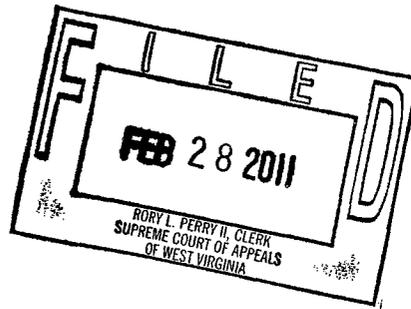


**IN THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA**

STATE OF WEST VIRGINIA,

Vs. Fayette County Indictment No. 09-F-136

**HENRY C. JENKINS,
Appellant.**



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I.

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II.

PROCEEDINGS AND RULINGS BELOW

On or about the 19th day of November, 2008, C.C.J., age 15, died in Women's and Children's Hospital in Charleston, West Virginia. The matter was investigated by the Fayette County Sheriff's Department and C.C.J.'s body was examined by the West Virginia State Medical Examiner, Dr. Zia Sabet. Dr. Sabet determined the cause of death to be the result of hypoxic encephalopathy resulting from complications related to Cystic Fibrosis.¹ The criminal investigation began in earnest when officers learned of the existence of oxycodone and valium in C.C.J.'s bloodstream.

On or about the 22nd day of May, 2009, Henry C. Jenkins, C.C.J.'s father, was charged with "Murder of a child by a parent". In September 2009, the Fayette County Grand Jury, sitting in its September Term, indicted Mr. Jenkins for the felony offenses of "felony murder" in violation of West Virginia Code §61-2-1; "delivery of a controlled substance, to-wit oxycodone" in violation of West Virginia Code §60A-4-401; "murder of a child by a parent, guardian or custodian" in violation of West Virginia Code §61-8D-2; and "child neglect resulting in death" in violation West Virginia Code §61-8D-4a.

Counsel for both sides filed motions and several hearings were heard between the indictment and trial. On May 4th, 2010 a Fayette County Petit Jury was sworn to hear the matter of the State of West Virginia vs. Henry C. Jenkins by the Honorable Judge Paul M. Blake Jr., Circuit Judge of Fayette County. The trial proceedings lasted three days. On May 6th, 2010, the jury returned a verdict of "Guilty" to the offense of "felony murder" (with a recommendation of "mercy), and "guilty" to the offense of "child neglect

¹ (See Exhibit "A")

resulting in death” as a lesser included offense of “murder of a child by a parent, guardian or custodian” as charged in Count three of said indictment.

On June 23, 2010 Judge Blake sentenced Mr. Jenkins to serve the remainder of his natural life in the West Virginia State Penitentiary for the offense of “felony murder”; and sentenced him to a period of three (3) to fifteen (15) years for the lesser included offense of “child neglect resulting in death.” Said sentences are to be served consecutively.

Due to the extremely high volume of court activity in the Fayette County Circuit Court system, the transcript of this matter was not delivered to counsel until the 13th day of October, 2010. Judge Blake entered a resentencing order on October 20th, 2010 to give counsel ample opportunity to prepare this appeal.

III.

STATEMENT OF FACTS

C.C.J. was born on May 4th, 1994, with a chronic condition known as cystic fibrosis. The Cystic Fibrosis Foundation’s website defines the condition as “...an inherited chronic disease that affects the lungs and digestive system of about 30,000 children and adults in the United States. A defective gene and its protein product cause the body to produce unusually thick, sticky mucus that clogs the lungs and leads to life threatening lung infections. In the 1950’s, few children with cystic fibrosis lived to attend elementary school.”² Those suffering from the disease undergo difficult treatments designed to cause deep coughing to loosen the mucus from the airways. Although

² Cystic Fibrosis Foundation, [www.cff.org/About CF/](http://www.cff.org/About%20CF/), pg. 1

medical science has made great strides in treating cystic fibrosis, it remains a debilitating condition that results in a shortened life expectancy for those with the ailment.

C.C.J. was diagnosed with cystic fibrosis in his infancy and suffered from its effects until the day he died. According to the testimony of friends and family he hated taking the breathing treatments, despised and often refused to go to the hospital or the Doctor's office, and did not care for the medication prescribed to him. He was basically sick and tired of being sick and tired.

C.C.J. had another serious adversity in his young life. Both of his parents, the Appellant Henry C. Jenkins, and his mother, Naomi Ann Griffith, were addicted to drugs throughout his life. Ms. Griffith was incarcerated in the West Virginia Penitentiary for Women at Lakin, West Virginia at the time of C.C.J.'s death and at the time she testified.³ Part of C.C.J.'s care fell to his grandmothers, Ms. Paruscio⁴ and Ms. Flint.⁵ Although both parents suffered from these addictions, the testimony that both Henry C. Jenkins and Naomi Ann Griffith loved C.C.J. was uncontroverted.

On November 13, 2008, C.C.J. was residing with the Appellant at their mobile home in the Mountainair Trailer Court, Hilltop, Fayette County, West Virginia. C.C.J. had stayed home that day from school because he had not felt well. In the late afternoon and early evening hours, several parsons gathered at the home. According to the testimony of Ms. Holly Burdette,⁶ she arrived at the home around 10:00 p.m. after receiving a phone call from C.C.J. asking for a ride. She was drinking with Marshall

³ (See Transcript Vol. VI, May 5, 2010, pp. 83-103)

⁴ (Transcript Vol. VI, May 5, 2010, pp. 5-25)

⁵ (Transcript Vol. VI, May 5, 2010, pp. 221-250)

⁶ (Transcript Vol. VI, pp. 104-146)

Walker⁷ and a Shaun Stark⁸ and asked them to transport C.C.J. and Henry Jenkins. They drove a few miles down Route 61 to the home of Joshua Lee Settle.⁹ According to Ms. Burdette, Henry went into the house for the purpose of getting “oxycontin 30’s”. He took grocery bags of Jeff Gordon memorabilia that belonged to the Appellant and C.C.J. to trade for the pills. After the Appellant came out of the house, Josh Settle came out and asked C.C.J. to come in the house and see a knife. C.C.J. was alone in the house for a period of time with Mr. Settle. Ms. Burdette testified that the Appellant had pills in his possession after going into Josh Settle’s house. They returned to the Mountainair Trailer Court. She testified that the Appellant had traded for three (3) pills, but that she only saw two (2). Mr. Jenkins gave her one (1) of those and she then went to a neighbor’s trailer.¹⁰

Mr. Settle corroborated some of Ms. Burdette’s testimony. He testified that he received a phone call from Mr. Jenkins requesting “pain pills”, and that he traded him three (3) pills for Jeff Gordon memorabilia. He claimed he asked C.C.J. to come into the house to show him a knife, and admitted to being alone with him for a few minutes. He denied giving C.C.J. any drugs.¹¹

