 199 (2012). “Judicial involvement with plea bargaining casts doubt over the entire process.” *State ex rel Brewer v. Starcher*, 195 W.Va. 185, 197, 465 S.E.2d 185, 197 (1995).

The Rule 11 prohibition against judicial participation in the plea negotiation process is absolute for the following reasons:

First and foremost, it serves to diminish the possibility of judicial coercion of a guilty plea, regardless of whether the coercion would cause an involuntary, unconstitutional plea. Second, such involvement is likely to impair the trial court's impartiality. A judge who suggests or encourages a particular plea bargain may feel a personal stake in the agreement and, therefore, may resent a defendant who rejects his advice. Third, judicial participation in plea discussions creates a misleading impression of the judge's role in the proceedings. As a result of his participation, the judge is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he suggests to the defendant.

State v. Sugg, 193 W.Va. at 406-407, 456 S.E.2d at 487-488.

The prohibition on judicial participation or interference in plea bargaining does not bar the State and defense counsel from informally approaching the trial court and asking the judge if he or she would be receptive to a proposed plea. *See State v. Crabtree*, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996); *State v. Welch*, 229 W.Va. at 652, 734 S.E.2d at 199 (2012). Rule 11 also leaves the acceptance or rejection of a plea agreement within the sound discretion of the circuit court. Syl. Pt. 2, *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984), Syl. Pt. 5, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984). However, when it comes time for a judge to rule on an agreement, Rule 11 requires “that a circuit court make a definite

announcement of acceptance, rejection, or deferral of its decision concerning the plea agreement.” *State ex rel Brewer*, 195 W.Va. at 195, 465 S.E.2d at 195 (1995).

Once the trial court fails to definitively accept, deny, or defer its ruling on a plea agreement and issues an order which adversely impacts one of the parties, or modifies the terms of the agreement, the court has injected itself into the plea negotiation process. At this juncture, the judge has abandoned his or her impartial position and become an advocate for one side or the other in violation of Rule 11. Such conduct constitutes reversible error.

In this case, the Honorable Thomas H. Keadle’s course of action is indicative of the behavior Rule 11 is aimed at preventing. On July 1, 2013, the parties informed the court that they were in the process of reaching a plea agreement. At that time, the prosecuting attorney also informed the court that if the case were to proceed to trial, the State would probably not be able to rebut Petitioner’s insanity defense. *App. Vol. IV*, p. 118. On July 9, 2013, Petitioner appeared before Judge Keadle with a signed plea agreement. *App. Vol. I*, p. 28; *App. Vol. IV*, p. 39.

The July 9, 2013, hearing was scheduled for the sole purpose of tendering the finalized plea agreement to the court. *App. Vol. I*, p. 36; *App. Vol. IV*, p. 38. At this stage, pursuant to Rule 11, the court was required to accept, deny, or defer its ruling on the plea agreement, and do so in a definitive manner. *State ex rel Brewer*, 195 W.Va. at 195, 465 S.E.2d at 195 (1995).

Instead, the trial court made no definitive ruling regarding the plea, and ordered Petitioner to undergo another psychological evaluation. *App. Vol. I*, p. 38; *App. Vol. IV*, pp. 40-41. In fact, the trial court never considered the plea, even though the July 9, 2013, hearing was scheduled for that very purpose. *App. Vol. IV*, p. 38. This was not a definitive deferral, but an unnecessary judicial investigation into an already investigated and stipulated fact.

Both the State and Petitioner had agreed Petitioner was competent to stand trial, but not criminally responsible pursuant to the psychological evaluation performed by Gregory Trainor. *App. Vol. I*, p. 26. That meeting of the minds is reflected in the plea agreement, whereby Petitioner’s plea would be “not guilty by reason of insanity.” *App. Vol. IV*, p. 39. It is also reflected in the Order of July 1, 2013, *App. Vol. I*, p. 38, and the transcript of July 1, 2013. *App. Vol. IV*, p. 116. The trial court was not aware of any new evidence warranting an additional

evaluation, nor was it requested by either of the parties. *App. Vol. IV*, p. 59. *See State v. Sanders*, 209 W.Va. at 379, 549 S.E.2d at 52. Pursuant to *W. Va. Code* § 27-6A-3(a), the trial court's determination in its Order of April 29, 2013, that Petitioner Fleming was competent to stand trial was final, and should not have been revisited by the court. *App. Vol. IV*, pp. 147, 150.

In contrast to the State's assertions at the Rule 11 hearing, Counsel for Defendant did object to this additional evaluation. *App. Vol. IV*, p. 129. That objection is not contained in the Order for July 9, 2013, because Judge Keadle prepared that order in advance of the scheduled hearing. *App. Vol. I*, pp. 124-125.

The trial court was also aware that if the case were to proceed to trial, the State did not believe it could prove Petitioner's sanity beyond a reasonable doubt. *App. Vol. I*, p. 119. The only support the trial court offered for its decision was that it thought there needed to be an additional psychological examination because the case was factually complex and involved numerous charges. *App. Vol. I*, pp. 124-125. But generally courts are precluded from conducting their own investigations or ordering additional evidence, and must base their decisions on the evidence presented to it.

In *State v. Sanders*, Defendant's mental status of competency to stand trial was at issue. *Sanders* was a difficult case for the circuit court because Sanders' mental condition varied greatly during the time he was evaluated and observed. He was in Sharp Hospital for nine (9) months before there was any substantial improvement so that he could attend trial. Then at a subsequent evaluation, he threw a chair at the professional who was conducting the evaluation. There were many other evaluations over a three (3) year period from 1994 to a competency hearing held on August 19, 1998, when the trial court found him competent to stand trial. However, the trial did not begin for a few months, and by November there again were questions about his competency, as he was having a great deal of conflict with his counsel. 209 W.Va. at 374-375.

The issue on appeal was whether the trial court should have conducted a second hearing on the issue of competency to stand trial after Sanders' behavior again became erratic, and whether the trial court complied with *W. Va. Code* § 27-6A-2(b), which mandated the trial to commence forthwith following a hearing where a defendant is found mentally competent. The

Sanders Court reversed his convictions, finding there should have been additional evaluations of his competency.

While *Sanders* did not address criminal responsibility, the case is instructive on the issue of additional evaluations. “A trial court has an affirmative duty to employ adequate procedures for determining competency once the issue has come to the attention of the Court.” 209 W.Va. at 377. *W. Va. Code* § 27-6A-1(a) permits a court to order a psychiatric evaluation when there is sufficient cause to believe a defendant lacks competency to stand trial or is not criminally responsible. 209 W.Va. at 378, fn. 7. Nonetheless,

when a competency hearing has already been held and defendant has been found competent to stand trial. . . a trial court need not suspend proceedings to conduct a second competency hearing **unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of that finding.** [Emphasis added.]

209 W.Va. at 378, citing a California case and a Vermont case. After citing these two (2) cases, the decision cites other cases from Idaho, South Carolina, Ohio, and the Eighth Circuit where it was held that a trial court was not required to order second mental evaluations, “without facts in the record showing defendant’s mental conditions had changed since the previous evaluation.” 209 W.Va. at 379.

While there is case law that the trial court must always be alert to circumstances showing a change that would render the accused unable to meet the standards of competence, and that an initial finding of competence does not “relieve a trial court of its responsibility to remain logical and vigilant as to the possibilities the defendant may lapse into incompetency during the course of subsequent proceedings,” 209 W.Va. at 378, the rule for the trial court is that there must be: “facts in the record showing defendant’s mental condition has changed, or evidence casting a serious doubt on the validity of that finding, or even something that the court would observe from the defendant himself.” 209 W.Va. at 367-368. The *Sanders* Court found that the trial court should have granted another competency hearing based on the evidence presented to the trial court, and *Sanders*’ conviction was vacated and the case remanded for more proceedings.

Numerous jurisdictions take a similar approach to court ordered competency and criminal responsibility evaluations. In Virginia, the trial court may order an evaluation when it has reason

to believe that the defendant lacks capacity or competency. *Va. Code* § 19.2-169.1. Oklahoma requires that there be a disagreement between the parties over the initial report, or that the court be dissatisfied with the initial report before it can order additional evaluations of the defendant. *Okla. Stat.* 22 § 1161(C)(2). Similarly, Missouri and Maine require that the trial court provide some good cause justification for its actions, prior to ordering a competency or criminal responsibility evaluation on its own motion. *Me. Rev. Stat.* 15 § 101-D(1)(A); *Mo. Rev. Stat.* § 552.020.1.

Washington State's competency and criminal responsibility evaluation statutes provide the appropriate procedures for evaluations where the defendant will enter a plea of not guilty by reason of insanity, like the plea Petitioner attempted to tender to the trial court in July and October of 2013. Like the statutes described above, Washington law also requires the trial court to provide justification for ordering an evaluation, including when the defendant is attempting to enter a plea of not guilty by reason of insanity. *Wash. Rev. Code* § 10.77.060(1)(a).

These statutes all share a common thread with *W. Va. Code* § 27-6A-2, which is that the trial court cannot order a competency or criminal responsibility evaluation without justifying its actions. In the present case, the trial court acted in violation of the key principle underlying each of the aforementioned statutes because it ordered Petitioner to undergo a second competency and criminal responsibility evaluation without providing any form of justification its action.

