

11-0459

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

Supreme Court No. \_\_\_\_\_

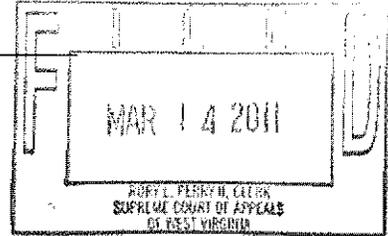
Circuit Court No. 09-F-162  
(Fayette County)

DAVID L. WELCH,

Petitioner.

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PETITION FOR APPEAL



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## PROCEEDINGS AND RULINGS BELOW

Prior to his April 12, 2010, jury trial in the Fayette County Circuit Court for felony murder, nine counts of sexual assault in the second degree, and three counts of sexual abuse in the first degree, David Welch (Mr. Welch), through counsel, reached a plea agreement with the Fayette County Prosecuting Attorney. The plea agreement provided he would plead guilty to three counts of sexual assault in the second degree and the remaining charges would be dismissed. Before the agreement could be presented in court, however, the prosecutor engaged in an out of court, *ex parte* discussion with the trial court as to whether the agreement would be acceptable to the court. The trial court told the prosecutor he would not accept the proposed plea agreement. The court subsequently indicated it rejected the agreement because it was not an appropriate disposition of the case given the serious nature of the case and the court's knowledge of the case. Because the trial court summarily rejected the proposed plea agreement and never considered it pursuant to the procedures in Rule 11, W. Va. R. Crim. P., the trial court failed to exercise its sound discretion to accept or reject the plea agreement and thereby abused its discretion. The trial court's out of court, *ex parte* discussion with the prosecutor further violated Rule 11's prohibition against the court's participation in plea discussions.

Mr. Welch's indictment for felony murder, W.Va. Code § 61-2-1 (1991) (2010 Repl. Vol.), alleged he caused the victim Linda K. Smith's death during the commission of a sexual assault, W.Va. Code § 61-8B-4 (1991) (2010 Repl. Vol.). While the State at trial established the death of the victim, the State failed to prove beyond a reasonable doubt Mr. Welch caused the victim's death during the commission of a sexual assault. The State presented video evidence of several sexual assaults of the victim by Mr. Welch, but neither this evidence nor the testimony of the State's pathologist that the victim died from asphyxiation due to a possibly obstructed airway

established the victim died from asphyxiation during the commission of a sexual assault. The slightly obese victim, an alcoholic who was known to drink for days, had substantial quantities of alcohol and drugs in her system. It is just as likely she died from alcohol intoxication or a combination of these substances and sleep apnea which, as the State's pathologist conceded, can be fatal. Mr. Welch's conviction for felony murder therefore violates the due process clauses of the state and federal constitutions.

During the State's case, a police officer testified Mr. Welch told him "he knew he was going to have to go back to prison." Although defense counsel objected, the trial court never ruled on the objection, and did not instruct the jury to disregard this testimony. The admission of this prejudicial evidence and the trial court's failure to instruct the jury to disregard it denied Mr. Welch his constitutional rights to a fair trial.

The jury convicted Mr. Welch of first degree felony murder and did not recommend mercy. Mr. Welch also was found guilty of nine counts of sexual assault in the second degree and three counts of sexual abuse in the first degree. On September 9, 2010, the trial court sentenced Mr. Welch to life without parole for the first degree murder, ten (10) to twenty-five (25) years on each of the nine counts of sexual assault in the second degree, and one (1) to five (5) years on each of the three counts of sexual abuse in the first degree. The court ordered the sentences to be served consecutively, making Mr. Welch's total prison sentence one of life without parole consecutive to 93-215 years.

## STATEMENT OF FACTS

On April 12, 2010, the day before trial, Carl Harris, the Fayette County Prosecuting Attorney, and defense counsel reached a plea agreement in which Mr. Welch would plead guilty to three counts of sexual assault in the second degree and the remaining charges would be dismissed. (4/13/10 Trial Transcript (Tr.) 6). The prosecutor approached the trial court with the plea agreement to see if it would be acceptable. In an out of court, *ex parte* discussion with the prosecutor, the trial court said it would not be acceptable. (4/13/10 Tr. 8-9).

The trial court's action prompted defense counsel to file a petition for a writ of prohibition in this Court due to the trial court's participation in plea discussions.<sup>1</sup> (4/13/10 Tr. 6). The trial court subsequently said it rejected the plea agreement because it felt it was not an appropriate disposition given the serious nature of the offenses and the court's knowledge of the case. (4/13/10 Tr. 7-9). The trial court indicated, however, it did not get into the "details" of why the prosecutor thought the plea agreement was appropriate. (4/13/10 Tr. 9). The trial court indicated there were a lot of unanswered questions, including that it was aware Mr. Welch had a prior felony conviction, but recidivist charges were not mentioned. (4/13/10 Tr. 9). The court also stated there is a "whole litany of things that we require of the written plea agreement." (4/13/10 Tr. 9). In response to defense counsel's claim the trial court participated in plea discussions, the trial court denied that it did and indicated that if the parties wanted to submit a plea agreement in writing he would consider it. (4/13/10 Tr. 12-13).

After voir dire of the jury, the State and defense counsel presented to the trial court a written plea agreement in which Mr. Welch would plead guilty to four counts of second degree sexual assault and the remaining charges, including the felony murder, would be dismissed.

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<sup>1</sup> The petition was dismissed on April 13, 2010. See Case No. 100467.

(4/13/10 Tr. 107). Although Mr. Welch withdrew his plea before it could be accepted by the trial court (4/13/10 Tr. 135), the prosecutor, in explaining why he was dropping the murder charge, indicated it was because “[t]he charge of murder is not as clear, based upon the medical examiner’s report, as I would have it be.” (4/13/10 Tr. 107). The prosecutor further stated, “[t]he tox screen does not show a high level of drugs or alcohol in her system at the time of her death, and the cause of death is asphyxiation. That part of what happened to the victim does not appear on the videotape that we have.” (4/13/10 Tr. 107).

To prove the felony murder charge that Mr. Welch caused the victim’s death during a sexual assault, the State presented a video made by a webcam attached to Mr. Welch’s computer in his bedroom showing Mr. Welch engaging in several acts of sexual intercourse with the victim (Mr. Welch’s penis in victim’s mouth). See video disk 3 of 4, numbered 00B335B, State’s Exhibit 16. (4/14/10 Tr. 66, 92-93). The video, however, does not show that the victim died during any of those sexual acts. In the video, the victim is actually breathing and alive after the sexual acts, particularly after the last sexual assault alleged in count two, the assault during which the victim allegedly died. (4/15/10 Tr. 116). In closing argument, the prosecutor even conceded the victim was alive at the end of the video, stating: “[w]as she breathing at the end of what you saw? Yes. We don’t know exactly what happened after that.” (4/15/10 Tr. 147, emphasis added). Defense counsel pointed out this significant fact in his motion for new trial which was denied by the trial court. (6/1/10 Tr. 9).

