

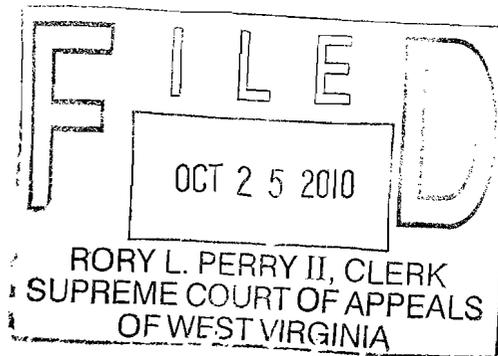
No. 101367

IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

JASON CLAY ANDERSON  
Petitioner,

v.

STATE OF WEST VIRGINIA  
Respondent.



FROM THE CIRCUIT COURT  
OF MARION COUNTY  
CASE NO. 07-F-195

BRIEF OF PETITIONER JASON CLAY ANDERSON

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H P Montoro".

Harry P. Montoro (WV Bar ID # 10280)  
Law Office of Harry P. Montoro, PLLC  
235 High Street, Suite 725  
Morgantown, WV 26505  
Phone: (304) 291-3232  
Fax: (340) 291-3344

*Counsel for Petitioner*

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## PETITION FOR APPEAL

The defendant, Jason Anderson, petitions the Court for an appeal of his conviction for Murder of a Child by a Parent, Guardian or Custodian arising from the death of his son, Jason Clark Anderson (hereinafter “Baby Jason”), for which he is presently serving a sentence of life imprisonment without mercy. In support of his petition, Mr. Anderson alleges various errors. The State’s evidence on the cause of Baby Jason’s death is insufficient to support the jury’s conclusion that Baby Jason died as a result of conduct on the part of Mr. Anderson because the State’s only witness on this issue could not identify a specific mechanism of death. The State’s evidence on Mr. Anderson’s purported malice and intent in depriving Baby Jason of care is likewise insufficient to support the jury’s conclusion that Mr. Anderson acted maliciously and intentionally because the State’s own witnesses repeatedly characterized Mr. Anderson’s conduct as “negligence,” “ignorance,” “laziness” and/or a result of drug use, and characterized the purported manner of Baby Jason’s death as “human negligence.”

In addition to the insufficiency of evidence to support the conviction, Mr. Anderson also assigns error to the failure of the trial court to disqualify the Office of the Prosecuting Attorney of Marion County (“Prosecutor’s Office”) after it offered a job to and hired one of Mr. Anderson’s appointed counsel in the months leading up to the trial. 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 *State v. Derr*. Finally, Mr. Anderson alleges plain error in

allowing Mr. Anderson to be shackled, in view of the jury, during the sentencing phase of his trial. For the reasons set forth more fully below, Mr. Anderson respectfully requests that this Court grant his Petition for Appeal and overturn his conviction below, or, in the alternative, remand to the trial court for resentencing.

### **I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Jason Anderson was charged with the offense of Murder of a Child by a Parent, Guardian or Custodian in the above-captioned case. 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.<sup>1</sup> 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 Baby Jason'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 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.

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<sup>1</sup> 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.

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.

## II. STATEMENT OF THE FACTS

The Defendant, Jason Anderson, is the father of Baby Jason, 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 Meacham and his grandfather, Denzil Anderson.<sup>2</sup> Tr. at 110.<sup>3</sup> When EMT's arrived at the Anderson home, they found Baby Jason lying dead in his crib. *Id.* at 113-114. EMTs attempted CPR on Baby Jason 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 Baby Jason 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 Baby Jason'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 Baby Jason had received. *Id.* at 133-34. Dr. Mihelic also testified that he did not notice any bruising on Baby Jason. *Id.* at 134. Dr. Mihelic did not opine on the specific manner of death of Baby Jason. *See id.*

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<sup>2</sup> Denzil Anderson is the biological grandfather and adoptive father of Jason Anderson.

<sup>3</sup> References to "Tr. at \_\_\_" are to the trial transcript. All other references are to the **Error! Main Document Only**.hearing transcript for the particular date identified.

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

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 Baby Jason but noted that the numerous lesions that had formed on Baby Jason 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 Baby Jason was wearing at the time he died. *Id.* Dr. Sabet testified that "this is negligence, maltreatment of the baby. . . This is intentionally or maybe ignorance." *Id.* at 216. When asked his opinion of the cause of Baby Jason'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 Baby Jason, 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 Baby Jason at the hospital on June 23, 2007. *Tr.* at 242. Dr. Verona expressly disagreed with Dr. Sabet's testimony that the lesions appearing on Baby Jason'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 Baby Jason's death was a result of SIDS. *Id.*

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 Baby Jason 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 Maria 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 Baby Jason was born, according to Ms. Meacham, Mr. Anderson refused to provide care to Baby Jason 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 Baby Jason, that she changed the bedding that the children had urinated on, that she had not “neglected [Baby Jason] to death” as alleged during the proceedings to terminate her parental rights to Maria. *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 Baby Jason 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 Baby Jason. *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 Baby Jason, he observed Baby Jason 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 Baby Jason died from SIDS or SUDI, sudden unexplained death in infancy. *Id.* at 596.