In this case, there was no evidence presented to the trial court showing there had been any change in Petitioner's mental status. There was no evidence presented to the trial court, and the trial court never observed anything from Petitioner to make the court question that there had been a change. In addition, the trial court previously made a finding that Petitioner Fleming was competent to stand trial in its Order of April 29, 2013. *App. Vol. IV*, p. 147. *W. Va. Code* § 27-6A-3(a) provides that the trial court is to make a preliminary finding of the qualified forensic evaluator's report and opinion on the issue of competency. Then is no hearing on the issue is requested within 20 day, "the preliminary findings of the court become the final order." *See App. Vol. IV*, p. 150. Thus, Judge Keadle's finding that Petitioner was competent to stand trial was a final order at the time he *sua sponte* ordered a new evaluation on July 9, 2013.

Moreover, the purpose for ordering a second evaluation because of evidence that the mental status of a defendant has changed is of a paternalistic nature, intended to protect a defendant who is mentally incompetent and should not be undergoing a trial. Here the trial court's behavior was not to protect Petitioner from his own mental condition, but simply to obtain additional evidence and material for a possible trial. Here the trial court decided to conduct an additional investigation, the trial court selected the investigator to conduct that investigation, and the trial court's investigative work then benefitted the State, which withdrew its plea offer and saddled its case on the back of the trial court's investigation. This violates the bright line that the trial court holds as an impartial arbitrator.

In *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980), this Court found that a circuit court judge should not step down from his judicial function and become an investigator, prosecutor, arresting officer, or instigator of legal actions, "for when he does, he lessens the public confidence in the impartiality of this office." 271 S.E.2d at 429. "No judge should take unto himself activities or functions which are delegated to other branches of the government." 271 S.E.2d at 430.

As stated in Justice Neely's opinion, concurring in part and dissenting in part, in *State ex rel. Hampstead v. Dostert*, 173 W.Va. 133, 313 S.E.2d 409 (1984):

Although court's are free to accept or reject individual charge bargains, they should avoid creating broad rules that limit traditional prosecutorial independence. Generally, courts should be wary of second guessing prosecutorial choices. To do so constitutes an impermissible intrusion into what is properly the executive's exclusive domain.

173 W.Va. at 147. Justice Neely also quotes Chief Justice Berger in *Newman v. U.S.*, 382 F.2d 479 (D.C. Cir. 1967), as stating:

Few subjects are less adapted to judicial review than the exercise by the executive of his discretion in deciding when and whether to institute criminal proceedings or what precise charge shall be made or whether to dismiss a criminal proceeding once brought.

382 F.2d at 480.

These cases involving Judge Dostert are obviously extreme cases of a circuit court judge trying to act as prosecutor. But when one combines the general rule against court's becoming

investigators, with the specific requirements of Rule 11 that the trial court receive and consider, then accept or reject a plea agreement, it is clear the trial court did violate Petitioner's fundamental right to a fair and impartial tribunal's consideration of his plea agreement that was being offered to the court.

When Petitioner entered the courtroom on July 9, 2013, he had a valid, written and signed plea agreement. Thus, when the trial court ordered an additional psychological evaluation, it directly interfered in the plea bargain process. The trial court ordered Dr. Adamski to perform the new evaluation. *App. Vol. IV*, pp. 61-62. Dr. Adamski found Petitioner both competent to stand trial and criminally responsible. *App. Vol. I*, pp. 30-32. Based on this report, the State revoked its plea offer, which had been accepted by Petitioner prior to the trial court ordering the new evaluation. *App. Vol. IV*, pp. 61-62. The trial court's interference in the plea negotiation process directly caused an accepted plea offer to be withdrawn. *App. Vol. I*, pp. 26-28.

Pursuant to Petitioner's plea agreement, he would have entered a plea of not guilty by reason of temporary insanity to seven (7) counts of wanton endangerment, and would be committed to an appropriate mental health facility. *App. Vol. IV*, p.39. The agreement stated his term of confinement and release would be governed by *W. Va. Code § 27-6A-5. Id.* As a result of the trial court's interference with the plea negotiation process, the trial court later used Adamski's findings to justify the State's revocation of its plea offer. *App. Vol. IV*, pp. 61-62. Petitioner's case proceeded to trial, where Petitioner was found guilty of 12 counts of wanton endangerment, one (1) count of fleeing in reckless indifference for safety of others, and (1) one count of attempted murder. *App. Vol. IV*, pp. 97-98.

Here, the trial court acted outside its legitimate authority, in violation of Rule 11 of the *West Virginia Rules of Criminal Procedure*. The trial court's interference in the plea negotiation process resulted in the State withdrawing its plea offer, and Petitioner's case proceeding to trial. As a result, Petitioner's sentence was substantially harsher than what he would have received pursuant to the plea agreement. In effect, the trial court became an advocate on behalf of the State. The trial court's actions produced favorable evidence for the State, which became the State's lone means of rebutting Petitioner's expert testimony at trial.

But for the trial court's inference in the plea negotiations, Petitioner Fleming would have entered a plea of not guilty by reason of temporary insanity to seven (7) counts of the indictment and been committed to a mental health facility. Because Fleming was forced to go to trial and received a sentence harsher than the one contained in the plea agreement, the trial court's impermissible interference in the plea negotiation process prejudiced Petitioner and caused him substantial harm. Therefore, Petitioner respectfully requests that this Court reverse his conviction and remand this case with directions that the court consider and accept the plea agreement Petitioner signed on July 9, 2013, or in the alternative, grant him a new trial.

B. The Trial Court erred when it denied Petitioner's Motion for a Rule 11 Hearing whereby Petitioner and the State could inform the court that the parties had entered into a valid, written plea agreement.

"[T]he decision whether to accept or reject a plea agreement is vested almost exclusively with the experienced men and women who preside at the circuit court level." *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 192, 465 S.E.2d 185, 192 (1995), citing *Tucker v. Holland*, 174 W.Va. 409, 416, 327 S.E.2d 388, 396 (1985). So long as the trial judge follows the procedures set forth in Rule 11 of the *West Virginia Rules of Criminal Procedure*, he or she may accept, reject, or defer ruling on a plea agreement to a later date in order to obtain more information. *State ex rel. Brewer*, 195 W.Va. at 192, 465 S.E.2d at 192, citing *State v. Whitt*, 183 W.Va. 286, 290, 395 S.E.2d 530, 534 (1990). Once the parties in a criminal case reach an agreement, the agreement must be presented to the court for acceptance, rejection, or deferral. *State ex rel. Brewer*, 195 W.Va. at 194, 196, 465 S.E.2d at 194.

This Court has said:

Plea bargaining is "an essential component of the administration of justice," and the requirement of Rule 11 that a circuit court make a definite announcement of acceptance, rejection, or deferral of its decision concerning the plea agreement is indispensable to a criminal justice system so heavily dependent on the plea agreement process.

State ex rel. Brewer, 195 W.Va. at 194, 465 S.E.2d at 194, quoting *Santobello v. New York*, 404 U.S. 257, 260 (1971).

"A circuit court's faithful observance of the requirements of Rule 11 is just as vital to the fairness and efficiency of the criminal process as the prosecutor's." *State ex rel Brewer*, 195

W.Va. at 195, 465 S.E.2d at 195. Thus, "[w]hen a criminal defendant and the prosecution reach a plea agreement, it is an abuse of discretion for the circuit court to summarily refuse to consider the substantive terms of the agreement solely because of the timing of the presentation of the agreement to the court." Syl. Pt. 5, *State v. Sears*, 208 W.Va. 700, 542 S.E.2d 863 (2000).

In this case, the trial court declined to make a definitive ruling regarding Petitioner Fleming's plea agreement on July 9, 2013. The trial court's order for the July 1, 2013, hearing, stated the sole purpose of the July 9, 2013, hearing was to consider Petitioner's plea agreement. *App. Vol. IV*, p. 38. Instead, the trial court *sua sponte* ordered Petitioner to undergo an additional psychological evaluation without considering, or definitively denying or deferring ruling on Petitioner's plea agreement, in violation of Rule 11. *App. Vol. IV*, pp. 40-41.

On October 16, 2013, the trial court by the Hon. H. Charles Carl, III, again refused to review Petitioner's signed plea agreement. Denying Petitioner Fleming's Motion for a Rule 11 Hearing, the trial court found Petitioner had merely received an offer, and no binding agreement had been formed. *App. Vol. IV*, pp. 61-63. This was due in part to the form of the agreement: a signed letter from the prosecutor to Petitioner's counsel, signed and dated by Petitioner and his counsel on July 9, 2013. *App. Vol. IV*, pp. 60-62. While this agreement may lack some formality, it has been an accepted means of accepting plea offers in the jurisdiction for quite some time. The parties had reached a binding plea agreement on July 9, 2013, when the parties came to court.

The trial court also denied Petitioner's Motion for a Rule 11 Hearing because it found that the State had properly revoked the offer based upon Dr. Adamski's conclusion that Fleming was criminally responsible. *App. Vol. IV*, pp. 60-63. For the reasons set forth in Error A above, Adamski's evaluation and report regarding Petitioner Fleming were the product of impermissible judicial interference in the plea bargain process. Thus, the trial court erred when it found the State had properly revoked its plea offer based on Adamski's report.

