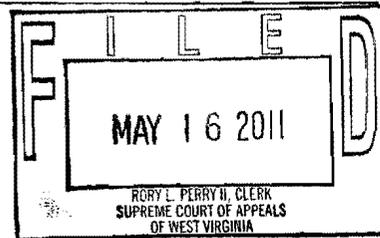

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 101367



STATE OF WEST VIRGINIA,

Respondent,

v.

JASON CLAY ANDERSON,

Petitioner.

PETITIONER'S BRIEF

HARRY P. MONTORO, WV BAR NO. 10280
ATTORNEY FOR THE PETITIONER
LAW OFFICE OF HARRY P. MONTORO, PLLC
235 HIGH STREET, SUITE 725
MORGANTOWN, WV 26505
PHONE: 304-291-3232
FAX: 304-291-3344

TABLE OF AUTHORITIES

CASES

<i>Deck v. Missouri</i> , 544 U.S. 622 (2005)	29
<i>James v. State</i> , 339 So. 2d 1047 (Ala. Crim. App. 1976).....	17, 18
<i>Scott v. United States</i> , 559 A.2d 745 (1989).....	24, 25
<i>State ex rel. Tyler v. MacQueen</i> , 191 W. Va. 597, 447 S.E.2d 289 (1994).....	28
<i>State v. Clark</i> , 171 W. Va. 74, 297 S.E.2d 849 (1982).....	15
<i>State v. Craig</i> , 131 W. Va. 714, 51 S.E.2d 283 (1948).....	14
<i>State v. Derr</i> , 192 W. Va. 165, 451 S.E.2d 731 (1994)	21, 22, 23
<i>State v. Finley</i> , 219 W. Va. 747, 639 S.E.2d 839 (2006)	29, 30, 31
<i>State v. Foster</i> , 221 W. Va. 629, 656 S.E.2d 74 (2007)	12, 13, 14, 15, 19, 21
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	14
<i>State v. Hicks</i> , 2011 W. Va. LEXIS 21	14
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	30
<i>State v. Mongold</i> , 220 W. Va. 259, 647 S.E.2d 539 (2007)	21, 22

STATUTES AND RULES

W. Va. Code § 7-7-8	26
W. Va. Code § 61-8D-2	3, 14
W. Va. R. Prof. Conduct 1.7.....	26
W. Va. R. Prof. Conduct 1.11	26, 27

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	2
II.	STATEMENT OF THE CASE	3
	A. PROCEDURAL HISTORY	3
	B. STATEMENT OF THE FACTS	4
III.	SUMMARY OF THE ARGUMENT.....	10
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION ...	12
V.	ARGUMENT.....	12
	A. The State failed to prove two essential elements of its case, causation and intent, because the State’s own witnesses could not identify a cause of death and characterized the conduct which caused the baby’s death as negligence	12
	i. The State failed to offer evidence of a causal link between the neglect of the baby and the baby’s death where the State’s witnesses could not identify a cause of death other than “severe caretaker maltreatment.”	13
	ii. The State failed to offer sufficient evidence that Mr. Anderson acted with malice and intent in neglecting the baby where the State’s own witnesses identified Mr. Anderson’s conduct as “human negligence,” “negligence,” “ignorance,” “laziness” and/or resulting from his use of drugs	18
	B. The trial court abused its discretion in permitting the State to enlarge gruesome photographs of the baby and to publish them to the jury by displaying them on a poster-board for significant periods of time during the trial where the trial court failed to engage in the analysis outlined by the Supreme Court of Appeals of West Virginia in <i>State v. Derr</i> and reiterated in <i>State v. Mongold</i>	21

C. The trial court erred in refusing to disqualify the Prosecutor’s Office where the Prosecutor’s Office engaged in employment negotiations with one of Mr. Anderson’s appointed defense counsel, and subsequently hired him, in the months leading up to trial24

D. The trial court committed plain error in requiring Jason Anderson to be handcuffed in view of the jury during sentencing proceedings.29

VI. CONCLUSION 31

PETITIONER'S BRIEF

This case arises from what is undoubtedly a tragic and horrific set of facts involving the death of a young child. As much as the State would like it, this Court cannot ignore the rule of law because there are tragic and horrific facts before it, any more than it can suspend the prosecution's burden of proof in favor of emotionally-charged circumstances, as was done in the case below. The jury was told the sad details of the death of defendant Jason Anderson's infant son, and was shown gruesome photographs of the child's lifeless body. However, the State's medical witnesses could not identify a cause of death, and instead testified that the baby died as a result of "severe caretaker maltreatment." The jury was also told, by the State's own witnesses, that Mr. Anderson's conduct in depriving care for his son was "negligence," "ignorance," "laziness" and a result of drug use, and characterized the purported manner of death as "human negligence." The jury nonetheless convicted Mr. Anderson of maliciously and intentionally causing the death of his child and sentenced him to life without mercy. Despite the weight of the argument that Mr. Anderson failed to give his son the level of care that society expects of parents, the evidence presented at trial is insufficient to support the jury's guilty verdict that Mr. Anderson intentionally caused the death of his son.

Closely related to the fact that the prosecution failed to carry its burden of proof on the elements of causation and intent, Mr. Anderson also alleges error as a result of the entry and manner of publication of gruesome photographs of the victim where the trial

court failed to engage in the analysis dictated by this Court. In light of the jury's conviction of Mr. Anderson despite the failure of the State to offer evidence of a cause of death or specific intent on Mr. Anderson's part, it is evident that the gruesome nature of the photographs played a significant and improper part in the jury's decision-making.

Mr. Anderson also assigns error to the failure of the trial court to disqualify the prosecutor's office after it engaged in employment negotiations with one of Mr. Anderson's appointed counsel in the months leading up to the trial. Although the State dismisses Mr. Anderson's contention in this regard as mere "speculation of subconscious biases and motivation," both state and federal rules governing the conduct of attorneys and judges supports Mr. Anderson's contention that the active employment negotiations between his attorney and the entity prosecuting his case gives rise to concerns of impropriety and bias which should be accorded serious review by this Court.

Finally, Mr. Anderson alleges that the trial court committed plain error in allowing Mr. Anderson to be shackled, in view of the jury, during the sentencing phase of his trial. For these reasons, as set forth more fully below, Mr. Anderson respectfully requests that this Court overturn his conviction and grant him a new trial, or in the alternative, grant him a resentencing.