It is important to note that a Preliminary Hearing was held in this matter on June 24, 2009. Ms. Burdette testified at that hearing, but the extent of Mr. Settle’s involvement in the death of C.C.J. Jenkins was not known, even at that late date. Mr. Settle was not interviewed by Fayette County investigators until long after the Appellant had been charged with murder in this case. Even though he admitted to delivering a controlled

⁷ (Transcript Vol. VI, pp. 210-220)

⁸ (Transcript Vol. VI, pp.199-208)

⁹ (Transcript Vol. VI, pp. 83-103)

¹⁰ (Transcript Vol. VI, pp. 110-112)

¹¹ Transcript Vol. VI, pg. 83)

substance to the Appellant and admitted to being alone with C.C.J., Mr. Settle was given immunity and was never charged with any crime.¹²

Ms. Burdette testified about the events that transpired later that night. She stated she and Shaun Sparks returned to the Jenkins home after visiting with neighbors because C.C.J. called and asked her to return. She found him on the front porch vomiting. She testified that she, the Appellant, and C.C.J. then stayed up for a few more hours. She never witnessed the Appellant, Henry C. Jenkins, give or administer a pill to C.C.J. She said that C.C.J. fell asleep on the couch and she and the Appellant stayed up and talked for a while until Mr. Jenkins fell asleep on the couch.

Ms. Burdette claimed she woke C.C.J. up about five in the morning and asked him if he was feeling better. She testified C.C.J. responded that he did feel better. She drifted off to sleep and woke approximately two hours later. When she awoke, she noted that Mr. Jenkins was already awake, sitting up in a chair. She heard what she described as a “gargling” noise and determined it was coming from C.C.J. Ms. Burdette testified that she realized something was seriously wrong with the boy and she was “in shock.” Shaun Stark began performing CPR on C.C.J. and at some point she heard Mr. Jenkins talking on the telephone. She testified that she didn’t think Mr. Jenkins realized the seriousness of C.C.J.’s condition at that point.¹³ Her testimony was a little confusing as to the chronological order of the events. At some point they attempted to revive C.C.J. by placing him in a cold shower. She did testify that at first Mr. Jenkins didn’t seem concerned, but after she informed him of the situation he tried to revive C.C.J. It was then Mr. Jenkins who called the ambulance.

¹² (See testimony of Det. Sizemore, Transcript Vol. VI, pg. 172)

¹³ (Tr. May 5, 2010; pg. 124)

Ms. Burdette never saw the third oxycontin pill she claimed Mr. Jenkins got at Josh Settle's, and she never saw anyone give C.C.J. a pill, and she was adamant that "there was no partying in the house, not while I was there."¹⁴ She did state that Mr. Jenkins told her sometime after C.C.J.'s death (she could not recall the date or time) that he felt responsible for C.C.J.'s death because he had "shot C.C.J. up with an oxycontin 30."¹⁵

Ms. Burdette made another startling admission during her direct and cross examination. She noted that she had picked up her prescription for valium that day, and the night of November 13, 2008 she had approximately ninety (90) valium pills in her possession. She claimed when she woke up and found Mr. Jenkins to be awake, smoking a cigarette, he asked her for a valium. When she went to her purse to she found all of the pills missing. She accused Mr. Jenkins of stealing them. It was at that point she noted C.C.J.'s appearance so she began to focus on him. She never reported the pills stolen to any law enforcement officials.

C.C.J. was taken first to Plateau Medical Center. He was treated in the emergency room by Dr. Frank Paul Poland. Dr. Poland testified he administered romazacon to C.C.J. Romazacon is a drug given to persons who are or may be experiencing and overdose of diazepines, such as valium. He stated he was trying a "shotgun" approach to treatment since he could not definitively determine C.C.J.'s condition.¹⁶

C.C.J. was flown to Women's and Children's Hospital in Charleston, West Virginia where he remained in a vegetative state until he died on November 19, 2008.

¹⁴ (Tr. May 5, 2010; pg.117)

¹⁵ (Tr. May 5, 2010; pg. 130)

¹⁶ (Transcript Vol. V, May 4, 2010; pp. 137-138)

The police investigation into C.C.J.'s death began immediately after the phone call was made to the 911 Center that he had fallen into cardiac arrest. On November 20, 2008, Dr. Zia Sabet of the West Virginia State Medical Examiner's Office performed an autopsy on C.C.J. with Detective J.K. Sizemore of the Fayette County Sheriff's Department present. Dr. Sabet issued a Death Certificate that day stating the cause of death to be "a. Hypoxic encephalopathy; b. Broncho-pneumonia, and; c. Cystic fibrosis." The form also contains a box for the Examiner to check the cause of death. Dr. Sabet checked the box marked "natural" and listed the cause as "diabetes mellitus II."¹⁷

Detective Sizemore was assigned to the case when it first began at the time C.C.J. stopped breathing. He obtained recorded telephone conversations between the Appellant, and C.C.J.'s mother, Naomi Ann Griffith, an inmate at the Lakin Correctional Facility. During one of the conversations the Appellant admitted to Ms. Griffith that C.C.J. had "snorted" a "30". In another he stated that C.C.J. had been obtaining drugs from "...other places too."¹⁸ Mr. Jenkins never admitted to delivering a pill to C.C.J. in these conversations.

Both Ms. Griffith and her mother, Ms. Paruscio testified about instances in the past where the Appellant admitted he had either allowed C.C.J. to experiment with illegal substances, or he attempted to treat his various health conditions with unprescribed medications.¹⁹

Dr. James C. Kraner, the Chief Toxicologist of the State Medical Examiner's Office issued the official toxicology report on January 21, 2009 in which he found traces

¹⁷ (See Exhibit "A")

¹⁸ (See testimony of Naomi Ann Lucas, Transcript Vol. VI, May 5, 2010; pp. 27-65. Also see transcripts of conversations between Appellant and Ms. Lucas in Circuit Clerk's trial file.

¹⁹ (Transcript Vol. I, March 4, 2010. This is the 404(b) hearing concerning the testimony of these two witnesses at trial)

of oxycodone in the blood samples first taken at Plateau Medical Center. The level of that substance was 0.06 mg/L, well within the guidelines as “therapeutic” level between 0.01-0.10 mg/L. He also found diazepam and nordiazepam at levels of 0.04 mg/L and 0.15 mg/L, respectively. Diazepam is the found in valium and nordiazepam is a metabolite the body produces after the ingesting of valium. These levels are over three times the level of oxycodone found, though they are still considered to be “therapeutic”. Dr. Kraner tested the samples of blood taken at Women’s and Children’s Hospital at the time of C.C.J.’ death, and found those samples to contain similar levels of diazepam and nordiazepam. Dr. Kraner admitted on cross-examination without specific knowledge of when the substances were ingested, the sample could reflect rising or descending levels of the substances in what he described as a “bell curve”. The results could show a rising level of a substance on the 14th of November and the second could show a descending level on the 18th.²⁰