### III. ASSIGNMENTS OF ERROR

- A. There was insufficient evidence that Baby Jason’s death was caused by any conduct (let alone criminal conduct) on the part of Mr. Anderson where the State’s only witness on cause of death expressly testified that he could not identify a specific underlying mechanism of death.**
- B. There was insufficient evidence that Jason Anderson acted with malice and intent in causing the death of Baby Jason where the State’s own witnesses identified the death of Baby Jason as a result of “human negligence” and characterized Mr. Anderson’s failure to care for Baby Jason as “negligence,” “ignorance,” “laziness” and/or resulting from his use of drugs.**
- C. The trial court erred in refusing to disqualify the Prosecutor’s Office where one of Jason Anderson’s appointed defense counsel was offered a position by the Prosecutor’s Office and was subsequently hired by the Prosecutor’s Office.**
- D. The trial court abused its discretion in permitting the State to enlarge gruesome photographs of Baby Jason 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*.**
- E. The trial court committed plain error in permitting Jason Anderson to be handcuffed in view of the jury during the sentencing phase.**

### IV. POINTS AND AUTHORITIES AND DISCUSSION OF LAW

- A. There was insufficient evidence that Baby Jason’s death was caused any conduct (let alone criminal conduct) on the part of Jason Anderson where the State’s only witness on cause of death expressly testified that he could not identify a specific underlying mechanism of death.**

Mr. Anderson's murder conviction must be overturned because there was insufficient evidence that Baby Jason's death was caused by any conduct on the part of Mr. Anderson because the State's only witness on cause of death could not identify how Baby Jason had died. The State has thus failed to prove *corpus delicti*, that is, "(1) [t]he death of a human being and (2) a criminal agency as its cause." *State v. Garrett*, 195 W. Va. 630, 640, 466 S.E.2d 481, 491 (W. Va. 1995). The Court in *Garrett* defined *corpus delicti* as "proof that the crime occurred and that somebody's criminality was the source of the crime, as distinguished from non-criminal sources, e.g., accident or natural causes." *Id.* at n.15 (citing *State v. Burton*, 163 W. Va. 40, 45, 254 S.E.2d 129, 134 (1979)). In this case, the State has not proved that Baby Jason's death occurred as a result of Mr. Anderson's criminality rather than from an accident or natural cause.

While the first factor, the death of a human being, has been proven and is not an issue in this case, the latter, "a criminal agency as its cause" may be established by circumstantial evidence or by presumptive reasoning from the adduced facts and circumstances. *Id.* at 641, 466 S.E.2d at 491 (citing *State v. Hall*, 172 W. Va. 138, 144, 304 S.E.2d 43, 49 (1983)). In *Garrett*, the medical examiner could not confirm for certain the cause of the victim's death because the victim's body, when located, was essentially reduced to skeleton. *Id.* However, the medical examiner testified that there was a void in the skeletal remains that was consistent with a bullet. *Id.* The Court held that this evidence, taken together with the defendant's confession, the victim's disappearance on the same day as a neighbor heard a gun shot, and eyewitness testimony of the defendant carrying firearms near

the victim's home and driving her truck with bloodstains on his pants was sufficient to establish criminal agency. *See id.* at 641, 466 S.E.2d at 492.

The *Garrett* Court cautioned that evidence corroborating a confession “need not of itself be conclusive; it is sufficient if[,] when taken in connection with the confession, the crime is established beyond reasonable doubt.” *Id.* (internal citations omitted). The Court also articulated that “[t]he corroborating evidence is sufficient if it permits a rational finding of guilt, beyond a reasonable doubt, when joined with the extrajudicial admission.” *See id.* (internal citations omitted).

The State has failed to establish the very elementary facts 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 id.* “It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.” *Id.* (internal citations omitted).

Even viewed in the light most favorable to the prosecution, the State has failed to establish that Baby Jason's death was caused by some action (let alone criminal action) on the part of Mr. Anderson. The State's only witness on cause of death, Dr. Sabet, 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. Dr. Sabet testified that he found no internal injuries on Baby Jason, and testified that "this is negligence, maltreatment of the baby. . . This is intentionally or maybe ignorance." *Id.* at 215-16.

However, on cross-examination, Dr. Sabet testified that at the time he performed the autopsy on Baby Jason, there was two to three ounces of liquid food inside the baby's stomach. *Id.* at 233. This testimony belies the contention that Baby Jason was neglected and, more importantly, it greatly undermines Dr. Sabet's conclusion, based on the condition in which he found Baby Jason, that any neglect of Baby Jason was the cause of his death, particularly in light of his inability to explain how Baby Jason died.

Because the State has failed to prove by any standard, let alone beyond a reasonable doubt, that Mr. Anderson's conduct caused the death of Baby Jason, there is insufficient evidence to support Mr. Anderson's conviction, and it should therefore be overturned.