The State’s pathologist, Dr. Paul Mullen, testified he performed the autopsy, but initially did not have compelling evidence of the cause of death. (4/15/10 Tr. 14). The victim’s blood alcohol level was .55, but Dr. Mullen said he could not get a good blood sample due to decomposition of the body which increases alcohol levels. (4/15/10 Tr. 17-18). The victim was

found on August 28, 2008, two days after Mr. Welch was last seen in Mt. Hope. (4-13-10 Tr. 167, 172-73). Regarding the victim's alcohol consumption, testimony from the victim's son, Roger Smith, and the victim's roommate, Jaelyn Ward, indicated the victim was an alcoholic and "drank for days at a time." (4/13/10 Tr. 150, 176). Dr. Mullen's autopsy also found evidence of chronic alcohol liver disease. (4/15/10 Tr. 22). The victim also was on depression, pain, and liver medications. (4/13/10 Tr. 150-51).

Additionally, Dr. Mullen found two sedative drugs, trazodone and seroquel, in the victim, but probably not at levels (trazodone .37 mg/liter and seroquel .08 mg/liter) high enough for a drug overdose. (4/15/10 Tr. 17-18, 31). As a result, Dr. Mullen initially concluded the cause of death was probably not alcohol intoxication and was not very convincing for a drug overdose. (4/15/10 Tr. 18).

Dr. Mullen then watched the video and decided the victim died from asphyxiation, the inability to breath, due to a "possibly compromised or obstructed airway." (4/15/10 Tr. 21). The video does show Mr. Welch putting pantyhose in the victim's mouth and then taking them out. (Video disk 3 of 4, State's Exhibit 16, 4/14/10 Tr. 66, 92-93). However, the video does not show the victim choking or struggling to breathe when the pantyhose are put into her mouth. In addition, when the pantyhose are taken out of the victim's mouth, she is still breathing.

Although in Dr. Mullen's opinion the victim died from asphyxiation, he did not testify the victim died from asphyxiation during or as a result of a sexual assault. Dr. Mullen further did not find physical injuries, such as hemorrhaging to the eyes, neck, airway or nose, associated with victims of asphyxiation. (4/15/10 Tr. 25).

Dr. Mullen also acknowledged in his testimony the victim's slight obesity could have contributed to sleep apnea and that a combination of drugs, alcohol, and sleep apnea can be fatal. (4/15/10 Tr. 26).

Dr. Mullen further testified that if someone placed a hand over the nose of a person who was even mildly sedated, it could cause asphyxiation. (4/15/10 Tr. 24-25). He did not testify, however, he observed that act on the video or that is what caused the victim to die from asphyxiation.

Larry Bowles, Mr. Welch's cellmate at the regional jail, testified Mr. Welch told him he (Welch) and the victim were drinking, Mr. Welch gave her some elavils (amitriptyline), then checked to see if she was still breathing, and she was "so he put his hand over her mouth and nose, and she wasn't breathing then. She was dead." (4/14/10 Tr. 40-41). Mr. Bowles' testimony did not indicate this act occurred during a sexual assault or when Mr. Welch did this to the victim. Mr. Bowles' testimony about his conversation with Mr. Welch did contain two statements Bowles attributed to Mr. Welch which were not true. Mr. Bowles said Mr. Welch told him (1) he gave the victim elavil and that drug was not found in the victim; and (2) that this incident happened in a trailer and Mr. Welch lived in a frame house. (4/14/10 Tr. 40-41).

In a pretrial motion in limine, defense counsel sought to prevent Mr. Welch's prior criminal record from being introduced at trial. When the motion was heard, the prosecutor agreed Mr. Welch's prior criminal record was inadmissible and said he intended to advise his witnesses not to mention Mr. Welch's prior criminal record in their testimony. (3/9/10 Tr. 26).

Nevertheless, during the State's case, Officer Neal, a Virginia police officer, testified Mr. Welch told him the day he was arrested, "he knew he was going to have to go back to prison." (4/14/10 Tr. 15). Defense counsel objected to this testimony, but the trial court never ruled on

the objection and just held a sidebar with counsel. (4/14/10 Tr. 15). The trial court further did not instruct the jury to disregard this highly prejudicial testimony.

## ASSIGNMENT OF ERROR

- I. The Trial Court Abused Its Discretion By Summarily Rejecting The Plea Agreement Between The State And Mr. Welch Prior To Its Presentation In Court And Prior To The Court's Consideration, Pursuant to Rule 11, W.Va. R. Crim. P., Of All The Factors Essential To The Court's Exercise Of Its Sound Discretion To Accept Or Reject The Agreement. The Trial Court's Out Of Court, *Ex Parte* Discussion With The Prosecutor Concerning The Plea Agreement, Resulting In Its Rejection, Constituted Judicial Participation In Plea Discussions In Violation Of Rule 11, W.Va. R. Crim. P.
- II. Mr. Welch's Conviction And Sentence For Felony Murder Is Not Supported By Sufficient Evidence As The State Failed To Prove Beyond A Reasonable Doubt That Mr. Welch Caused The Victim's Death During The Commission Of A Sexual Assault.
- III. The Admission Of Testimony That Mr. Welch Said "He Knew He Was Going To Have To Go Back To Prison" Was Prejudicial Error As It Likely Influenced The Jury's Felony Murder Guilty Verdict And Decision Not To Recommend Mercy. The Erroneous Admission Of This Evidence Combined With The Trial Court's Failure To Instruct The Jury To Disregard It Was Plain Error.

## DISCUSSION OF LAW

### **I. The Trial Court Abused Its Discretion By Summarily Rejecting The Plea Agreement Between The State And Mr. Welch Prior To Its Presentation In Court And Prior To The Court's Consideration, Pursuant to Rule 11, W.Va. R. Crim. P., Of All The Factors Essential To The Court's Exercise Of Its Sound Discretion To Accept Or Reject The Agreement. The Trial Court's Out Of Court, *Ex Parte* Discussion With The Prosecutor Concerning The Plea Agreement, Resulting In Its Rejection, Constituted Judicial Participation In Plea Discussions In Violation Of Rule 11, W.Va. R. Crim. P.**

The State and Mr. Welch reached a plea agreement pretrial that was rejected by the trial court during an out of court, *ex parte* discussion between the court and the prosecutor before it could be presented in court pursuant to the procedures set forth in Rule 11, W.Va. R. Crim. P. In summarily rejecting the plea agreement prior to its consideration of all the factors necessary to the exercise of its sound discretion, the trial court abused its discretion by failing to exercise it. The court's participation in an *ex parte* discussion with the prosecutor, resulting in the court's rejection of the plea agreement, further amounted to judicial participation in plea discussions in violation of Rule 11, W.Va. R. Crim. P.