I. ASSIGNMENTS OF ERROR

A. The State failed to prove two essential elements of its case, causation and intent, because the State's own witnesses could not identify a cause of death and characterized the conduct which caused the baby's death as negligence.

i. The State failed to offer evidence of a causal link between the neglect of the baby and the baby's death, where the State's

witnesses could not identify a cause of death other than “severe caretaker maltreatment.”

ii. The State failed to offer sufficient evidence that Mr. Anderson acted with malice and intent in neglecting the baby where the State’s own witnesses identified Mr. Anderson’s conduct as “human negligence,” “negligence,” “ignorance,” “laziness” and/or resulting from his use of drugs.

B. The trial court abused its discretion in permitting the State to enlarge gruesome photographs of the baby and to publish them to the jury by displaying them on a poster board for significant periods of time during the trial where the trial court failed to engage in the analysis outlined by the Supreme Court of Appeals of West Virginia in *State v. Derr* and reiterated in *State v. Mongold*.

C. The trial court erred in refusing to disqualify the Prosecutor’s Office where the Prosecutor’s Office engaged in employment negotiations with Mr. Anderson’s appointed defense counsel and subsequently hired him, in the months leading up to trial.

D. The trial court committed plain error in permitting Jason Anderson to be handcuffed in view of the jury during sentencing proceedings.

II. STATEMENT OF THE CASE

A. Procedural History

Jason Anderson was charged with the offense of Murder of a Child by a Parent, Guardian or Custodian pursuant to W. Va. Code § 61-8D-2. By Order dated March 18, 2009, the undersigned was appointed substitute counsel to represent Mr. Anderson. By Order dated April 10, 2009, Brent Beveridge was appointed co-counsel to represent Mr. Anderson. In or around October 1, 2009, Mr. Beveridge was hired by the Prosecutor’s

Office as a Special Assistant Prosecutor.¹ On or about December 1, 2009, Mr. Anderson filed a motion to disqualify the Prosecutor's Office. Mr. Anderson's motion to disqualify was denied on December 14, 2009.

On March 3, 2010, a Motion to Determine the Admissibility of Evidence was filed by the State of West Virginia requesting that the prosecution be allowed to admit into evidence during trial, *inter alia*, photographs of the baby's body after death. By Order dated March 31, 2010, the Court ruled largely in favor of the State, admitting over Mr. Anderson's objection photographs marked as State's Exhibits 2-A, 2-B, 2-C, 2-D and 9-A. A trial was held in this matter from April 7 through April 12, 2010, and the jury returned a verdict of guilty. The sentencing phase of the trial was held on April 12, 2010, and the jury sentenced Mr. Anderson to life without mercy. On April 21, 2010, a final order sentencing Mr. Anderson to life without mercy was entered by the trial court. Mr. Anderson filed a Petition for Appeal on October 25, 2010. This matter was set for oral argument under Rule 19 of the Revised Rules of Appellate Procedure and a briefing schedule was set by this Court by Order dated April 14, 2011.

B. Statement of the Facts

The defendant, Jason Anderson, is the father of J.C.A. (hereinafter "the baby" or "the child"), who was born on April 8, 2007 and who died on June 23, 2007. The evidence presented at trial was that on June 23, 2007 at approximately 11:55 a.m., EMTs were called to the home where Jason Anderson lived with his girlfriend Jennifer

¹ Mr. Beveridge remained employed by the Prosecutor's Office throughout the trial and conviction of Mr. Anderson until his untimely death on April 25, 2010.

Meacham and his grandfather, Denzil Anderson.² Tr. at 110.³ When EMT's arrived at the Anderson home, they found the baby lying dead in his crib. *Id.* at 113-114. EMTs attempted CPR on the baby to no avail and transported him to Fairmont General Hospital. *Id.* at 118.

The State presented the testimony of Dr. Charles Mihelic, who was one of the emergency room doctors who attempted to revive the baby upon his arrival to the hospital. *Id.* at 130. Dr. Mihelic was determined by the Court to be an expert in the field of emergency room medicine and designated as an expert witness. *Id.* at 131. Dr. Mihelic testified that there were lesions on the baby's abdomen and little finger and an ulcer on his penis. *Id.* at 132-33. Dr. Mihelic opined that such conditions take time to appear and would not have formed over night. *Id.* Dr. Mihelic testified that the conditions made him concerned about the level of care the baby had received. *Id.* at 133-34. Dr. Mihelic also testified that he did not notice any bruising on the baby. *Id.* at 134. Dr. Mihelic did not opine on the specific manner of death of the baby. *See id.* at 129-139.

The State also presented the testimony of Dr. Zia Sabet, the chief medical examiner for the State of West Virginia. *Id.* at 201. Dr. Sabet testified that he found no internal injuries on the baby but noted that the numerous lesions that had formed on the baby would have taken between ten to fourteen days to form. *Id.* at 215. Dr. Sabet also testified that he ruled out sudden infant death syndrome, or SIDS, based upon the soiled clothing the baby was wearing at the time he died. *Id.* Dr. Sabet testified that "this is

² Denzil Anderson is the biological grandfather and adoptive father of Jason Anderson.

³ References to "Tr. at ____" are to the trial transcript. All other references to transcripts are identified by particular date.

negligence, maltreatment of the baby. . . This is intentionally [sic] or maybe ignorance.”

Id. at 216. When asked his opinion of the cause of the baby’s death, Dr. Sabet testified as follows:

[I]t is our opinion that Jason Clark Anderson, a two-and-a-half month old, relatively small for age, who died suddenly and unexpectedly in the setting of severe care-taker maltreatment, including evidence of nonaccidental soft tissue injuries, poor hygiene with severe diaper rash, and investigative findings indicative of severe caretaker neglect. While a specific underlying mechanism of death has not been identified, the post-mortem and investigative findings point to severe caretaker maltreatment as the underlying cause [of] death. Infant’s demise, death. So manner of death in this case is classified as homicide.

Id. at 228-229. Dr. Sabet’s testimony in this regard was immediately followed by this exchange with the State’s attorney:

Q. And hence homicide being defined as being caused by another human being?

A. Human. **And negligence of the human.**

Id. at 229 (emphasis added). On cross-examination, Dr. Sabet testified that at the time he performed the autopsy on the baby, there was two to three ounces of liquid food inside the baby’s stomach. *Id.* at 233.