On May 22nd, 2009, Detective Sizemore obtained an arrest warrant for the defendant charging him “Murder of a child by a Parent” in violation of West Virginia Code §61-8D-2a. On May 27, 2009, accompanied by Detective Perdue, he travelled to Mr. Jenkins’ mother’s residence and asked if the Appellant would give a taped statement. While the three parties stood by the road, the Detectives read a Miranda rights card to the Appellant and took a recorded statement. Immediately after taking the statement the Appellant was served with the warrant they had obtained five (5) days previously, and was arrested and taken into custody.²¹

²⁰ (Tr. Vol. V, May 4, 2010; pp. 209-216. See also Exhibits “ “ and “ “)

²¹ (Tr. Vol. III, April 12, 2010; pp. 18-31)

On April 12, 2010 the Court heard the defendant's motion to suppress the statement.²² The Court asked the parties to return a few days later for argument and allowed the parties to submit proposed findings of fact, conclusions of law and rulings. The Court issued his ruling on April 27, 2010.²³ The Court suppressed the use of the statement, but only during the State's case-in-chief. Over defense counsel's objection, the Court permitted its use for impeachment purposes if the defendant chose to testify at trial.²⁴

Again, it is important to note that during the investigation up to the arrest of Mr. Jenkins, law enforcement officials had no idea of the role played by Josh Settle in delivering drugs to the Appellant and his son.

On July 28, 2009 Dr. Zia Sabet, along with Dr. Kaplan, issued an eight (8) page report titled "Report of Death Investigation and Post-Mortem Examination Findings".²⁵ His opinion as to the cause of death stated "It is our opinion that [C.C.J.], a 14-year old male teenager, died as the result of combined oxycodone and diazepam intoxication resulting in fatal hypoxic encephalopathy following a 5-day hospitalization, without documented prescription access to oxycodone and diazepam. Cystic Fibrosis and insulin dependent diabetes mellitus are potentially contributory conditions." He then ruled the manner of death to be "undetermined".

At trial, Dr. Sabet testified that in his opinion the combination of oxycodone and valium in C.C.J.'s system, coupled with his multiple health issues could all be "contributing factors" in C.C.J.'s death. As to the combination of drugs in his system, Dr.

²² (Tr. Vol. III, April 12, 2010)

²³ (Tr. Vol. IV, April 27, 2010)

²⁴ (Tr. Vol. IV; pp. 31-32)

²⁵ (See Exhibit " ")

Sabet stated on direct examination “And manner of death is classified as undetermined because we don’t know really if this therapeutic drug concentration—I’m not one hundred per cent sure.”²⁶

In September 2009, the Fayette County Grand Jury, sitting in its September Term, indicted Mr. Jenkins for the felony offenses of “felony murder” in violation of West Virginia Code §61-2-1; “delivery of a controlled substance, to-wit oxycodone” in violation of West Virginia Code §60A-4-401; “murder of a child by a parent, guardian or custodian” in violation of West Virginia Code §61-8D-2; and “child neglect resulting in death” in violation West Virginia Code §61-8D-4a. After argument of counsel in pre-trial motions²⁷ and argument prior to instructions²⁸ the Court agreed to instruct the jury that the charge contained in Count Four, “child neglect resulting in death” (WV Code §61-8D-4a(a)) is a lesser included offense of Count Three, “death of a child by parent” (WV Code §61-8D-2a).²⁹

Trial was held on this case May 4th through 6th, 2010. The Jury received the case in the late morning hours on May 6th, 2010. After the jury had deliberated for some time, they passed a note to the bailiff with the following question: “Does the felony that was committed have to cause the death or contribute to it? 05/06/2010 Taunya Fleshman”. (emphasis in original) Defense counsel pointed out the fact that the State’s own instruction required that said felony “caused” the death of the decedent, even though the Prosecutor argued in closing argument about “contributing factors to the death”. After argument by counsel and over defense counsel’s objection, the Court passed a note back

²⁶ (Tr. Vol. V, May 4, 2010; pp. 227-228. Dr. Sabet’s full testimony Tr. Vol. V, pp. 218-240)

²⁷ (Tr. Vol. II)

²⁸ (Tr. Vol. VII, May 6, 2010; pp. 8-44)

²⁹ (Tr. Vol. VII, May 6, 2010; pg. 27)

to the jury stating “Ladies and gentlemen of the jury, I have received your note and regret that I am unable to further answer the question you asked. I know you were attentive to the instructions as they were read to you by the Court. They cannot be read to you again. Each individual should rely upon their own memory in answering the question. You may now continue to deliberate toward verdicts in this case. Judge Blake.”³⁰

The jury returned to the jury room and deliberated for several more hours. On May 6th, 2010, the jury returned a verdict of “Guilty” to the offense of “felony murder” (with a recommendation of “mercy), and to the “guilty” to the offense of “child neglect resulting in death” as a lesser included offense of “murder of a child by a parent, guardian or custodian.”

IV.

ISSUES PRESENTED

A.

Whether the Court Erred in Allowing the State to Proceed Against the Defendant for the Offenses of “Felony Murder”, the Underlying Felony Being Delivery of Oxycodone; and “Death by a Parent”, the Cause of Death Being “Impairment of Physical Condition by Delivery of Oxycodone”; and “Child Neglect Resulting in Death” said Neglect Allegedly being “Allowing or Permitting Child to Abuse Oxycodone”

B.

The Prosecution’s Medical Experts Testified that the Manner of Death Was “Undetermined” and They Were “Not Hundred Per Cent Sure” if Controlled Substances

³⁰ (Tr. Vol. VII, pp. 114-121. see also Exhibits “B” and “C”)

at a Therapeutic Level Caused the Death of the Child. Consequently, the Evidence That the Appellant Caused the Death of the Child Fell Short of Proof Beyond a Reasonable Doubt and the Appellant's Motion for a Judgment of Acquittal Should have Been Granted

C.

Whether the Court Erred in Suppressing the Defendant's Statement Only During the State's Case in Chief

D.

Whether the Court Erred in Allowing the State to Utilize Immaterial and Gruesome Photographs of the Autopsy During its Case in Chief

E.

Whether the Court erred in permitting the use of 404(b) evidence of Ms. Griffith and Ms. Paruscio against the Appellant at Trial

V.

ARGUMENT

A.

Whether the Court Erred in Allowing the State to Proceed Against the Defendant for the Offenses of "Felony Murder", the Underlying Felony Being Delivery of Oxycodone; and "Death by a Parent", the Cause of Death Being "Impairment of Physical Condition by Delivery of Oxycodone"; and "Child Neglect Resulting in Death" said Neglect Allegedly being "Allowing or Permitting Child to Abuse Oxycodone"

The indictment charged the defendant with four crimes: Count One was “felony murder”, the underlying felony being the distribution of oxycodone to C.C.J.; Count Two with the felony “delivery of a controlled substance; to-wit: oxycodone”; Count Three with “death of a child by parent” by “inflicting upon C.C.J. impairment of physical condition other than by accidental means”; and Count Four with “child neglect resulting in death” in that the Appellant failed to get C.C.J. timely necessary medical treatment and/or allowed or permitted him to abuse controlled substances.” One can safely presume from the evidence presented that the “impairment” inflicted upon C.C.J. in Count Three was the result of the delivery of a controlled substance, to wit: oxycodone.