While the trial court was under no obligation to accept the agreement between Petitioner and the State, it was required to consider the offer. Syl. Pt. 5, *State v. Sears*, 208 W.Va. 700, 542 S.E.2d 863 (2000). The court's failure to consider this plea agreement on July 9, 2013, and later

on October 16, 2013, constitutes an abuse of discretion. *Id.* Therefore, Petitioner requests this Court reverse his conviction and remand with directions to accept the signed plea agreement.

C. The Trial Court erred when it allowed all the guilty verdicts returned by the jury to stand when the State had failed to prove beyond a reasonable doubt that Petitioner was sane at the time the criminal conduct occurred.

1. Proof of Sanity.

“There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.” *State v. Daggett*, 167 W.Va. 411, 421, 280 S.E.2d 545, 551 (1981), *quoting* Syl. Pt. 2, *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979). If after reviewing all the evidence, the jury is left with a reasonable doubt of defendant's sanity at the time the offense was committed, the “jury must accord him the benefit of that doubt and acquit him.” *Daggett*, 167 W.Va. at 421, 280 S.E.2d at 551, *quoting* *Edwards v. Leverette*, 258 S.E.2d 436, 439-440 (W.Va. 1979).

When a criminal defendant sufficiently raises the issue of sanity through the use of expert testimony, the State has to counter the defense’s expert with an expert of its own. *State v. Rowe*, 168 W.Va. 678, 681, 285 S.E.2d 445, 447 (1981). Regardless of whether the State attempts to counter an insanity defense with its own expert testimony or through cross-examination, the burden is on the State to prove beyond a reasonable doubt that the defendant was sane at the time he committed the offense. *State v. Rowe*, 168 W.Va. at 681-83, 285 S.E.2d at 447-48.

When a criminal defendant raises the issue of sanity, he must show by a preponderance of the evidence that at the time the criminal conduct occurred, “a mental disease or defect [caused] the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law.” *State v. Flournoy*, 232 W.Va. 175, 180, 751 S.E.2d 280, 285 (2013), *quoting* Syl. Pt. 2, *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976), *overruled on other grounds*, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

In this case, the defense offered the expert testimony of two psychological experts, who testified Petitioner Fleming lacked the capacity to appreciate the wrongfulness of his conduct at

the time the criminal conduct occurred, and he was unable to conform his conduct to the laws of this state because he was in the midst of PTSD-induced blackout. *App. Vol. III*, pp. 78-82, 118. Because the defense properly established its insanity defense at trial, the burden fell on the State to prove beyond a reasonable doubt that Petitioner was sane at the time the criminal conduct occurred.

During cross-examination, neither Mr. Trainor nor Dr. Feingold backed down from their assertion that Petitioner was not criminally responsible. *App. Vol. III*, pp. 78-82, 118. The State did nothing on cross-examination to “demolish” the testimony of the defense’s experts that would, standing alone, prove Petitioner’s sanity beyond a reasonable doubt. *State v. Rowe*, 168 W.Va. at 681, 285 S.E.2d at 447. Thus, the State’s case regarding Petitioner’s sanity would be made or broken on the rebuttal expert testimony of Dr. Thomas Adamski.

2. Dr. Adamski’s Bias.

Dr. Adamski was appointed *sua sponte* by the trial court to perform an impartial evaluation of Petitioner Fleming’s competency and criminal responsibility. He instead acted as though he was retained by the State. After his initial interview with Petitioner, Adamski telephoned the prosecutor to report he would find Petitioner criminally responsible. *App. Vol. III*, p. 182. In all, Adamski called the prosecutor several times. Adamski testified he called “for more records.” *App. Vol. III*, p. 183. Yet Adamski never initiated a call to Petitioner’s counsel, not even regarding records whether Petitioner was awarded the combat infantry badge (“CIB”). *App. Vol. III*, p. 182.

Counsel for Petitioner called Adamski to find out why Adamski had not talked to Petitioner’s wife, who was with Petitioner the entire afternoon and evening of the day of the incident. Adamski told counsel that he might call Petitioner’s wife, when in fact Adamski had already sent his report to the court. *App. Vol. III*, pp. 182-183.

At his initial meeting with Petitioner Fleming, Adamski told Petitioner that he did not have the records to show that Petitioner was awarded a CIB, and Petitioner needed to have it documented. *App. Vol. III*, p. 180. Petitioner opened his shirt and showed Adamski his CIB

chest tattoo. Adamski told Petitioner, “Anyone can get that,” and testified he was surprised anyone who was 40 years old would get a tattoo. *App. Vol. III*, p. 181.

Later in his testimony, Adamski stated the CIB was “insignificant.” *App. Vol. III*, p. 184. Yet in Adamski’s report that caused the State to withdraw its plea offer, Adamski cites the CIB three (3) times and places great weight on his perceived absence of a CIB. In that report, Adamski found that Petitioner was not in combat because he did not receive a Combat Infantry Badge, that Petitioner’s claim of being in combat without the CIB was tantamount to “stolen valor,” and that Petitioner’s false claim of combat was evidence of “malingering.” *App. Vol. IV*, pp. 130-142.

On cross-examination Adamski identified Ex. 5. *App. Vol. IV*, p.88. This is the letter dated December 10, 2013, from the prosecutor to Adamski, enclosing the records proving Petitioner was awarded the CIB and other combat awards. *App. Vol. III*, pp. 188-189. The letter states: “Please advise when you believe an amended report, if any, will be available so that I may confer with counsel.” Counsel for both parties anticipated that Adamski would prepare a supplemental report in light of the additional records. In fact, the trial scheduled for December 17, 19, 20, and 23, 2013, was continued to January, 2014, on the State’s motion, so that the State could obtain a supplemental report from Adamski. This motion is not mentioned in the Order for December 12, 2013, prepared by the State. *App. Vol. IV*, p. 89. But it is reflected in the prosecutor’s letter, and in the Clerk’s Docket sheet showing the issuance and return of the various subpoenas for the trial. *App. Vol. I*, pp. 3-6.

While Adamski placed great emphasis on his perceived absence of the CIB in his original report, and later was shown he was mistaken, Adamski saw no reason to amend his report. *App. Vol. III*, pp. 188-189. Compare Dr. Feingold’s assessment of the importance of the CIB, where he states that if he were conducting an evaluation where a man claimed to suffer from PTSD yet lacked the CIB, that this perceived “lie” could taint the evaluation. *App. III*, pp. 135-136.

Adamski’s characterization at trial that the CIB was “insignificant,” showed his bias, as well as the rest of his testimony. When asked if he told Petitioner Fleming he would be going overseas for a month before he could return to complete his evaluation, first he answered the

question and then ended his answer by interjecting the State's argument that Petitioner did not have a valid mental defense. *App. Vol. III*, pp. 185-186.

Petitioner Fleming was at the V.A. Hospital in Martinsburg for seven (7) months prior to the trial, receiving treatment for PTSD and alcoholism. Adamski never reviewed the records from these seven (7) months, yet testified the V.A. records are "poor," and criticized both the records and the hospital employees. *App. Vol. III*, pp. 179-180. Even when his impression was mistaken (as with the CIB), and corrected, it did not matter to Adamski.

If ever there was doubt regarding Adamski's impartiality, he showed his bias in his testimony under cross-examination:

A: Yeah, so I didn't initiate the phone conversation between us.

Q: But you initiated phone calls to Mr. James (prosecutor)?

A: I initiated phone calls to Mr. James because the records I had were incomplete.

Q: And you never called me to say to me that you're (sic) client says he had a combat infantry badge, but I don't have the records. What do you have for me, Mr. Garrett, to show that, did you?

A: I don't know that it's my role to go chasing down the records, sir.

Q: Well, you just said that you called Mr. James to get more records.

A: Well, I have to call somebody. He's the one that. . .he's the one. . .

Q: He's the one—say it, keep on, come on. Say what you're thinking. He's the one that you're working for.

A: Well, Mr. James didn't approach me about doing this case.

App. Vol. III, p. 183.

Accordingly, when presented with a direct question regarding his impartiality, Adamski can only say that the State did not "approach" him. He cannot say that he did not proceed as though he was working for the State. In fact, he almost said, "He's the one I was working for (or something like that), but realized what he was saying and stopped in mid-sentence—twice—and did not dispute Petitioner's counsel completing what he was going to say. *App. Vol. III*, p. 183.

3. Dr. Adamski's Testimony.

Dr. Adamski's testimony fell far short of sufficiently rebutting the testimony of Mr. Trainor and Dr. Feingold, or of proving beyond a reasonable doubt that Petitioner Fleming was sane on the night of September 3, 2012. During his testimony, Adamski attempted to brush PTSD aside and paint the picture that Petitioner's conduct on September 3, 2012, was simply a drunken overreaction to a fight with his wife. *App. Vol. III*, pp. 167-68. Adamski completely failed to address how alcohol consumption affects those suffering from PTSD, where Feingold went into great detail on how alcohol worsens PTSD symptoms. *App. Vol. III*, pp. 101-103.