The State also presented the testimony of Dr. Matthew Verona, who was an emergency room doctor who, along with Dr. Mihelic, treated the baby at the hospital on June 23, 2007. Tr. at 242. Dr. Verona expressly disagreed with Dr. Sabet’s testimony that the lesions appearing on the baby’s would take ten to fourteen days to form. *Id.* at 249. Instead, Dr. Verona testified that the lesions were indicative of bacterial decomposition that begins within eight to ten hours after death. *Id.* at 250. Dr. Verona also testified that in his opinion, he did not believe the baby’s death was a result of SIDS.

Id. Dr. Verona offered no opinion on the medical cause of the baby's death. *Id.* at 240-256.

The State also presented the testimony of numerous neighbors and acquaintances of Jason Anderson and his family who testified about the level of care given to the baby by Jason Anderson and Jennifer Meacham, the baby's mother. *See generally, id.* at 140-200. These individuals, including Amanda Oliverio, also testified about the level of care given to Jason Anderson and Jennifer Meacham's other child, a daughter named M.A., who was approximately one and a half years old at the time of the baby's death. *Id.* Ms. Oliverio testified about the conditions of the home in which Jason Anderson, Jennifer Meacham and Denzil Anderson lived with M.A. and the baby. *Id.* at 180. Ms. Oliverio also testified regarding the purported relationship between Jason Anderson and Jennifer Meacham and identified Mr. Anderson as "controlling." *Id.* at 183.

The State also presented the testimony of Jennifer Meacham, who had entered into a plea deal with the Prosecutor's Office for her role in the death of the baby in which she plead guilty to child neglect resulting in death and received a three to fifteen year sentence in exchange for her testimony against Mr. Anderson. *Id.* at 327-28. Ms. Meacham testified, among other things, that Jason Anderson began ignoring their daughter M.A. when she was about a month and a half old. *Id.* at 283. When Ms. Meacham was asked why Mr. Anderson acted this way, she testified that Mr. Anderson "just got lazy. He didn't want to do anything," *id.* at 284, that he "just got stuck in video games," *id.* at 285, and that he used drugs, *id.* at 290. After the baby was born, according to Ms. Meacham, Mr. Anderson refused to provide care to the baby or to allow Ms.

Meacham to provide him with care. *Id.* at 297. Ms. Meacham testified that Mr. Anderson “got lazy again” and told her his grandfather, Denzil Anderson, would care for the baby. *Id.* at 298. Ms. Meacham claimed that Mr. Anderson would not allow her to change the baby’s diaper or otherwise care for him, and that if she would attempt to do so, Mr. Anderson would physically restrain her from doing so. *Id.* at 303.

On cross-examination, Ms. Meacham was questioned regarding her previous testimony, at a hearing in front of Circuit Judge Fred Fox during an abuse and neglect proceeding, that she had fed, changed and bathed the baby, that she changed the bedding that the children had urinated on, that she had not “neglected [the baby] to death” as alleged during the proceedings to terminate her parental rights to M.A.. *Id.* at 329-33. Ms. Meacham claimed to have been lying under oath during those proceedings. *Id.* at 333. Ms. Meacham also testified that she and Jason Anderson, along with Amanda Oliverio, who had earlier testified about the lack of care given to the baby by Mr. Anderson and Ms. Meacham, did drugs together at Ms. Oliverio’s house. *Id.* at 335-36.

Mr. Anderson called his grandfather, Denzil Anderson, who testified that he did not fear Mr. Anderson, that Mr. Anderson never threatened him, and that he never observed Mr. Anderson physically harm Ms. Meacham or threaten Ms. Meacham if she fed or cared for the baby. *Id.* at 552. Mr. Anderson also called Justin Ash, who was employed as a Child Protective Services supervisor with the West Virginia Department of Health and Human Resources. *Id.* at 554. Mr. Ash testified that although he had visited the Anderson home on a number of occasions, including on June 7, 2007, just weeks before the death of the baby, he observed the baby to be wearing a clean diaper and

observed no redness or rash on the baby's body. *Id.* at 558-59. Additionally, Mr. Ash testified that while the carpets in the house were dirty and stained and there was an odor of dog urine throughout the house, the conditions of the house did not rise to a level that would be dangerous to the children in the house. *Id.* at 559.

Mr. Anderson also presented the expert testimony of Dr. Richard Fowler, who was, at the time of the trial, employed as the chief medical examiner for the State of Maryland. *Id.* at 577-78. Dr. Fowler testified as to the definition of SIDS:

The official definition of SIDS is the sudden and unexplained death of an infant under one year of age after a full investigation of the death, which includes an autopsy, a review of the medical records, social history, special testing for any of the other potential causes of death. When you've actually done everything that you can reasonably do with the resources at hand and you've actually come up with nothing, then you actually call a death SIDS.

Id. at 594. Dr. Fowler testified that some of the risk factors for SIDS include poor socioeconomic situations, lower educational status, teenage motherhood, maternal smoking and/or drug abuse, and being male, among others. *Id.* at 595. Dr. Fowler testified that he, like Dr. Sabet, the medical examiner for the State of West Virginia, excluded all natural diseases and all trauma, and that having done so, Dr. Fowler concluded that the baby died from SIDS or SUDI, sudden unexplained death in infancy. *Id.* at 596.

The State presented no testimony on a medical cause of the baby's death. *See id.* at 129-139 (testimony of Dr. Charles J. Mihelic); *id.* at 201-238 (testimony of Dr. Zia Sabet); *id.* at 240-256 (testimony of Dr. Matthew Verona).

III. SUMMARY OF ARGUMENT

The State failed to establish two essential elements of its case, causation and intent. With regard to the element of causation, the State failed to present any evidence on a medical cause of the baby's death. None of the State's witnesses offered any opinion as to a causal link between the conditions of neglect of the baby and the baby's death. The only testimony that came close to offering an opinion on a causal link between the neglect of the baby and his death was Dr. Sabet's testimony that the cause of death was "severe caretaker maltreatment," which is simply an indication of *who*, and not *what*, Dr. Sabet believed cause the death, and the testimony of Dr. Verona that he did not believe the baby's death was SIDS, *i.e.*, that he did not believe the baby's death was unexplained. However, neither Dr. Sabet, Dr. Verona nor Dr. Mihelic offered an explanation or opinion as to the actual cause of the baby's death. The State was permitted to rely on the emotionally-charged circumstances necessarily involved in the death of a young child, as well as the gruesome photographs depicting the baby's lifeless body, and the jury was swept away despite the State not having offered evidence on the essential element of causation.