Counsel for the defense filed a “Motion to Elect” asking the Court to require the State to elect a Count in the indictment and a theory under which to proceed. The defense also argued a similar motion in for a judgment of acquittal after the end of the State’s case, and again at the close of evidence. The issue was again addressed tangentially in discussions of instructions and the Court’s decision of how to design the “verdict form”.³¹

Each of the counts arises out of an identical series of events. Each Count revolves around the alleged delivery of the controlled substance oxycodone to C.C.J. by the Appellant, and C.C.J.’s ingesting of that substance allegedly causing his death. Count Four adds, with the curious “and/or” conjunction, the additional allegation of an alleged failure to get timely medical treatment for C.C.J. after witnesses discovered he was having difficulty breathing.

³¹ (Transcript Vol. II; March 30, 2010. Vol. II contains the argument of counsel on the defendant’s “motion to elect”. The Judge held a ruling in abeyance. Transcript Vol. VI, May 5, 2010, pp.179-196, contains the “motion for a judgment of acquittal”. Transcript Vol. VII, May 6, 2010 pp. 7-21 is renewal of the “motion for a judgment of acquittal”, and Transcript Vol. VII, pp. 37-40 is the Court’s ruling on the verdict form.)

This Court has granted the State of West Virginia great latitude in how to indict and pursue evidence against defendants charged with first degree murder. In State v. Hughes, 225 W.Va. 218, 691 S.E.2d 813 (2010), the defendant complained that the Court instructed the jury on both “felony murder” and “premeditated murder” even though he had not been indicted for felony murder. More recently, in State v. Berry, West Virginia Supreme Court No. 35501, January 20, 2011, the defendant was indicted under both theories of “premeditated murder” and “lying in wait murder”.

In Hughes , this Court held an indictment alleging that a defendant “feloniously, willfully, maliciously, deliberately, premeditatedly, and unlawfully did slay, kill and murder” is sufficient to encompass all of the alternative theories of the crime of “murder” contained within W. Va. Code § 61-2-1 (2009). See also W. Va. Code Ann. § 61-2-1 (“[i]n an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately, and unlawfully slay, kill, and murder the deceased.”). The State is then free to rely upon multiple theories of murder for the purposes of trial. State v. Hughes, 225 W.Va. 218, 691 S.E.2d 813 (2010), at Syllabus Point 2

In Berry defense conceded enough evidence was proffered to prove one theory of murder, but not the other. Citing Hughes, this Court again found the State was only obligated to prove one theory if the evidence was sufficient to do so and the jury were properly instructed on all theories.

In the case at bar, however, the State elected to indict for felony murder alleging a specific felony of delivery of a controlled substance, and then indicting for that

same felony in the second count of the indictment.³² This is very different from both the Hughes case and the Berry case. The State elected to go under the theory of felony murder without presenting evidence of any other theory (other than “failure to get timely necessary medical assistance in the “and/or” section of Count Four). Given the evidence adduced at trial one could assume the State sought to indict in this manner due to the complete lack of evidence the Appellant intended to kill or injure his son.

Count Three charged the Appellant with “death of a child by parent” in violation of West Virginia Code 61-8D-2a in that he “inflicted” upon C.C.J. an unnamed “impairment of physical condition.” Given the evidence adduced at trial, one can only assume the alleged impairment must have been the result of the delivery of oxycodone as alleged in Counts One and Two. This is not a different theory of murder such as the inherent differences between “felony murder”, “lying in wait” and “premeditation”. This is the exact same offense with the additional element of the Appellant being a parent and the decedent being in his care, custody and control.

This Court addressed a similar issue involving a conviction for “incest” in violation of West Virginia Code §61-8-12 and “sexual abuse by a custodian” in violation of West Virginia Code §61-8D-5(a) in State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993). The defendant asserted his being convicted and sentenced for both offenses was a violation of the “double jeopardy” provisions of the Fifth Amendment of the U. S. Constitution. This Court disagreed noting the test established by the United States Supreme Court in Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180 76 L .Ed. 306 (1932) whether two or one violation existed depended upon “...whether each provision requires

³² (When the Court prepared the verdict form and sent the charge of “felony murder” under Count One to the jury, Count Two was dismissed in accordance with State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992)

proof of a fact which the other does not.”³³ This Court further noted that the United States Supreme Court has held that congress can make its intent clear in the body of the statute, and the U. S. Supreme Court differentiated those statutes in Garrett v. United States, 471 U.S. 773, 105 S Ct. 2407, 85 L. Ed. 764 (1985) from others that were open to interpretation.

Citing Garrett this Court noted in George W.H., *supra.*, pg. 29, 433, that the legislature specifically noted in the body of §61-8D-5(a) that it was separate and distinct offense from other offenses, and therefore conviction and sentencing on both counts was not a violation of the double jeopardy provisions of the U.S. and West Virginia Constitutions. The Legislature included no such language in §61-8D-2a, the statute in question in the case at bar.

This case fails the Blockburger test as well. There is no element of the crime of “felony murder” as charged in Count One of this indictment that is not included in the elements of Count Three. The Appellant, as the “parent” in question, is alleged to have “delivered” oxycodone to C.C.J., which drug is alleged to have caused “an impairment” which caused C.C.J.’s death. All elements of Count One are included in Count Three.

Under these circumstances, the trial Court should have forced the State to elect between proceeding with “felony murder” as charged in Count One or with “death of a child by a parent” as charged in Count Three at some point during the trial.

B.

The Prosecution’s Medical Experts Testified that the Manner of Death Was “Undetermined” and They Were “Not Hundred Per Cent Sure” if Controlled Substances

³³ George W.H., *supra.*, pp. 25, 432. Citing Blockburger, *supra.*, pp. 284 U.S. 299, at pg. 304, 52 S. Ct. 180, at pg. 182, 76 L. Ed. 306 at pg. 309)

at a Therapeutic Level Caused the Death of the Child. Consequently, the Evidence That the Appellant Caused the Death of the Child Fell Short of Proof Beyond a Reasonable Doubt and the Appellant's Motion for a Judgment of Acquittal Should have Been Granted

An essential element of the crime of “murder” is that the actions of the perpetrator cause the death of the victim. West Virginia Code §62-2-1 says it is not necessary to list the specific means by which the act is accomplished within the indictment, the code still uses the term “...by which, the death of the deceased was caused.” When the State proceeds under a “felony murder” theory” as in the case at bar, the State may be relieved of some showing of some requirements of “intent” or “plan” as in “premeditated murder”, but is in no way relieved of the requirement that the actions of the perpetrator caused the demise of the deceased. Murder is the most serious crime with the severest penalties in our code, the importance of requiring the State to create a “causal connection” is vital.