Adamski also failed to explain how alcohol alone would have caused Petitioner to advance toward the officers in a tactical, zig-zagging manner, to drive a car at a high rate of speed with a high degree of tactical precision, and to suddenly return to reality after a shotgun slug struck his ammunition pouch. *App. Vol. III*, pp. 79-81. These behaviors were the basis of the defense argument that Petitioner Fleming was in a PTSD-induced flashback or delusion when the criminal conduct occurred. Adamski failed to address or explain how any of these key facts supported his assertion that Petitioner was sane at the time he committed the offenses.

Dr. Adamski's final opinion at trial was that Petitioner's PTSD diagnosis was irrelevant, and Petitioner behaved the way he did on September 3, 2012, because he was intoxicated and angry. *App. Vol. III*, p. 181. However, at no point during the trial did the State produce a single piece of evidence that Petitioner Fleming's behavior was consistent with someone under the influence of alcohol. Not a single witness testified that Fleming's speech was slurred, that his motor functions were impaired, or that he exhibited any other visible signs of someone who was intoxicated. In fact, the evidence shows that Petitioner's behavior and motor functions were those of someone who was not under the influence of alcohol. Fleming approached the deputies in a tactical manner, drove his jeep at high rate of speed with precision, and his return to reality was very sudden. All these facts, according to the defense experts, indicate that Petitioner was in the midst of a PTSD-induced blackout or flashback when the criminal conduct occurred.

Because the State failed to sufficiently rebut the defense experts' testimony, and failed to show Petitioner acted like someone under the influence of alcohol, it failed to prove beyond a

reasonable doubt that Petitioner Fleming was sane at the time of his criminal conduct. Based on this evidence, no rational trier of fact could have found Petitioner was sane beyond a reasonable doubt. Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Therefore, the trial court erred when it allowed the guilty verdicts to stand. Petitioner now requests this Court to reverse his conviction.

D. The Trial Court committed plain error when it allowed the jury's guilty verdict on Petitioner's attempted murder charge to stand.

Criminal defendants are guilty of an attempt if they attempt "to commit an offense, but [fail] to commit or [are] prevented from committing" the offense. *W. Va. Code* § 61-11-8. Thus, someone who attempts to commit first degree murder must attempt to, but fail or be prevented from, completing an intentional, willful, deliberate, premeditated, and malicious killing of another. *W. Va. Code* § 61-11-8; *W. Va. Code* § 61-2-1. The term malice "implies a mind under the sway of reason. It excludes the idea of sudden passion aroused by an unanticipated and unprovoked battery inflicted by the assailant without the fault of the person assailed." Syl. Pt. 3, *State v. Galford*, 87 W.Va. 358, 105 S.E. 237 (1920).

In a murder or attempted murder case where the defendant uses or attempts to use a deadly weapon in the commission of the crime, the jury may infer malice, willfulness, and deliberation. *State v. Carey*, 210 W.Va. 651, 661, 558 S.E.2d 650 (2001); Syl. Pt. 2, *State v. Ferguson*, 165 W.Va. 529, 252 S.E.2d 166 (1980), *overruled on other grounds by State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983). However, in cases where the jury may infer or presume these elements, the presumption or inference can be rebutted by showing "mitigating circumstances, by excuse, by the testimony of the accused that he did not intend to kill or by any other evidence other than that which proves the killing." *State v. Bowyer*, 143 W.Va. 302, 310, 101 S.E.2d 243, 247 (1957).

In this case the only evidence at trial that Petitioner Fleming acted maliciously was the use of a firearm. That lone piece of evidence was sufficiently rebutted by the defense expert testimony. Dr. Feingold established Petitioner was unaware of what was transpiring on the night of September 3, 2012, because he was suffering from a PTSD flashback. Petitioner told the

expert examiners and officers that all he could remember was arguing with his wife and wanting to be left alone. *App. Vol. IV*, p. 144.

On the night in question, Jason Ludwick and Brian Slade sought out Petitioner Fleming. Petitioner did not seek these confrontations. He did not hunt down Brian Slade and shoot at him. Brian Slade pursued Petitioner. Petitioner Fleming did not plan or act under the “sway of reason.” Syl. Pt. 3, *State v. Galford*, 87 W.Va. 358, 105 S.E. 237 (1920). Because any evidence of malice was sufficiently rebutted at trial, the jury could not find Petitioner acted with malice beyond a reasonable doubt. Therefore, it was plain error to allow Petitioner’s conviction for attempted murder to stand.

The State also failed to present any evidence that Petitioner’s actions were premeditated and deliberate. A defendant acts deliberately when he or she “[considers] the taking of another's life while in a cool and deliberate state of mind.” *State v. Miller*, 197 W.Va. 588, 600, 476 S.E.2d 535, 547 (1996). With respect to premeditation, this Court has held there “must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.” *State v. Catlett*, 207 W.Va. 747, 536 S.E.2d 728, 733 (2000), *quoting* Syl. Pt. 5, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

When a jury finds a defendant guilty of a crime where there is no evidence satisfying an essential element of the offense, “or the evidence is plainly insufficient to warrant such finding by the jury, such verdict should be set aside and a new trial awarded.” Syl. Pt. 4, *Bowyer*, 143 W.Va. 302, 101 S.E.2d 243. In this case, the State presented no evidence showing Petitioner took any time to form the intent to kill Brian Slade, that this alleged attempt to kill Slade was brought about by any “calculation or design,” or that Petitioner formed that intent while in a “cool and deliberate state of mind.” *Miller*, 197 W.Va. at 600, 476 S.E.2d at 547; *Catlett*, 207 W.Va. 747, 536 S.E.2d at 733. Because the State failed to prove Petitioner’s actions were malicious, or deliberate, or premeditated, Petitioner’s guilty verdict on the attempted murder of Brian Slade should be set aside.

E. The Trial Court erred when it failed to declare a mistrial following the State's examinations of Heather Ludwick, Dr. Adamski, and Dr. Feingold.

In order to declare a mistrial, something must arise during the trial that creates a manifest necessity to dismiss the jury and end the proceedings. *State ex rel Brooks v. Worrell*, 156 W.Va. 8, 11-12, 190 S.E.2d 474, 476 (1972); *State v. Armstrong*, 179 W.Va. 435, 369 S.E.2d 870 (1988); *W. Va. Code* § 62-3-7. Manifest necessity, which gives rise to the need for the trial court to discharge the jury without rendering a verdict, may arise from various circumstances. Syl. Pt. 2, *State v. Little*, 120 W.Va. 213, 197 S.E. 626 (1938). The power of the trial court in a criminal case to “discharge a jury without rendering a verdict is discretionary; but the power ‘is a delicate and highly important trust’ and must be exercised soundly.” *Id.* at Syl Pt. 3.

While this Court has declined to explicitly define manifest necessity, there are various interpretations of the phrase. This Court has stated that the term “covers a broad spectrum of situations which in some instances bear little relationship to the literal meaning of this phrase.” *State v. Gibson*, 181 W.Va. 747, 750, 384 S.E.2d 358, 361 (1989), quoting *Keller v. Ferguson*, 177 W.Va. 616, 620, 355 S.E.2d 405, 409 (1987). *Black's Law Dictionary* defines manifest necessity as “a sudden and overwhelming emergency, beyond the court’s and parties’ control, that makes conducting a trial or reaching a fair result impossible and therefore authorizes the granting of a mistrial.” *Black's Law Dictionary*, 402 (Pocket ed. 1996). In addition, “the circumstances must be prejudicial, or appear to be prejudicial, to the accused or the state.” Syl. Pt. 3, *State ex rel. Brooks v. Worrell*, 156 W.Va. 8, 190 S.E.2d 474 (1972).

In this case, there were several times jurors were exposed to questioning or testimony designed to inflame and prejudice them. Because the State’s conduct at these times made reaching a fair result in this case impossible, the trial court erred by failing to declare a mistrial.

1. Heather Ludwick.

During the prosecuting attorney’s direct examination of Heather Ludwick, he asked several questions which lacked a factual basis and were aimed at inflaming the jury and prejudicing them against Petitioner Fleming. The prosecuting attorney asked Mrs. Ludwick if Petitioner was speaking Arabic or issuing military commands. *App. Vol. II*, p. 174. The

prosecutor then asked her if Petitioner was talking about aliens or spaceships. *App. Vol. II*, p. 175. Counsel for Petitioner objected to these questions and moved the trial court to grant a mistrial. *App. Vol. II*, pp. 178-180. The trial court denied this motion. *App. Vol. II*, p. 180.

“Trial courts should preclude questions for which the questioner cannot show a factual and good faith basis.” *State v. Guthrie*, 194 W.Va. 657, 687, 461 S.E.2d 163, 193 (1995), *citing State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987). Questions which lack a factual and good faith basis can be prejudicial, even though the witness has no knowledge of the subject matter of the inquiry. *State v. Guthrie*, 194 W.Va. at 687, 461 S.E.2d at 193.

The prosecuting attorney knew Petitioner did not speak in Arabic to Mrs. Ludwick, that he did not issue military commands, and he did not talk to her about aliens or spaceships. Thus, the State lacked the requisite factual basis to ask these questions, and did not have a good faith basis for these questions. The only logical basis for that line of questioning was to undermine Petitioner’s insanity defense by improperly putting those questions before the jury.