The State also failed to establish beyond reasonable doubt that Mr. Anderson had the specific intent to cause his child's death. The jury was told, *by the State's own witnesses*, that Mr. Anderson's conduct in depriving care for his son was "negligence," "ignorance," "laziness" and a result of drug use, and characterized the purported manner

of death as “human negligence.” The jury nonetheless convicted Mr. Anderson of maliciously and intentionally causing the death of his son and sentenced him to life without mercy. Whatever crime Mr. Anderson may be guilty of in failing to provide the level of care expected of a parent for his child, the evidence presented at trial is insufficient to support the jury’s guilty verdict that Mr. Anderson intentionally caused the death of his son.

The trial court also erred in failing to engage in the analysis dictated by this Court in *State v. Derr* when it did not identify any fact of consequence in question to which certain photographs of the baby’s lifeless body would be relevant, but nonetheless allowed the enlarged photographs to be published to the jury. In light of the jury’s conviction of Mr. Anderson despite the failure of the State to prove a cause of death or specific intent on Mr. Anderson’s part, it is evident that the horrific and gruesome nature of the photographs inflamed the jury and played an improper part in its decision-making.

Mr. Anderson also assigns error to the failure of the trial court to disqualify the prosecutor’s office after it negotiated for employment with, and ultimately hired, one of Mr. Anderson’s appointed counsel in the months leading up to the trial. Because active employment negotiations with a prosecuting entity gives rise to concerns of impropriety and bias against Mr. Anderson, who was not afforded the knowledge that his counsel was negotiating for employment with the Prosecutor’s Office during the months leading up to his trial, or the opportunity to make an informed decision about whether he consented to continued representation by counsel despite the employment negotiations, the

Prosecutor's Office should have been disqualified once the relationship between it and Mr. Anderson's counsel came to light.

Mr. Anderson also alleges that the trial court committed plain error in permitting Mr. Anderson to be shackled in view of the jury in the sentencing phase of his trial.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. Anderson agrees with the Court's determination that this case is appropriate for oral argument under Rule 19 and believes that the minimum time for argument set forth in Rule 19 will be sufficient. Mr. Anderson does not believe the case is appropriate for a memorandum decision, given that memorandum decisions reversing the decision of a circuit court should be issued in limited circumstances under the Revised Rules of Appellate Procedure. *See* W. Va. Rev. R. of App. Proc. Rule 21(e).

V. ARGUMENT

A. The State failed to prove two essential elements of its case, causation and intent, because the State's own witnesses could not identify a cause of death and characterized the conduct which caused the baby's death as negligence.

In analyzing this issue of sufficiency of the evidence, this Court has adopted the following standard:

An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how

it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

State v. Foster, 221 W. Va. 629, 635, 656 S.E.2d 74, 80 (2007) (internal citations omitted).

The Court has also recognized that

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Id.

Viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of causation and intent proved beyond a reasonable doubt because the State failed to put on evidence of a causal link between the evidence of neglect of the baby and the baby's death, and because the State's own witnesses attributed the neglect of the baby to negligence on the part of his parents, including Mr. Anderson.

- i. The State failed to offer evidence of a causal link between the neglect of the baby and the baby's death where the State's witnesses could not identify a cause of death other than "severe caretaker maltreatment."**

Mr. Anderson's murder conviction must be overturned because there was insufficient evidence that the baby's death was caused by any conduct on the part of Mr. Anderson. None of the State's witnesses could identify how the baby had died. Mr. Anderson does not contest the sufficiency of the evidence that the baby was neglected and

subjected to deplorable living conditions. The testimony to that effect was accepted by the jury as credible, and under the standards articulated in *Foster*, the jury's implicit findings in that regard are not challenged here. The fact that the evidence is sufficient to show that the baby received poor care from his parents, including Mr. Anderson, however, does not mean that the State does not have to carry its burden of proving that the baby's death was in fact caused by some consequence of his parents' neglect. The State put forth no testimony on the actual cause of death and has thus failed to prove that the baby died because he was neglected by his parents.

It is axiomatic that the state has the burden of proving every essential element of the crime charged beyond a reasonable doubt. *See State v. Hicks*, 2011 W. Va. LEXIS 21 (citing Syl. pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)). Causation is an essential element of the crime of murder, and thus the state must prove the causal connection between a deceased's injuries and his death beyond a reasonable doubt and not by mere conjecture and speculation. *See* W. Va. Code § 61-8D-2(a) ("If any parent, guardian or custodian shall maliciously and intentionally cause the death of a child under his or her care, custody or control by his or her failure or refusal to supply such child with necessary food, clothing, shelter or medical care, then such parent, guardian or custodian shall be guilty of murder in the first degree.") (emphasis added); *see also State v. Craig*, 131 W. Va. 714, 726 51 S.E.2d 283, 290 (1948) (overturning conviction where prosecutor failed to prove causal connection between injuries received in an accident by decedent and his death, finding "[o]n that vital point there is only speculation and conjecture"). The proper method of proving cause of death is for a coroner or attending physician to testify as to his or her opinion on the

matter. *See State v. Clark*, 171 W. Va. 74, 78, 297 S.E.2d 849, 853 (1982) (“[T]he state medical examiner . . . may describe the type and nature of wounds suffered by the victim. He may give his opinion as to the physical and medical cause of death. The state medical examiner may describe tests conducted as part of his examination.”). However, the State’s medical witnesses were unable to give an opinion on the cause of death, instead attributing the death to “severe caretaker maltreatment,” which is simply an indictment of Mr. Anderson and Ms. Meacham, and does not constitute evidence of a causal connection between the neglect of the baby and the baby’s death.

The State has failed to establish the very elementary fact necessary to sustain Mr. Anderson’s conviction. Of course, when analyzing the sufficiency of the evidence, the evidence is to be viewed in light most favorable to prosecution. *See Foster*, 221 W. Va. at 635, 656 S.E.2d at 80. However, even viewed in the light most favorable to the prosecution, the State has failed to establish what the cause of the baby’s death was. Although the State presented various medical witnesses in this case which take up more than fifty pages of the trial transcript, no medical cause of death was identified by any witness for the State.