#### Standard of Review

"Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, Chrystal R. M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). "A court may reject a plea in exercise of sound judicial discretion." State v. Sears, 208 W.Va. 700, 704, 542 S.E.2d 863, 867 (2000) (quoting Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 498 (1971)).

The Trial Court's Summary Rejection Of The Plea Agreement And Failure To Consider The Agreement Pursuant to The Procedures Required By Criminal Rule 11 Was A Failure To Exercise Its Discretion, And Thereby An Abuse of Discretion

Our nation's courts have long recognized that plea bargaining "is an essential component of the administration of justice." State v. Sears, 208 W.Va. 700, 703, 542 S.E.2d 863, 866 (2000) (quoting Santobello v. New York, 404 U.S. 257, 260, 92 S. Ct. 495, 498 (1971)). While Rule 11 of the West Virginia Rules of Criminal Procedure gives the trial court discretion to refuse a plea bargain, Syl. Pt. 5, State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397 (1984), the court must exercise "sound judicial discretion" in doing so. Santobello, 404 U.S. at 262, 92 S.Ct. at 498. Accord Sears, 208 W.Va. at 704, 542 S.E.2d at 867.

As a general matter, "[a] court's ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice." Syl. Pt. 4, Myers v. Frazier, 173 W.Va. 658, 319 S.E.2d 782 (1984). "A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant's prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant." Id. at Syl. Pt. 6.

More specifically, Criminal Rule 11 provides a detailed set of standards and procedures governing the plea bargaining process and the court's exercise of sound discretion. Id. at 664, 319 S.E.2d at 788. Criminal Rule 11 (e)(2) provides that "[i]f a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court. . . at the time the plea is offered." Accord State ex rel. Simpkins v. Harvey, 172 W.Va. 312, 321, 305 S.E.2d 268, 277 (1983). Rule 11 expressly recognizes the trial court must have all of the details of the plea agreement to properly exercise its discretion to accept or reject the agreement. Additionally, this Court in syllabus point 8, Myers, 173 W.Va. 658, 319 S.E.2d 782, stated:

To ensure that the trial court properly exercises its discretion in accepting or rejecting plea agreements, it is incumbent upon the prosecutor to inform the court of his reasons for proposing the plea agreement.

The Myers' Court further stated:

A trial court has the right to be informed not only of the terms of the agreement, but also of the circumstances surrounding the criminal episode which is covered by the plea bargain. Additionally, a court is entitled to secure all relevant information surrounding the background, prior criminal record, and the degree of criminal involvement of the defendant to assist it in determining whether to accept or reject the tendered plea bargain.

Id. at Syl. Pt. 9. Thus, this Court concluded in State v. Whitt, 183 W.Va. 286, 290, 395 S.E.2d 530, 534 (1990):

This Court has recognized that a trial judge has discretion to refuse a plea bargain agreement if he follows the procedure prescribed by the rules governing plea agreement procedure. *State v. Guthrie*, [173] W.Va. [290], 315 S.E.2d 397 (1984); *State ex rel. Roark v. Casey*, 169 W.Va. 280, 286 S.E.2d 702 (1982).

In this case, the trial court did not exercise its discretion in rejecting the plea agreement.

The trial court summarily rejected the plea agreement without following Rule 11 procedures for the presentation of the plea agreement in open court and before giving fair consideration to the above information normally elicited at the plea hearing which is necessary to the court's exercise of sound discretion.

The Fayette County Prosecuting Attorney, Carl Harris, and defense counsel reached a plea agreement providing for a guilty plea to three counts of sexual assault in the second degree, W.Va. Code § 61-8B-4 (1991) (2010 Repl. Vol.), and dismissal of the remaining charges, including a count of felony murder. The prosecutor approached the trial court with the proposed plea agreement, but the court, in an *ex parte* discussion with the prosecutor, said it would not accept the plea agreement. (4/13/10 Trial Transcript (4/13/10 Tr.) 8-9). The next day in court, defense counsel advised the trial court he had filed a writ of prohibition because of the court's

participation in plea negotiations. (4/13/10 Tr. 6). The trial court indicated it rejected the plea agreement because it did not feel the plea agreement was an appropriate disposition of the case given the serious nature of the offenses and its knowledge of the case. (4/13/10 Tr. 7-9). The court said there were many unanswered questions, including that it was aware Mr. Welch had a prior felony conviction, but there was nothing mentioned about recidivist charges. (4/13/10 Tr. 9). The trial court further indicated it did not discuss the “details” of why the prosecutor thought it was an appropriate plea agreement. (4/13/10 Tr. 9). The court also acknowledged there is a “whole litany of things that we require of the written plea agreement.” (4/13/10 Tr. 9). The trial court denied that it participated in any plea discussions and indicated if the parties wanted to submit a plea agreement in writing the court would consider it. (4/13/10 Tr. 12-13).

The trial court’s summary rejection of the plea agreement outside the Rule 11 procedure does not constitute the exercise of sound discretion. As acknowledged by the trial court, the court did not receive and consider all the details of the plea agreement before rejecting it. It is most significant that the trial court never heard and considered the prosecutor’s reasons for proposing the plea agreement before rejecting it. See Syl. Pt. 8, Myers, 173 W.Va. 658, 319 S.E.2d 782.<sup>2</sup> Nor can it be assumed the trial court understood all of the other circumstances surrounding the case before rejecting the plea agreement. In short, the trial court failed to exercise its sound discretion when it summarily rejected the plea agreement before it could be presented and considered in court. A trial court abuses its discretion “when a relevant factor that

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<sup>2</sup> When a subsequent plea agreement was presented to the trial court after voir dire of the jury, the prosecutor indicated the basis for dropping the murder charge was that this charge was not as clear as he would like it based upon the medical examiner’s report; the tox screen does not show a high level of drugs or alcohol in the victim’s system at the time of her death; the cause of death is asphyxiation; and that part of what happened to the victim does not appear on the videotape. (4/13/10 Tr. 107). Mr. Welch withdrew his plea before it was accepted by the trial court. (4/13/10 Tr. 135).

should have been given significant weight is not considered[,]” and when “[the trial court] fails to exercise any discretion at all [in making its decision.]” Banker v. Banker, 196 W.Va. 535, 548, 474 S.E.2d 465, 478 (1996). See United States v. Cunningham, 429 F.3d 673, 679 (7<sup>th</sup> Cir. 2005) (“[W]hen a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise.”).