The State’s questioning of Mrs. Ludwick was improper, prejudicial to Petitioner Fleming, and created the manifest necessity for a mistrial, as reaching a fair result became impossible once the jury heard the prosecutor’s inflammatory questions. Therefore, the trial court should have granted Petitioner’s motion for a mistrial.

2. Dr. Adamski.

Similarly, the State’s examination of its expert Dr. Adamski also warranted the declaration of a mistrial. The primary purpose of Adamski’s testimony was not to rebut Petitioner’s insanity defense, but to make a number of unfounded and prejudicial remarks in order to inflame and prejudice the jury against Petitioner Fleming.

With respect to mental illness, Adamski testified that “diagnoses are not important.” *App. Vol. III*, p. 162. He later critiqued the various methodologies for diagnosing PTSD, but not in terms of their accuracy or reliability. Instead, while admitting he was not an expert in PTSD, he painted the picture that PTSD is not a legitimate and diagnosable disorder. *App. Vol. III*, pp. 176, 179. Moreover, on several occasions Adamski attempted to discredit Petitioner Fleming’s character with no justification for his statements.

Adamski testified that he had a hard time seeing how someone with an IQ as low as Petitioner's could possibly be a policeman or military officer. *App. Vol. III*, p. 163. This implied either Petitioner was smarter than his tests showed, or he was not intelligent enough to perform these jobs. Adamski testified thus without any justification other than his bare assertion that in his opinion someone with Petitioner's alleged IQ was incapable of handling the jobs Petitioner previously held. When asked about the tattoo Petitioner received to memorialize his service in Iraq, Adamski replied he was surprised a 40 year old man would get a tattoo. *App. Vol. III*, p. 181. Adamski also stated anyone could get that tattoo, regardless of whether they actually served in the military. *Id.* Here he implied Petitioner could be lying about his military service record.

Adamski also provided an expert opinion to the jury, testifying Petitioner was criminally responsible at the time he committed the criminal conduct. *App. Vol. III*, p. 176. However, Adamski provided this opinion without providing any factual justification. *App. Vol. III*, pp. 176, 181. Instead of citing specific events from September 3, 2012, or observations he made during his evaluation of Petitioner Fleming, Dr. Adamski testified that Petitioner was criminally responsible because he was intoxicated and his PTSD diagnosis was irrelevant. *App. Vol. III*, p. 187. Adamski made this assertion without addressing the testimony from defense experts that alcohol can aggravate or amplify PTSD symptoms. Adamski also refused to directly answer defense counsel's questions on several occasions. *App. Vol. III*, pp. 180-186.

Upon the completion of Adamski's testimony, the trial court should have declared a mistrial. Adamski's expert opinion was rendered without a factual basis; he questioned the legitimacy of PTSD as a diagnosable disorder; and he made numerous prejudicial remarks about Petitioner's character, intelligence, and service career. Dr. Adamski, via a question from the prosecuting attorney, also mischaracterized Mr. Trainor's testimony to the effect that Petitioner Fleming "was able to appreciate and understand his criminal actions that evening," when Trainor testified opposite to that. *App. Vol. III*, p.176. Dr. Adamski's conduct from the witness stand made it impossible for Petitioner's trial to proceed in a fair manner. Pursuant to the doctrine of manifest necessity, the trial court erred when it failed to declare a mistrial.

3. Dr. Feingold.

During the State's *voir dire* examination of Petitioner's PTSD expert, Dr. Feingold, the prosecuting attorney again asked several questions aimed solely at inflaming the jury and prejudicing Petitioner. The State asked Dr. Feingold if he was aware of the possible ethics violations for rendering an expert opinion without first interviewing Petitioner. *App. Vol. III*, pp. 88-89. The State also asked Dr. Feingold about academic articles he had written with, or which had appeared alongside articles written by Daniel Helminiak, who has written on the use of recreational drugs like MDMA to treat PTSD symptoms. *App. Vol. III*, pp. 91-92.

While the State's assessment of the ethical rules governing psychologists was accurate, it was inapplicable to Dr. Feingold's conduct. The State knew when it asked Dr. Feingold about ethical violations that the report to which it was referring was written only as a critique of the report prepared by Dr. Adamski. The State knew that Dr. Feingold's conduct was ethical, permissible, and, at the time his report was prepared, was the extent of the scope of services he was contracted to perform for Petitioner's defense. *App. Vol. III*, p. 95. Note that Dr. Feingold extensively interviewed Petitioner before he delivered an expert opinion regarding Petitioner's criminal responsibility at trial. *App. Vol. III*, pp. 104-112.

After Dr. Adamski submitted his report finding Petitioner criminally responsible, Petitioner retained Dr. Feingold for the sole purpose of critiquing Adamski's report, and as a potential rebuttal witness of Adamski's testimony at trial. At that time Feingold had not personally interviewed Petitioner. The trial date was then continued, and Petitioner was transferred from the regional jail to the V.A. hospital. Dr. Feingold was then able to interview Petitioner several times, making him able to testify in Petitioner's case in chief at trial.

Prior to trial, the prosecutor advised the trial court the State objected to Dr. Feingold being allowed to criticize Dr. Adamski's report. The State objected because when Dr. Adamski prepared his report, he did not have "all the records," including those authenticating Petitioner's Combat Infantry Badge. Petitioner agreed and the trial court ordered Dr. Feingold could not testify at trial regarding his initial critique and the circumstances of his initial involvement. *See* Order of June 16, 2014. *App. Vol. IV*, pp. 145-146.

At trial, in the State's *voir dire* and cross-examination of Dr. Feingold, the prosecutor asked a series of questions implying or attempting to show Dr. Feingold violated his professional ethical code by rendering an opinion [his original critique, *App. Vol. IV*, pp. 68A-68Q] without first personally interviewing Petitioner Fleming. These questions were asked even though the prosecutor knew the Order of June 16, 2014, did not allow Dr. Feingold to say that he had only been retained at that time to critique Adamski's report. *App. Vol. III*, pp. 88-89, 121-123.

A bench conference ensued and the trial court ruled the State had opened the door and Petitioner's counsel now could ask Feingold to explain what happened. While Dr. Feingold attempted to explain, the damage had been done as the State was able to accuse Dr. Feingold of unethical behavior when his hands were tied to respond. *App. Vol. III*, pp. 121-122, 133-135.

With respect to Dr. Feingold's work with Daniel Helminiak, the State asked no questions about the actual substance of Dr. Feingold's work, their respective methodologies, the nature of their work together, or how Helminiak's work had any bearing on Feingold's qualifications as an expert in the field of PTSD. The State's *voir dire* of Dr. Feingold was nothing more than an attempt to discredit him by making unfounded allegations of ethical misconduct, and implying that he held the same beliefs as someone he was loosely associated with in the field of psychology. The State asked these questions during its *voir dire* with the hope of inflaming and prejudicing the jury against Petitioner, Dr. Feingold, and Petitioner's insanity defense. At that point in the trial, it became manifestly necessary to declare a mistrial, as it became impossible for the trial to proceed in a fair manner.

F. The Trial Court erred when it allowed the State to introduce improper character evidence about Petitioner and ask questions without a factual and good faith basis when it examined defense witness Lois Fleming.

At trial, the State asked defense witness Lois Fleming, Petitioner's mother, a number of questions which lacked a factual and good faith basis. The prosecuting attorney asked Mrs. Fleming about Petitioner leaving the Charlotte-Mecklenburg Police Department, about a prior divorce, whether alcohol and anger issues played a part in that divorce, and about a prior domestic incident. *App. Vol. III*, pp. 13-17. The State did not have a good faith or factual basis for any of these questions. For the reasons set forth in the preceding section, the trial court erred in allowing the State to question Mrs. Fleming in this manner. Moreover, when the State questioned Mrs. Fleming, it admitted evidence of Petitioner's alleged prior bad acts in violation of Rule 404(b) the *West Virginia Rules of Evidence*. Thus, the trial court further erred when it allowed the State to question Mrs. Fleming about these alleged prior bad acts.

Review of a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step process. First, it is determined whether the trial court committed clear error in its "factual determination that there is sufficient evidence to show the other acts occurred." *State v. LaRock*, 196 W.Va. 294, 310, 470 S.E.2d 613, 629 (1994). The trial court's determination that the evidence was admissible for a legitimate purpose is subject to *de novo* review. *Id.*

The trial court's admission of evidence governed by Rule 404(b) following the trial court's Rule 403 analysis is reviewed under an abuse of discretion standard. *LaRock*, 196 W.Va. at 310-311, 470 S.E.2d at 629-630; *State v. McGinnis*, 193 W.Va. 147, 159, 455 S.E.2d 516, 528 (1994), *citing State v. Bell*, 189 W.Va. 448, 453, 432 S.E.2d 532, 537 (1993); Syl. Pt. 1, *State ex rel. Tinsman v. Hott*, 188 W.Va. 349, 424 S.E.2d 584 (1992). Under this standard of review, the inquiry is whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion. *McGinnis*, 193 W.Va. at 159, 455 S.E.2d at 528. Rule 404(b) evidence is reviewed in the light most favorable to the offering party, while "maximizing its probative value and minimizing its prejudicial effect." *Id.*

Rule 404(b) provides in part: "Evidence is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith." *W.Va. R. E.*, Rule 404 (b).

However, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. McDaniel*, 211 W.Va. 9, 12, 560 S.E.2d 484, 487 (2001), quoting *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990). “[W]here a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result.” *State v. McGinnis*, 193 W.Va. at 153, 455 S.E.2d at 522 (1994). The admission of such evidence is not merely prejudicial to the defendant, but rises to the level of reversible error. *State v. Simmons*, 175 W.Va. 656, 658, 337 S.E.2d 314, 316 (1985).

If the State wishes to use evidence of a defendant’s prior bad acts for one of the permitted purposes under Rule 404(b), the prosecution “is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose.” *McGinnis*, 193 W.Va. at 154, 455 S.E.2d at 523. See also, *TXO Prod. Corp. v. Alliance Resources*, 187 W.Va. 457, 470, 419 S.E.2d 870, 883 (1992), quoting *Huddleston v. U.S.*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 1502, 99 L.Ed.2d 771, 784 (1988). This procedural barrier provides a defendant with some degree of protection against prosecutorial abuse and overreaching. *McGinnis*, 193 W.Va. at 155, 455 S.E.2d at 524.

First, the trial court must determine whether a piece of evidence is intrinsic or extrinsic. “[A]cts intrinsic to the alleged crime do not fall under Rule 404(b)'s limitations on admissible evidence.” *State v. Harris*, 2013 W.Va. LEXIS 321, 12 (W.Va. Apr. 11, 2013), quoting *U.S. v. Chin*, 83 F.3d 83, 87-88 (4th Cir. 1996). Evidence of other crimes are intrinsic when the other act and the crime charged are “inextricably intertwined” or are part of a “single criminal episode.” *State v. Dennis*, 216 W.Va. 331, 351, 607 S.E.2d 437, 457 (2004). See also, *U.S. v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990). If the evidence is intrinsic, it should not be suppressed when those facts come in as *res gestae*. *Dennis*, 216 W.Va. at 351, 607 S.E.2d at 457; *U.S. v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980).

“Events, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered *res gestae* and admissible at trial.” Syl. Pt. 3, *State v. Ferguson*, 165 W.Va. 529, 270 S.E.2d 166 (1980), overruled on other grounds, *State v. Kopa* 173 W.Va. 43, 311 S.E.2d 412 (1983). However,

"other criminal act evidence admissible as part of the *res gestae* or same transaction introduced for the purpose of explaining the crime charged must be confined to that which is reasonably necessary to accomplish such purpose." *Dennis*, 216 W.Va. at 351, 607 S.E.2d at 457, quoting Syl. Pt. 1, *State v. Spicer*, 162 W.Va. 127, 245 S.E.2d 922 (1978).

If it is determined that a piece of evidence is governed by Rule 404(b), further analysis by the trial court is required. This Court adopted the four-part *Huddleston v. U.S.* test for determining the admissibility of Rule 404(b) evidence in *TXO Production* in 1992. *TXO Prod. Corp.*, 187 W.Va. at 470, 419 S.E.2d at 883. Pursuant to the *Huddleston* test, the trial court must first determine whether the prior bad act evidence is probative of some material issue other than the defendant's character. *McGinnis*, 193 W.Va. at 155, 455 S.E.2d at 524. "Evidence reflecting only a propensity to commit a crime is inadmissible." *Id.* The burden is on the State to "identify, with particularity, the specific purpose for which the evidence is being offered." *Id.* The specific purpose cannot involve or relate to any inferences of the defendant's character. *Id.*

Next, the trial court must conduct a relevance inquiry pursuant to Rules 401, 402 and 104 of the *West Virginia Rules of Evidence*. *Id.* Evidence is relevant "only if the jury can reasonably infer that the act occurred and that the defendant was the actor." *McGinnis*, 193 W.Va. at 156-157, 455 S.E.2d at 525-526. When making this relevance inquiry, the trial court is to consider all of the evidence and reach its decision by a preponderance of the evidence. *Id.* Further, when a trial court assesses the probative value of this evidence, it should focus on the purpose for which the State has offered it. *McGinnis* at 193 W.Va. at 156, 455 S.E.2d at 525.

Even if the trial court determines a prior bad act is relevant, it must still be subjected to Rule 403's balancing test. *Id.* Thus, to be admissible, the probative value of the prior bad act must supersede the risk that "its admission will create substantial danger of unfair prejudice." *Id.* The Rule 403 balancing test must appear on the trial record. *Id.*

The final part of the *Huddleston* test requires that, if requested, the trial court must give a limiting instruction. *Id.* This instruction should explain to the jury that the prior bad act cannot be considered proof of the defendant's guilt on the charged offense. *Id.* If counsel does not

request a limiting instruction, the trial court is under no obligation to give one; however, this Court has strongly recommended that such an instruction should be given unless objected to by the defendant. *McGinnis*, 193 W.Va. at 156-157, 455 S.E.2d at 525-526. In addition to providing a limiting instruction at the time the evidence is offered, this Court also recommends that it be repeated to the jury in the trial court's general charge at the conclusion of the evidence. *McGinnis*, 193 W.Va. at 159, 455 S.E.2d at 528.

Due to the highly prejudicial nature of Rule 404(b) evidence, the *McGinnis* court determined that exposing the jury to such evidence at trial creates an unfair risk of conviction. *McGinnis*, 193 W.Va. at 158, 455 S.E.2d at 527. Thus, the admissibility of Rule 404(b) evidence must be determined in a preliminary proceeding pursuant to Rule 104(a).

In the present case, the State introduced evidence that Petitioner was a drinker whose drinking led to violent acts and destroyed relationships when cross-examining his mother. The State also attempted to show Petitioner was a bad police officer whose misconduct led to him being removed from duty. The prosecuting attorney was incorrect in these assertions, and made them in violation of Rule 404(b) of the *West Virginia Rules of Evidence*.

The prosecuting attorney asked Mrs. Fleming if she knew why her son had been discharged from his position as a police officer, implying misconduct on the part of Petitioner. *App. Vol. III*, p. 13. The State attempted to show Petitioner was a bad police officer. Yet Petitioner's police service records clearly show that Petitioner resigned from his post, and the only blemishes on his service record were minor infractions. *App. Vol. IV*, pp. 75-87. Nonetheless, the State asked leading, prejudicial, loaded, "when did you last beat your wife," type of questions.

The State also attempted to elicit testimony from Mrs. Fleming that her son had anger issues and a drinking problem, and these problems led to a domestic incident with his current wife and caused a prior divorce. *App. Vol. III*, pp. 15-17. This was an attack on Petitioner's character and an attempt to show he was predisposed to drinking and violence, which was the State's theory for Petitioner's criminal conduct. By this line of questioning, the State attempted to show that on September 3, 2012, Petitioner acted in conformance with testimony it elicited

from Mrs. Fleming. None of Mrs. Fleming's answers verified or even dignified the State's pernicious, misleading, improper and prejudicial questions. However, the damage was done as the jury heard Petitioner was a "bad man" with a problematic history.

None of the evidence the State obtained during its examination of Mrs. Fleming was intrinsic to the crime. Further, the State provided no time frame for Petitioner's acts. If the State would have established a time frame for Petitioner's prior acts, it would have been apparent to the jury that they were remote in time to September 3, 2012, the night in question.

"Evidence reflecting only a propensity to commit a crime is inadmissible." *McGinnis*, 193 W. Va. at 155, 455 S.E.2d at 524. Here, the State attempted to show that due to Petitioner's prior conduct, he had a propensity to commit the criminal conduct on September 3, 2012. The State was required to "identify, with particularity, the specific purpose for which the evidence is being offered," and the specific purpose cannot involve or relate to any inferences of the defendant's character. *Id.*

Upon defense counsel's objection, the prosecutor replied that it was purely impeachment evidence; however, the prosecutor never explained what exactly he was trying to impeach with this line of questioning. *App. Vol. III*, pp. 15-16. The State failed to set forth the particular purpose for which the evidence was being offered. *McGinnis*, 193 W.Va. at 155, 455 S.E.2d at 524. The true purpose of the State's questioning was to show that Petitioner had the propensity to commit the crimes with which he was charged, and acted in conformity therewith. The State also failed to show how these alleged prior bad acts were probative of some material issue other than Fleming's character. *McGinnis*, 193 W.Va. at 155, 455 S.E.2d at 524. All of the State's insinuations through its questioning were contrary to the weight of the evidence regarding Petitioner Fleming's life history.

The State's questioning of Mrs. Fleming created an unfair risk of conviction. The State failed to disclose in advance of trial that it intended to raise these matters, so the trial court never had the opportunity to conduct a mandatory Rule 404(b) hearing, or a Rule 403 balancing inquiry. *McGinnis*, 193 W.Va. at 158, 455 S.E.2d at 527. This was highly prejudicial to

Petitioner, and rises to the level of reversible error. *State v. Simmons*, 175 W.Va. at 658, 337 S.E.2d at 316. Therefore, this Court should vacate Petitioner's conviction.