Importantly, Dr. Sabet, the medical examiner who performed the autopsy on the baby, expressly testified that he could not identify a specific underlying mechanism of death:

[I]t is our opinion that Jason Clark Anderson, a two-and-a-half month old, relatively small for age, who died suddenly and unexpectedly in the setting of severe care-taker maltreatment, including evidence of nonaccidental soft tissue injuries, poor hygiene with severe diaper rash, and investigative findings indicative of severe caretaker neglect. While **a specific underlying mechanism of death has not been identified**, the post-mortem and investigative findings point to **severe caretaker maltreatment as the underlying cause [of] death**. Infant’s demise, death. So manner of death in this case is classified as homicide.

Tr. at 228-229 (emphasis added). Dr. Sabet testified that he found no internal injuries on the baby, and testified that “this is negligence, maltreatment of the baby. . . This is intentionally [sic] or maybe ignorance.” *Id.* at 215-16. “Severe caretaker maltreatment” or “maltreatment of the baby” is simply not a cause of death sufficient to sustain a conviction of murder and a sentence of imprisonment for life with no mercy.

Although Dr. Sabet testified that the baby had a skin infection and lesions on his body and that he had experienced a weight loss from the time of his birth until his death, neither Dr. Sabet nor any other witness testified that, in their opinion, within a reasonable (or any) degree of medical certainty, the baby died of infection or starvation or any other consequence of the neglect of Mr. Anderson or Ms. Meacham. *See id.* at 201-238; *see also id.* at 129-139 (testimony of emergency room physician Charles J. Mihelic); *id.* at 240-257 (testimony of emergency room physician Matthew Verona). Instead, Dr. Sabet attributed the baby’s death to “severe caretaker maltreatment.” This testimony is the equivalent of identifying Mr. Anderson and Ms. Meacham as the individuals who “caused” the baby’s death, but is simply not sufficient to prove, beyond a reasonable doubt, the actual causation of the baby’s death.

Similarly, neither of the physicians who received the baby upon his arrival at the emergency room opined on the cause of the baby’s death. *See id.* at 129-139 (Dr. Mihelic’s testimony); *id.* at 240-257 (Dr. Verona’s testimony). The closest either doctor came to testifying about a cause of death was Dr. Verona’s testimony ruling out SIDS. *Id.* at 249. Dr. Verona’s conclusion that the baby did not die of SIDS without identifying a cause of

death is the equivalent of stating that he was sure the baby's death was caused by something, but what, he could not say. Thus, while Dr. Verona did not believe that the baby's death was unexplainable, he did not and could not explain it.

In short, none of the State's three medical witnesses – Dr. Sabet, who performed the autopsy, or Dr. Verona and Dr. Mihelic, who received the baby at the emergency room – opined with any degree of medical certainty on a causal link between the evidence of neglect they observed on the baby and the baby's death. Dr. Mihelic testified that he did not take any cultures of the lesions. *Id.* at 139. Dr. Mihelic offered no opinion on the baby's cause of death, other than that he was concerned about the level of care the baby had received given the lesions he observed upon the baby's arrival at the emergency room. *Id.* at 132-133; *see also id.* at 129-139. Dr. Verona testified that he did not believe the cause of the baby's death was SIDS, *i.e.*, that this was an unexplained death, yet offered no opinion about the actual cause of the baby's death. *See id.* at 247-248; *id.* at 240-257. And Dr. Sabet expressly testified that he could not identify a specific cause of death. *See id.* at 228-229.

While proof of a medical cause of death is not always necessary, permitting a jury to infer a cause of death from circumstantial evidence is generally limited to circumstances in which the cause of death could not be medically determined due to the absence of a body or the state of decomposition of the body as a result of the defendant's efforts to hide or destroy evidence. *See, e.g., James v. State*, 339 So. 2d 1047 (Ala. Crim. App. 1976) (“Certainly, where a body has not been found, the courts have allowed the *corpus delicti* to be proved by circumstantial evidence. Likewise, where the cause of death cannot be medically determined due to the state of decomposition and putrefaction of the body, the

courts have allowed cases to go to juries on circumstantial evidence.”). In circumstances such as these, however, there is no justification for permitting the jury to infer a cause of death. Allowing the jury to infer a cause of death in limited cases where there has been destruction of evidence is permissible, but in a prosecution for murder where there has been no destruction of evidence, the State cannot avoid its burden of producing medical testimony to prove the essential element of causation.

The State has failed to prove by any standard, let alone beyond a reasonable doubt, an essential element of the crime of murder, that is, that Mr. Anderson’s conduct caused the death of the baby. It is clear that the jury in this case was confronted with facts which cannot be characterized by anything other than horrific. However horrific the facts of this case, there is no justification in our legal system for suspending the State’s burden of proving the essential element of causation. The State offered no opinion on a medical cause of death in this case, and there is therefore insufficient evidence to support Mr. Anderson’s conviction. Mr. Anderson’s conviction must be reversed by this Court.

- ii. The State failed to offer sufficient evidence that Mr. Anderson acted with malice and intent in neglecting the baby where the State’s own witnesses identified Mr. Anderson’s conduct as “human negligence,” “negligence,” “ignorance,” “laziness” and/or resulting from his use of drugs.**

There was also insufficient evidence to support the jury’s conclusion that Mr. Anderson acted maliciously and intentionally in causing the death of the baby where the State’s own witnesses identified the death of the baby as a result of “human negligence” and

characterized Mr. Anderson's conduct as "laziness," "ignorance," "negligence" and/or resulting from his use of drugs.

In this case, no rational trier of fact could have found that Mr. Anderson acted with malice and intent in failing to provide the baby with proper care because the State's own witnesses, including Dr. Sabet and Ms. Meacham, characterized Mr. Anderson's conduct in failing to provide the baby with proper care as "ignorance," "negligence", "laziness" and/or resulting from drug use.

Dr. Sabet testified that when he examined the baby, he was wearing soiled clothing which exhibited "negligence, maltreatment of the baby." *Id.* at 216. When asked his opinion of the manner of the baby's death, he characterized it as homicide by "human negligence." *Id.* at 229. The only testimony from Dr. Sabet indicating any sort of intentional or malicious conduct on the part of Mr. Anderson was equivocal at best: "[t]his is intentional or maybe ignorance." *Id.* at 216.