In State v. Sears, 208 W.Va. 700, 703, 542 S.E.2d 863, 866 (2000), the parties reached a plea agreement but the trial court rejected it without considering its substantive terms because it violated a local rule prohibiting pleas after pretrial hearings were concluded. The defendant was convicted of aggravated robbery at trial and sentenced to sixty years in prison. Id. This Court reversed the conviction, stating:

When a criminal defendant and the prosecution reach a plea agreement, it is an abuse of discretion for the circuit court to summarily refuse to consider the substantive terms of the agreement solely because of the timing of the presentation of the agreement to the court.

Id. at Syl. Pt. 5.

The Court noted that a trial court must utilize discretion when considering a proposed plea agreement. Sears, 208 W.Va. at 705, 542 S.E.2d at 868. The Court further stated that “in order to insure [courts] exercise sound judicial discretion . . . courts must set forth, on the record, the prosecution’s reasons for framing the bargain and the court’s justification for rejecting it.” Id. at 705, 542 S.E.2d at 868 (quoting United States v. Robertson, 45 F.3d 1423, 1438 (10<sup>th</sup> Cir. 1995) (footnote omitted)). See also People v. Darlington, 105 P.3d 230, 232 (Colo. 2005) (“The trial court must consider all relevant factors and articulate the reasons for rejecting an agreement on the record.”); United States v. Moore, 916 F.3d 1131, 1136 (6<sup>th</sup> Cir. 1990) (“The authority to

exercise judicial discretion implies the responsibility to consider all relevant factors and rationally construct a decision”[;] appellate court remanded so district court could articulate reasons for rejecting guilty plea); United States v. Maddox, 48 F.3d 555, 558 (D.C. Cir 1995) (“trial judge must provide a reasoned exercise of discretion in order to justify a departure from the course agreed on by the prosecution and defense.”) (quoting United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973)); United States v. Mancinas-Flores, 588 F.3d 677, 680-81, 685 (9<sup>th</sup> Cir. 2009) (trial court rejected plea after defendant said he was not guilty; appellate court reversed, stating, “we are not satisfied that the district court’s rejection of defendant’s guilty plea was the result of an exercise of discretion made after consideration of all the relevant factors.”).

The Sears Court highlighted the importance of the trial court following the plea agreement procedures provided in Criminal Rule 11, finding “that the discretion granted to trial courts pursuant to Rule 11 is a valuable trust that should not be discarded for the sake of expediency[.]” Sears, 208 W.Va. at 705, 542 S.E.2d at 868.

The trial court’s actions in this case were comparable to those in Sears because the trial court here summarily rejected the plea agreement without considering all of its substantive terms and relevant factors, particularly the prosecutor’s reasons for agreeing to the plea bargain.

The Sears Court reversed Sears’ conviction and remanded to the trial court with instructions to permit him “to offer to the Court his plea pursuant to the plea negotiation originally agreed to by the State.” Id. at 705, 542 S.E.2d at 868. This Court should order the same relief in this case.

The Trial Court Effectively Participated In And Interfered With Plea Discussions When The Prosecutor Engaged The Court In An Out of Court, Ex Parte Discussion Regarding The Acceptability of The Plea Agreement, Resulting In Its Summary Rejection By The Court

Rule 11(e), W.Va. R. Crim. P., states:

“The court **shall not** participate in any such [plea] discussions.” (Emphasis added).

Thus, this Court recognizes that “Rule 11(e)(1) prohibits absolutely a trial court from all forms of judicial participation in or interference with the plea negotiation process.” State v. Sugg, 193 W.Va. 388, 406, 456 S.E.2d 469, 487 (1995). The Sugg Court noted that a judge’s involvement in plea discussions is likely to impair the trial court’s impartiality and creates a misleading impression of the judge’s role in the proceedings. Id. “Judicial involvement with plea bargaining casts doubt over the entire process.” State ex rel. Brewer v. Starcher, 195 W.Va. 185, 197, 465 S.E.2d 185, 197 (1995).

In this case, the trial court’s out of court, *ex parte* discussion with the prosecutor regarding the acceptability of the plea agreement clearly interfered with the plea negotiation process as it nixed the agreement before it could be properly disclosed and presented in court pursuant to Rule 11. The trial court effectively participated in the plea discussions as the court made known that the plea agreement reached by the parties was unacceptable. The trial court’s action derailed the parties’ plea discussions and agreement and forced them to return to the plea negotiation process. See State ex rel. Roark v. Casey, 169 W.Va. 280, 283, 286 S.E.2d 702, 704 (1982) (“we do recognize that by exercising the power to reject a plea agreement under Rule 11(e)(4) a judge makes an implicit statement about his view of the terms of a plea bargain. Should the prosecutor and defendant’s counsel reach a second agreement that is accepted by the court, it could be argued that the court had, in effect, participated in the discussion leading to the accepted agreement.”).

What occurred in this case is really no different than a situation where the prosecutor consults with the trial court before making a plea offer to a defendant and the court advises the prosecutor such a plea is unacceptable, causing the prosecutor to refrain from making the offer

and requiring him to return to the plea negotiation process. The effect of the trial court's interference in that situation is exactly the same as the one at bar – the parties are required to return to the plea negotiation process due to the court's interference in that process. Thus, any discussion by the trial court with the parties regarding the acceptability of a plea agreement outside the procedures of Criminal Rule 11 is the equivalent of judicial participation in plea discussions.

As this Court recognized in State ex rel. Brewer, 195 W.Va. at 197, 465 S.E.2d at 197, “[t]he prohibition on court participation in plea negotiations in Rule 11 ‘is designed to totally eliminate judicial pressure from the plea bargaining process.’” (quoting United States v. Corbitt, 996 F.2d 1132, 1135 (11<sup>th</sup> Cir. 1993)). As argued above, where the trial court exercises a veto over the parties’ plea discussion and agreement before its disclosure in court, judicial pressure and its adverse effects on the parties and their plea negotiations is evident.