Likewise, West Virginia Code §61-8D-2a states in pertinent part “if any parent...shall maliciously and intentionally inflict upon a child under his care...any impairment of physical condition by other than accidental means, thereby causing the death of such child”. The necessity of proof beyond a reasonable doubt that his actions were the “cause” of death is clear and paramount in American jurisprudence.

Neither Dr. Kraner³⁴ nor Dr. Sabet³⁵ would commit that oxycodone in C.C.J's system was the “cause” of death. Dr. Kraner said the level of both drugs was at a

³⁴ (Transcript Vol. V, May 4, 2010; pp. 188-216)

³⁵ (Transcript Vol. V, pp. 218-240)

“therapeutic” level, but that could reflect rising or falling levels, he couldn’t be sure. He admitted on cross-examination the possibility that the valium level in C.C.J.’s blood on the 14th and then the 18th of November could indicate an ingestion of valium on the 14th that was at a therapeutic level at the time of testing, and was still falling on the 18th of November.³⁶

Dr. Sabet’s testimony was confusing at times. When asked to give an opinion as to an opinion as to cause of death the Doctor answered:

“Cause of death for this 14-years-old male teenager is combined oxycodone and diazepam intoxication, based on this organ failure, and cystic fibrosis associated with diabetes mellitus which is what Type I is from the chart that he had, could be contributing factor to his death. And manner is because of the not therapeutic concentration of the oxycodone and Valium, and also (unintelligible) of reported caretaker’s neglect to provide timely medical rescue, because based on the investigation we received from law enforcement, this father a few time rejected to take this teenager to the medical facility and even tried to treat in the tub with the ice or cold water. These all could be contributing factors to his death. And manner of death is classified as undetermined, because we don’t really know this therapeutic drug concentration—I’m not one hundred per cent sure.”³⁷

No State expert ever said that the ingestion of oxycodone by C.C.J. caused his death, only that the combination of oxycodone and valium may have somehow contributed. The State presented no witness that saw the Appellant give the child any oxycodone. Ms. Burdette said after she got back to the Jenkins trailer there was no one “partying” there while she was there, which was the following morning. She claimed the Appellant admitted to her some time later he “shot [C.C.J.] up with an oxy 30.”³⁸ Dr. Sabet did not find any injection evidence in his autopsy of C.C.J. The State introduced transcripts and played the recording of the conversations between Ms. Griffith and the

³⁶ (Transcript Vol. V, pp. 213-214)

³⁷ (Transcript Vol. V, pp. 227-228)

³⁸ (Transcript Vol. VI, pg. 30)

Appellant wherein he admitted he knew the juvenile had ingested oxycodone that night. There was no other evidence of a delivery of oxycodone to C.C.J. by the Appellant.

There was absolutely no evidence of any kind or nature that the Appellant ever delivered, or for that matter ever had in his possession, valium or any other diazepam. Only Ms. Burdette admitted to possessing valium, and she admitted to be awake with C.C.J. around 5:00 a.m. The State made no attempt to explain how that substance ended up in C.C.J.'s system at four times the level of oxycodone found in his system.

(1)

History of Felony Murder for "Delivery of a Controlled Substance"

Felony murder is the crime of murder during the commission of several enumerated felonies: arson, sexual assault, robbery or burglary. State v. Davis, 205 W.Va. 569, 519 S.E.2d 825 (1999) In 1991, the West Virginia Legislature added the crime of "a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code" to the list of felonies that can be the basis for murder. "The elements which the State is required to prove to obtain a conviction of felony murder are: (1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; (3) the death of the victim as a result of injuries received during the course of such commission or attempt. State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997); citing State v. Williams, 172 W.Va. 295, 311, 305 S.E.2d 251, 267 (1983) In the case at bar, the underlying offense is the delivery of oxycodone, so the State is also required to prove an actual "delivery" as defined by West Virginia Code 60A-4-401 *et. seq.* and that

said delivery was “intentional” and “knowing” as opposed to accidental or unknowing. Wade, supra., citing Syl. Pt. 3 State v. Dunn, 162 W.Va. 63, 246 S.E.2d 245 (1978)

Furthermore, the State must show that the felony and the homicide are parts of one continuous transaction that are closely related in point of time place and causal connection. State v. Wade, 200 W.Va. at 647-648, 490 S.E.2d at 734-735. The Wade case and numerous others involving a “felony murder” prosecutions involved shootings that occurred during a drug transaction. The inherent danger of such illegal commercial activity is clearly the basis for making the felony of “delivery of controlled substances” on of the enumerated “felony murder” felonies.

To the best of Appellant counsel’s knowledge and belief , the only West Virginia case involving “felony murder” with the underlying felony being “delivery”, and the “delivery” itself caused the death of the victim is State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998). In that case, the State presented testimony the defendant had sold morphine to other persons, and presented witnesses to the defendant actually injecting morphine into the victim several hours before he died. Moreover, the State presented Dr. Donell Cash, the State’s Chief Toxicologist for the Chief Medical Examiner’s Office, that the victim’s contained alcohol, cocaine extract and morphine. He characterized the morphine to be a “lethal dose” of that drug alone. The then State of West Virginia acting Chief Medical Examiner, Dr. Zia Sabet, testified that death was the result of “multiple drug intoxication...the first effective drug was morphine, the second alcohol, and the third cocaine. Dr. Sabet concluded that if the morphine were taken out of Burge’s system, he would not have died when he did.” Two other medical experts agreed with this conclusion. State v. Rodoussakis, 204 W.Va. 58, at 62, 511 S.E.2d 469, at 473

(2)

*The State Failed to Prove Beyond a Reasonable Doubt What Caused the Death of
C.C.J.*

Unlike the Rodoussakis case, the State failed to prove beyond a reasonable death that “delivery of oxycodone”, as alleged in Counts One, Two and Three of the indictment caused the death of C.C.J. The State had the same medical examiner in Dr. Sabet and the gentleman in the same position as Chief Toxicologist (Dr. Kraner) as the Prosecution presented in Rodoussakis. Dr. Kraner testified the level of oxycodone was “therapeutic”, not lethal. Dr. Sabet did not testify that oxycodone was in the juvenile’s system at a lethal level, or even that it was “the first effective” drug. Dr. Kraner testified the level of valium was also “therapeutic”, but it was four times the level the oxycodone found in the system. Dr. Sabet was never asked by the State if the oxycodone were taken out of his system, would he survived. Based on his answer to State’s question about the cause and manner of death cited earlier,³⁹ it seems likely that Dr. Sabet would have to reply that he was not sure.