Likewise, Ms. Meacham's testimony, when she was asked why Mr. Anderson failed to provide care to his children, was that Mr. Anderson "just got lazy. He didn't want to do anything," *id.* at 284, that he "just got stuck in video games," *id.* at 285, and that he used drugs, *id.* at 290. *See also id.* at 298 (Ms. Meacham testifying that Mr. Anderson "got lazy again" and told her his grandfather, Denzil Anderson, would care for the baby).

While credibility determinations are for the jury to make, *see Foster*, 221 W. Va. at 635, 656 S.E.2d at 80, it would be impossible for the jury to both credit Dr. Sabet's testimony and Ms. Meacham's testimony that Mr. Anderson acted out of neglect,

ignorance, laziness or as a result of drug use, but still find that Mr. Anderson acted maliciously and intentionally in failing to provide the baby with appropriate care.

There was evidence from Ms. Meacham (whose credibility is highly suspect, given her plea arrangement with the Prosecution's Office and her contention that while she lied under oath during her abuse and neglect proceeding, she was being truthful at Mr. Anderson's trial) that Mr. Anderson would not allow her to care for the baby, and that she was fearful of Mr. Anderson because he would physically restrain her from caring for the baby. However, this evidence, even when taken with Ms. Oliverio's testimony that Mr. Anderson was "controlling" and was the decision-maker as between him and Ms. Meacham, is wholly underwhelming when compared with the substantial evidence, by the State's own witnesses, that Mr. Anderson's conduct was a result of laziness, ignorance, negligence or drug use. *See* Tr. at 216 (Dr. Sabet's testimony that the baby was neglected and maltreated); *id.* (Dr. Sabet testifying baby's condition was perhaps result of "ignorance"); *id.* at 229 (Sabet testifying that baby's death was "homicide by human negligence"); *id.* at 298 (Ms. Meachem testifying that Mr. Anderson's neglect of the baby was a result of laziness); *id.* at 285 (Ms. Meachem testifying that Mr. Anderson's neglect of baby was result of being consumed by video games); *id.* at 290 (Ms. Meachem testifying that Mr. Anderson's change in attitude toward children was because of his drug use).

The overwhelming evidence at trial was that Mr. Anderson was a young father, barely an adult, who did not have the necessary skills or knowledge to effectively care for a child or to keep a proper home, who lived with two older adults who were equally incapable of caring for a child or keeping a proper home. While the State's evidence of the

neglect of the baby was likewise overwhelming, the State's own witnesses characterized Mr. Anderson's lack of care for him as nearly uniformly negligent, except for Dr. Sabet's equivocal surmising that the neglect of the baby was "intentional or maybe ignorance" and Ms. Meacham's highly suspect testimony that Mr. Anderson prevented her from caring for the baby (testimony belied by the testimony of Denzil Anderson who never saw Mr. Anderson prevent Ms. Meacham from caring for or threaten Ms. Meacham if she did care for the baby). Even viewed in the light most favorable to the State, as is required by *Foster*, the evidence is insufficient to establish that Mr. Anderson acted intentionally or with malice in his failure to properly care for the baby. For this reason, Mr. Anderson's conviction should be overturned.

B. The trial court abused its discretion in permitting the State to enlarge gruesome photographs of the baby and to publish them to the jury by displaying them on a poster-board for significant periods of time during the trial where the trial court failed to engage in the analysis outlined by the Supreme Court of Appeals of West Virginia in *State v. Derr* and reiterated in *State v. Mongold*.

The trial court abused its discretion in permitting the State to enlarge gruesome photographs of the baby and to publish them to the jury by displaying them on a poster-board on an easel for significant periods of time during the trial where the trial court failed to engage in the analysis outline by this Court. The trial court permitted, over the objection of defense counsel, the use of four photographs of the baby taken at Fairmont General Hospital and one photograph taken by the state medical examiner.⁴ 3/31/10 Order Resolving State's Motion to Determine the Admissibility of Evidence ("3/31/10 Oder") at

⁴ The photographs at issue were admitted as State's Exhibits 2-A, 2-B, 2-C, 2-D and 9-A.

¶ 12. However, the photographs in question were calculated to arouse the jury's passions and prejudice Mr. Anderson, and did in fact arouse the jury's passions and prejudice Mr. Anderson, as they show the baby's body in various positions and covered in lesions.

In *State v. Mongold*, the Court reiterated the test for admissibility of photographs over a gruesome objection:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

220 W. Va. 259, 647 S.E.2d 539, 552 (2007) (citing Syl. Pt. 10, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)).

In this case, the trial court abused its discretion in admitting the photographs because it failed to apply the test for admissibility of photographs over a gruesome objection carved out in *Derr* and reiterated in *Mongold*. *Derr* requires that the trial court engage in two separate steps in determining whether to admit gruesome photographs. First, the trial court must determine the relevancy of the proffered exhibit on the basis of whether the photograph is probative as to a fact of consequence. Syl. Pt. 10, *Derr*, 192 W. Va. 165, 451 S.E.2d 731. Second, the trial court must "consider whether the probative value of the exhibit is substantially outweighed by" unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.* The trial court in this case skipped

the first step of the *Derr* analysis entirely by failing to identify any fact of consequence to which the photographs in question would be relevant. Rather, in the 3/31/10 Order, the trial court summarily concluded that “the probative value of the photographs [subsequently admitted as Exhibits 2-A, 2-B, 2-C, 2-D and 9-A] greatly exceeds the prejudicial nature of those photographs.” 3/31/10 Order at ¶ 12. Nowhere in the 3/31/10 Order and at no point in the transcript of the hearing held on March 16, 2010 did the trial court identify any fact of consequence to which the photographs in question would be relevant. Having not done so, the trial court could not weigh the probative value of the photographs.

Although the standard for reviewing the admissibility of photographs is a deferential one, a trial court’s failure to engage in an analysis dictated by this Court is by definition an abuse of discretion. Moreover, in light of jury’s conclusion that Mr. Anderson was guilty of murder despite the failure of the State to proffer evidence on the essential element of causation, it is evident that the prosecution’s use of enlarged, gruesome photographs of the baby absolutely had the effect of inflaming the jury. The trial court’s failure to engage in the *Derr* analysis was an abuse of discretion and the gruesomeness of the photographs inflamed the jury to the point where they convicted Mr. Anderson despite the State’s failure to offer evidence of a causal link between the neglect of the baby and the baby’s death. For this reason, Mr. Anderson’s conviction should be overturned.