**II. David Welch’s Conviction And Sentence For Felony Murder Is Not Supported By Sufficient Evidence As The State Failed To Prove Beyond A Reasonable Doubt That Mr. Welch Caused The Victim’s Death During The Commission Of A Sexual Assault.**

Count one of Mr. Welch’s indictment alleged that he “committed the offense of ‘murder’ in that he did unlawfully, feloniously, willingly, maliciously and deliberately slay, kill and murder Linda K. Smith, *during the commission of a sexual assault* against Linda K. Smith . . . W. Va. Code § 61-2-1.” (Emphasis added). The State’s evidence, however, was insufficient to prove beyond a reasonable doubt Mr. Welch caused the victim’s death during a sexual assault. Neither the video evidence the State presented nor the State’s pathologist’s testimony the cause of death was asphyxiation due to a possibly obstructed airway established the victim died during or as a result of a sexual assault. The autopsy revealed the victim had a substantial quantity of

alcohol and drugs in her system and it is more likely she died from alcohol poisoning or a combination of these substances and sleep apnea. Mr. Welch's conviction for felony murder therefore violates the due process clauses of the 14<sup>th</sup> Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution.

#### Standard of Review

“ . . . [W]hen reviewing the sufficiency of evidence to support a criminal conviction . . . [the Court] examine[s] 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.” Syl. Pt. 1 (in part), State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

#### The State's Evidence Is Insufficient To Prove Beyond A Reasonable Doubt Mr. Welch Caused The Victim's Death During The Commission Of A Sexual Assault

The State's evidence was insufficient to prove beyond a reasonable doubt Mr. Welch caused the victim's death during the commission of a sexual assault. To establish this allegation, the State relied principally upon (1) a video made by a webcam attached to Mr. Welch's computer showing Mr. Welch engaged in several acts of sexual intercourse with the victim, i.e., Mr. Welch's penis in the victim's mouth; and (2) the testimony of the State's pathologist, Dr. Paul Mullen, that the victim died from asphyxiation.<sup>3</sup> However, neither the video nor the

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<sup>3</sup> The State also introduced evidence via a jailhouse informant that Mr. Welch asphyxiated the victim by putting his hand over her mouth but, as will be discussed below, there is no evidence this occurred during a sexual assault.

pathologist's testimony, separately or together, proved beyond a reasonable doubt the victim died during or as a result of the commission of a sexual assault.

First, the State claimed the victim died during the sexual assault alleged in count two of the indictment. (4/15/10 Tr. 116). While the video numbered 00B335B (Video disk 3 of 4, State's Exhibit 16) shows Mr. Welch engaged in the sexual acts alleged in counts 2, 3, 4, and 5 of the indictment, the video does not show that the victim died during any of those sexual acts. (4/14/10 Tr. 66, 92-93). The video actually shows the victim breathing and alive after the sexual acts and particularly after the last sexual assault alleged in count two, the assault during which the victim allegedly died. The prosecutor even admitted during closing argument the victim was alive at the end of the video:

\* \* \*

Did she have any ability to resist, to do anything, on the video that you saw from August, 2008? She was limp. There was no reaction. No reaction whatsoever, and you could clearly see what he did. Was she breathing at the end of what you saw? Yes. We don't know exactly what happened after that.

\* \* \*

(4/15/10 Tr. 147). Thus, from the video a rational trier of fact cannot find beyond a reasonable doubt that Mr. Welch caused the victim's death during the commission of a sexual assault.

Moreover, the State's pathologist, Dr. Paul Mullen, testified that, after performing the autopsy, he initially did not have compelling evidence of the cause of death. (4/15/10 Tr. 14). He thought it could be a toxicology – related death or due to asphyxiation. (4/15/10 Tr. 14). The victim's blood alcohol content was .55, but Dr. Mullen said he could not get a good blood sample due to decomposition of the body which increases alcohol levels.<sup>4</sup> (4/15/10 Tr. 17-18). Dr. Mullen and Dr. James Kraner, the State's toxicologist, also said there was no alcohol found

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<sup>4</sup> The victim's body was found on August 28, 2008, two days after Mr. Welch was last seen in Mt. Hope, W.Va. (4/13/10 Tr. 167, 172-73).

in the vitreous fluid in the eye which is more reliable since advanced decomposition is minimal in the vitreous fluid. (4/15/10 Tr. 24, 31). Although an accurate blood alcohol level could not be calculated, testimony from the victim's son, Roger Smith, and the victim's roommate, Jaclyn Ward, indicated the victim was an alcoholic, "drank for days at a time," and was on depression, pain, and liver medication. (4/13/10 Tr. 150-51, 176). Dr. Mullen's autopsy further revealed evidence of chronic alcohol liver disease. He also found two sedative drugs in the victim, trazodone and seroquel, but not at high levels (trazodone .37 mg/liter and seroquel .08 mg/liter), and probably not enough for a drug overdose. (4/15/10 Tr. 17-18, 31). Thus, Dr. Mullen initially concluded the cause of death was probably not alcohol intoxication and not very convincing for a drug overdose. (4/15/10 Tr. 18).

Given the victim's history of alcoholism, her appearing virtually unconscious and physically helpless on the video, and a postmortem blood alcohol level of .55, there is strong reason to question Dr. Mullen's conclusion the cause of death was "probably not alcohol intoxication." A contrary conclusion is even more likely if the victim consumed a large amount of alcohol shortly before her death and the alcohol had not yet been absorbed by the vitreous fluid in the eye which absorbs alcohol more slowly. (Tr. 4/14/10 Tr. 32). A leading forensic pathology treatise discusses alcohol production from decomposition and concludes that "[i]n the majority of cases postmortem alcohol production does not exceed .10%." Werner U. Spitz & Russell S. Fisher, Medicolegal Investigation of Death, Guidelines for the Application of Pathology to Crime Investigation, p. 771 (3d ed. 1993, Werner U. Spitz, Editor). If that is true in this case, the victim's blood alcohol content would have been .45 at death, more than a .40 level recognized as the normal level at which deep coma and death occur. Id. at 773. Even if the victim had developed an increased tolerance for alcohol because she was an alcoholic, that

potentially fatal level, in combination with the sedative drugs in her system, could have caused her death. It certainly does not eliminate a reasonable doubt that is what occurred.

This analysis is supported by authority in other jurisdictions relating to how much of the postmortem blood alcohol level could be attributed to decomposition. See Miller v. Rinker Boat Company, Inc., 815 N.E.2d 1219, 1227 (Ill. App. 2004) (Dr. Travis Hindman, a forensic pathologist, testified “that in some individuals, postmortem decomposition could contribute up to 0.2 of the blood alcohol.”); American Dredging Company v. Lambert, 153 F.3d 1292, 1296 (11<sup>th</sup> Cir. 1998) (“Dr. [Richard] Jensen further testified about studies in which decomposition alone accounted for blood alcohol readings as high as .20.” (footnote omitted)); Williams, v. Mississippi, No. 2008-CT-00695-SCT, 2010 Miss. LEXIS 590, at \*9, 11 (Miss. November 10, 2010) (Dr. Earnest Lykissi, a forensic toxicologist, testified the victim, who had been dead three days before the autopsy was performed, had a blood alcohol content of .6 percent and “some of the alcohol in [the victim’s] system could have been attributed to decomposition, but only as much as .14 percent.”).