**B. There was insufficient evidence that Jason Anderson acted with malice and intent in causing the death of Baby Jason where the State's own witnesses identified the death of Baby Jason as a result of "human negligence" and characterized Mr. Anderson's conduct as "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 Baby Jason where the

State's own witnesses identified the death of Baby Jason 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 analyzing this issue of sufficiency of the evidence, the 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.*

In this case, no rational trier of fact could have found that Mr. Anderson acted with malice and intent in failing to provide Baby Jason 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, the chief medical examiner for the State of West Virginia, and the State's only witness on the cause of death of Baby Jason, testified that when he examined Baby Jason, he was wearing soiled clothing which exhibited "negligence, maltreatment of the baby." *Id.* at 216. When asked his opinion of the manner of Baby Jason'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 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 Baby Jason 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 Baby Jason, 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, *etc.* See Tr. at 216 (Dr. Sabet's testimony that Baby Jason 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 neglect of Jason was likewise overwhelming, the State's own witnesses characterized Mr. Anderson's lack of care for Baby Jason as nearly uniformly negligent, except for Dr. Sabet's equivocal surmising that the neglect of Baby Jason was "intentional or maybe ignorance" and Ms. Meacham's highly suspect testimony that Mr. Anderson prevented her from caring for Baby Jason (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 Baby Jason). 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 Baby Jason. For this reason, Mr. Anderson's conviction should be overturned.

**C. The trial court erred in refusing to disqualify the Prosecutor's Office where one of Jason Anderson's appointed defense counsel was offered a position by the Prosecutor's Office and was subsequently hired by the Prosecutor's Office.**

The trial court erred in denying Mr. Anderson's motion to disqualify the Prosecutor's Office where one of his appointed defense counsel was offered a position by the Prosecutor's Office and was subsequently hired by the Prosecutor's Office.

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.").

Brent Beveridge was appointed co-counsel to represent Mr. Anderson in April 2009. In July 2009, Mr. Beveridge was approached by Patrick Wilson, the lead prosecuting attorney in the Prosecutor's office, who asked Mr. Beveridge if he would be interested in an assistant prosecutor's position if funding for such a position became available. *See* Beveridge Amended Affidavit. Between mid-July 2009 and mid-September 2009, Mr. Beveridge asked Mr. Wilson about the status of the funding and was informed that it had not been resolved. *See id.* Between July 2009 and the time he was officially hired by the Prosecutor's Office in October 2009, Mr. Beveridge was actively representing Mr. Anderson and engaged in plea negotiations with Mr. Wilson on Mr. Anderson's behalf. *Id.* These plea negotiations would have occurred at the same time Mr. Beveridge had what amounted to a standing offer of employment with the Prosecutor's Office conditioned upon the Office obtaining funding. Although Mr. Beveridge contends that between the time he first was approached about a position by Mr. Wilson and the time he was effectively employed by the Prosecutor's Office, he "adhered to [his] ethical obligation of maintaining [his] client's confidentiality" and that he continued to do so after he was employed by the Prosecutor's Office.

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 the biases, albeit subconscious, that a standing offer of employment, which in fact comes to fruition, with the Prosecutor's Office 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 had an outstanding offer of employment with the Prosecutor's Office.

Because of Mr. Beveridge's attorney-client relationship with Mr. Anderson and his relationship as co-counsel with the undersigned, Mr. Beveridge should have informed Mr. Anderson of the conflict presented by Mr. Wilson's offer of employment to 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 became employed by it.

**D. The trial court abused its discretion in permitting the State to enlarge gruesome photographs of Baby Jason 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 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 Baby Jason 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 Baby Jason taken at Fairmont General Hospital and one photograph taken by the state medical examiner<sup>4</sup> after concluding that "although the photographs could be characterized as gruesome, they were not unduly prejudicial in comparison to their probative value." 3/31/10 Order Resolving

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

State's Motion to Determine the Admissibility of Evidence ("3/31/10 Oder") at ¶¶ 10-12.

However, the photographs in question were calculated to arouse the jury's passions and prejudice Mr. Anderson, as they show Baby Jason'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. The trial court’s sanctioning of the prosecution’s use of enlarged, gruesome photographs of Baby Jason had no other effect but to inflame the jury, and the trial court’s failure to engage in the *Derr* analysis was an abuse of discretion. Mr. Anderson’s conviction should therefore be overturned.

**E. 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 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).

For these reasons, Mr. Anderson respectfully requests that 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*.

#### V. PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Jason Anderson respectfully request that this Court grant his Petition for Appeal and overturn the conviction against him, or in the alternative, remand this case to the trial court for resentencing.

Jason Anderson,  
By Counsel



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Harry P. Montoro, Esquire  
W.Va. Bar ID# 10280  
Law Office of Harry P. Montoro, PLLC  
235 High Street, Suite 725

Morgantown, WV 26505  
Phone: (304) 291-3232  
Fax: (304) 291-3344