C. The trial court erred in refusing to disqualify the Prosecutor's Office where the Prosecutor's Office engaged in employment negotiations with one of Mr. Anderson's appointed defense counsel, and subsequently hired him, in the months leading up to trial.

The trial court erred in denying Mr. Anderson's motion to disqualify the Prosecutor's Office where Mr. Beveridge, one of Mr. Anderson's appointed defense counsel was offered a position by the Prosecutor's Office and was subsequently hired by the Prosecutor's Office. The State's dismissal of Mr. Anderson's concerns in this regard as "speculation about subconscious biases and motivation" fails to recognize that at least one other court has determined that employment negotiations similar to the ones between Mr. Beveridge and the Prosecutor's Office are improper. Mr. Anderson, at the very least, should have been informed of the negotiations and given the opportunity to decide whether he wanted Mr. Beveridge to continue representing him during the time between July 2009 when Mr. Beveridge was first approached by the Prosecutor's Office and October 2009 when his employment with Prosecutor's Office began and his representation of Mr. Anderson ceased. The failure of either the Prosecutor's Office or Mr. Beveridge himself to notify Mr. Anderson or his undersigned counsel of the employment negotiations was improper.

In *Scott v. United States*, the District of Columbia Court of Appeals determined that a district court judge should have disqualified himself from the defendant's trial and sentencing which occurred while the judge was negotiating for employment with the Department of Justice. *See* 559 A.2d 745 (1989). In *Scott*, the judge presiding over the

defendant's trial, which began in November 1984, began discussions with the Department of Justice in October 1984 when he indicated that he was contemplating a career change. *Id.* at 747. In December 1984, the judge asked that he be considered for a particular position at the Department of Justice. *Id.* In January 1985, the judge sentenced the defendant, and was offered the Department of Justice position eight days later. *Id.* The District of Columbia Court of Appeals reasoned that because Canon 3 of the Code of Judicial Conduct urges judges to disqualify themselves in proceedings in which their impartiality might reasonably be questioned, a "judge who is presiding at the prosecution by the United States Attorney's Office [who] is actively negotiating for employment with the Department's Executive Office for United States Attorneys" is a violation of the Canon. The court then concluded that the defendant was entitled to relief. *Id.* at 750; *see also* Code of Judicial Conduct, Canon 3(E)(1) cmt. ("Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.").

In this case, just as in *Scott*, Mr. Beveridge was actively seeking employment from the Prosecutor's Office during the time he was representing Mr. Anderson. The circumstances here, however, are even more egregious than in the *Scott* case because this was not a matter of whether Mr. Beveridge could be an *impartial judge* presiding over a trial, but was instead a question of whether he could be a *zealous advocate* for his client at a

time when he was actively seeking employment with the Prosecutor's Office. If it is improper for a judge to preside over trial by an entity with which he is seeking employment, it is certainly improper for an attorney to represent a client in a matter being pursued by an entity with which he is seeking employment.

Moreover, Mr. Beveridge's failure to inform Mr. Anderson that he was seeking employment with the Prosecutor's Office is a violation of Rule 1.7 of the West Virginia Rules of Professional Conduct, which provides in pertinent part that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." W. Va. R. Prof. Cond. 1.7. Mr. Anderson was never given the opportunity to consent to Mr. Beveridge's continued representation of him after Mr. Beveridge began employment negotiations with the prosecuting attorney who was pursuing the murder charge against him, despite the fact that Mr. Beveridge's own interest in potential employment with the Prosecutor's Office would materially limit his responsibilities to Mr. Anderson.

West Virginia Code § 7-7-8 provides that if, in the Court's opinion, it would be improper for the prosecuting attorney and his assistants to discharge his or her official duties in a particular case, the Court must appoint a substitute attorney to act. *See* W. Va. Code §7-7-8 ("If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case."). Rule 1.11 of

the Rules of Professional Conduct, which governs successive and private employment, provides that a lawyer serving as a public employee may not participate in a matter in which the lawyer participated personally and substantially while in private practice. Rule 1.11(c) (“Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be authorized to act in the lawyer’s stead in the matter.”).

While the circuit court did indeed hold a hearing on whether Mr. Beveridge was sufficiently screened off from Mr. Anderson’s case upon his employment with the Prosecutor’s Office, the circuit court did not account for any subconscious biases that weighed upon Mr. Beveridge during his employment negotiations with the Prosecutor’s Office. And while Mr. Anderson does not doubt the veracity of Mr. Beveridge’s averments that he did not disclose confidential communications with Mr. Anderson, Mr. Beveridge’s affidavit does not account for any subconscious biases that his employment negotiations with the Prosecutor’s Office, which in fact came to fruition, may have had on him at a time when he was required to zealously represent Mr. Anderson’s interest, interests that were directly in conflict with the interests of the Prosecutor’s Office. For more than half of the period between Mr. Beveridge’s appointment as co-counsel and his subsequent employment with the Prosecutor’s Office, Mr. Beveridge was in negotiations for employment with the Prosecutor’s Office. Moreover, Mr. Anderson was deprived of the opportunity to decide whether he wanted Mr. Beveridge to represent him at a time when he

was anticipating employment with the Prosecutor's Office by the failure of either Mr. Beveridge or the Prosecutor's Office to inform him or co-counsel that Mr. Beveridge was discussing employment with the Prosecutor's Office.

The State's contention that *State ex rel. Tyler v. MacQueen* "dealt with the identical factual situation" misses the issue in dispute here, because there is no discussion in *MacQueen* about the length of time that the petitioner's attorney was in negotiations for employment with the prosecuting attorney's office, or whether there was simply an offer and acceptance of employment. *See* 191 W. Va. 597, 447 S.E.2d 289 (1994). As explained above, it is not the mere fact of Mr. Beveridge's employment immediately preceding his representation of Mr. Anderson in this very case that Mr. Anderson takes issue with. Rather, it is the fact that Mr. Beveridge was approached by the Prosecutor's Office in July 2009 about a position if funding became available, and that for a span of three months preceding his employment with the Prosecutor's Office, at the very time that Mr. Beveridge was representing Mr. Anderson in this matter, Mr. Beveridge had communications with the Prosecutor's Office about the position. The appearance of impropriety and the subconscious bias created by the length of time that Mr. Beveridge was in negotiations for employment with the Prosecutor's Office during the time he represented Mr. Anderson are not dissipated by the assurances that Mr. Beveridge was effectively screened from Mr. Anderson's case when his employment with the Prosecutor's Office actually began.