Both of the State’s experts cited in their testimony and their reports⁴⁰ that C.C.J. was injured by a combination of the drugs he ingested sometime between November 13th and 14th, 2008. Somewhere and from someone he obtained valium, in much higher quantity than he obtained oxycodone in that time period. It is traditional in the tradition of American jurisprudence that “a person is not criminally responsible for a homicide unless

³⁹ (Transcript Vol. V, pp. 227-228)

⁴⁰ (See Exhibit “ “)

his or her act can be said to be the cause of death.”” Where an act of some other person, or intervening cause, breaks the causal connection between the defendant’s unlawful acts and the victim’s death, then the defendant is relieved of liability for a homicide offense” 40 Am. Jur. 2d Homicide 12 . The State had to prove the Appellant’s criminal responsibility for this homicide through expert testimony⁴¹ in this case, and failed to ask the necessary questions to prove the substance they alleged the Appellant delivered to constitute the underlying felony was in fact the cause of death.

(3)

The State Failed to Prove the “Delivery” of Either Controlled Substance by the Appellant to C.C.J.

The State attempted to prove the delivery of oxycodone to the juvenile by the Appellant by the testimony of Holly Burdette that the Appellant claimed he “shot up [C.C.J.] with an oxy 30”to her some time after the funeral. The State further sought to prove delivery of oxycodone through 404(b) testimony and the conversations between he and Ms. Griffith while she was incarcerated at the Lakin Correctional Facility.

Unlike Rodoussakis, no one ever saw a delivery of oxycodone between the juvenile and the Appellant. In order to prove the underlying felony, the State must prove beyond a reasonable doubt the underlying felony State v. Wade, 200 W.Va. 637, at 645, 490 S.E.2d 724, at 732 (1997). The State’s evidence is completely unreliable and does not prove the underlying felony beyond a reasonable doubt.

Moreover, we know that the oxycodone alone was not in itself the cause of death. We know from the Medical expert’s testimony that a combination of oxycodone and

⁴¹ For a full treatment of “Necessity and Effect, in Homicide Prosecution, of Expert Medical Testimony as to Cause of Death” 65 A.L.R.3d 283

valium may have contributed to his death, but we don't know which was the "effective first drug" in the juvenile's system.

We do know that the State presented absolutely no evidence whatsoever that the Appellant delivered to the deceased or even had in his possession that evening any valium or like product. All we know is that Ms. Burdette did have valium in her possession that evening and she and C.C.J. were the only two awake in the home a few hours before anyone noticed he was having trouble breathing.

(4)

The Court Erred in Denying the Defense Motion for a Judgment of Acquittal and in Responding to the Jury's Question

Counsel for the defense made a motion for a "judgment of acquittal" based on the above facts after the close of the State's case.⁴² The State's response to the motion was to argue that they had shown that oxycodone "contributed" to the death of C.C.J. The Judge agreed and denied the motion. Counsel renewed the motion at the close of all evidence, and was again denied.⁴³ The State in this instance sought to distinguish Rodoussakis. The Prosecutor stated in response to defense counsel "I'm not certain that Rodoussakis is on point." His point was that in this case the drugs in question contributed to the child's death."⁴⁴ In other words, the State agreed the seminal case in the West Virginia on "felony murder" with "delivery of a controlled substance", the ingestion of which caused the death of the victim, was not on point to the case at bar.

Lastly, the parties submitted instructions to the Court. After brief discussion, the Court adopted the State's Instruction number one which covered the charges contained in

⁴² (Transcript Vol. VI, pp. 177-196)

⁴³ (Transcript Vol. VII, May 6, 2010; pp. 8-19)

⁴⁴ (Transcript Vol. VII, pg. 11)

Count one of the indictment. Clearly the instruction repeatedly stated that the Appellant was guilty of felony murder if he delivered oxycodone to C.C.J. and that delivery of said substance “resulted in his death.” State’s instruction number two concerned Count three of the indictment and clearly stated the parent must “inflict” upon the child any “impairment of condition, by other than an accidental means, thereby causing the death of [C.C.J.]” Both instructions were read to the jury during the Court’s charge.⁴⁵

After the jury had deliberated for some time, they passed a note to the bailiff with the following question: “Does the felony that was committed have to cause the death or contribute to it? 05/06/2010 Taunya Fleshman”. Defense counsel pointed out the fact that the State’s instruction said the felony “caused” the death of the decedent, or “resulted” in the death of the decedent, even though the Prosecutor argued about “contributing factors to the death” during his argument. Counsel insisted the Court instruct them they must find he “caused” the death. After argument by counsel and over defense counsel’s objection, the Court passed a note back to the jury stating “Ladies and gentlemen of the jury, I have received your note and regret that I am unable to further answer the question you asked. I know you were attentive to the instructions as they were read to you by the Court. They cannot be read to you again. Each individual should rely upon their own memory in answering the question. You may now continue to deliberate toward verdicts in this case. Judge Blake.”⁴⁶

Obviously the jury was confused over instructions and argument presented by the State in contravention with one another. Had the jury been properly instructed that in a felony murder case the underlying felony must set off a continuous transaction, without

⁴⁵ (For argument of instructions, see Transcript Vol. VII, pp. 22-40. For Court’s reading of the charge see Transcript Vol. VII, pp. 44-68)

⁴⁶ (Tr. Vol. VII, pp. 114-121. see also Exhibits “ “ and “ “)

any intervening cause, that causes the death of the victim, they would not have returned a guilty verdict as to Count one of the indictment.

(5)

Conclusion

Felony murder relieves the State of certain obligations of proving malice or a mens rea for the offense of “homicide”. It does not, however, relieve the time honored tenet of American law that the State is required to prove that the defendant’s actions caused the death of the deceased. In this case the State failed to show that “delivery of oxycodone” actually killed the deceased since he obviously obtained another substance that was equally or possibly of much greater lethality. They failed to prove this Appellant actually completely a transaction that met the definition of “delivery of oxycodone” to the decedent, and offered no evidence whatsoever that he delivered or even possessed the other substance in the decedent’s system. Lastly, the State confused the jury with contravening arguments and instructions that successfully relieved the State of the responsibility of proving their case, that the alleged underlying felony caused the death of the deceased beyond a reasonable doubt. The State clearly failed to meet its burden of proof as to Count one of the indictment charging “felony murder”, and Count three charging “death of a child by a parent”.

C.