Even assuming, *arguendo*, decomposition in this case could account for .20 of the .55 blood alcohol content, the victim would still have had about a .35 blood alcohol level at death, a potentially lethal level, which, when combined with the drugs, could have been fatal. For example, in State v. Frutiger, 907 P.2d 158, 159-60 (Nev. 1995), the victim, a heavy drinker, had been dead for a minimum of two days to possibly over a week and the pathologist could not determine the cause of death due to severe decomposition of the body. Nevertheless, the pathologist, “Dr. [Roger] Ritzlin testified that [the victim’s] blood alcohol level was .341; and although blood alcohol may increase with decomposition, [the victim’s] blood alcohol alone could have caused her death.” Id. at 159. Another pathologist also concluded the most likely

cause of death was chronic and acute alcoholism. Id. at 160. Thus, if the victim in this case had a .35 blood alcohol level it likewise could have caused her death, particularly when combined with the sedative drugs found in her system.

Subsequent to his initial evaluation, Dr. Mullen testified he then watched the video and came to the opinion the victim died from asphyxiation, the inability to breathe, due to a “possibly compromised or obstructed airway.” (4/15/10 Tr. 21). The video does show Mr. Welch putting pantyhose in the victim’s mouth and then taking them out. (Video disk 3 of 4, State’s Exhibit 16, 4/14/10 Tr. 66, 92-93). The video, however, does not show the victim choking or struggling to breathe when the pantyhose are put into her mouth. The video further shows that when the pantyhose are taken out, the victim is still breathing.

Furthermore, Dr. Mullen did not testify the victim died from asphyxiation during or as a result of the sexual assault, which is the State’s burden of proof on the felony murder count. Syl. Pt. 5, State v. Mayle, 178 W.Va. 26, 357 S.E.2d 219 (1987). Dr. Mullen also did not find any of the physical injuries sometimes found in victims of asphyxiation such as hemorrhaging to the eyes or neck; and found no injuries to the airway, neck, or nose. (4/15/10 Tr. 25). Moreover, Dr. Mullen only testified to a possibility the victim died from a compromised or obstructed airway. (4/15/10 Tr. 21). A possibility is not a reasonable probability and does not even satisfy the standard of proof in a civil case, much less proof beyond a reasonable doubt, the standard here. See Syl., Hayzlett v. Westvaco Chlorine Products Corp., 125 W.Va. 611, 25 S.E.2d 759 (1943) (“In an action for wrongful death the testimony of a physician as to the possibility of a causal relation between the inhalation by decedent of sulphur dioxide gas and subsequent death is not sufficient, standing alone, to establish such relation.”); Sakaria v. Trans World Airlines, 8 F.3d 164, 172-73 (4<sup>th</sup> Cir. 1993) (“In a long line of decisions in this circuit, we have emphasized that

proof of causation must be such as to suggest “probability” rather than mere “possibility,” precisely to guard against raw speculation by the fact-finder.” (citations omitted)); Syl. Pt. 3, Hovermale v. Berkeley Springs Moose Lodge, 165 W.Va. 689, 271 S.E.2d 335 (1980) (“Where a physician is testifying as to the causal relation between a given physical condition and the defendant’s negligent act, he need only state the matter in terms of a reasonable probability.”). See also State v. LaRock, 196 W.Va. 294, 305-07, 470 S.E.2d 613, 624-26 (1996) (this Court upheld the exclusion of expert testimony where the psychological expert could only opine that it is “possible” the defendant did not know what he was doing until after he did it, finding this testimony would not assist the trier of fact).

Thus, Dr. Mullen’s testimony the victim died from asphyxiation due to a “possibly compromised or obstructed airway” is insufficient for the jury to find beyond a reasonable doubt the victim died from asphyxiation. See Spencer v. McClure et al., 217 W.Va. 442, 447, 618 S.E.2d 451, 456 (2005) (“the law is clear that a mere possibility of causation is not sufficient to allow a reasonable jury to find causation.”) (quoting Tolley v. ACF Industries, Inc., 212 W.Va. 548, 558, 575 S.E.2d 158, 168 (2002)).

Dr. Mullen did testify that if someone placed a hand over the nose of someone who was even mildly sedated, it could cause asphyxiation. (4/15/10 Tr. 24-25). Dr. Mullen did not say, however, he observed that act in the video or that is what caused the victim’s death. The State did present evidence from Larry Bowles, Mr. Welch’s cellmate at the regional jail, who testified Mr. Welch told him he (Welch) put his hand over the victim’s nose and mouth, she stopped breathing, and she was dead. (4/14/10 Tr. 41).<sup>5</sup> It is true that Mr. Bowles’ testimony may be

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<sup>5</sup> Mr. Bowles also testified to two things which were not true: (1) that Mr. Welch told him he gave the victim elavil (none was found in the victim); and (2) that this happened in a mobile home (Mr. Welch lived in a frame house). (4/14/10 Tr. 40-41).

sufficient to support a conviction for first-degree murder via a premeditated theory. It is not sufficient, however, to prove Mr. Welch's alleged fatal actions occurred during the commission of a sexual assault, the State's burden of proof, even assuming the truth of Mr. Bowles' testimony, which is questionable. See footnote 4. Even assuming, *arguendo*, the truth of Mr. Bowles' testimony, Mr. Welch's fatal actions could have just as well occurred after the sexual assaults. Thus, this evidence does not satisfy the State's burden of proof that death occurred during or as a result of the commission of the sexual assault alleged in count two of the indictment.

The above evidence simply does not meet the Guthrie test for proving Mr. Welch's guilt of felony murder beyond a reasonable doubt. A rational trier of fact cannot find beyond a reasonable doubt that Mr. Welch caused the victim's death during the commission of a sexual assault. The Fayette County Prosecuting Attorney was not even convinced he could prove Mr. Welch's guilt of felony murder as he was willing to dismiss this charge in exchange for Mr. Welch's guilty plea to several sexual assaults. See footnote 2, page 12. Even if one assumes the victim died from asphyxiation, there is really no evidence as to when it occurred, much less evidence it occurred during or as a result of a sexual assault. In addition, as demonstrated above, it is just as likely the victim died from alcohol intoxication or, as admitted by Dr. Mullen, that the victim's slight obesity could have contributed to sleep apnea and a combination of drugs, alcohol, and sleep apnea can be fatal. (4/15/10 Tr. 26).