G. The Prosecuting Attorney's misconduct severely prejudiced Petitioner, depriving him of his constitutional right to a fair trial.

This Court has stated: "A prosecutor is not a mere partisan. To the contrary, he 'assumes a quasi-judicial role and is required to set a tone of fairness and impartiality.'" *State v. Collins*, 186 W.Va. 1, 13, 409 S.E.2d 181, 193 (1990), citing *State v. England*, 376 S.E.2d 548, 556 (1988); Syl. Pt. 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977). West Virginia law acknowledges that the prosecutor should vigorously pursue the State's case, but in doing so, "he must not abandon the quasi-judicial role with which he is cloaked under the law." Syl. Pt. 3, *Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Where prosecutorial misconduct is raised on appeal, the "inquiry focuses on the fairness of the trial and not the culpability of the prosecutor, because allegations of prosecutorial misconduct are based on notions of due process." *State v. Guthrie*, 194 W.Va. 657, 687, fn. 25, 461 S.E.2d 163, 193 (1995). In evaluating whether a statement made or evidence introduced by the State constitutes prosecutorial misconduct, "first look at the statement or evidence in isolation and decide if it is improper." *Id.* If the statement or evidence is improper, the next step is to determine if it resulted in the trial being unfair using the following factors:

- (1) The nature and seriousness of the misconduct;
- (2) the extent to which the statement or evidence was invited by the defense;
- (3) whether the statement or evidence was isolated or extensive;
- (4) the extent to which any prejudice was ameliorated by jury instructions;
- (5) the defense's opportunity to counter the prejudice;
- (6) whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters; and
- (7) the sufficiency of the evidence supporting the conviction.

Guthrie, 194 W.Va. at 687, fn. 25, 461 S.E.2d at 193; Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

In this case, the prosecuting attorney, acting alone and in concert with the State's expert, Dr. Adamski, deliberately tried to inflame the jury, to turn its attention from the facts of the case to extraneous and prejudicial matters, and improperly undermined Petitioner Fleming's PTSD,

his character, and his service to this country. The prosecutor's conduct was not an isolated event, but a repeated pattern of behavior that persisted throughout the duration of the trial.

The prosecuting attorney asked Heather Ludwick a number of questions for which he had no factual or good faith basis. *App. Vol. II*, p. 174-175. Similarly, the prosecutor admitted improper character evidence regarding Petitioner in his examination of Lois Fleming. *App. Vol. III*, pp. 13-17. The prosecuting attorney also asked improper questions during his *voir dire* of defense expert Dr. Feingold. Those questions were not aimed at questioning Dr. Feingold's qualifications as an expert. Instead, the prosecuting attorney wanted to put irrelevant and impermissible matters before the jury to discredit Dr. Feingold's testimony. For the reasons set forth herein, the prosecutor's conduct during his examinations of Heather Ludwick, Lois Fleming, Dr. Feingold, and Dr. Adamski were improper.

The prosecuting attorney acted in concert with the court-appointed psychological examiner Adamski to smear Petitioner Fleming, his expert witnesses, and PTSD from the witness stand. Adamski was appointed by the court to conduct an additional forensic examination for competency and criminal responsibility. Adamski was not appointed to be partisan, but when confronted by defense counsel about for whom he was working, Adamski essentially admitted he was working for the prosecuting attorney as his expert. *App. Vol. III*, p. 183. Adamski was combative on the witness stand and unresponsive to defense counsel's questions, and this conduct appeared to be encouraged by the prosecuting attorney. *App. Vol. III*, p. 186. This conduct was improper and prejudicial.

The conduct of the prosecuting attorney, both alone and in concert with Adamski, constitutes serious misconduct. The attacks on Petitioner's character, his service record, and PTSD as a clinical disorder, as well as the way Heather Ludwick, Dr. Feingold, and Lois Fleming were questioned, were not invited by the defense. These were not isolated events, but persisted throughout the trial. The verdict is evidence the State's smear tactics were effective, because against the great weight of the evidence the jury found Petitioner was sane beyond a reasonable doubt on the night of September 3, 2012. Thus, the court's jury instructions failed to remedy the prejudice manufactured by the prosecuting attorney and Dr. Adamski. The record reveals these

matters were deliberately placed before the jury to prejudice the jurors against Petitioner. *State v. Guthrie*, 194 W.Va. at 687, fn. 25, 461 S.E.2d at 193; Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469. *See also U.S. Constitution*, Amendments V, VI, XIV, and *W. Va. Constitution*, Article III, §§ 10, 14. For these reasons, the State's misconduct deprived Petitioner of his constitutionally guaranteed right to a fair trial, and his conviction should be reversed.

H. The Trial Court erred when it denied Petitioner's Motion for Judgment of Acquittal at the close of the State's case-in-chief and at the conclusion of the trial.

Rule 29 of the *West Virginia Rules of Criminal Procedure* provides that the trial court shall, upon a defendant's motion, "order the entry of judgment of acquittal. . .if the evidence is insufficient to sustain a conviction of such offense or offenses." *W. Va. R. Crim. P.*, Rule 29. In this case, Petitioner moved the trial court to grant his Motion for Judgment of Acquittal at the close of the State's case-in-chief and at the conclusion of trial. *App. Vol. II*, pp. 241-46; *App. Vol. III*, p. 191. Both motions were denied. *App. Vol. II*, pp. 246-247; *App. Vol. III*, p. 191.

Petitioner argued that jurisdiction and venue were not proven, as no witness was ever asked, and no witness testified, that the acts complained of occurred in Hampshire County, West Virginia. *App. Vol. II*, p. 241. The State's counter was that maps were introduced showing the location of Capon Bridge, and that trial court could take judicial notice of that. *App. Vol. II*, p. 243. However, there was no affirmative testimony on this issue, and venue will not be presumed. Venue must be proved, and the burden of proving it is on the State. The State has the burden of proving that the crime occurred in the county where the defendant is tried. This requirement arises by virtue of Art. III, § 14, of the *West Virginia Constitution*. *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979), citing *State v. Tapp*, 153 W.Va. 759, 172 S.E.2d 583 (1970).

This Court held in *State v. Burton* not only that venue can be established by circumstantial evidence, but that it need only be proved by a preponderance of the evidence. 254 S.E.2d at 140-141. Yet proof of venue is part and parcel of the constitutionally guaranteed right to due process in a criminal trial. Here the prosecutor never asked the question of a single witness whether the acts complained of took place in Hampshire County, West Virginia. While

the trial court bought the State's argument and took judicial notice via the maps used that venue was in Hampshire County, Capon Bridge is a border town and there was no proof on the record that the charged acts did take place in Hampshire County. For the trial court to find otherwise was an abuse of discretion.

Petitioner also argued that the State failed to prove that numerous counts of wanton endangerment were anything more than a simple brandishing. *App. Vol. II*, p. 241-246. The trial court abused its discretion when it denied Petitioner's motion, because the State failed to meet its burden of proof on these issues. The trial court committed plain error in denying Petitioner's motion at the conclusion of the trial, because for the reasons herein, the State failed to prove beyond a reasonable doubt the elements of premeditation and malice on the attempted murder charges. The State also failed to prove beyond a reasonable doubt Petitioner was sane at the time the offenses were committed. Thus, the trial court's error in denying Petitioner's motion and allowing the trial to proceed was plain because it substantially impacted the fairness of the trial.

I. The Trial Court erred when it denied Petitioner's Motion for New Trial.

This Court reviews "the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and . . . reviews the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 1, *State v. Kennedy*, 229 W.Va. 756, 735 S.E.2d 905 (2012), quoting Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000). Related questions of law are subject to *de novo* review. *Id.* On September 17, 2014, the trial court denied Petitioner's Motion for New Trial. *App. Vol I*, p. 59; *App. Vol IV*, pp. 114-117.

Many of the grounds Petitioner asserted in his Motion for New Trial are presented throughout this brief. For the reasons set forth herein, and in Petitioner's Motion for New Trial, the trial court should have granted Petitioner a new trial. *App. Vol. IV*, pp. 114-116. The trial court abused its discretion when it denied Petitioner's motion. Therefore, this Court should

reverse the trial court's ruling and remand the case to the circuit court with directions that Petitioner be granted a new trial.

J. The Trial Court erred when it sentenced Petitioner to a period of incarceration disproportionate to the underlying criminal conduct.

“The primary object of punishment is retributory justice, and unless such justice be shown in the sentence of the court it is not likely to deter others from committing crime nor to reform the person sentenced.” *State v. Cooper*, 172 W.Va. 266, 272, 304 S.E.2d 851, 856 (1983), quoting *State v. Newman*, 108 W.Va. 642, 152 S.E. 195, 197 (1930). Also, excessive punishment fails to deter others from committing crimes and “does not reform the criminal who perceives injustice toward himself.” *Id.* This Court held that a trial court's best and most appropriate approach to sentencing is to “adapt the duration of the punishment to the prisoner's guilt, keeping in view his character and susceptibility to reformation as an ingredient.” *Id.*

When imposing a sentence, the trial court “may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense.” *State v. Buck*, 173 W.Va. 243, 245, fn.1, 314 S.E.2d 406, 408 (1984), quoting *State v. Houston*, 166 W.Va. 202, 273 S.E.2d 375 (1980). That inquiry may include:

the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, his natural inclination or aversion to commit crime, the stimuli which motivate his conduct, and . . .the judge should know something of the life, family, occupation and record of the person about to be sentenced.