Whether the Court Erred in Suppressing the Defendant’s Statement Only

During the State’s Case in Chief

The testimony of Detective Sizemore⁴⁷ was clear that he and fellow Fayette County Detective Rod Perdue went to the home of Mr. Jenkins mother on May 27, 2009 to interview the defendant. Detective Sizemore had been investigating the death of C.C.J. Jenkins for seven months at the time. Based on the investigation and the statements of other witnesses, Detective Sizemore had obtained a warrant for the Appellant on May 22, 2009. The Detective testified that at the interview on May 27, 2009, he read the Appellant his rights form a Miranda⁴⁸ card he carries with him. The Detective read from the card on the witness stand:

“You have the right to remain silent and refuse to answer questions. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and to have an attorney present while you are being questioned. If you cannot afford an attorney, one will be provided for you without cost if you so desire. You can decide at any time to exercise these rights and not answer any questions or make any statements”⁴⁹

The interview took place outside on Summerlee Road in Oak Hill, Fayette County, West Virginia. The parties apparently chatted amiably and smoked cigarettes along side the road on a nice spring evening. The Officers never informed him of whether he was under arrest, or whether he was free to leave. The Appellant was not placed in handcuffs during the interrogation, but he was arrested immediately after the interview. The Detective admitted that he had the arrest warrant in his pocket during the interview. It is doubtful that the Appellant could have said anything at the time of the interrogation that would have dissuaded the Detectives from serving the warrant on him the Appellant and taking him into custody.

⁴⁷ (Tr. Vol. III, April 12, pp.18-31)

⁴⁸ Miranda v. Arizona, 384 US 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

⁴⁹ (Tr. Vol. III, pg. 20)

During argument of the defense suppression motion, the Court asked the State's Attorney why the Detectives failed to tell the Appellant they had a warrant for his arrest. State's Attorney admitted that the purpose of conducting the interview in that manner was to "not throw a big rock in the pond" and to establish "good rapport". He further stated it was a "tactical decision" to "...interview him [the Appellant], and they wanted - they wanted to do it in as harmless and as a nonthreatening way possible."⁵⁰ In other words, the Officers acted to induce the Appellant into making a statement to later use against him at trial. Interestingly, counsel for the State admitted at the first hearing on this motion that the interrogation was clearly custodial.⁵¹

The Trial Court agreed with the defense counsel's motion to suppress and concluded that the purpose and manner of conduct of the interview was to induce a statement, and suppressed the State's ability to utilize the statement in its case in chief. The Court, however, denied the defense motion to prohibit use of the statement for any purpose at trial and allowed its use on rebuttal to impeach the Appellant should he chose to testify at trial.⁵²

First of all, was it proper for the State to question a defendant, for whom they have already obtained an arrest warrant for a very serious felony charge, on the side of the road, and without any indication to that defendant that he is in fact under arrest or the nature of the charge? Secondly, given the fact that the State's delay in taking the defendant physically into custody and taking him before a Magistrate was only to obtain a statement from him, was the defendant's right to prompt presentment violated? The Court has relied primarily on the following case law and other authority.

⁵⁰ (Tr. Vol. IV, April 27, 2010; pp. 17-18)

⁵¹ (Tr. Vol. III, pg. 33)

⁵² (Tr. Vol. IV; pp. 26-32)

Professor Cleckley noted in his “Hand Book on Criminal Procedure”, I-440, that there is a disagreement among the jurisdictions regarding whether an accused must be advised of the nature of the accusation. West Virginia requires that the defendant be put on notice as to the purpose of his interrogation. He writes that the purpose of telling the suspect of the nature of the offense is so the accused can intelligently refuse to answer questions. This valuable tool to the Court also referred to the case of State v. Randolph, 179 W.Va. 546, 370 S.E.2d 741 (W.Va. 1988).

In the Randolph case our Supreme Court stated that one fact to consider whether or not a defendant has intelligently and voluntarily waived his Miranda rights is whether the defendant was initially advised of the nature of the charge against him, and refers the reader to State v. Goff, 169 W.Va. 778, 289 S.E.2d 473 (1982).⁵³ The Goff case states that ‘some information should be given to the defendant as to the nature of the charge in order that he can determine whether to intelligently and voluntarily exercise or waive his Miranda rights. Id at 742; 548.’⁵⁴ The Court additionally ruled that independent authority to protect a person’s right not to incriminate himself is found in Article Three, Section Five of the West Virginia Constitution and this is a higher standard than called for in the United States Constitution.

The right of a defendant to be Promptly Presented to a Magistrate and advised of his rights and the nature of the charges against him is by rule, West Virginia Rule of

⁵³ This proposition as outlined in Randolph was also later cited with approval in State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995).

⁵⁴ The West Virginia Supreme Court acknowledge in the Goff case that the United States Supreme Court has since held that a suspect need not be informed of all possible charges before effectively waiving his Miranda rights under the federal constitution, Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed. 2d 954 (1987).

Criminal Procedure 5(a), and by West Virginia Code §62-1-5. Both authorities have the same requirement, “An officer making an arrest under a warrant issued upon a complaint..., shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

The case law which has spoken to possible violation of the prompt presentment requirements do not however share the issue before this Court, a situation where although a warrant has been obtained and, and it is literally in the pocket of a Police Officer, that the defendant is unaware that he is under arrest. However, a primary focus of all the case law is whether or not the purpose of the delay was to secure a confession.⁵⁵ If the primary purpose of delay was to obtain a confession, such confession is to be suppressed for violation of the Prompt Presentment Rule.

State v. Wickline, 184 W.Va. 12, 399 S.E.2d 42 (1990), outlines examples of necessary delay including to carry out routine administrative procedures such as recording, fingerprinting and photographing; to determine whether a charging document should be obtained against the accused; to obtain information to aid in averting harm to persons or property; or, to obtain relevant non-testimonial information likely to lead to the discovering of the identity or location of other persons who may have been associated with the arrestee in the commission of the relevant offense.

Rule 613(b) of the West Virginia Rules of Evidence concerns “extrinsic evidence of prior inconsistent statement of witness” and impeachment evidence. The question of the State utilizing a statement found inadmissible to subsequently impeach a defendant was first addressed by this Court in the case of State v. Goodmon, 170 W. Va. 123, 290

⁵⁵ See State v. DeWesse, 213 W.Va. 339, 582 S.E.2d 786 (2003), State v. Milburn, 204 W.Va. 203; 511 S.E.2d 828 (1998), State v. Parker, 181 W.Va. 619, 383 S.E.2d 801 (1989), State v. Humphrey, 177 W.Va. 264, 351 S.E.2d 613 (1986) and of course State v. Persinger, 169 W.Va. 121, 286 S.E.2d 261 (1982).

S. E.2d 260 (1981). In that case the defendant gave numerous statements and the Court made various rulings concerning the admissibility of each. The statement in question was suppressed in the State's case in chief because the defendant's Miranda⁵⁶ rights were violated when the interview continued after the clear request for counsel. Citing federal precedent, this Court ruled that the statement provided valuable impeachment information to the jury concerning the defendant's credibility, and was therefore, admissible for that limited purpose.⁵⁷

This Court has addressed this issue several times since the Goodmon decision. In State v. Randle, 179 W. Va. 242, 366 S.E.2d 750 (1988) this Court reversed the Circuit Court of Marion County's decision that a statement was not admissible in the State's case in chief, but admissible for impeachment purposes. The Court found that promises and inducements made by the officers were used to "foment hope or despair" in the defendant's mind, thus "negative[ing] a defendant's freewill", and rendering the confession involuntary.⁵⁸ The Court ruled that the confession was not just improper in law, specifically distinguishing the facts from Goodmon, but also improper in fact because of the false inducements.⁵⁹ This Court further noted that a reversal of the conviction was necessary in Randle because "...the defendant did not testify and the confession, therefore, was not admitted into evidence. However the court's improper ruling deferred the defendant from testifying and severely prejudiced his case."⁶⁰ That exact situation exists in the case at bar.