In syllabus point 4, State v. Hall, 172 W.Va. 138, 304 S.E.2d 43 (1983), this Court held:

To prove the corpus delicti in a case of homicide two facts must be established:  
(1) The death of a human being and (2) a criminal agency as its cause.

Accord Syl. Pt. 4, State v. Garrett, 195 W.Va. 630, 466 S.E.2d 481 (1995). The Court further held in syllabus point 1 (in part), State v. Roush, 95 W.Va. 132, 120 S.E. 304 (1923), that “[t]he

evidence of defendant's agency in the commission of the supposed crime must be so clear and convincing as to exclude any reasonable hypothesis of other causes." See State v. Durham, 156 W.Va. 509, 516, 519, 195 S.E.2d 144, 148, 150 (1973) (acknowledging Court's holding in Roush, but recognizing existence of criminal agency may be established by circumstantial evidence).

As argued above, the State failed to prove beyond a reasonable doubt and by substantial evidence that Mr. Welch actually caused the victim's death during the commission of a sexual assault. The State's pathologist could only speculate the victim died from asphyxiation due to a "possibly compromised or obstructed airway." (4/15/10 Tr. 21) This is not clear and convincing evidence of the cause of death, much less proof beyond a reasonable doubt; and it certainly fails to establish beyond a reasonable doubt Mr. Welch caused the asphyxiation during a sexual assault as alleged in count one of the indictment. As this Court noted in State v. Craig, 131 W.Va. 714, 726. 51 S.E.2d 283, 290 (1948), "[t]he uncertain character of the proof on that vital element of the offense charged in the indictment clearly fails to satisfy the universally recognized requirement of the law that, in a criminal case, the guilt of the defendant must be established by competent evidence beyond a reasonable doubt."

Thus, from the evidence it is just as likely the victim died from alcohol poisoning or a combination of drugs, alcohol, and sleep apnea. Finally, even assuming Mr. Welch may have asphyxiated the victim by placing his hand over her nose and mouth, there is no clear and convincing evidence, much less proof beyond a reasonable doubt, this act occurred during the commission of the sexual assault which is the State's burden of proof.

Mr. Welch cannot be convicted of felony murder on the basis of guesswork and speculation.

**III. The Admission Of Testimony That Mr. Welch Said “He Knew He Was Going To Have To Go Back To Prison” Was Prejudicial Error As It Likely Influenced The Jury’s Felony Murder Guilty Verdict And Decision Not To Recommend Mercy. The Erroneous Admission Of This Evidence Combined With The Trial Court’s Failure To Instruct The Jury To Disregard It Was Plain Error.**

A Virginia police officer who spoke with David Welch the day of his arrest testified Mr. Welch told him “he knew he was going to have to go back to prison.” Although defense counsel objected to this testimony, the trial court never ruled on the objection in front of the jury and did not instruct the jury to disregard this testimony. The erroneous admission of this prejudicial testimony combined with the failure of the trial court to instruct the jury to disregard it was plain error. This prejudicial evidence likely influenced the jury’s felony murder guilty verdict and decision not to recommend mercy.

Standard of Review

Since defense counsel failed to move for a mistrial, did not request the jury be instructed to disregard this prejudicial testimony, and the trial court failed to instruct the jury to disregard this testimony, this error must be reviewed under the plain error standard. Plain error is defined as “(1) an error; (2) that is plain; (3) that effects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7 (in part), State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The Erroneous Admission Of Testimony Indicating Mr. Welch Had Previously Been In Prison Was Highly Prejudicial

This Court has held that “the admission of collateral crime evidence is highly prejudicial[.]” State v. Dolin, 176 W.Va. 688, 692, 347 S.E.2d 208, 212-13 (1986) *overruled on other grounds*, State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 (1990), and its

improper admission “has generally been held to constitute reversible error.” State v. McGinnis, 193 W.Va. 147, 153, 455 S.E.2d 516, 522 (1994) (quoting State v. Simmons, 175 W.Va. 656, 658, 337 S.E.2d 314, 316 (1985)). See also Almendarez-Torres v. United States, 523 U.S. 224, 235, 118 S.Ct. 1219, 1226 (1998) (“the introduction of evidence of a defendant’s prior crimes risks significant prejudice.”). In Dolin, this Court explained why evidence of collateral crimes is generally not admissible:

‘ . . . when one is placed on trial for the commission of a particular offense, he is to be convicted, if at all, on evidence of the specific charge against him. The purpose of the rule excluding evidence in a criminal prosecution of collateral offenses is to prevent a conviction for one crime by the use of evidence tending to show that the accused engaged in other legally unconnected criminal acts, and to prevent the inference that because the accused engaged or may have engaged in other crimes previously, he was more liable to commit the crime for which he is being tried.’ (Emphasis added).

Dolin, 176 W.Va. at 692, 347 S.E.2d at 212 (quoting State v. Harris, 166 W.Va. 72, 76, 272 S.E.2d 471, 474 (1980)).

To prevent Mr. Welch’s prior criminal record from being disclosed to the jury, defense counsel filed a motion in limine. At the hearing on this motion, the prosecutor agreed Mr. Welch’s prior record was inadmissible and stated it was his intent to advise his witnesses not to mention in their testimony Mr. Welch’s prior criminal record. (3/9/10 Tr. 26).

Nevertheless, collateral crime evidence was improperly admitted at Mr. Welch’s trial when Officer Neal of the James City County Police Department in Virginia testified:

Q [Prosecutor, Mr. Harris] Did he [Mr. Welch] talk to you about what the circumstances were why he left West Virginia.

A A little bit. He said he left in a hurry when he woke up. He said he woke up and his girlfriend was dead, then he was scared that – *he knew he was going to have to go back to prison.* (Emphasis added).

MR. ADKINS [Defense Counsel]: Objection

THE COURT: On what grounds? Well, come up here? Come up here.  
(Court, counsel and defendant at benchside)

MR. ADKINS: Okay. He said he knew he was going to have to go back to prison. I don't want this to get out of control.

THE COURT: Me either. That's as far as it's going to go, Carl?

MR. HARRIS: Yes. I didn't expect that.

THE COURT: All right.

(4/14/10 Tr. 15-16). Thus, the jury was explicitly informed Mr. Welch had been to prison before, from which the jury would naturally infer Mr. Welch had a prior criminal conviction for a serious felony offense. This information clearly prejudiced the jury's determination of guilt or innocence of the felony murder offense as well as the jury's decision whether to recommend mercy. The jury's knowledge Mr. Welch had been to prison before would make the jury much more inclined to find him guilty and not recommend mercy.