Id. The trial court then should apply the facts it obtains prior to sentencing to impose a sentence which is proportionate to the defendant's acts and adheres to West Virginia and federal constitutional protections against cruel and unusual punishment. Syl. Pts. 4, 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981); *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988); *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

Evaluating the proportionality of a sentence is a two-step process. Under the first step, a subjective test, a sentence may violate West Virginia constitutional provisions, even if it does not rise to the level of cruel and unusual punishment, if “it is so disproportionate to the crime for

which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” Syl. Pt. 5, *Cooper*, 172 W.Va. 266, 304 S.E.2d 851. "If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further." *Cooper*, 172 W.Va. at 272, 304 S.E.2d at 856.

If it cannot be said that a sentence shocks the conscience under the subjective test, then the Court proceeds to the second step, which is an objective inquiry. *Cooper*, 172 W.Va. at 272, 304 S.E.2d at 856; Syl. Pt. 5, *Wanstreet*, 166 W.Va. 523, 276 S.E.2d 205. Under the objective test, the Court considers:

the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Cooper, 172 W.Va. at 272, 304 S.E.2d at 856; Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205. Where a sentence is out of tune with these factors, it violates the constitutional commands of Art III, § 5 of the *West Virginia Constitution*, which requires that criminal penalties be “proportionate to the character and degree of an offense.” Syl. Pt. 5, *Cooper*, 172 W.Va. 266, 304 S.E.2d 851; *W. Va. Const.*, Art. III, § 5.

In the present case, Petitioner was sentenced to serve a determinate term of three (3) years for Count IV of the indictment, wanton endangerment, to run concurrent with Counts I and II, wanton endangerment, and to run consecutive to an indeterminate term of not less than three (3) nor more than fifteen (15) years for Count V, attempted murder. The attempted murder sentence was ordered to run concurrent with Counts VI through XII, also wanton endangerment sentences. In addition, Petitioner was sentenced to an indeterminate term of not less one (1) nor more than five (5) years for Count XIII, fleeing with reckless disregard for the safety of others, to run consecutive to the sentences set forth above. Petitioner was also sentenced to a determinate term of five (5) years for Count XIV, wanton endangerment, to run concurrent with Count XV, a five (5) year determinate sentence for wanton endangerment, which together are to run consecutive to all other sentences. *App. Vol. IV*, pp. 118-25.

Petitioner’s sentence shocks the conscience. This is a man in his mid-forties with absolutely no criminal record. This is a man who honorably served his community as a police

officer, and who honorably served his country in combat in a foreign country. Petitioner paid a hefty price for his service. Chris Fleming returned home from Iraq physically intact, but psychologically scarred. Because of the horrific things Fleming experienced in Iraq, he developed PTSD, with which he struggles daily. Petitioner committed the criminal conduct for which he was sentenced in the haze of a PTSD-induced flashback or delusion. At sentencing, the trial court acknowledged that “but for” Petitioner’s military service in Iraq, the events of September 3, 2012 would never have transpired. *App. Vol. IV*, p. 103. Petitioner was remorseful and sincerely apologetic for his actions. *App. Vol. IV*, p. 92.

Petitioner clearly needs help, the kind of help that he cannot get while serving a lengthy sentence in the state penitentiary. Petitioner’s Motion for Probation should have been granted so that he could receive the help he truly needs at the V.A. hospital. Petitioner’s sentence does not serve the objective of retributory justice because it neither reflects the level of Petitioner’s guilt, nor does it provide the appropriate rehabilitation for someone with Petitioner’s condition.

There is no justice in punishing Petitioner, a war veteran and dedicated public servant, as though he is a common criminal. Petitioner was incapable of controlling his actions and conforming his behavior to the laws of this state on September 3, 2012, because of his PTSD. *Syl. Pt. 5, Cooper*, 172 W.Va. 266, 304 S.E.2d 851. Throughout the duration of the proceedings in the circuit court, Petitioner’s condition improved dramatically. Once Mr. Fleming was placed in the custody of the V.A. hospital, he started to come to terms with his PTSD. It became easier for him to talk about his experiences in Iraq and to accept his PTSD for what it is. He learned that PTSD is not a sign of weakness, but a cost of war.

When the trial court sentenced Fleming to serve multiple consecutive sentences in the state penitentiary, it impeded his ability to improve and conquer his PTSD. Just as our country needed Fleming’s service in Iraq, he now needs the services of the V.A. hospital to recover from the trauma he experienced in Iraq. Chris Fleming was not able to conform his conduct to the laws of West Virginia on the night of September 3, 2012, because of his PTSD. Therefore, the appropriate and just sentence is probation so he can receive treatment for the conditions that led to the events of September 3, 2012. Petitioner requests that this Court reverse the trial court’s

sentence and remand the matter to the Circuit Court of Hampshire County with directions that Petitioner be granted probation with the condition that he resume treatments at the V.A. hospital.

VI. CONCLUSION

In summary, Petitioner Chris Wade Fleming respectfully requests this Honorable Court to grant the relief Petitioner seeks herein. On July 9, 2013, Petitioner appeared before the trial court with a signed plea agreement in hand. The trial court interfered in the plea negotiation process in violation of Rule 11 of the *West Virginia Rules of Criminal Procedure* by ordering Petitioner to undergo an additional psychological evaluation. The trial court knew the State was unable to prove beyond a reasonable doubt Petitioner was sane on the date in question. The order for an additional evaluation by a hand-picked evaluator gave the State the evidence it needed to rebut Petitioner's insanity defense. The trial judge abandoned his impartial role and became an advocate on behalf of the State in violation of Rule 11. The trial court further violated Rule 11 when it denied Petitioner the opportunity to tender his plea agreement to the court.

At trial there were four (4) times the court should have declared a mistrial. In the State's direct examination of its witnesses Heather Ludwick and Dr. Adamski, the prosecutor asked questions for which there was no factual or good faith basis, which were designed to inflame the jury, to place improper matters before the jury, and to prejudice it against Petitioner Fleming. In the State's voir dire of defense expert Dr. Feingold, and its cross-examination of Petitioner's mother, the prosecutor again asked questions for which he had no good faith or factual basis, solely to inflame and prejudice the jury against Petitioner. The prosecutor's misconduct deprived Petitioner Fleming of his constitutional right to a fair trial.

The State failed to meet its burden of proof in a number of respects at trial. The State failed to prove beyond a reasonable doubt that Petitioner was sane at the time he committed the underlying offenses. On the charge of attempted murder, the State failed to prove beyond a reasonable doubt that Petitioner acted with malice or deliberation, and failed to present any evidence the actions were premeditated.

The trial court erred when it allowed the admission of improper character evidence during the examination of Mrs. Fleming, which created an unfair risk that Petitioner would be

wrongfully convicted. The trial court also erred when it denied Petitioner's Motion for New Trial and his Motions for Judgment of Acquittal.

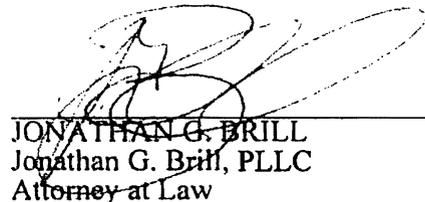
The trial court abused its discretion when it sentenced Petitioner. Chris Fleming was not able to conform his conduct to the laws of West Virginia on the night of September 3, 2012, because of his PTSD. Given his age, his lack of any criminal history, and his prior service as a police officer and armed services veteran, the trial court should have sentenced Fleming to probation with the condition that he resume treatment at the V.A. hospital for his PTSD.

Respectfully submitted on this the 19th day of March, 2015.

CHRIS WADE FLEMING
Petitioner by Counsel



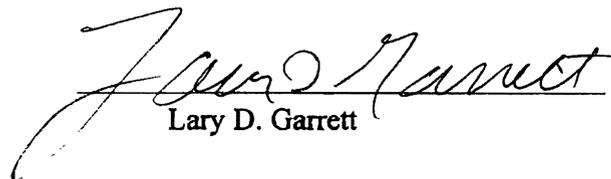
LARY D. GARRETT
Garrett & Garrett
Attorneys at Law
P.O. Box 510
Moorefield, WV 26836
Ph: 304-538-2375
Fax: 304-538-6807
garrettlaw@hardynet.com
WV State Bar ID# 1344
Co-Counsel for Petitioner



JONATHAN G. BRILL
Jonathan G. Brill, PLLC
Attorney at Law
P.O. Box 932
Romney, WV 26757
Ph: 304-822-7110
Fax: 304-822-7109
jonathangbrill@gmail.com
WV State Bar ID # 11316
Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Lary D. Garrett, Co-Counsel for Petitioner, hereby certify that I served the foregoing *Brief of Petitioner* upon the State of West Virginia by mailing a true copy thereof to its Assistant Attorney General, Derek A. Knopp, at his office address of 812 Quarrier Street, 6th Floor, Charleston, WV 25301, by U.S. Mail, postage prepaid, on this the 19th day of March, 2015.



Lary D. Garrett