⁵⁶ *Supra*.

⁵⁷ See Goodmon, *supra*. pp. 129-130, 266-267; citing Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); and Oregon v Hass, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed.2d 570 (1975)

⁵⁸ Randle, *supra*. pp. 244-246, 752-753.

⁵⁹ Randle, *supra*., pg. 245,753; citing State v. Goff, 169 W. Va. 778, 289 S.E.2d 473 (1982)

⁶⁰ Randle, *supra*., pg. 246,754.

Likewise, this Court found in State v. Smith, 186 W. Va. 33, 410 S.E.2d 269 (1991) that the police treatment of the defendant during an interrogation could render a statement involuntary in fact, as well as involuntary in law. Mr. Smith was taken into custody and held for several hours before taken to a magistrate. The evidence was clear that the arresting officers had beaten the defendant during the interrogation. This Court, citing Randle, ruled that the statement was “coerced” thus negating the defendant’s freewill to make a voluntary statement and rendering it inadmissible in law and in fact. It was therefore inadmissible for any purpose. Furthermore, as in the case at bar, the Court noted in a footnote the importance of the “prompt presentment” aspect of the Smith case:

“Because of the inherently coerced nature of Mr. Smith’s statement, we have not addressed the violation of the prompt presentment statute. However, it is apparent that if Mr. Smith had been promptly presented, as is required by W.Va. Code §62-1-5 [1965], many problems would have been avoided”⁶¹

As in the case at bar, many of the problems could have been avoided had the Detectives been forthright with the Appellant and just properly informed him he was under arrest. Their attempt to gain a confession by subterfuge and deception was properly suppressed during the State’s case in chief, and should have been suppressed for all purposes at trial.

D.

Whether the Court Erred in Allowing the State to Utilize Immaterial and Gruesome Photographs of the Autopsy During its Case in Chief

Whether or not photographs are “gruesome” and therefore objectionable should be decided on a case by case basis pursuant to Rules 401 through 403 of the West

⁶¹ Smith, *supra*, pg. 36,272. Footnote 4.

Virginia Rules of Evidence. The test established by this Court in State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994), Syllabus Pt. 8 is for the Trial Court to determine whether the photo is probative to “a fact of consequence in the case”, then weigh the “counterfactors listed in Rule 403”. The primary aspect of the test is the “probative” nature of the photos, the value they may or may not have in assisting the jury in determining the eventual outcome of a case.

When arguing to exclude the use of certain photographs from use in the State’s case, defense counsel accentuates the grisly and horrific nature of the photos to request their suppression. As this Court noted recently in Berry, West Virginia Supreme Court No. 35501, January 20, 2011 (citing Derr, 192 W.Va. at 177 n.12, 451 S.E.2d at 743 n. 12) “The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced...” The Court realized the aspects of a changing culture and the exposure the average person has to subjects formerly taboo from public viewing and consumption. Many television shows and video games deemed suitable for children depict scenes that would have been viewed as unnecessarily “gruesome” just a few generations ago.

This does not alter, however, the initial test of whether or not a photograph is probative of a “fact in consequence to the case.” In the case at bar, a photograph of C.C.J.’s corpse taken during the autopsy was introduced by the State. The photo depicted abrasions on his back.⁶² Dr. Sabet testified these abrasions were a “typical effects of the opiate” and the photo was admitted into evidence. Dr. Sabet was viewing C.C.J.’s body on November 20, 2008, several days after he had fallen into a coma and been transported

⁶² (Transcript Vol. V, May 4, 2010; pg. 221-224. The photo was taken before the actual autopsy began, so Appellant is not raising a “gruesomeness” issue as raised in State v. Young, 173 W.Va. 1, 311 S.E.2d 118 (1983)

to Plateau Medical Center. Neither Dr. Poland nor Dr. Chebib testified about observing any abrasions. C.C.J. was under Dr. Chebib's care for several days. The State called several nurses from Plateau Medical and Dr. Chebib's notes included the names of numerous nurses who assisted in his treatment at Women's and Children's Hospital. None of these persons were asked or called to testify about abrasions on C.C.J.'s back anywhere close to the time of the offense, by the numerous personnel who could have proffered such testimony.

Dr. Sabet's testimony was purely speculative and not probative of anything other than to theorize about the origin of scratches that no one observed on November 14, 2008, the date of his collapse. Photographs of the body parts of deceased fifteen year old boys are still disturbing, even in our desensitized society. The state's intention was to introduce a photograph of virtually no probative value to remind the jury of the overall tragedy of the situation.

E.

Whether the Court erred in permitting the use of 404(b) evidence of Ms. Griffith and Ms. Paruscio against the Appellant at trial

The Appellant directed counsel to raise as an issue on appeal the State's introduction of certain 404(b) evidence against him. Both his ex-wife, Ms. Griffith, and his ex-mother-in-law, Ms. Paruscio, testified at a 404(b) hearing about certain incidents where C.C.J. had obtained illegal substances with the Appellant's alleged knowledge or

cooperation.⁶³ The defense objected to the State's entering such evidence before a jury and a hearing was held on the State's 404(b) motion on March 4, 2010.

The Appellant asserts that the requirements for the admission of such evidence as outlined in this Court's previous cases such as Caton v. Sanders, 215 W.Va. 755, 601 S.E.2d 75 (2004) and State v. Mongold, 220 W.Va. 259, 647 S.E.2d 539 (2007). The State's motion failed to provide the defense with sufficient explanation of the State's intention and purpose for using such evidence, and the Court failed to make all the requisite findings of fact to admit said evidence properly.

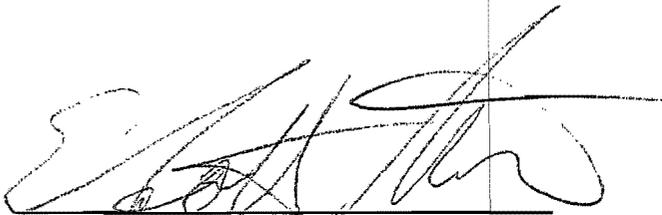
Furthermore, said evidence was highly prejudicial against this defendant while having little probative value to assist the jury in arriving at the ultimate issue.

⁶³ (Transcript Vol. I, March 4, 2010)

VI.

CONCLUSION AND RELIEF REQUESTED

Wherefore, your Appellant respectfully requests this Honorable Court reverse the Jury's verdict of "guilty of first degree murder", and enter an order dismissing that charge and dismissing it from the Fayette County Docket.



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