The Erroneous Admission Of This Evidence And The Trial Court's Failure To Instruct The Jury To Disregard It Was Plain Error

Since the jury heard evidence Mr. Welch had been to prison before and was not instructed to disregard it, it can only be assumed the jury improperly considered it in their deliberations as to guilt or innocence and whether to recommend mercy. The improper admission of this evidence and the trial court's failure to instruct the jury to disregard this highly prejudicial evidence must be considered plain error.

"To trigger application of the "plain error" doctrine, (1) there must be 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." Syl. Pt. 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

As shown above, the introduction of evidence Mr. Welch had been to prison before was error that was also plain as its inadmissibility was recognized by the trial court who cautioned the prosecutor about it. (4/14/10 Tr. 15-16). The erroneous admission of this evidence further affected Mr. Welch's substantial rights as it was very prejudicial and denied him his due process right to a fair trial. 14<sup>th</sup> Amendment, U.S. Constitution; Article III, § 10, W.Va. Constitution.

In State v. Ricketts, 219 W.Va. 97, 99-100, 632 S.E.2d 37, 39-40 (2006), the Court reversed the defendant's conviction where the trial court improperly admitted, over defense counsel's objection, the defendant's prior convictions to impeach his testimony. This Court reversed the conviction even though the trial court subsequently instructed the jury to disregard the evidence of Mr. Ricketts' prior conviction because this evidence was "prejudicial" and the "irreparable harm to Ricketts' defense had already occurred." Id. at 101-02, 632 S.E.2d at 41-42. The admission of similar evidence in this case was likewise prejudicial.

While the Ricketts Court found an instruction to the jury to disregard this prior conviction could not undo the damage that had already been done, this Court in other cases found similar prejudicial evidence did not have a prejudicial impact on the jury where the jury was instructed to disregard it. For example, in State v. White, 223 W.Va. 527, 529, 678 S.E.2d 33, 35 (2009), the defendant was tried for three counts of second degree sexual assault and the defendant moved for a mistrial because the jury inadvertently received evidence indicating he was a registered sex offender. The trial court instructed the jury not to consider that inadmissible evidence and denied the motion for mistrial. Id. at 530, 678 S.E.2d at 36.

In deciding this issue, the White Court used the analysis set forth in syllabus point two of State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1081 (1980):

Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

White, 223 W.Va. at 532, 678 S.E.2d at 38. This Court found that because the evidence of the defendant's guilt in White was "substantial" and "virtually unassailable," id. at 532, 678 S.E.2d at 38, and the trial court instructed the jury to disregard the improperly admitted evidence, the evidence did not have a prejudicial effect on the jury's verdict. Id. at 535, 678 S.E.2d at 41.

By contrast, the evidence of Mr. Welch's guilt of felony murder is insufficient as the State failed to prove beyond a reasonable doubt, either via video evidence, Dr. Mullen, the State's pathologist, or Larry Bowles, the victim died during the commission of a sexual assault or as a result thereof. See second assignment of error, *supra*. The prejudicial evidence that Mr. Welch was previously in prison was therefore not harmless. See White, 223 W.Va. at 532, 678 S.E.2d at 38. Cf. State v. Sharp, \_\_\_ W.Va. \_\_\_, 700 S.E.2d 331, 335-36 (2010) (Court found State's evidence was sufficient to support conviction after removing officer's improper testimony he identified defendant from mugshots and defendant declined to have jury instructed to disregard testimony).

Even assuming, *arguendo*, the evidence was sufficient to convict Mr. Welch of felony murder, the error was not harmless as there is grave doubt the improperly admitted evidence did not substantially sway the jury's verdict. See White, 223 W.Va. at 532, 678 S.E.2d at 38. The evidence as to what caused the victim's death and when it occurred was not clearly established and is entirely circumstantial, including whether it occurred during the commission of or as a result of a sexual assault. As this Court noted in Atkins, in a situation where it "is basically a

circumstantial evidence case . . . there is an increased probability that the error [admission of prior criminal conviction] will be deemed prejudicial.” Atkins, 163 W.Va. at 515, 261 S.E.2d at 63. That is the situation here.

The White Court noted it had upheld convictions where the trial court instructed the jury to disregard inadmissible evidence, such as in State v. Gwinn, 169 W.Va. 456, 288 S.E.2d 533 (1982), which held:

Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error. *Syllabus Point 7, State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975); *Syllabus Point 18, State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966). (footnote omitted).

Id. at Syl. Pt. 5. White, 223 W.Va. at 534, 678 S.E.2d at 40. See also State v. Bennett, 179 W.Va. 464, 472-73, 370 S.E.2d 120, 128-29 (1988) (trial court instructed jury to disregard evidence of defendant’s prior unrelated criminal activity and this Court held “[t]he action of the trial court in sustaining the defendant’s objection and instructing the jury to disregard the statement was sufficient to protect the defendant’s right to a fair trial.”).

Because the trial court failed to give an instruction to disregard the prejudicial evidence Mr. Welch was previously in prison, the jury clearly considered this evidence in its deliberations on guilt and innocence and on whether to recommend mercy. The trial court’s failure to instruct the jury it could not consider this highly prejudicial evidence in its deliberations seriously affected the fairness and integrity of Mr. Welch’s trial. Therefore, it was plain error. See State v. Evans, 210 W.Va. 229, 232, 557 S.E.2d 283, 286 (2001) (Court found admission of defendant’s prior convictions was plain error as they seriously affected the fairness of his trial.); United States v. Ailstock, 546 F.2d 1285, 1291-92 (1976) (Court found defendant was denied fair trial where prejudicial testimony defendant had been in prison before was improperly

admitted and failure of defense counsel to request an instruction to disregard this evidence did not excuse duty of trial court to give such instruction.).

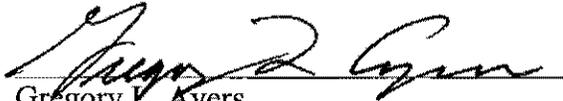
**RELIEF REQUESTED**

For the above reasons, David Welch respectfully requests that his convictions and sentences be reversed and his case remanded to the trial court so that the initial plea agreement rejected by the trial court may be considered by another judge. Alternatively, Mr. Welch requests that his conviction and sentence for felony murder be reversed and a judgment of acquittal be entered, or that he be granted a new trial on that charge.

Respectfully submitted,

DAVID L. WELCH

By Counsel



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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on this 8<sup>th</sup> day of March, 2011, a copy of the foregoing Petition For Appeal was sent via U.S. Postal Service to Carl L. Harris, Prosecuting Attorney, 108 E. Maple Ave., Fayetteville, WV 25840.

  
\_\_\_\_\_  
Gregory L. Ayers  
Counsel for Petitioner