Because of Mr. Beveridge's attorney-client relationship with Mr. Anderson and his relationship as co-counsel with the undersigned, either the Prosecutor's Office or Mr. Beveridge should have informed Mr. Anderson or co-counsel of the conflict presented by

the offer of the Prosecutor's Office to employ him, and Mr. Beveridge should have withdrawn from the case and been precluded from any involvement in the case, either as a prosecutor or as defense counsel. Because he did not do so, the Prosecutor's Office should have been precluded from further prosecution of this matter after Mr. Beveridge's employment offer came to light, at the time he became employed by the Prosecutor's Office. Because the circuit court did not disqualify the Prosecutor's Office, Mr. Anderson's conviction should be overturned and he should be given a new trial.⁵

D. The trial court committed plain error in requiring Jason Anderson to be handcuffed in view of the jury during sentencing proceedings.

The trial court erred in requiring Jason Anderson to be handcuffed in view of the jury during sentencing proceedings. As this Court has recognized,

[T]he appearance of the offender during the penalty phase in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community – often a statutory aggravator and nearly always a relevant factor in jury decisionmaking. . . . It also almost inevitably affects adversely the jury's perception of the character of the defendant. And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations.

State v. Finley, 219 W. Va. 747, 752, 639 S.E.2d 839, 844 (W. Va. 2006) (citing *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005)). Although the *Finley* Court was asked to decide whether requiring a defendant to wear prison garb during sentencing deprived defendants of a fair trial, the Court found “no discernable difference in the prejudicial effect upon a jury of seeing a person in prison garb versus seeing that

⁵ In the event Mr. Anderson's conviction is overturned on the grounds of insufficiency of the evidence, Mr. Anderson has requested that his conviction be overturned outright, and the charges against him be dismissed. If the Court agrees, the issue of whether the Prosecutor's Office should be disqualified is moot.

person in shackles in light of the decision the jury is obliged to make at . . . the penalty phase.” *Id.* The Court explained that

The jury is no longer looking narrowly at the circumstances surrounding the charged offense. In order to make a recommendation regarding mercy, the jury is bound to look to look at the broader picture of the defendant’s character - examining the defendant’s past, present and future according to the evidence before it - in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom. The jury must be as impartial in reaching this decision as it was in reaching the conviction decision. Courts bear the burden of ensuring that necessary steps be taken to maintain the dignity and neutrality of the penalty phase proceedings, like any other proceedings, in order to provide a fair trial within the constitutional guarantee of due process. As recognized in *Deck*, elusive and unquantifiable considerations must be minimized throughout a murder trial, at both guilt and penalty phases. While the court in *Deck* decided that the compelled use of visible shackles at the penalty phase impugns the integrity of the proceedings and manifests a violation of due process because the practice essentially puts a thumb on one side of the scale, we find the same degree of unfairness results when a criminal defendant is forced to wear jail or prison clothing during the penalty phase of a bifurcated murder trial.

Id. at 752, 639 S.E.2d at 844.

Counsel on behalf of Mr. Anderson failed to object to Mr. Anderson wearing shackles and failed to otherwise preserve this issue for appeal. However, given the recognition of this Court as well as the recognition by the United States Supreme Court in *Deck* that compelled use of visible shackles at the penalty phase “impugns the integrity of the proceedings,” application of the plain error rule to this issue is appropriate. As this Court has recognized in *State v. Miller*, “[t]o trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995) (internal citations omitted).

The circuit court should not have permitted Mr. Anderson to be shackled in the jury's view during sentencing. Because the United States Supreme Court has determined that the use of shackles at the penalty phase impugns the integrity of the proceedings, Mr. Anderson respectfully requests that, in the event his conviction is upheld, his sentence of life without mercy be overturned, and that the trial court be ordered to empanel a jury for trial of the sole issue of whether mercy is to be recommended for sentencing in accordance with *Finley*.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, Jason Anderson respectfully request that this Court overturn the conviction and dismiss the charges against him because the State's evidence on the essential elements of causation and intent is insufficient to sustain his conviction for murder. Alternatively, Mr. Anderson requests that the Court overturn the conviction and grant him a new trial on the basis that the circuit court abused its discretion in permitting the State to enlarge gruesome photographs of the baby and to publish them to the jury without engaging in the analysis outlined by this Court, and/or on the basis that the circuit court erred in failing to disqualify the Prosecutor's Office after it engaged in employment negotiations with, and subsequently hired, one of Mr. Anderson's appointed counsel during the months leading up to Mr. Anderson's trial. If the Court allows Mr. Anderson's conviction to stand, Mr. Anderson requests that the Court overturn his sentence of life imprisonment without mercy and order the circuit

court to empanel a new jury for resentencing in light of the trial court's plain error in allowing Mr. Anderson to be shackled in view of the jury during the sentencing phase.



Jason Anderson,
By Counsel

Harry P. Montoro, W.Va. Bar No. 10280
Law Office of Harry P. Montoro, PLLC
235 High Street, Suite 725
Morgantown, WV 26505
Phone: (304) 291-3232
Fax: (304) 291-3344

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

No. 101367

JASON CLAY ANDERSON,

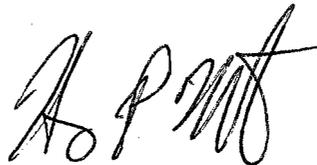
Petitioner.

CERTIFICATE OF SERVICE

I, HARRY P. MONTORO, attorney for the Petition, do hereby certify that service of the within and foregoing "Petitioner's Brief" was made upon the party hereinbelow listed by depositing a true copy of the same in the United States Mail, postage prepaid, addressed as follows:

Laura Young, Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

all of which was done on the 13 day of MAY 2010.



Harry P. Montoro, W.Va. Bar No. 10280
Law Office of Harry P. Montoro, PLLC
235 High Street, Suite 725
Morgantown, WV 26505
Phone: (304) 291-3232
Fax: (304) 291-3344